



Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Fall 2016 Vol. 6, No. 1 General Editor Lynne Liberato Executive Editor David Furlow

Columns

Message from the President

By Macey Reasoner Stokes

Your Society staff and volunteers have been hard at work this fall on a number of projects and programs which would not be possible without your support.

[Read more...](#)



Macey Reasoner Stokes

Fellows Column

By David J. Beck

The Society's Fellows program continues to grow, recently adding two new Fellows for a total of thirty-nine.

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David J. Beck

Executive Editor's Page

By David A. Furlow

This issue of the *Journal* focuses on elections, the most important of America's five unique contributions to world civilization. [Read more...](#)



David A. Furlow

Lead Articles

The Colonel Versus the Judge

By Judge Mark Davidson & Kent Rutter

During WWII, a lawyer serving abroad in the armed forces challenged a respected incumbent judge on the Supreme Court of Texas. The race was unlike any the Court had seen. [Read more...](#)



The challenger, Gordon Simpson

Revisiting Historic Election Law in a Modern Constitutional Challenge: *Cotham v. Garza*, 805 F. Supp. 389 (S.D. Tex. 1995)

By W. Mark Cotham

Twice in my lifetime I have sued my beloved state to enforce the United States Constitution.

[Read more...](#)



W. Mark Cotham

Ferguson v. Maddox: Impeachment, Politics, and the Texas Supreme Court

By Horace P. Flatt

In Texas, no grounds for impeachment appear in either the state Constitution or statutes. This absence has always been controversial.

[Read more...](#)



Gov. Ferguson, impeached in 1917

Features

In Memoriam:

Justice Barbara Culver Clack, 1926-2016

By Osler McCarthy

The second woman to serve full time on the Texas Supreme Court when she was appointed in 1988 died in Midland on September 11, 2016.

[Read more...](#)



Justice Barbara Culver Clack

In Memoriam:

Hans Wolfgang Baade, 1929-2016

By Marilyn P. Duncan

The Texas legal community lost one of its most distinguished scholars, teachers, and colleagues on September 14 in Austin.

[Read more...](#)



Hans Wolfgang Baade

Many Thanks to Our Summer Archives Intern, Victoria Clancy!

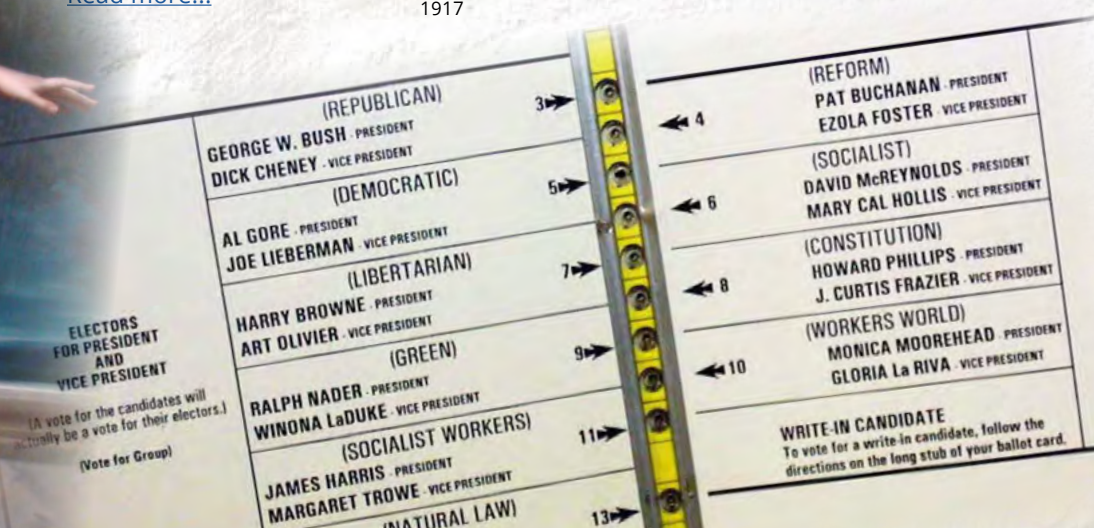
By Caitlin Bumford

Thanks to Victoria Clancy, our first summer appraisal intern, we now have a better handle on the TSCHS archives than we've had in years.

[Read more...](#)



Victoria Clancy



We're All Coahuiltejanos Now

By David A. Furlow

The Society joined with the Texas State Library and Archives Commission and the Center for the Study of the Southwest at Texas State University to mark the publication of a significant scholarly work. [Read more...](#)



Cover of *Actas*

On the Road Again, from El Paso to Houston

By David A. Furlow

For a year, the Society worked with the El Paso County Bar Association to present a program about the contributions of Castilian Spanish, Mexican, and Tejano law to Texas jurisprudence. [Read more...](#)



Artwork at the El Paso County Justice Center

Thank You, Mary Sue Miller

By David A. Furlow

The Society's display case at the Texas Supreme Court was suffering from neglect. Our Mary Sue came to its rescue! [Read more...](#)



Mary Sue Miller

Book Reviews

The Journey of the American Ulysses: A Review of H. W. Brands's Biography, The Man Who Saved the Union: Ulysses Grant in War and Peace

**By Marie R. Yeates
and John F. McInerney**

Born Hiram Ulysses Grant, he only became Ulysses S. Grant when, as a new cadet, his birth name was accidentally altered by West Point. The new name stuck. [Read more...](#)



The book cover

William J. Boyce and John H. Torrison with John DeMers: Miss Fortune's Last Mission: Uncovering a Story of Sacrifice and Survival

**A book review
by David A. Furlow**

The authors have written not about courthouse trials but about the trials that afflict men's souls during war and that haunt their families long afterwards. [Read more...](#)



The book cover

News & Announcements

21st Annual John Hemphill Dinner: Hon. Paul Clement Was the Featured Speaker

**By Marilyn P. Duncan
Photos by Mark Matson**

About 420 attendees filled the Grand Ballroom of Austin's Four Seasons Hotel on September 9 to enjoy dinner and the evening's program. [Read more...](#)



Hon. Paul Clement

Bill Chriss Receives the 2016 Chief Justice Pope Award for Integrity, Professionalism

By Marilyn P. Duncan

The Texas Center for Legal Ethics has named attorney and TSCHS board member William J. Chriss as the recipient of the 2016 Chief Justice Jack Pope Professionalism Award. [Read more...](#)



Bill Chriss

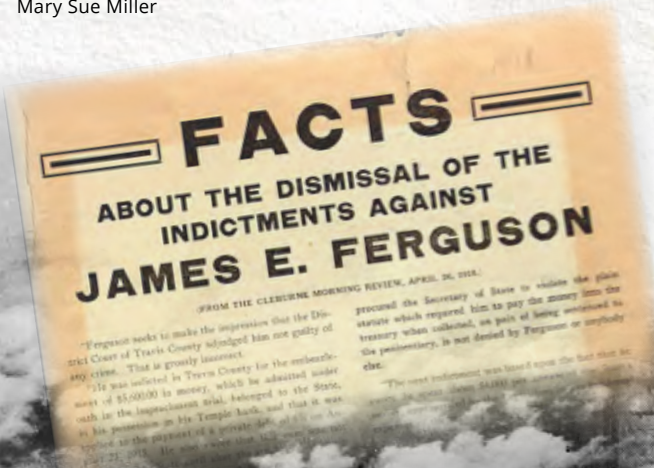
BA Breakfast Brings Court Colleagues Together for Annual Reunion

By Amy Warr

On September 10, about 100 justices, briefing attorneys, staff attorneys, staff, and guests gathered for the Briefing Attorney Breakfast at the Law Center. [Read more...](#)



Amy Warr addresses the audience



[2016 Inductees to Texas Appellate Hall of Fame Announced](#)

By Jackie Stroh

Three new honorees were inducted posthumously into the Texas Appellate Hall of Fame in September: Chief Justice James Patterson Alexander, appellate practitioner Marvin S. Sloman, and appellate practitioner David W. Holman. [Read more...](#)

[GLO's Save Texas Symposium Remembers the Alamo in a New Light](#)

By Pat Nester

How are the Alamo and the new 9/11 Memorial in New York City alike? This and many other bedeviling questions about historical phenomena were the focus of the Save Texas History Symposium. [Read more...](#)



[Harris County Law Library Awarded for Centennial Historical Program](#)

By David A. Furlow

The Harris County Law Library was honored to receive the 2016 Excellence in Marketing Award—Best Campaign from the American Association of Law Libraries (AALL). [Read more...](#)

[Haley Shares History of Texas Law and Courts at AAAL Annual Meeting](#)

Noted author-historian James L. Haley was the luncheon speaker at the American Academy of Appellate Lawyers' fall meeting in San Antonio on September 30. [Read more...](#)



James Haley

Membership & More

[Calendar of Events](#)

[Officers, Trustees & Court Liaison](#)

[2016-17 New Member List](#)

[2016-17 Membership Upgrades](#)

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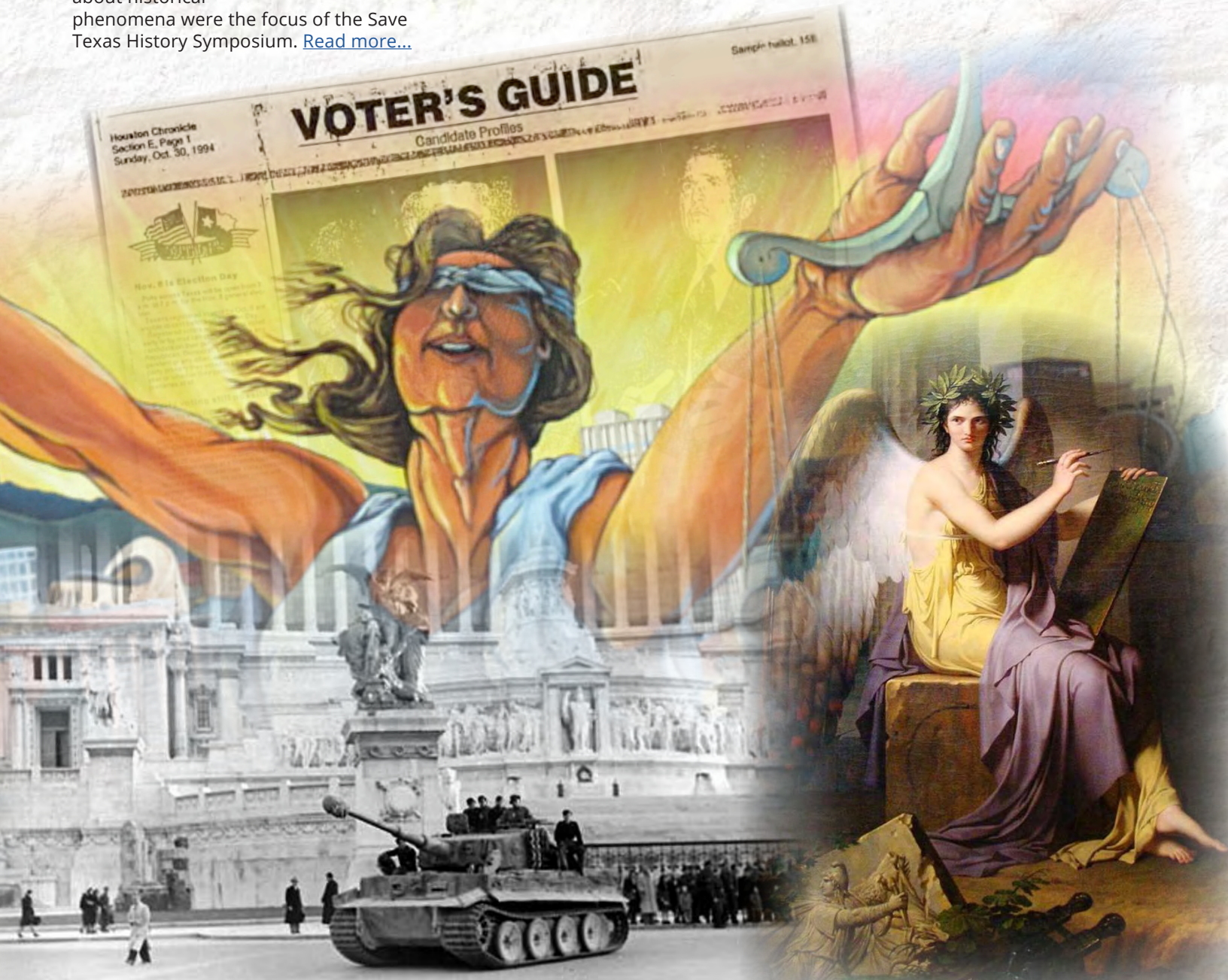


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FB: Texas Supreme Court Historical Society

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Macey Reasoner
Stokes

Message from the *President*

Your Society staff and volunteer members have been hard at work this fall. On September 9th, we held the 21st Annual John Hemphill Dinner at the Four Seasons Hotel in Austin. Our keynote speaker, Paul D. Clement, former Solicitor General of the United States, gave an insightful and entertaining speech on the life and legacy of former Justice Antonin Scalia to a sold-out crowd. Jonathan Smaby, Executive Director of the Texas Center for Legal Ethics, presented the Chief Justice Jack Pope Professionalism Award to a well-deserving Bill Chriss, and outgoing President Ben Mesches presented the President's Award to Warren Harris for all his work on the Taming Texas series and chairing the strategic planning committee. The annual Briefing Attorneys' Breakfast followed the next morning at the Texas Law Center. The Justices and staff of the Texas Supreme Court and former BAs from around the state attended the breakfast.

On September 22nd, we cohosted a reception with the Texas State Library and Archives Commission and the Center for the Study of the Southwest at Texas State University to mark the publication of *Proceedings of the Constituent Congress of Coahuila and Texas, 1824-1827*. This fascinating book on the first constitution in Texas, back when it was a part of Mexico, was authored by Professor Jesús F. (Frank) de la Teja of Texas State University and the Honorable Manuel González Oropeza, Chief Magistrate of the Superior Electoral Court of Mexico. The reception at the Lorenzo de Zavala State Library and Archives Building in Austin was a packed house and included such dignitaries as Consul General of Mexico for Austin Carlos González Gutiérrez, Texas State Librarian Mark Smith, and Texas General Land Office Deputy Director for Archives and Records Mark Lambert, as well as *Journal* Executive Editor David Furlow and Managing Editor Marilyn Duncan.

Looking ahead, during the lunch hour of our Fall Board Meeting on Thursday, October 20th, we will hear a presentation by Ali James, Curator of the Capitol and Director of Visitor Services at the State Preservation Board. Please join us at the Texas Law Center in Austin to hear Ms. James's speech if you are able.

On March 2, 2017 (Texas Independence Day!), the Society will present a program at the Texas State Historical Association's 2017 Annual Meeting. The program, to be held from 2 to 3:30 p.m. at the Hyatt Regency Downtown Houston, is entitled "Semicolons, Murder and Counterfeit Wills: Texas History through the Law's Lens." We greatly appreciate our panel presenters, Judge (Ret.) Mark Davidson, Bill Kroger of Baker Botts LLP, and Chief Justice (Ret.) Wallace Jefferson of

Alexander Dubose Jefferson Townsend, for volunteering their time for this program.

Finally, our staff is currently finalizing the next volume in our popular Taming Texas educational series, which member volunteers will use to continue teaching Texas judicial history classes to middle school students around the state. The second *Taming Texas* book is entitled *Law and the Texas Frontier* and is slated for publication in 2017.

Thank you for your continued support of the Society. I hope to see you at one of these events!

MACEY REASONER STOKES *is a partner with Baker Botts LLP in Houston and heads the firm's appellate section.*

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Fellows Column

By David J. Beck, Chair of the Fellows



We had an excellent turnout of Fellows for the Society's recent 21st Annual John Hemphill Dinner on September 9, 2016. At the dinner, I presented a recap of the Fellows' activities and wanted to report that same information here.

The Society's Fellows program continues to grow. We have recently added two new Fellows, bringing the total number of Fellows to thirty-nine. They are all listed below.

Our "Taming Texas" project has been even more successful than we anticipated. This judicial civics program for seventh-grade Texas history classes that puts judges and lawyers in classrooms teaching students about the third branch of government continues to expand. In addition to producing a new book, *Taming Texas: How Law and Order Came to the Lone Star State*, we have now completed the manuscript for the second book in the Taming Texas series, *Law and the Texas Frontier*. The new book focuses on the development of the law and the courts during the frontier period. Having just read the manuscript, I can attest that this will be another great work when it is published in 2017. Chief Justice Hecht has written the forewords for both books.

Since the Hemphill Dinner, we launched our fall Taming Texas program, in partnership with the Houston Bar Association, and began taking the judicial civics project into the schools across the Houston area. Amazingly, last spring the HBA volunteers taught the program to nearly 10,000 seventh graders, and we hope to reach similar numbers this fall. At the September 26 kick-off event, Justice Brett Busby, Judge Debra Mayfield, and Fellow David Furlow, the co-chairs of the HBA committee implementing the project, provided an orientation to the judges and lawyers who volunteered to teach. They also introduced the newly revised classroom curriculum that will be used this fall. We appreciate the assistance of Fellow Warren Harris and *Taming Texas* co-author Marilyn Duncan in making changes to the lesson plans based on comments from teachers and lawyers who taught last spring. You can access the new materials under the Resources tab at www.tamingtexas.org. It is our current plan to take the Taming Texas project statewide in the spring of 2017.

Also at the Hemphill Dinner, Warren Harris received the second annual President's Award for outstanding service to the Texas Supreme Court Historical Society. President Ben Mesches noted that Warren's leadership of the Fellows' Taming Texas book project and judicial civics classroom program was key to their success.

Finally, I want to express once again our appreciation to the Fellows for their support of programs like our historic oral argument reenactments and our Taming Texas judicial civics and court history project. If you are not currently a Fellow, please consider joining the Fellows and supporting this important work. If you would like more information or want to become a Fellow, please contact the Society office or me.

FELLOWS OF THE SOCIETY

Hemphill Fellows

(\$5,000 or more annually)

David J. Beck*

Joseph D. Jamail, Jr.* (Deceased)

Richard Warren Mithoff*

Greenhill Fellows

(\$2,500 or more annually)

Stacy and Douglas W. Alexander

Marianne M. Auld

S. Jack Balagia

Bob Black

Elaine Block

E. Leon Carter

Tom A. Cunningham*

David A. Furlow and

Lisa Pennington

Harry L. Gillam, Jr.

Marcy and Sam Greer

William Fred Hagans

Lauren and Warren Harris*

Thomas F.A. Hetherington

Allyson and James C. Ho*

Jennifer and Richard Hogan, Jr.

Dee J. Kelly, Jr.*

David E. Keltner*

Thomas S. Leatherbury

Lynne Liberato*

Mike McKool, Jr.*

Ben L. Mesches

Nick C. Nichols

Jeffrey L. Oldham

Hon. Harriet O'Neill and

Kerry N. Cammack

Hon. Thomas R. Phillips

Hon. Jack Pope*

Shannon H. Ratliff*

Robert M. Roach, Jr.*

Leslie Robnett

Professor L. Wayne Scott*

Reagan W. Simpson*

S. Shawn Stephens*

Peter S. Wahby

Hon. Dale Wainwright

Charles R. Watson, Jr.

R. Paul Yetter*

*Charter Fellow

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David A. Furlow

“*On a Sea without a Compass*”: Election, Politics, War and Legal History

This issue of the *Journal* focuses on elections, the most important of America's five unique contributions to world civilization. This is fitting in the most amazing of election years when all eyes turn toward Election Day: some with hope for the future, others with fear, but many with the dreadful fascination reserved for the screeching brakes and clamorous whistles of derailing commuter trains.

The Greeks gave the world their language, olives, wine, theater, poetry, democracy, medicine, science, and history. The Romans bequeathed Latin, jurisprudence, a republic, imperial governance, and Catholicism. Iberia birthed Spanish and Portuguese, global maritime discovery, the Inquisition, and Cervantes. Britain offered English, Shakespeare, and an unwritten constitution under a limited monarchy. France conferred la lingua franca; Jean d'Arc; baroque music; *liberté, égalité* and *fraternité*; Napoleon; the nonviolent *terroirisme* of vineyards; and the peculiar belief that Jerry Lewis is a comic genius.

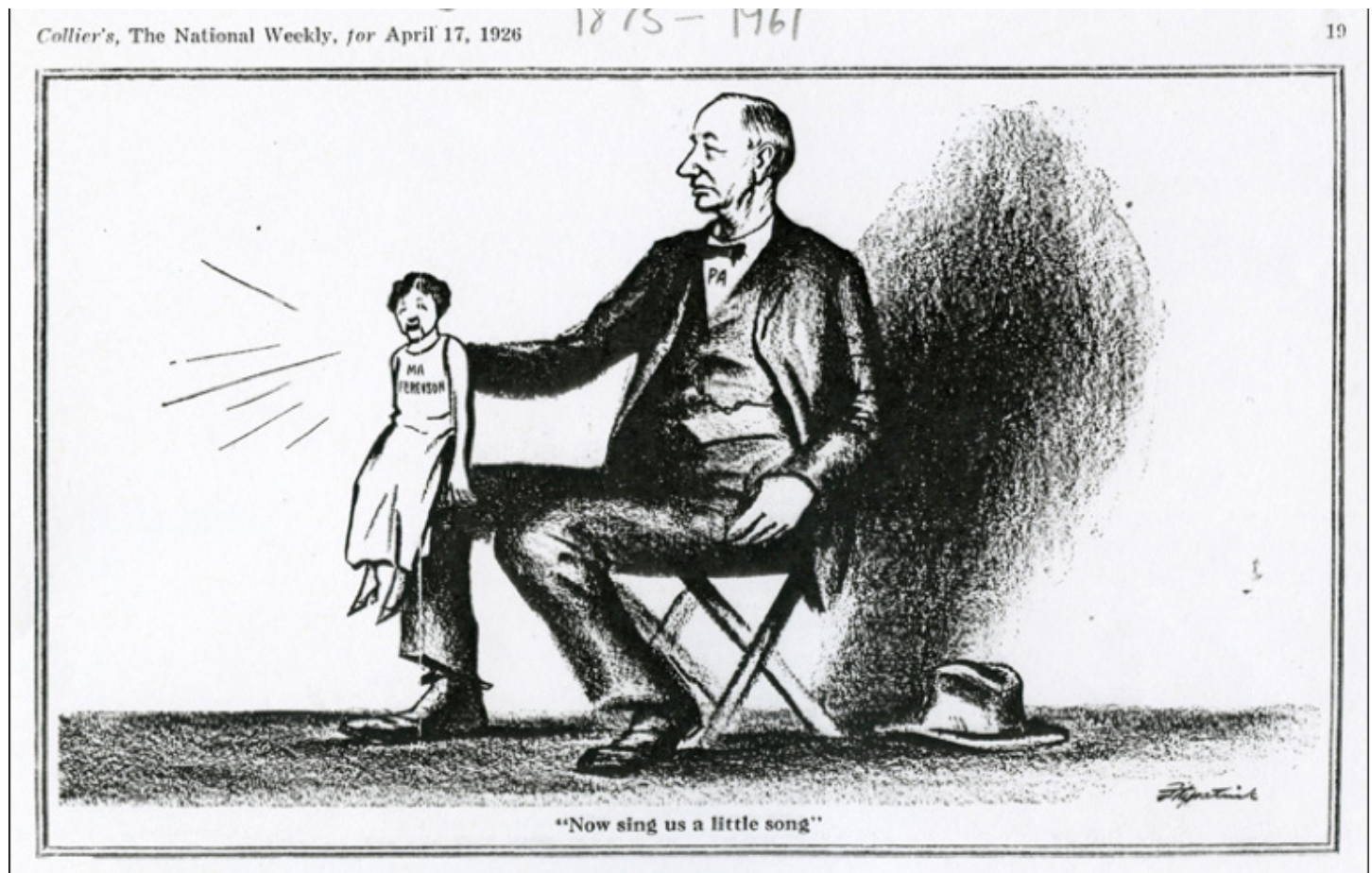
Regular elections of the governing elite by the governed under a written constitution that checks and balances powers while barring establishment of a state religion constitutes America's greatest contribution to world civilization. America has other uniquely notable accomplishments, of course: a literature of the citizenry; jazz music; nuclear power; and the entire spectrum of electronic communications, *i.e.*, telegraph, telephone, radio, television, and Internet. When we celebrate Thanksgiving, we venerate the first election of a governor by the governed at Cape Cod on November 21, 1620, when most of the men aboard the *Mayflower* elected John Carver as their governor. Later famous for Thanksgiving turkeys, the Pilgrims refused to allow a king across the sea to foist upon them a turkey of a governor.

Few governors have ever been bigger turkeys than Texas governor James Edward Ferguson, Jr., a/k/a “Pa” Ferguson, who served as Texas's governor from 1915 to 1917. A Travis County grand jury indicted Gov. Ferguson on seven charges, including one count of misapplying public funds, one count of embezzlement, and one count that he had diverted a special fund. The Legislature incorporated those charges in the articles of impeachment it presented against Gov. Ferguson. Concerned that the governor was waging an unjust war against the University of Texas, the Legislature concluded “Pa” Ferguson's impeachment litigation with extreme prejudice.

Horace P. Flatt, a Texas scholar, biographer, and historian, retells the story of Ferguson's impeachment from a sympathetic perspective. Did the Legislature deprive Gov. Ferguson of due process and the due course of law when it conducted the Governor's impeachment proceedings? Did the Texas Supreme Court give the governor all the justice he deserved on appeal? Does the Legislature need to revisit and clarify the impeachment process to ensure that future governors receive the legal protections that are their due under the Constitution of 1876? Is that Mick Jagger we hear in the background singing "Sympathy for the Devil?"

If "Pa" Ferguson did, indeed, receive a raw deal from a lawless legislature, as seems possible, all Texans who enjoy rich tales about the Lone Star State owe him a debt of gratitude for running his wife M. A. "Ma" Ferguson's successful gubernatorial campaign. While she was running for governor, she assured voters that she would do as her impeached and convicted husband told her, enabling Texans to receive a bargain basement deal: "two governors for the price of one." In the ninety years since 1924, no one has yet campaigned under a more compelling political slogan than, "Me for Ma, and I Ain't Got a Durned Thing Against Pa."

A committed reformer, "Ma" Ferguson granted so many pardons to condemned criminals during two nonconsecutive terms—nearly 4,000—amidst swirling rumors of bribery that a majority of Texas voters amended the Constitution in 1936 to strip future governors of their traditional power to issue pardons, reserving that governmental responsibility to a new,



Collier's Magazine's cartoon about "Ma" and "Pa" Ferguson, April 17, 1926, available through the Austin History Center.

independent Texas Board of Pardons and Paroles. And who can top “Ma” for her (perhaps apocryphal) defense of Shakespeare’s English? “If English was good enough for Jesus Christ,” she supposedly said, “it ought to be good enough for the children of Texas.”

Thomas Jefferson Rusk, the first Chief Justice of the Texas Supreme Court to preside over a session, famously warned delegates at Texas’s Constitutional Convention of 1845 about the dangers of electing judges and justices:

If we have a[] . . . judiciary which is swayed by popular clamors, you are on a sea without a compass; your rights of person are not safe; your property is not safe; the reputation of your country is endangered; all is anarchy and confusion.... Should we...have a weak and vacillating judiciary, destitute of talent and integrity, with no merit beyond that of office seekers, who, if they cannot secure an important office will take a small one; if they cannot get good salaries take small ones?¹

Rusk echoed Edmund Burke’s February 11, 1780 *Speech on the Plan for Economical Reform*, where the great conservative observed that, “In the first class I place the *judges* as of the first importance....The judges are, or ought to be, of a *reserved* and retired character, and wholly unconnected with the political world.”

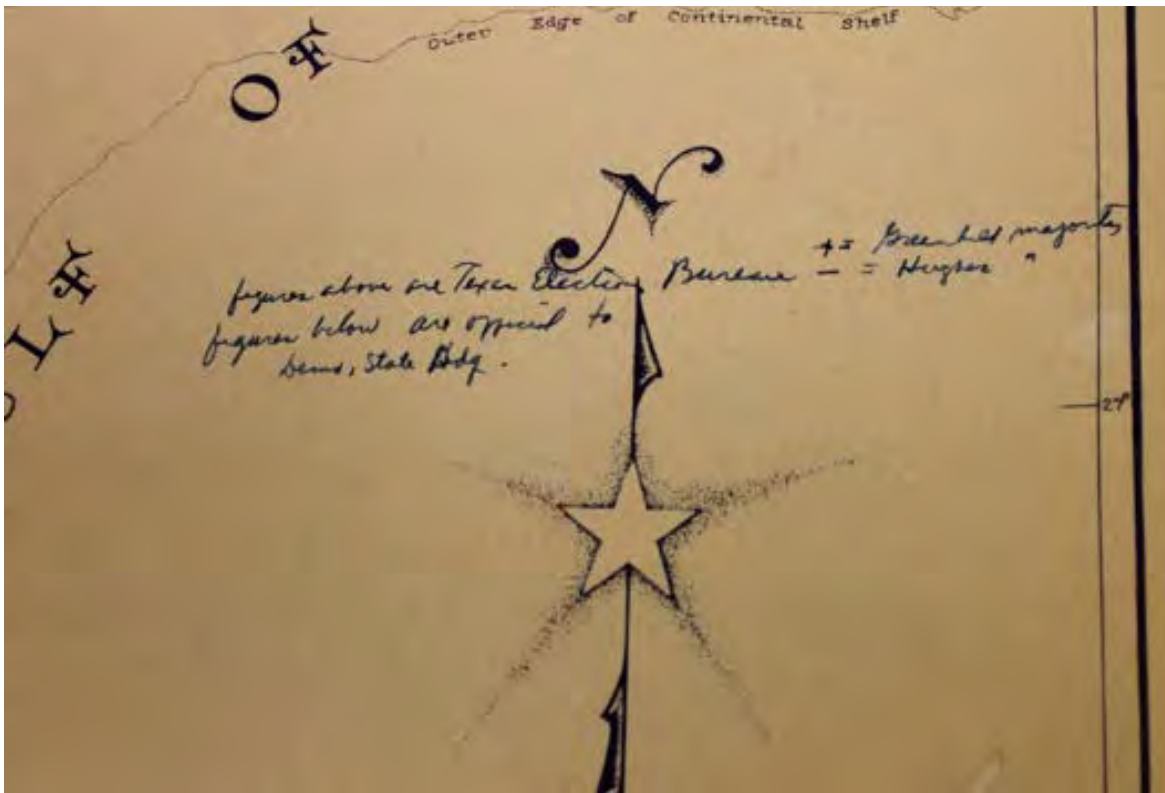
Judge Mark Davidson and his coauthor, Haynes and Boone appellate specialist Kent Rutter, shine a spotlight on one of the most famous (or infamous) of all Texas judicial election battles: the competing campaigns of Justice Richard Critz and Lieutenant Colonel Gordon Simpson in the controversial election of 1944. Expanding an article they first published in the *Texas Bar Journal* in 2002, Davidson and Rutter reveal how the Second World War, an aggrieved attorney, and the politics of personal revenge shaped the make-up of the Texas Supreme Court and appeals of Nazi war crimes trials.

The Texas Supreme Court Historical Society and the State Bar of Texas have valuable records of similar judicial elections, including the map on the next page, a photo of which State Bar Director of Archives Caitlin Bumford recently made available to this *Journal*. The original 30” x 29” map depicts the 1958 election battle between Justice Joe Greenhill and opposing candidate Judge Sarah Hughes. A second image with a notation that assigns a plus sign to a Greenhill majority and a minus sign to a Hughes majority, directly below, has led Caitlin to believe that the map was annotated by the Greenhill campaign, as opposed to the Hughes campaign.

The intersection between judicial election campaigns and politics has become more controversial in recent years because of two U.S. Supreme Court decisions. First, in *Republican Party of Minnesota v. White*, a 5-4 majority of the U.S. Supreme Court upheld the First Amendment rights of judicial candidates when they conflicted with the State of Minnesota’s “announce clause” statute that sought to silence their views on controversial legal and political topics to avoid any appearance of impropriety.²

¹ William F. Weeks, *Debates of the Texas Convention* (Houston: J. W. Cruger, 1846), 238-39. I’d like to thank former Chief Justice Thomas Phillips for bringing this quotation to my attention through a draft of his forthcoming book about Texas judicial elections.

² 536 U.S. 765 (2002).



Second, seven years later, in *Caperton v. A.T. Massey Coal Company*,³ Associate Justice Anthony Kennedy, joined by four members of the Court's "liberal wing," ruled that that one party's constitutional rights under the Fourteenth Amendment's Due Process Clause could be compromised if an opposing party makes extraordinary campaign contributions to a judge likely to cast a swing vote in an appeal involving that party. Chief Justice John Roberts warned that *Caperton* would decrease "public confidence in judicial impartiality" and that its vague "probability of bias" standard was extraordinarily vague and its parameters were "inherently boundless."

Commercial litigator, mediator, National Debate Tournament champion, and Good Steward Global Initiative founder W. Mark Cotham examines the election battlefield where judicial elections are fought and won. Focusing on the information about a candidate's background, interests, and political positions, he describes how his own First Amendment challenge to the last of Texas's Jim Crow election laws in *Cotham v. Garza*⁴ has shaped the conduct of every judicial election in Texas since November 27, 1995.

Mark's article overflows with studies and anecdotes that any judicial candidate will want to read, for example, the California elections study that University of Houston Political Science Department Professor Richard Murray presented in federal court showing that a Scandinavian surname conferred a 24 percent political advantage to a candidate seeking office, while an Italian name delivered a 39 percent disadvantage. In short, nature abhors a vacuum. If state



³ 556 U.S. 868 (2009).

⁴ 905 F. Supp. 389 (S.D. Tex. 1995).

law deprives voters of objectively verifiable information about a judicial candidate of the kind found in bar preference surveys, newspaper editorials, activist election brochures, and League of Women Voters' lists, voters will decide which candidates to vote for or against based on racial, ethnic, or gender bias.

The news items in this issue continue along the same lines. Former TSCHS President and Vinson & Elkins appellate partner Marie Yeates and her colleague John McInerney offer a book review of Professor H. W. Brands's biography *The Man Who Saved the Union: Ulysses Grant in War and Peace*. As the title suggests, Ms. Yeates's review and Professor Brands's biography depict the intersection of peace, war, and politics in and outside of Texas before, during, and after the Civil War.

I penned my own book review of a different kind of judicial history: history written by a judge, in this case, Fourteenth Court of Appeals Justice Bill Boyce's history of his father's experience in the war-ravaged skies over World War II era Europe: *Miss Fortune's Last Mission: Uncovering a Story of Sacrifice and Survival*.

This issue's news features cover events of the past three months, beginning with Marilyn Duncan's photo-montage about the Society's Annual John Hemphill Dinner. Another feature focuses on our own board member Bill Chriss's honor as this year's recipient of the Chief Justice Jack Pope Professionalism Award from the Texas Center for Legal Ethics. We also include memorials to the late Texas Supreme Court Justice Barbara Culver Clack and eminent Texas legal historian Hans Baade.

This issue wraps up by reporting on the Society's sponsorship of the Texas General Land Office's recent "Save Texas History" symposium at the Alamo and the Texas State Library and Archives' reception honoring Manuel González Oropeza and Jesús F. de la Teja's publication of the scholarly, two-volume *Actas del Congreso Constituyente de Coahuila y Texas de 1824 a 1827. Primera Constitución bilingüe*, or, in English translation, *Proceedings of the Constituent Congress of Coahuila and Texas, 1824-1827: Mexico's Only Bilingual Constitution*.

So, friends, ride with this issue of the Texas Supreme Court Historical Society Journal toward the sounds of the cannons, the reverberating cry of the electioneer, and the mechanical click, click, click of the voting-wheel turning from one candidate to the next....

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The Colonel Versus The Judge¹

By Judge Mark Davidson and Kent Rutter

By U.S. tradition, free elections are held even in times of war, when state and local events are often overshadowed by news of a world in turmoil. It was under these conditions that during World War II, a lawyer serving abroad in the United States armed forces challenged a respected incumbent judge on the Supreme Court of Texas. The result was a race unlike any the Court had ever seen.

The Soft, Gruff, Opinionated Incumbent

Justice Richard Critz was a member of the Supreme Court when World War II began. The day after the Japanese bombed Pearl Harbor, the Court's three male briefing attorneys announced they would resign to join the armed forces, and the Court replaced them with three talented and dedicated women.² Critz found little use for the women who served as briefing attorneys during the war. This was not because the briefing attorneys were women, but rather because of his disdain for all briefing attorneys, whether male or female. Usually, he refused even to speak with them.³

Critz was a principled man, an outstanding jurist, and a famously stern presence. Critz's son-in-law, the late Congressman J. J. "Jake" Pickle, described him as "a loyal old staunch American from a family that had been here two hundred years."⁴ Critz's ancestors came to America from Germany in the seventeenth century and fought in the American Revolution. His father and brothers fought in the Civil War under General Stonewall Jackson.

Critz began his career as a country lawyer in Granger, Texas. He was later elected city attorney and then served as the county judge of Williamson County. In the 1920s, he helped the local district attorney prosecute the Ku Klux Klan. That paid off when the district attorney, Dan Moody, was elected governor and appointed Critz to the Commission of Appeals.

¹ This article is revised version of an article published in the *Texas Bar Journal* in February 2002 under the title, "The Texas Supreme Court Goes to War: The Colonel Versus the Judge" (vol. 65, no. 2).

² See Judge Mark Davidson and Kent Rutter, "The Texas Supreme Court Goes to War: Texas Women Respond to the Court's Call to Duty," *Texas Bar Journal* 65, no. 1 (January 2002).

³ Joe Greenhill, Critz's briefing attorney, says he went into his office no more than ten times. Briefing attorney Beth O'Neil Atkins says she never met him, even though she worked for the court for three months during which he was still a member.

⁴ Congressman Pickle shared his memories of Judge Critz in a 2001 interview. He died in 2005. He also wrote about Critz in a book coauthored by his daughter, Peggy Pickle. See Jake Pickle and Peggy Pickle, *Jake* (Austin: University of Texas Press, 1997), 197–200.



Justice Richard Critz.
Tarlton Law Library.

In 1935, Justice William Pierson of the Supreme Court was shot and killed by his son. Governor Jimmy Allred appointed Critz to fill the vacancy, calling him “one of the strongest men that ever sat on either the Supreme Court or the Commission of Appeals.”

As he had on the Commission of Appeals, Critz devoted himself to the painstaking, intellectually rigorous work of the Court. Congressman Pickle recalled that Critz was deeply satisfied with life on the Court because “there, he could read and study, read and study, and write.” A man with few hobbies, Critz was a devout servant of the law and a prolific author of methodical, exacting opinions. During his tenure, the Court started to eliminate its significant backlog.

Critz’s judicial skills were widely admired, but his brusque demeanor won him few friends. Nowhere was Critz’s abruptness more evident than at oral argument. Then, as now, during argument an appellate judge typically would either ask a series of questions or maintain a respectful silence until the lawyer’s time expired. Not Justice Critz. When Critz disagreed with the position a lawyer had taken, he would ask, “Do you really mean to argue that...” and then proceed to summarize the lawyer’s argument. When the lawyer responded in the affirmative, Critz was known to announce: “I believe that’s the silliest thing I’ve ever heard.” He would then swivel his chair so that his back faced the lawyer and remain in that position until the lawyer completed his argument. Critz used oral argument to size up the cases; he never cared much that it also gave lawyers a chance to size up the judges, and never worried that his unvarnished demeanor might cost him his politically advantageous friendships with the bar. Congressman Pickle recalled: “If he thought an argument was ridiculous, he’d show it. He had his own ideas what the law was, and he just wasn’t political.”

Behind the imposing facade, however, was a gentle man. “People who got to know him recognized him as a character,” Congressman Pickle recalled. Critz adored his family, and Congressman Pickle remembered him as “one of the most understanding family men I’ve ever known.” When Pickle married Sugar Critz, the judge’s daughter, Critz helped—on a judge’s salary—the newlyweds get started by providing them the support they needed to buy their first home. “Judge Critz was gruff and tough with lawyers,” Congressman Pickle recalled, “but he was an old softie. People who knew him, loved him.”

The Lawyer Who Held a Grudge

One night in 1942, an angry lawyer stormed into Andrew’s Cafe in Hillsboro. Angus Wynne, the first president of the State Bar, had just lost another case in the Supreme Court.⁵ Wynne had lost in the Supreme Court several times as a lawyer,⁶ but this time he had appeared

⁵ *Tide Water Oil Co. v. Bean et al.*, 138 Tex. 497, 160 S.W.2d 235 (1942).

⁶ See, e.g., *Simpson-Fell Oil Co. v. Stanolind Oil & Gas Co.*, 136 Tex. 158, 125 S.W.2d 263 (1939); *Wood v. State ex rel. Lee*, 133 Tex. 110, 126 S.W.2d 4 (1939) (opinion by Critz, J.); *Ex parte Henry*, 132 Tex. 575, 126 S.W.2d 1 (1939) (opinion by Critz, J.); *Ex parte O’Brien*, 132 Tex. 579, 126 S.W.2d 3 (1939) (opinion by Critz, J.).



Angus Wynne, the State Bar President in 1939–40, held a grudge against Justice Critz. State Bar of Texas, Presidents web page.

as one of the parties. Wynne contended that his suit to try title to land could be maintained in Van Zandt County, even though the land was located in Rusk County. Wynne prevailed in the district court and the court of appeals, but after two mandamus proceedings and an appeal on a certified question, he lost in the Texas Supreme Court. The opinion was written by Critz.

Robert W. Calvert was having a cup of coffee at Andrew's Cafe that evening when Wynne came in.⁷ "We're going to run somebody against Critz," Wynne told Calvert.⁸ "And we're going to beat him."

The Long Distance Candidate

The man chosen for the job was Gordon Simpson, a lawyer, politician, and patriot from Tyler. A World War I veteran who had served as a State Representative in the 1920s, Simpson was later appointed by Governor Moody to complete an unexpired term as a district judge. He succeeded Wynne in 1941–42 as president of the State Bar. In 1942, although not subject to the draft, he joined the Army's Judge Advocate General Corps and served on a panel that reviewed and issued opinions on all convictions arising from court martials in the African-Italian Theater of Operations. In 1944, Simpson was stationed in Italy. One of his junior officers, Jim Bowmer, wrote that "Col. Simpson was a beloved second father to all of us....He was a man of impeccable character."⁹ No one contacted for this article had anything unkind to say about him.

The last thing on Simpson's mind was a campaign for the Texas Supreme Court. But early in 1944, Wynne called Simpson's wife, Grace, and asked her if she thought her husband would be interested in coming home to serve on the Supreme Court.¹⁰ Wynne told Mrs. Simpson that he was speaking as the unofficial spokesman for the bar and that there was massive dissatisfaction with Critz. It is unknown whether it was Wynne or Mrs. Simpson who wrote to Italy and asked Simpson to run. According to Calvert, Simpson's reaction was somewhat muted. He quoted Wynne as saying of Simpson, "Well, he was willing."

⁷ Calvert, a former Speaker of the Texas House of Representatives and Chairman of the State Democratic Executive Committee, later served as an Associate Justice on the Supreme Court of Texas from 1950 to 1961, and as Chief Justice from 1961 to 1972.

⁸ All quotations from Calvert in this article came from an oral history interview conducted in late 1985 and early 1986 by H. W. Brands. It is available in published form at the University of Texas Tarlton Law Library.

⁹ The information about Simpson's activities in Europe comes from a 2002 letter written by Bowmer to the State Bar of Texas following publication of an earlier version of this article in the *Texas Bar Journal*. Bowmer had a spectacular career as an attorney and served as president of the State Bar in 1972–73. He also was a member of the Board of Trustees of the Texas Supreme Court Historical Society from 2000 to 2005. He died in 2006.

¹⁰ The authors interviewed Mrs. Margaret Simpson Carloss in the fall of 2001. The information about the communication between Grace Simpson and Angus Wynne comes from that interview. Mrs. Carloss died in 2016.

See How They Run

It was a five-way race. Critz outspent the other candidates, advertised extensively, and won endorsements from the major newspapers and most lawyers on both sides of the docket. Because of wartime travel restrictions and gas rationing, none of the candidates toured the state. In Critz's case, it is unlikely he would have done so under any circumstance. Critz saw political campaigning as a disdainful task for a judge seated on the state's highest court. Unlike his colleagues, he rarely gave speeches or made appearances around the state, even when he was running for reelection. Congressman Pickle recalled, "He never talked politics. He never talked about political issues. He just assumed he'd be reelected."

For Simpson, who remained in Italy with the Fifth Army, campaigning was not just unlikely, but impossible. Bowmer wrote that there was no increase in letters to Simpson from the United States during the campaign or immediately after. "In fact communications were so slow that he had no quick way of finding out if he had made it into a run-off, so I had a friend from Baylor days who was on the staff of *Stars and Stripes* wire Texas and find out, as a news story."¹¹

Given the limited name identification of the membership of the Court, the race was a low-key affair. Everyone knew that a runoff was likely. Each of the five candidates ran well in his home county. James B. Hubbard, a former district judge from Bell County, finished with 10 percent of the vote; Tom Smiley, the county judge of Karnes County, finished with 11 percent; Charles T. Rowland of Fort Worth finished with 17 percent; and Simpson finished with 24 percent, running very strongly in his (and Wynne's) area of Northeast Texas and poorly in the rest of the state.¹² Critz finished first or second in most counties and won 38 percent of the vote—more than any other candidate, but not enough to avoid a runoff against Simpson.

In the runoff, Simpson's supporters, with Angus Wynne at the helm, launched an aggressive—and highly negative—campaign. Critz was handicapped by his lack of military service and his German-sounding name. Wynne started a slogan among Simpson's supporters of "Stop Fritz, Beat Critz." "Fritz" was the slang term for the Nazi forces, the enemy of all Americans. The slogan intentionally mispronounced "Critz" (which rhymes with "rights") to make its point.

Wynne placed advertisements that emphasized that "Lt. Col. Gordon Simpson" was serving his country in Italy. In a typical swipe at Critz, one ad charged, "Behind his back, and while he can't say one word in his own defense, he is being made the subject of the most vicious slander, and that by men who never wore their country's uniform." What the slander was is not determinable. It does not appear in any newspaper account of the race or in any available campaign material, and no one interviewed for this article remembers any negative campaigning by Critz.

¹¹ Letter from Bowmer.

¹² Smiley had run unsuccessfully for the Supreme Court in 1938. During World War II, he refused to accept a rationing book for shoes and groceries, and attained some notoriety as the "Barefoot Judge."



British propaganda posters made the name "Fritz" synonymous with Nazi.
 Left: Wikimedia, British National Archives. Right, Getty Images.

Not all of Wynne's advertising on behalf of Simpson focused on war-related issues. Another ad asserted,

ATTENTION, Mr. and Mrs. Voter! Do you know that you can't take a lawsuit to the Supreme Court of Texas just because you want to? That court must grant its permission first. The docket of that court has been cleared (about which the incumbent boasts) by refusing to grant this permission—by refusing A RIGHT TO BE HEARD!¹³

The harshest attacks, however, were reserved for advertising not officially sponsored by the Simpson campaign. One ad stated that,

On two occasions the Associate Justice now seeking re-election held that because

¹³ It goes without saying that Simpson did not end the "Writ of Error" system of case review when he was on the court. Of course, since he didn't write, or even see, the advertisements criticizing the practice, he couldn't have been expected to do so.

a mechanic working in a bakery did not have a health card he could not collect Workmen's Compensation Insurance, otherwise due him for permanent injuries, nor could his widow, where the injuries proved fatal. Fair-minded people should resent such a technical holding by any judge.


The advertisement urged voters to elect Simpson, but the small print at the bottom of the ad claimed, "This advertisement paid for by disinterested Houston lawyers as a public service." Whether these lawyers were disinterested, or even from Houston, is an interesting question. Critz's ads in the *Houston Post* featured virtually every leader of the bar from both sides of the docket. It is very possible the ads were paid for by a lawyer from Longview who was very interested in the campaign—Angus Wynne.¹⁴



Gordon Simpson served in the Judge Advocate General Corps of the U.S. Fifth Army in Italy, here shown liberating Rome on June 4, 1944. Left: Newspaper ad for the Simpson campaign. Right: BBC/Getty photo of American troops liberating Rome.

Critz had the endorsement of virtually every newspaper in the state. His campaign responded to Wynne's attacks with advertisements boasting support from influential public figures, the major newspapers, and a cross-section of the bar. One ad urged voters to "Ask Your Lawyer!" about Critz's abilities as a judge. Another set of ads asked people to "Think Critz!" Given the slogan Wynne had started, it is apparent that they did, but with unintended results.

¹⁴ The provisions of the law that require disclosure of contributors and of those who pay for political advertising were not adopted until 1973.



Keep This Great Jurist on the Job!
RICHARD CRITZ
for Supreme Court of Texas
Led His Nearest Opponent in July Primary by
Approximately 100,000 Votes

Justice Critz has exemplified the best traditions of a Texas judiciary rich in notable service . . . he possesses the broad view of the true jurist and the professional attainment necessary to capable judgment on the bench.—DALLAS NEWS.

KEEP CRITZ FOR HIS SECOND FULL TERM
 (Pol. Adv. by Friends of Judge Critz)

Vox Populi

The runoff election in the Democratic Primary was held on August 26, 1944. Voter turnout was low. Many registered voters were overseas, and those who were at home were not focused on the election—on the same day Texans were voting in the runoff, the Allied armies were liberating Paris. Rural and suburban voters were loath to use rationed gasoline to drive any distance to go to the polls. A total of 468,000 votes were cast in the race, compared to more than 860,000 votes cast in the 1940 runoff for Chief Justice of the Supreme Court.



5,100 miles from Paris, voters were electing a Justice to the Texas Supreme Court on August 26, 1944, the day Allied troops liberated the city. American troops marched through the Arc de Triomphe in the victory parade depicted above four days later. Wikimedia Commons.

The results of the election were reported by the press as a political upset. Simpson received 274,157 votes to Critz's 194,937. Simpson carried 140 counties, losing only 76. He received

overwhelming support in East Texas, getting 94.53 percent of the vote in Smith County. Critz did best in South Texas, where a few calls from former Governor Allred won Critz the support of the political bosses who dominated the region. He also carried, but not overwhelmingly, the counties in Central Texas with a sizeable German-American population.

Why did Simpson win? Certainly Critz's lack of political acumen cost him dearly, and Angus Wynne ran a skillful campaign. Simpson's best counties were in the areas of northeast Texas where Wynne had his best political contacts.¹⁵ Simpson's work with the State Bar of Texas earned him many friends around the state, and his well-advertised military record was popular with the electorate. It was believed at the time, and it seems likely given the benefit of hindsight, that the determining factor was simply that running for re-election in the political environment of 1944 with a German-sounding name was more of a political liability than Critz could overcome.

Critz's junior officer, Jim Bowmer, disagreed with this conclusion. His letter reviewing an earlier draft of this article stated that,

While the article speculated somewhat that Judge Critz' German name was perhaps a deciding factor, and that may sound intriguing in retrospect to a historian who wasn't on the scene, I never hear that either overseas or later. After I got home from the army and started practicing, whatever comment I heard from lawyers about the race was that Judge Critz was so rude to lawyers appearing before the court that it beat him.

On the other hand, Mrs. Elaine Folley Notestine, the daughter of Texas Supreme Court Justice A. J. "Jack" Folley, wrote that,

During the election, Judge Critz's name was frequently misspelled Richardt - Germanic - by opposition ads, a worrisome event during our nation's battle with Germany.¹⁶

Chief Justice Joe Greenhill, who had been a briefing attorney for the Court before he volunteered for military service, was of the opinion that Critz's German name and Wynne's attacks were responsible for the outcome. Greenhill, of course, was in the South Pacific during the campaign, so his information is almost certainly hearsay attributable to the members of the Court for whom he worked after his discharge.¹⁷



Jim D. Bowmer, Gordon Simpson's European Campaign Manager. State Bar of Texas, Presidents web page.

¹⁵ Wynne had boasted to Calvert that anyone who ran against Simpson wouldn't carry a county east of the Trinity River. He was right. In fact, Simpson carried every county east of the Brazos River.

¹⁶ Mrs. Notestine's letter was sent to the Editor of the *Texas Bar Journal* following publication of the earlier version of this article, and was published in the April 2002 issue of the *Bar Journal*.

¹⁷ The authors interviewed Judge Greenhill for this article. He died in 2011.

After the Election

After he left the Court, Critz joined the firm of Mann, Bauknight, Kuykendall & Stevenson in Austin. "He didn't really prosper as a lawyer after he left the court, since his love of the law was best expressed in the contemplative setting of an appellate court," said Congressman Pickle. "He missed being on the Supreme Court. Very much so."

To what cause did Critz attribute his defeat? The answer is lost to history. "Judge Critz would never talk about Gordon Simpson, Angus Wynne, or what happened. He never carried a grudge and he never talked about it," said Pickle. Several other people interviewed for this article agree. His death in 1959 was mourned by the Court and the bar.

Gordon Simpson returned from Italy to take the oath of office in January of 1945. He quickly acquired a reputation as being one of the brightest and hardest-working members of the Court. "He made us write opinion drafts using language that could be understood by the public," according to a former briefing attorney. "He would always tell us, 'Write like you are writing for a newspaper.'"

Three years after Simpson joined the Supreme Court, the Army ordered him to report to Dachau, Germany, to serve as an appellate judge on the tribunal that reviewed the convictions of Germans charged with war crimes. Simpson upheld the convictions of the Nazi higher-ups who engineered the Holocaust, but he had reservations about the convictions of noncommissioned



Upper left and middle: In the Battle of the Bulge, SS Kampfgruppe Peiper, an elite panzer unit, took many American POWs and murdered some in the Malmedy Massacre. Upper right: Snow preserved their bodies until the Army reached the site in January 1945. Below: The Simpson Commission reviewed the Dachau war crimes trials, including that of SS Colonel Joachim Peiper.
Bundesarchiv and Irish History Malmedy War Crimes website.





officers who were following orders when they killed U.S. soldiers captured during the Battle of the Bulge. The prisoners had been taken to the town of Malmedy, Belgium, and on orders from German generals, had been shot. The Nuremberg tribunal ordered the German noncommissioned officers incarcerated for terms of up to ten years.

Judge Simpson wrote a white paper to President Truman and made a report to the World Court that recommended that the sergeants and corporals who had followed the orders of their superiors be released for time served. Having served in World War I and World War II, he understood the mind of a soldier and felt that a lesser degree of culpability attached to a low-ranking soldier who was following orders given by a superior during wartime. Simpson's performance on the Dachau tribunal—one of the toughest jobs any judge could face—brought him praise from all sides. Today, his portrait hangs in the German courthouse where he presided.



Not long after Simpson returned to Texas, he was offered the job of vice president and general counsel of the General American Oil Company, one of his clients before the war. He resigned his seat on the Supreme Court and moved to Dallas.¹⁸ Later, he joined Thompson & Knight, where he reported to the office every day well past his nintieth birthday. He died in 1987 at the age of 92. A briefing attorney from the post-war years summed up the opinions of many when he recalled Simpson "was as fine a man as I have ever known."

Gordon Simpson.
Top: State Preservation Board. Bottom: State Bar Presidents website.

Electing a "Name"

America has traditionally been a "melting pot" in which the many cultures brought to our country by its immigrants have blended together. Today, that concept is being replaced with the view that our cultural diversity creates a "tossed salad" in which every ethnic group remains separate, yet a part of the whole of our nation. Regardless of which view prevails, making choices for elective office solely on the basis of the "name" of a candidate is beneath the democratic ideals of our nation. If Justice Critz was defeated because of his Germanic name, it was not the last time a candidate's ethnicity hurt a political campaign. Discrimination in any form against anyone, even in times of war, solely on the basis of an ancestry in common with our nation's enemies, is wrong. It happened to many patriotic Japanese-Americans and German-Americans during World War II. If our nation is to thrive in this century, it will not happen now or in the future.

¹⁸ See, e.g., Gordon Simpson of Dallas [sic], "Negotiations for a Foreign Oil Concession," *Texas Bar Journal* (Jan. 1961): 31-32, 79. The *Journal* thanks Richard B. Phillips of Thompson & Knight, LLP for locating this article that reflects Justice Simpson's postwar activities.

Authors' Note

This article would not have been possible without the assistance of many people who agreed to be interviewed about their knowledge of the characters and stories in this article. Among the people who were most helpful were Congressman Jake Pickle, Chief Justice Joe Greenhill, and Margaret Simpson Carloss.

The article would have been impossible to research today, due to the deaths of all of the persons interviewed. We hope that efforts are made to preserve the history of our legal system, since the judiciary is the one branch of government that bases its current rulings on those of the past.



JUDGE MARK DAVIDSON served as Judge of the 11th District Court for twenty years before his retirement in 2009. He is now serving as the Multi-District Litigation Judge for all asbestos cases in the State of Texas, being named to that position by Chief Justice Wallace Jefferson and the Multi-District Litigation Panel of the Texas Supreme Court. In that role, he has judicial duties over the 85,000 asbestos cases pending throughout the state.



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Revisiting Historic Election Law in a Modern Constitutional Challenge: *Cotham v. Garza*, 805 F. Supp. 389 (S.D. Tex. 1995)

By W. Mark Cotham

Twice in my lifetime I have sued my beloved state to enforce the United States Constitution.¹ Mine was a fortunate generation not called on to serve in the military. Bringing lawsuits was a way, albeit a puny one in comparison with my father's generation,² of preserving constitutional freedoms. The first time I sued my state was as the named plaintiff in a suit seeking to overturn a historic ban on voters possessing lists of candidates not in their own handwriting while in the polling booth.³ After filing cross-motions for summary judgment and a successful motion for reconsideration, the U.S. District Court for the Southern District of Texas, Judge Sim Lake presiding, declared the statute unconstitutional.⁴ By allowing voters to take a newspaper editorial, a bar preference poll, or a League of Texas Voters election guide into a voting booth, the *Cotham v. Garza* decision has changed the way every subsequent Texas election has been conducted since 1995, including every judicial election.

This article examines the historical foundation of the statute Judge Lake overturned, shows why the law no longer made sense in modern Texas, and explains how the legal conflict played out.

I. The Historical Foundation for Texas's Ban on Voters Possessing Candidate Lists.

A study by a proud son or daughter of Texas about the history of our electoral laws will make one less proud. That history has been extensively reviewed in recent litigation successfully challenging Texas's voter identification law.⁵ That history reveals decades of racism and petty

¹ In addition to the constitutional challenge discussed in this article, I started and helped litigate a successful Commerce Clause challenge to Texas's ban on importation of wine from out-of-state wineries. See *Dickerson v. Bailey*, 212 F. Supp. 2d 673 (S.D. Tex. 2002), *aff'd*, 336 F.3d 388 (5th Cir. 2003).

² My father, Edward T. Cotham, Sr. was a bombardier in the Fifth Army Air Corps in World War II. He flew B-24 missions in the South Pacific. His early life was a testament to the fact that courage is not an absence of fear but a resolute response to it. He absolutely hated being at war and away from his family. His response was to volunteer for extra combat missions in the hopes that he could accumulate sufficient points to return home earlier. Several times, just as he was about to hit a return threshold, the totals were upwardly changed.

³ *W. Mark Cotham v. Antonio O. Garza, Jr.*, in his official capacity, 905 F. Supp. 389 (S.D. Tex. 1995).

⁴ *Ibid.*

⁵ *Veasey v. Perry*, 71 F. Supp. 3d 627 (S.D. Tex. 2014).

politics where disenfranchisement was a weapon to perpetuate power.⁶ Back at the turn of the century, when the law prohibiting possession of a list of candidates was enacted, that background was especially apparent.

The statute I challenged was born in an odorous atmosphere. It originated as part of the Terrell Election Law, passed in 1903 and amended in 1905. The relevant portion of that statute was in Section 70, which provided:

70. Any judge may require a citizen to answer under oath before he secures an official ballot whether he has been furnished with any paper or ballot on which is marked the names of any one for whom he has agreed or promised to vote or for whom he has been requested to vote, or has such paper or marked ballot in his possession, and he shall not be furnished with an official ballot until he has delivered to the judge such marked ballot or paper, if he has one. And any person who gives, receives or secures or is interested in giving or receiving an official ballot or any paper whatever, on which is marked, printed or written the name or names of any person or persons for whom he has agreed or proposed to vote, or for whom he has been requested to vote, or has such paper marked, written or printed in his possession as a guide or indication by which he could make out his ticket, shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not less than one hundred dollars nor more than five hundred dollars and confinement in the county jail for thirty days.⁷

By the time of my lawsuit, the Legislature had recodified that statute as Texas Election Code Annotated § 63.011 (West 1986) to provide as follows:

§ 63.011. Written Communication Prohibited

- (a) A voter may not have in his actual possession while marking the ballot a written communication that:
 - (1) was prepared and furnished to the voter by another person; and
 - (2) is marked or printed in a way that identifies one or more candidates or measures for which the voter has agreed to vote or has been requested to vote.
- (b) A sample ballot that has not been marked or printed in a way that identifies candidates or measures for which to vote, that is obtained by the voter from

⁶ On July 26, 2016, the Fifth Circuit, in a 9-6 *en banc* decision, determined that Texas's voter identification law violates the Voting Rights Act and cannot be enforced as is in the 2016 presidential election. Opinion at https://www.brennancenter.org/sites/default/files/legal-work/Texas_ID_Fifth_Circuit_072016.pdf. The Fifth Circuit's remand resulted in an agreed-upon interim set of steps necessary to protect the integrity of the election process. *Veasey v. Abbott*, Civil Action No. 2:13-CV-00193 (S.D. Tex. Aug. 10, 2016).

⁷ *The Terrell Election law. Embracing all amendments to date*, Texas Secretary of State (1908), 15. Available online at <https://archive.org/details/terrellection00texagoog>.

a newspaper or another person, and that the voter marks himself is one example of a written communication that is not prohibited under Subsection (a).

- (c) An election officer may not accept a voter for voting if the officer knows that the voter has actual possession of a communication prohibited by Subsection (a) at the time he offers to vote.
- (d) An election officer may require a voter to answer under oath whether the voter has actual possession of a communication prohibited by Subsection (a). If a voter has a prohibited communication, the voter may not receive an official ballot until the voter delivers the communication to the election officer.
- (e) A person commits an offense if the person violates Subsection (a). The offense is a Class C misdemeanor.

A Class C misdemeanor was then punishable by a “fine not to exceed \$500.”⁸

Among the states, only Texas and Arkansas had a law that prohibited the possession of written communications while marking a ballot.⁹ The Terrell Election Law, championed by and named after senior statesman Alexander W. Terrell, adopted a mandatory primary statute which the Legislature amended in 1905 to permit Democratic Committee chairmen to establish their party’s “voting qualifications.”¹⁰ This became the basis for institutionalizing the all-white primary. In 1904, the Texas “Democratic executive committee gave its approval to the almost statewide practice by suggesting that county committees require primary voters to affirm: ‘I am a white person and a Democrat.’”¹¹

Alexander Terrell “made no secret of his white supremacist attitude, stating on one occasion that the ‘foremost man of all the world is the Anglo-Saxon American white man’” and on another that “the 15th Amendment to the U.S. Constitution, which assured black voting rights, was ‘the political blunder of the century.’”¹² Other commentators have been only slightly more charitable in assessing Terrell’s motives, suggesting that while he “certainly intended to exclude African Americans, partly because they were black and partly because they were likely to be illiterate, he also wanted to restrict the influence of all voters who were, in his view, irresponsible because

⁸ TEX. PENAL CODE ANN. § 12.23 (West Supp.1995).

⁹ *Cotham*, 905 F. Supp. at 393.

¹⁰ Darlene Clark Hine, “The Elusive Ballot: The Black Struggle against the Texas Democratic White Primary, 1932–1945,” in Bruce A. Glasrud and James M. Smallwood, eds., *The African American Experience in Texas: An Anthology* (Lubbock: Texas Tech University Press, 2007), 280–81. See also Irby C. Nichols, Jr., “Terrell, Alexander Watkins,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fte16>.

¹¹ Alwyn Barr, *Reconstruction to Reform: Texas Politics 1876–1906* (Dallas: Southern Methodist University Press, 1971), 201. See also O. Douglas Weeks, “Election Laws,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/wde01>.

¹² Mike Kingston, Sam Attlesey, and Mary G. Crawford, *The Texas Almanac’s Political History of Texas* (Austin: Texas State Historical Association, 1992), 186.



Alexander W. Terrell's gravestone at the Texas State Cemetery. Photo by David A. Furlow.

they were illiterate or poor or purchasable."¹³

Predictably, "voter participation among all groups dropped dramatically after the passage of the Terrell Law. Black participation declined from an estimated 100,000 in the 1890s to about 5,000 in 1906."¹⁴ In fairness, the poll tax, another measure supported by Terrell and enacted through a constitutional amendment in 1902, had already begun the disenfranchisement of many African American voters.¹⁵

Courts largely dismantled the Terrell Election Law and related discriminatory laws over many decades, including express endorsements of all-white primaries and the state's poll tax, in a long, sad history of civil rights litigation.¹⁶ That struggle included heroic efforts by civil rights

¹³ Michael Perman, *Struggle for Mastery: Disenfranchisement in the South 1888–1908* (Durham: University of North Carolina Press, 2001), 287.

¹⁴ Alwyn Barr, *Black Texans: A History of African Americans in Texas 1528–1995* (Norman: University of Oklahoma Press, 1996), 79–80; Kingston, Attlesey, and Crawford, *Texas Almanac's Political History*, 187.

¹⁵ Kingston, Attlesey, and Crawford, *Texas Almanac's Political History*, 189.

¹⁶ Texas's law prohibiting blacks from participating in Democratic primary elections was struck down as a violation of the Constitution's Fourteenth and Fifteenth Amendments in *Nixon v. Herndon*, 273 U.S. 536 (1927). In *Nixon v. Condon*, 286 U.S. 73 (1932), the Supreme Court rejected Texas's next attempt to disenfranchise African Americans

champions, including then private practitioner Thurgood Marshall, who was one of the attorneys who filed the decisive case that finally enjoined further operation of the Texas white primary system.¹⁷ Recent judicial opinions in federal court challenges to Texas’s voter identification laws have held that the Legislature used “voting fraud” and “electoral integrity” as pretexts when enacting statutory requirements and restrictions in the district court¹⁸ and in the Fifth Circuit.¹⁹

II. The Law Banning Voter Candidate Lists Long Outlived Any Justification for Its Usefulness—If It Ever Had Any.

It is tempting to conclude that the Legislature that enacted the Terrell Election Law viewed it as another tool in the arsenal to disenfranchise black, Hispanic, and poor white voters. Logically, anything that would make the voting process more cumbersome for such voters, including any law preventing them from possessing a list, would accomplish this goal. If, however, one credits the Legislature with any legitimate anti-fraud goal, it was apparent by the 1990s that such a purpose was no longer being accomplished.

By the 1990s, the sheer number of electoral choices swamped modern Texas voters. Unlike in the past, today’s urban voter often faces an extraordinary panoply of choices. “Ballots in the state’s most populous counties, where a large number of judges must stand for election, routinely present Texas voters with 40 to 100 contested races, proposed constitutional amendments, and local propositions.”²⁰ Federal congressional elections, state governor and legislative elections, and local municipal elections are just the start. There will also be local propositions and constitutional amendments. In a major urban area such as Houston and Dallas and to a lesser extent San Antonio, Fort Worth, and Austin, there will be dozens of judicial races.

As the court in my case explained, “[b]ecause voters are limited in their ability to remember candidates’ names and how they wish to vote on various measures, they often need written cues to remind them of how they wish to vote when the ballot presents them with a number of names, amendments, and propositions.... ‘Written cues’ are any of various kinds of written information that voters use to refresh their recollections about various candidates or to assist them in voting, *e.g.*, party affiliation labels on the ballot, a League of Women [Voters guide], the published survey results of the Houston Bar Association, etc.”²¹

when it held that the Texas Democratic Party Executive Committee received its power to determine party membership from the State of Texas, so state action was present in the Democratic Party’s conduct of elections. Eventually, in *U.S. v. Classic*, 313 U.S. 299 (1941), the Court held that primary elections were such an integral part of electing officials that federal laws guaranteeing the right to vote applied. *Smith v. Allwright*, 321 U.S. 649 (1944) then decided that primary elections were so pervasively regulated by the State that, in doing their part to run primaries, political parties were state actors subject to the Fourteenth and Fifteenth Amendments. In *Terry v. Adams*, 345 U.S. 461 (1953), the Court finally ended the all-white primary after nine years of acquiescence and twenty-six years of litigation by eliminating the role of the Jaybird Democratic Association, a leadership caucus within the party, in evading anti-discrimination requirements.

¹⁷ Kingston, Attlesley, and Crawford, *Texas Almanac’s Political History*, 189.

¹⁸ *Veasey v. Perry*, 71 F. Supp. 3d at 627, 654, 691–93 (S.D. Tex. 2014).

¹⁹ *Veasey v. Abbott*, No. 14-41127, at *17, 2016 U.S. App. LEXIS 13255 (5th Cir. July 20, 2016) (*en banc*).

²⁰ *Cotham*, 905 F. Supp. at 392–93.

²¹ *Ibid.*, 293.

It is difficult to see the virtue, either from the voter's perspective or from the state's perspective, of confronting voters with so many decisions. The results are not surprising. Straight-party ticket voting by half or more of Texans, some by choice and some simply because ballots offered no alternative written cues, particularly when alternative printed materials were banned, is common.²² Voter roll-off, the phenomenon in which voters in "down-ballot" races just quit voting/guessing, is extremely common.²³ Even for people satisfied that one party or the other has a monopoly on the good candidates, voting a straight-party ticket offers no help on propositions, constitutional amendments, and local elections which are, by design, non-partisan.

In the absence of partisan signals, voters predictably turned in desperation to the only information available to them—the names of the candidates on a ballot. In at least three different kinds of Texas elections, voters had no partisan cue on which to base their vote: first, proposition elections, either local charter-amendment, referendum, and recall elections or statewide elections involving votes to approve or reject state constitutional amendments; second, local municipal elections; and third, party primaries. For many voters, the absence of any such cue will mean that they will cast a ballot based solely on the limited information before them—candidate names or impressions about the way ballot propositions are phrased.

Voter reaction to candidate names, especially surnames, has often been a determining factor in close elections in Texas. For example, most observers credit mistaken name association for the infamous election of Donald B. Yarbrough to the Texas Supreme Court because voters confused his name with popular former Senator Ralph Yarborough and Donald H. Yarborough, who twice ran for governor with a similar sounding but differently spelled surname.²⁴ Likewise,

²² In my case, University of Houston Political Science Professor Richard Murray in my case opined that it was "impossible to estimate with precision how many voters select a straight-party ticket simply because they cannot legally bring written information inside the voting booth. In my opinion, however, that number is significant and could play a decisive role in certain elections." Affidavit of Professor Richard Murray filed December 16, 2014 in my case, 7, ¶ 14.

²³ Professor Murray explained in his affidavit in my case that there "are a significant number of voters who simply do not vote in races where they lack any written cues about a candidate except for the party affiliation" and that the differential between high and low profile races which is usually "on the order of 10-25% less votes being cast in the low-profile races" illustrates this point. *Ibid.*, 8, ¶ 15.

²⁴ The almost comedic story of Donald B. Yarbrough's election illustrates much that is wrong about judicial elections in Texas. The Tarlton Library's "Justices of Texas 1836-1986" website summarizes the story nicely:

In 1976, Donald B. Yarbrough was a little known, thirty-five year old Houston lawyer who shared a similar last name with longtime U.S. Senator Ralph Yarborough, and with Donald H. Yarborough, who had run twice for the Texas governorship. Donald B. Yarbrough, a former staff lawyer for Campus Crusade for Christ, ran for a Texas Supreme Court seat in the 1976 election, claiming that God wanted him to run. He reportedly spent \$350 on his campaign and made one speech during the primary. Voter confusion and name recognition led to Yarbrough's victory in the Democratic primary over his highly respected opponent, Charles Barrow. While running in the primary, Yarbrough had thirteen civil suits against him pending in state and federal courts. But because there was no Republican candidate, Yarbrough was unopposed in the general election and won the seat; he attributed his victory to God.

Yarbrough was sworn in to service in January 1977 but, facing indictments for forgery and perjury and the possibility of impeachment, he resigned from the court in July of that year. Gov. Dolph Briscoe subsequently appointed Charles Barrow to the court; Barrow was elected and reelected to the position.

Yarbrough was convicted of lying to grand jurors when he denied meeting with an associate to

Chief Justice of the Texas Supreme Court Robert W. Calvert maintained that he had a substantial advantage at election time because so many people mistook him for the longtime comptroller of public accounts, Robert S. Calvert—the man who signed welfare checks.²⁵

Historical research about elections experts presented in my case against the state showed, not surprisingly, that voters confronting a ballot with nothing but candidate names favored certain perceived ethnicities and disfavored others.²⁶ In my case, the State attempted to defend a statute that often left voters with only the candidates' names to choose from when historical election research and undeniable experience showed that limiting voters' ability to cast an informed ballot was not desirable.

Until my lawsuit, partisan political dynamics thwarted legislative reform of the statute I challenged, which existed from 1905 until the 1990s without substantive alteration. In the early 1990s there were legislative hearings about eliminating it, but those hearings never resulted in the enactment of any bill into law. I went to Austin and testified in favor of repealing the statute, but that did not prove successful. It is not especially hard to understand why changing a statute like this is so difficult. The party in the majority will naturally look askance at any change which makes it easier for voters to vote outside of the majority, including, especially, "split ticket" voting.

I have never been a politically active person. Nonetheless, on the morning of November 8, 1994, I decided to vote in a state election involving twenty-three statewide offices, two national offices (Senator and



Mark Cotham brought his marked-up League of Women Voters list to this Spring Valley voting station on November 8, 1994.
Photo by David A. Furlow.

discuss forging a car title, was sentenced in March 1978, and failed to appear in court for sentencing. Instead, he fled with his wife and two children to Grenada where, safe from extradition, he attended medical school. Nineteen months later in 1983, while auditing a medical course in St. Vincent, he was arrested by federal authorities and returned to Texas, where a five-year prison sentence for aggravated perjury awaited him. In 1986 he was sentenced to six years in federal prison for bribery. Following his imprisonment he reportedly relocated to Florida, where he was planning to write a book on his version of the events of 1976-77.

Tarleton Law Library, "Donald Burt Yarbrough (b. 1941)," *Justices of Texas 1836-1986*, <https://tarltonapps.law.utexas.edu/justices/profile/view/120>.

²⁵ R. H. Kraemer, E. Crain, and W. E. Maxwell, *Understanding Texas Politics* (St. Paul: West Publishing Co., 1975), 140, originally cited by Professor Murray in his Second Supplemental Affidavit filed in my case.

²⁶ Professor Murray also presented research from historical primary election research from California that calculated the advantages and disadvantages of candidates' perceived ethnicities based on their names. For example, at that time and place, a Scandinavian name conferred a 24 percent political advantage, while an Italian name delivered a 39 percent disadvantage. Professor Richard Murray's Second Supplemental Affidavit (filed January 26, 1995 in my case), cited Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 S.W. L.J. 102 (1986).

GENERAL ELECTION

November 8, 1994

Early Voting Dates

October 19 – November 4



THE LEAGUE OF WOMEN VOTERS

VOTERS GUIDE

NONPARTISAN



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The League of Women Voters produced a non-partisan guide to the November 8, 1994 elections in Harris County. Photo of original trial court exhibit by David A. Furlow.

process rights protected by the Fourteenth Amendment to the United States Constitution since the statute was inherently vague about the nature of the information it made a crime to possess. Finally, we alleged that the statute violated established rights to political association. We drew the honorable U.S. District Court Judge Simeon ("Sim") Lake as our presiding judge.

A Surprising Initial Setback

We were crestfallen to receive an adverse summary judgment from Judge Lake who, to his credit, gave the matter expedited consideration because of the lawsuit's potential impact on elections. He based his original summary judgment on a determination that "plaintiff had failed to present competent summary judgment evidence demonstrating that his interest in possessing written materials while marking a ballot outweighed defendant's [the State of Texas's] regulatory interests." The court based its conclusion on Texas Election Code Annotated

Representative), five county non-judicial offices and forty-three county judicial races. I grabbed a copy of my League of Women Voters Guide to help inform my vote. When I arrived at the poll an election clerk told me that I would have to put my guide away. I said "but I need it to know who to vote for," and was met with a "sorry, that's the law." My response was literally, "We'll see." I then voted in about half the races I would otherwise have ventured a vote in, had I been armed with my guide.

A bit of research and the assurance by one of my former law partners that I would definitely lose was all the fuel I needed to generate a complaint. I had another more optimistic partner, David Furlow, who very capably represented me.

We filed suit in federal district court and asserted essentially three claims. First, we alleged that criminalization of the possession of information was a breach of the First Amendment to the United States Constitution. Second, we alleged that the ban violated due

§ 63.011's exemption of certain sample ballots and on the State's interpretation of § 63.011 to exempt handwritten notes, both of which the court concluded provided voters the means to cast ballots "without fear of forgetting for whom or for what they wished to vote."²⁷

This development surprised us. First, the issue was, from a plaintiff voter's perspective, glancingly presented by the State, if that, and had not been fully explored in the original summary judgment response. Second, it had never dawned on the plaintiff's side that a court would find that an average Texas voter received or even had reasonable access to sample ballots. Nevertheless, the court originally ruled that the existence of sample ballots meant that the burden of the challenged statute on voters was not substantial.

Plaintiff Redoubled Efforts While the State Began to Back Down

Faced with an opinion that did not reflect the true status of the unavailability of sample ballots to voters, my team marshalled proof to show how the challenged law placed voters in an untenable position. We secured affidavits from Professor Richard Murray, the dean of voter analysts in all of Texas, and Tony Sirvello, then the Administrator of Elections for the Harris County Clerk, and a large number of fact witnesses familiar with the election system in Harris County.

Our affidavits, official records, and statutes established several baseline facts about the unavailability of sample ballots to most voters in Harris County and in other counties throughout Texas. Most importantly, sample ballots were not officially distributed in any significant numbers to voters, the only sample ballots then available in Harris County were the result of a gift from an oil company that supported a printing of 10,000, and the sample ballot printed in the *Houston Chronicle* did not include local precinct elections and was itself prohibited from being taken into the booth because of printing on its reverse side. As the plaintiff I also discussed the "Jim Crow" nature of the Terrell Election Law in response to the suggestion that this law served any valid modern purposes.

The State of Texas, much to its credit, did not redouble its efforts at proof, but instead essentially stood on the record it had made. As the district court's opinion reflects, this did not leave the court with much choice since on so many key issues the record was "uncontroverted."

The court seriously considered the additional evidence the plaintiff's side marshalled. "After the court entered the January 19, 1995, memorandum and order," the court observed, "plaintiff submitted an extensive amount of new evidence demonstrating that the exemptions provided for by the statute as written (use of certain sample ballots) and as applied (use of handwritten notes) are not effective because permissible sample ballots are not generally available to Texas voters and because defendant's interpretation of the statute to prohibit the possession of all written materials other than those composed in the voter's own handwriting is over-inclusive and subject to arbitrary and selective enforcement."²⁸

²⁷ *Cotham*, 905 F. Supp. at 391.

²⁸ *Ibid.*

VOTER'S GUIDE

Sample ballot, 15E

Candidate Profiles



Nov. 8 is Election Day

Polls across Texas will be open from 7 a.m. to 7 p.m. for the Nov. 8 general election.

Texas registered to vote by Oct. 9 are eligible to cast ballots on Election Day. Registered voters who have not voted early or by mail can punch holes for any candidate on their punch-card ballots — Republican, Democrat, Libertarian, independent or any other, no matter which party primary they voted in during this year or whether they participated in the primaries at all.

Early voting still possible

Polls for early Harris County voters will be open through Nov. 4.

To vote early in person, voters may come to the second floor of the Anderson Clayton Courthouse Annex, 1310 Caroline in downtown Houston, or visit any of 26 voting county branch locations. When voting at a branch location, voters should vote in their state representative's district, so his or her name will appear on the ballot.

For people who want to vote by mail, county clerk workers said ballots must arrive by 7 p.m. on Nov. 8 in the Harris County clerk's mailbox.

If you vote early or by mail, you may not vote on Nov. 8 in person.

For additional information, call the county clerk's office at 755-6185 or 755-6411.

Small turnout expected

Voter registrar Carl S. Smith, who has watched many elections since he became tax assessor and collector in 1947, predicts that at most 40 percent of Harris County's nearly 1.3 million eligible voters will cast ballots in the general election. "I think we'll be lucky to get 30 percent, 40 percent," Smith said. "Certainly it won't run 50 percent."

1,200,963 eligible voters

After purging Harris County voter registration rolls of 180,000 names of people whose certificates were removed as "unsubstantiated," county officials say there are exactly 1,200,963 voters eligible to cast ballots on Nov. 8.

The "purge" came in August when the county tax assessor-collector mailed notifications to people who have been registered in the past to vote in Harris County.

Who is on the ballot?

All eligible Texans can vote for governor, U.S. senator, lieutenant governor, attorney general, comptroller of public accounts, treasurer, land commissioner, agriculture commissioner, railroad commissioner, Supreme Court, Court of Criminal Appeals.

Check your yellow voter registration card to find out in what district you live for U.S. representative, state senator, state representative, county commissioner, precinct and police of the peace precinct. If you don't know your registration district, check the back of your registration card for a phone book.

Only your representatives will appear on the ballot. All eligible Harris County residents can vote for county judge, commissioner's races also appear on some ballots.

Polling places

The polling places in Harris County for the 1994 general election will be published in the Houston Chronicle on Election Day, Tuesday, Nov. 8.

About this section...

Biographical information about candidates published in the Houston Chronicle's Voter's Guide for the 1994 general election is based on, but not necessarily confined to, data provided by the candidates.

Candidates are listed in the order in which they appear on the ballot. Under Texas law, the nominees of the party winning the most recent governor's election appear first on the ballot.

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Gov. Ann Richards hopes Texas voters will give her another term in office; however, George W. Bush, a Republican, aims to end Richards' reign in Austin.

Richards facing re-election challenge

By R.S. RATCLIFFE
Houston Chronicle
Austin Bureau

ASTON — In the Texas governor's race, the state's first female governor in more than 50 years is facing a re-election challenge from the Republican son of a former U.S. chief of the FBI. Richards is running on a platform of public education and rapid growth of the state private sector for public protection.

Republican George W. Bush, managing partner of oil Texas Rangers baseball team and eldest son of former President George H.W. Bush, is challenging Richards on the grounds that her record is less than ideal than she portrays.

Bush claims crime is more rampant, more violent and that Richards has ignored juvenile crime. He is pushing for welfare and public education reforms.

Libertarian Barry Hinkley is launching his campaign on the basis of both his opposition to an incoming big, intrusive government. The Libertarian candidate in 1992, Jeff Durrell, got 33 percent of the vote statewide. Hinkley says he wants to build the Libertarian Party. He said a vote for him should not be seen as a protest vote.

Richards has made the state's economy her top priority, noting that 500,000 jobs have been created in the state since she took office. She has bragged about ending the longest strike in Texas history.

Baby boomers vie to become county judge

3 in race as Lindsay opts to give up seat

By ALAN BERNSTEIN
Houston Chronicle Political Writer

Harris County government fights crime, disease, traffic congestion, flooding and other urban suburban problems.

But for the first time since 1974, Republican Jim Lindsay isn't fighting to run county government.

Three men from the baby boom generation are vying to replace him: Republican Robert Eckels, Democrat Vance Ryan and Libertarian W. Richard Smith III.

While they offer to lead the county toward the next century, Eckels and Ryan have already been touched by the county government's controversial history.

Lindsay and his political backers support Eckels, whose father, the late Bob Eckels, served with Lindsay on the Commission on the Future.

The other Eckels resigned in 1988 after being accused of accepting an illegal gift from a county contractor.

Smith III, the new county judge, takes over in January.



After losing a surprise victory in the Democratic primary, Eckels is vying to succeed Lindsay.



Libertarian candidate Vance Ryan is vying to succeed Lindsay.

Hutchison aims to hold Senate post

Democrat Fisher, Libertarian candidate challenging incumbent

By ADAM RAMSEY
Houston Chronicle Austin Bureau

ASTON — If it seems as if the race for the U.S. Senate has been going on for a while, it may be because the two major candidates ran against each other in the same seat just 18 months ago.

Republican Kay Bailey Hutchison of Dallas, a former Texas House member, congressional candidate and Texas lieutenant governor, won that 1993 special election, emerging from a field of seven that 30 candidates to attack the position held for 18 years by Lloyd Bentsen.

Hutchison is running for re-election in the same seat. She is vying to succeed Lindsay.

ATTACHMENT NO. 1

Although newspapers printed voters' guides such as this *Houston Chronicle* guide in November 1994, Texas law barred voters from taking them into the voting booth. David A. Furlow's photo of Plaintiff's exhibit.

After evaluating the additional evidence, the court vacated its earlier “final judgment” on June 8, 1995, and entered a docket control order containing a schedule for discovery and a trial on the merits. At an August 11, 1995 docket call, all parties requested the court to decide the case on an agreed record consisting of affidavits, exhibits, and stipulated facts. The court did so.

The expanded record enabled the court to make the following findings and conclusions about the general unavailability of sample ballots to voters:

23. The only ballots routinely available to Texas voters before an election are specimen ballots that are to be made available for public inspection either in the office of the county clerk or in the office of the authority responsible for having the official ballots prepared....²⁹

24. The authority responsible for procuring election supplies may have a supply of sample ballots printed but is not required to do so....³⁰

★ ★ ★ ★

25. Only a limited number of sample ballots are printed before Texas elections and those are printed principally for the use of election judges and clerks who display them at the polling places. (Affidavit of John Willingham, Administrator of Elections for Williamson County, Texas, at P 21.)

★ ★ ★ ★

27. In Harris County two sample ballots are routinely posted at each polling place, one at the door and one at the place where voting actually occurs. (Affidavit of Gerald Furlow at PP 6-7; Affidavit of Carla S. Cawlfild at PP 6-7.) There is no mechanism in Harris County for printing and delivering sample ballots to precincts for use by voters who wish to use them. (Affidavit of Tony J. Sirvello, III, Administrator of Elections for the Harris County Clerk, at P 21.)

28. The only sample ballot available for inspection prior to the May 6, 1995, election in plaintiff’s hometown of Spring Valley, Texas, was posted at the city hall polling place. The sample ballot could not be duplicated or removed from the building. (Affidavit of W. Mark Cotham at P 15.)

29. Defendant [State of Texas] makes no effort to distribute sample ballots to potential voters and has no specific knowledge of any efforts made by Texas counties or other entities to distribute sample ballots to potential voters. Although sample ballots are contemplated by the Texas Election Code, no governmental entity has the duty to distribute sample ballots to Texas voters.

²⁹ *Cotham*, 905 F. Supp. at 393-94.

³⁰ *Ibid.*, 905 F. Supp. at 394.

30. Although voters in Harris County can potentially obtain sample ballots from four sources: the county, newspapers, private organizations, and political parties and candidates, none of these sources provide voters with ready access to permissible sample ballots.

- (a) Harris County does not have a budget, a mechanism, or the staff for printing and delivering sample ballots to voters who wish to use them.
- (b) Sample ballots published in local newspapers can be tainted by the presence of election-oriented material on their backsides, as was the sample ballot published in the *Houston Chronicle* prior to the November 1994 election.
- (c) Although some private organizations, such as the Tenneco Government Affairs Department, and various political interest groups attempt to make sample ballots available to the public, the large number of precincts and the large number of precinct-specific races (*e.g.*, justice of the peace, state representative, and state senator) make the task of providing accurate and complete sample ballots to all voters who seek them almost impossible for such organizations.
- (d) Sample ballots prepared by political parties and candidates are often tainted by the practice of highlighting the names of a particular party's candidates.

(Affidavit of Tony J. Sirvello, III, at PP 12–26.)³¹

The court then summarized what our side's uncontroverted evidence showed about voting in Texas elections, most of which remains true to this day:

- (1) ballots in Texas's most populous counties routinely present voters with more than forty contested races, constitutional amendments, and propositions;
- (2) Texas voters are limited in their ability to remember more than a few candidates' names and how they would like to vote on more than a few measures;
- (3) because Texas voters cannot remember all of the candidates and measures for which they wish to vote, they need written cues to remind them of the way they wish to vote when presented with long ballots;
- (4) the only expressly recognized exception to § 63.011(a)'s ban on the possession of written communications while marking a ballot is that appearing in § 63.011(b), which allows voters to refer to certain sample ballots that they have marked themselves;
- (5) although sample ballots are contemplated by the Texas Election Code, no governmental entity has the duty to distribute sample ballots to the Texas electorate;

³¹ *Ibid.*

- (6) defendant makes no effort to distribute sample ballots to potential voters, has no established program to distribute sample ballots to potential voters, and has no specific knowledge of any efforts made by Texas counties or other entities to distribute sample ballots to potential voters;
- (7) sample ballots published in newspapers and prepared by private entities are often prohibited by § 63.011 because of the presence of political advertising, *i.e.*, the names of certain candidates are highlighted or the back sides of the sample ballots contain campaign-related material;
- (8) defendant interprets § 63.011 to encompass all other written materials except notes made in a voter's own handwriting; and
- (9) preparing a handwritten list of all the candidates and measures for which a voter wishes to vote can take up to an hour.³²

After reevaluating the legal issues in light of fact-findings the State did not contest, the court found that the challenged law did, indeed, burden voters such as the plaintiff:

Plaintiff's uncontroverted evidence leads the court to conclude that Texas voters in the state's most populous counties are sometimes unable to cast informed, meaningful votes for the candidates and measures of their choice without the ability to possess written communications while marking their ballots.³³

The court then evaluated the interests the State advanced to support the statute's constitutionality. The State argued that the statutory ban on possessing written communications while marking ballots was a necessary part of the State's regulatory scheme because it protected the integrity of the electoral process by preventing voter intimidation and fraud and because it aided the orderly and prompt administration of ballots on election day by minimizing the time voters spend in the voting booth.³⁴

The court found that the State "failed to present any evidence demonstrating that the restrictions imposed by § 63.011 on the rights of plaintiff [Cotham] and other Texas voters to cast meaningful votes and to associate politically through the vote are necessary either to advance the legitimate state interest of preserving the integrity of the electoral process by preventing voter intimidation and fraud or to advance the insubstantial state interest of limiting the amount of time voters spend marking their ballots."³⁵

With no corresponding interest being advanced, Judge Lake ruled that Texas Election Code § 63.011 was unconstitutional and permanently enjoined its enforcement. "Pursuant to the Findings of Fact and Conclusions of Law set forth below, the court concludes that § 63.011 of

³² *Ibid.*, 905 F. Supp. at 397-98.

³³ *Ibid.* at 398.

³⁴ *Ibid.*, 905 F. Supp. at 398.

³⁵ *Ibid.*, 905 F. Supp. at 400-01.

the Texas Election Code violates rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and that plaintiff is entitled to a permanent injunction restraining the enforcement of § 63.011....”³⁶ The court advised the parties that it waited until November 27, 1995, after the next major election, to rule to minimize its disruption of that election.

“Because neither plaintiff nor any other Texas voter has been prosecuted for violating § 63.011,” the court ruled, “and because the court has concluded that plaintiff’s interest in possessing written communications while marking a ballot outweigh the state’s asserted interests in limiting those communications to certain sample ballots and handwritten notes,” the court made no decision about whether the statute was unconstitutionally vague and ambiguous.³⁷

The State of Texas did not appeal the court’s decision. The state’s counsel informed my attorney that the Secretary of State was troubled by the origin of the statute and could not in good conscience defend it further. Both sides reached a compromise on the size of the prevailing party attorney’s fee award.

I supported Representative Debra Danburg’s later efforts to amend the statute. In 1997 the Legislature amended the statute by enacting Senate Bill 82, which removed the provision the district court permanently enjoined and replaced it with another provision to help keep the voting booths clean.³⁸

Afterwards, some legislators sought to provide Texans with a readily accessible voters’ guide to judicial candidates similar to voters’ guides already published in Alaska, California, Oregon, and Washington.³⁹ State Representative Henry Cuellar, a Democrat, and State Senator Robert Duncan, a Republican, jointly sponsored House Bill 59, which created a new Chapter 278 in the Texas Election Code; it empowered the Texas Secretary of State to post an Internet voters’ guide based on information provided by candidates.⁴⁰ Section 278.003(a) of the bill required every judicial candidate in Texas to disclose basic biographical information:

- (1) current occupation;
- (2) educational and occupational background;
- (3) biographical information; and
- (4) any previous experience serving in government.⁴¹

³⁶ *Ibid.*, 905 F. Supp. at 401.

³⁷ *Ibid.*

³⁸ TEX. ELEC. CODE ANN. § 61.011 replaced the statute and provided for removing “sample ballots or other written communications used by voters that were left or discarded in the polling place.” Added by Acts 1997, 75th Leg., R.S., Ch. 112, Sec. 1, effective Sept. 1, 1997.

³⁹ Shannon Davis, “How should judges be elected? The rise and fall of a reform bill,” *PBS Frontline: Justice for Sale* (1999), <http://www.pbs.org/wgbh/pages/frontline/shows/justice/howshould/risefall.html>.

⁴⁰ See “Bill History,” H.B. 59, 76th Leg., R.S. (1999), available on *Texas Legislature Online*, <http://www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=76R&Bill=HB59>.

⁴¹ *Ibid.*

The bill received the support of Republican Tom Phillips, then Chief Justice of the Texas Supreme Court.⁴² On May 27, 1999, the Legislature passed House Bill 59, and, on May 28, 1999, forwarded it to Governor George W. Bush.⁴³

Governor Bush vetoed House Bill 59 on June 20, 1999. He issued an official memorandum where he stated that:

House Bill 59 creates an inappropriate role for the Texas Secretary of State by requiring that office to post information on the Internet about judicial candidates. Information about candidates should be distributed by the candidates themselves, political parties, and by private organizations, not by government officials. Additionally, this proposal might create the false impression that the Secretary of State guarantees the truth of information provided by the candidates.⁴⁴

Anthony Champagne, a professor at the School of Social Science at the University of Texas at Dallas and an expert on judicial elections, differed. "There is nothing inappropriate about trying to get truthful information out to the public," Professor Champagne explained at the time.⁴⁵ Champagne speculated that a more well-informed electorate might have split their tickets and voted against Republican judicial candidates.⁴⁶

Governor Bush's veto surprised bill sponsor Henry Cuellar, who stated that the Texas Secretary of State could have avoided being put in an "inappropriate role" by adding a short disclaimer to the proposed voters' guide stating that he was merely reprinting information each candidate provided and had no editorial authority to review each statement for its truth or falsity.

Conclusion

The *Cotham v. Garza* decision changed the way Texas elections have been conducted by allowing voters to cast better-informed ballots when they choose to do so. Since November 27, 1995, a Texas voter has been able to take a newspaper editorial, a bar preference poll, or a League of Texas Voters election guide into a voting booth to help that voter keep track of all of the candidates and decide which candidate(s) to vote for or against. The decision has changed the way every subsequent judicial election has been conducted. In the absence of a state voters' guide to judicial candidates of the kind House Bill 59 would have provided, voters can rely on themselves, parties, interest groups, newspapers, bar organizations and trusted friends to help them vote for the best candidates and vote against the worst ones.

The titanic presidential campaign battle every four years obscures the fact that local elections dramatically impact the lives of people on issues such as property taxes, local

⁴² Davis, "How should judges be elected?" *PBS Frontline*.

⁴³ "Bill History," H.B. 59, 76th Leg., R.S. (1999).

⁴⁴ Governor George W. Bush's Memorandum dated June 20, 1999, <http://www.lrl.state.tx.us/scanned/vetoes/76/hb59.pdf>.

⁴⁵ Davis, "How should judges be elected?" *PBS Frontline*.

⁴⁶ *Ibid.*

development, education, and justice. We should all be concerned about the fundamental issues of informed voting at the heart of *Cotham v. Garza* because today's electoral system in urban Texas areas remains extraordinarily challenging to any voter trying to cast an informed vote.

A legislature whose members truly loved their state, their children, and their grandchildren would refocus the electoral process to maximize informed voting rather than merely to perpetuating their own power. If that happened, courts analyzing modern Texas laws might no longer have to see voters' rights through a prism where historically discredited legislative acts play such an important role.



The author is especially grateful to David Furlow not only for originally helping to win the case, but also for his assistance in remembering key facts about the case and his research and editorial assistance.



MARK COTHAM is the President of Good Steward Global Initiative, an all-volunteer nonprofit that uses donated books to establish libraries in developing countries. He has practiced oil and gas and commercial litigation in Houston since 1982 and remains active mediating cases. He graduated with honors from the University of Texas School of Law.

[Return to Journal Index](#)

Ferguson v. Maddox: Impeachment, Politics, and the Texas Supreme Court

By Horace P. Flatt

It is a *right* of the people in a free society to remove from office any duly elected or appointed official who fails to fulfill the trust placed in him or her; it is the *duty* of the people in a free society to honor any rights of the supposedly offending official. In Texas, impeachment is a procedure for removing an elected official from office.

One of the rights reserved to every state is to determine for itself the qualifications for an office and the conditions under which an officeholder, duly appointed or elected, may serve.¹ Thus, while in all states save Oregon, impeachment is a procedure that may be followed, grounds for impeachment (“impeachable offenses”) vary from state to state.

In Texas, no grounds for impeachment appear in either the state Constitution or the statutes. This absence has been a source of controversy ever since the first impeachment trial was held in 1871. The absence means that the “grounds for impeachment...can be any misconduct of an officer, public or private, of such a character as to indicate unfitness for office.”² Under such an interpretation, an official serves at the “pleasure of the Legislature.”

As with other citizens, officeholders are guaranteed certain rights under the 1876 Texas Constitution’s Bill of Rights. Article I, Section 16, for instance, prohibits the passage of any “bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts....” Furthermore, Article I, Section 19 of the Constitution provides that “[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.”³ This latter section is of paramount importance in any discussion of impeachment in Texas. In 1873, the Texas Supreme Court held in *Honey v. Graham* that a duly elected or appointed officer held a public office as property *and* as a privilege. While it was later decided that in Texas a public office was not a “property,” there has been no challenge to its status as a privilege.



James Edward Ferguson, Jr., a/k/a “Pa” Ferguson. Library of Congress Prints and Photographs Division, LC-DIG-ggbain-16894 (file from original negative).

¹ *Cummings v. State of Missouri*, 71 U.S. 277, 318, 319 (1867).

² L. Dewitt Hale et al., “Impeachment – Report of the Select Committee on Impeachment to the Speaker and House of Representatives,” 64th Texas Legislature, July 23, 1975, 4.

³ The Texas Constitution guarantees the right of due process to the holder of a “privilege” in addition to the guarantees of due process under the U.S. Constitution.

Judgment belongs to the judiciary. *A charge of forfeiture can only be made out on proof—proof sufficient to satisfy twelve unprejudiced minds.*

To forfeit his right to an office, the incumbent must have done something sufficient in law to deprive him of the office; and the constitution and laws secure to the person so accused the right of traverse—the right of trial—and no power on earth can lawfully deprive him of these rights.

But it has been assumed on the argument of this case that that a great emergency existed requiring the removal of George W. Honey from the office of state treasurer, and that the governor, as in duty bound, promptly met the emergency.

Upon a system of laws so well devised as ours, it is safe to assume that no such emergency can arise or cast itself upon the governor as would authorize him in assuming power and functions which do not constitutionally belong to him....



The power of the governor to fill a vacancy, when one exists, is not disputed. *The power to create a vacancy is denied by every authority, except where the office is filled by the governor's choice of an incumbent without concurrence of the senate or election by the people, and the term of office is undefined by law.* In such case the incumbent holds at the pleasure of the executive, and may be at any time removed from the office. [Citations omitted.]⁴

Thus, in any case involving removal from office, an individual office-holder is entitled to “due process of law” under the Fourteenth Amendment to the U.S. Constitution and to “due course of law” under Article I, Section 19 of the Texas Constitution of 1876.

No one familiar with the conduct in office of Governor James E. Ferguson would doubt that he should have been removed from office.⁵ In particular, his autocratic behavior in regard to the University of Texas led university supporters to press for investigations which might lead to impeachment – the *only* way under the Texas Constitution he might be removed from office.⁶

The “facts” of the Ferguson case justified House legislators’ drafting of articles of impeachment, but, in following the impeachment procedure, the Senate had to conduct a trial that verified the “facts” and also applied the appropriate law. There were sufficient facts to

⁴ Emphasis added. *Honey v. Graham*, 39 Tex. 11, 13-19, 1873 Tex. LEXIS 318 (1873). See also *State v. Crumbaugh*, 26 Tex. Civ. App. 521, 526, 63 S.W. 925 (Tex. Civ. App.—San Antonio, 1901, writ ref’d) (“A public office is not property, within the meaning of the constitutional provision that ‘no person shall be deprived of life, liberty, or property without due process of law.’ It is a mere public agency, revocable according to the will and appointment of the people, as exercised in the Constitution and the laws enacted in conformity therewith.”)

⁵ Carol O’Keefe Wilson, *In the Governor’s Shadow* (Denton: University of North Texas Press, 2014). See also Ralph W. Steen, “Ferguson, James Edward,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/ffe05>.

⁶ Lewis L. Gould, “The University Becomes Politicized: The War with Jim Ferguson, 1915–1918,” *Southwestern Historical Quarterly* 86 (July 1982): 255.

justify his removal, but what about the law? How would impeachment proceed? What about Ferguson's rights as the office holder who held the highest office in the Lone Star State?

In the 1917 impeachment trial of Ferguson, the first important debate concerned the nature of impeachment: was it to be a criminal case or a civil case? Ferguson's counsel argued that it was a criminal case, basing his argument on an unambiguous statement in Section 11 of Article IV (Executive Department) which stated that an impeachment case was a criminal case: "In all criminal cases, excepting treason and impeachment"⁷

The presiding judge of the Court, seizing upon an argument by the prosecution, ruled that an impeachment case was "quasi-criminal," that is, a case in which an offense not necessarily a crime could be punished as if it were a crime. Yet, under Texas law, "no power, police or otherwise, assumed by legislative, judicial or executive departments of the government is sufficiently comprehensive to set aside, override or annul the plain or mandatory provisions of the Constitution. To attempt to do so would be usurpation of power."⁸

The ruling that the case was "quasi-criminal" imposed a severe limitation upon Ferguson's rights.⁹ There must be a law which both describes the crime and its associated penalty; it must include, in an impeachment case, the penalty of removal from office and disqualification from holding public office in the future. In Texas, it has been ruled there is no crime that is not included in the Penal Code.¹⁰ While the penalty of removal from office may be found in the Penal Code, there is no crime in the code to which this penalty attaches. For example, Ferguson was found guilty of a violation of state banking laws. This is a *fact*.

But where is a provision in the Texas Constitution or in Texas statutory law making such a violation punishable by removal from public office? What legal provision governs and restrains the use of such a power? In *Barnett v. State*, the Court warned of the dangers of standard-less, no-notice legal proceedings:

Take away, destroy, or impair modes of procedure, and due course of the law of the land becomes impossible, and the constitutional guarantees dead letters. The judiciary system becomes a mockery and a mobocracy. It is the mob only which looks alone to the facts in disregard of legal form and procedures, and who know

⁷ This is a declaration so clear it seems unquestionable: the entire Constitution can be combed, and there is no contrary statement. There are only sections here and there which reinforce the declaration. In *Smith v. Brown*, 3 Texas 360, 370, 1848 Tex. LEXIS 66 (1848), the Court held that when words "seem so plain and clear, and the sense so distinct and perfect, there is no ground left for any other interpretation than that which naturally arise on the plain, common sense acceptance of words used." See also *Solon v. State*, 54 Tex. Crim. 261, 114 S.W. 349 (Tex. Crim. App. 1908).

⁸ *Solon*, 54 Tex. Crim. at 313.

⁹ *Bishop v. State*, 43 Tex 390, 396, 1875 Tex. LEXIS 73 (1875). One of the grounds for granting a motion for a new trial was a misapplication by the court as to the law, or any other material error calculated to injure the rights of the defendant. 43 Tex. at 401-02.

¹⁰ *Scott v. State*, 86 Tex 321, 323, 24 S.W. 789, 790 (1894) ("the revised Penal Code and Code of Criminal Procedure, which were passed at the same session of the Legislature, expressly declare, that it was the purpose of the Legislature in the one to define every offense against the laws of the State (Penal Code, article 1), and in the other to make rules of procedure in respect to the punishment of offenses intelligible to the officers of the State and to the persons to be affected by them.").

“no due course of law.”¹¹

Tried in the absence of procedural norms, Governor Ferguson experienced the denial of his constitutional rights and the loss of his office.

An especially questionable article concerned a personal loan of \$156,500 secured by Ferguson to avoid bankruptcy in 1917. He refused to divulge to either the House investigating committee or the Senate any information concerning the loan. There was only a “suspicion” that some official misconduct in office had either already been committed or was contemplated, but there was no presentation of admissible proof: to avoid being removed from office, he had to provide proof of his innocence – a reversal of the burden of proof in any trial. Did Governor Ferguson receive “due process,” to use the federal term, or “due course of the law of the land,” to quote Article I, Section 19 of the Texas Constitution?

The question illustrates the dark side of Ferguson’s prosecution. If one can be removed from office based on nothing more than a suspicion of wrongdoing, then who is truly safe in office? In closing the defense in his trial, Ferguson commented that the Constitution gave greater legal protections to officials subject to removal from office by procedures other than impeachment than to those subject only to impeachment.

Specific problems associated with other articles on which Ferguson was convicted could be discussed, but the overarching problem was the failure to follow the due course of law in what is denominated in the Texas Constitution a criminal trial.

Nonetheless, seeing that his conviction was inevitable, Ferguson resigned from office on September 24, 1917. He was formally convicted the following day. The full punishment authorized in the Constitution was imposed: he lost his office and was barred from holding another public office. Shortly before the beginning of his impeachment trial, Ferguson had been indicted by a Travis County grand jury on seven charges of misapplication of public funds, one embezzlement charge, and one count that he had diverted a special fund, charges referenced in the later articles of impeachment.¹² Shortly after the conclusion of his trial, prosecutors dropped those charges.¹³ This demonstrates why a trial by a body not overly subject to the influence of a high official should be given, under proper legal guidelines, the authority to remove an offending official from office. If impeachment is the procedure to be followed under Article III, Section 42, the Legislature has the power to provide appropriate guidelines—that is, to develop a set of impeachable offenses and imbed them in the Texas Penal Code.

It might be an impossible task for any legislative body to describe every offense that might justify an elected official’s removal from office, but it is clear that the Texas Legislature has never made the effort. While the result might well be imperfect, that is no reason to continue this legislative inaction. As the laws and Constitution of Texas exist today, no one can be removed

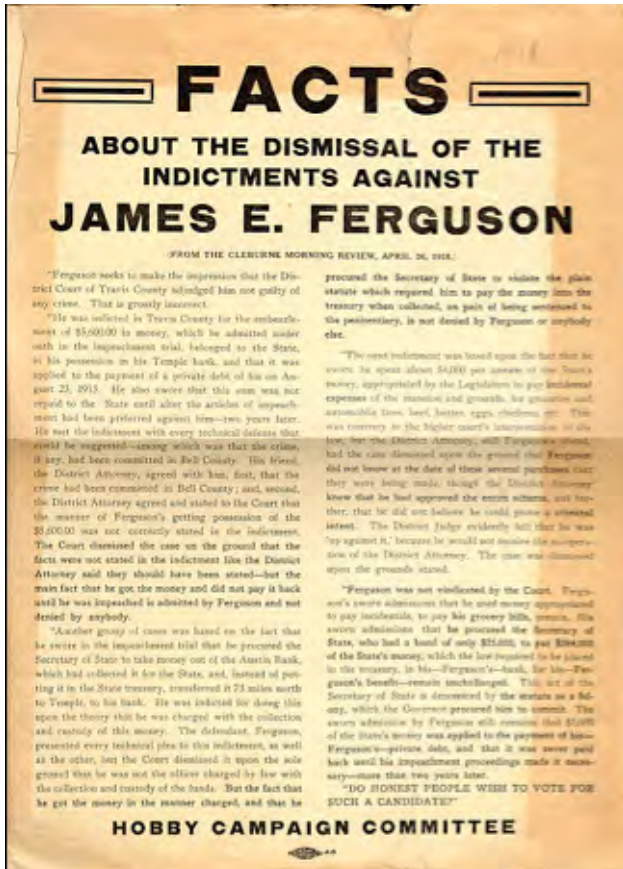
¹¹ *Barnett v. State*, 42 Tex. Crim. 302, 454, 62 S.W. 765 (Tex. Crim. App. 1901).

¹² Marguerite Johnson, *Houston: The Unknown City 1836–1946* (College Station: Texas A&M University Press, 1991), 205.

¹³ *Dallas Morning News*, December 9, part 1, p. 1 and December 12, 1917, part 1, p. 1; *Houston Daily Post*, May 12, 1918, part 1, p. 12. See also Steen, “Ferguson, James Edward,” *Handbook of Texas Online*.

from public office by impeachment without violating Section 19 of the Bill of Rights because no one can be deprived of a privilege—the office that person holds—without following due course of law. If this task is not begun, then, according to the “savings clause” of the Bill of Rights (Article I, Section 29 of the 1876 Texas Constitution), “all laws contrary thereto, or to the following provisions, shall be void....” Without due process of law, the impeachment procedure is void in Texas.

Ferguson became a candidate for governor in 1918. There was no bar in the election laws to his running for office. A major campaign issue concerned his impeachment and consequent disqualification from holding office. There was much newspaper commentary and unofficial opinions on his impeachment. An especially influential opinion at the time was that of Justice H.O. Head of Sherman. Head had served as judge of the Fifteenth District Court and then as one of the first three justices of the Second Court of Appeals. His opinion that Ferguson was properly impeached was endorsed in the same newspaper article by two other former justices of the Courts of Appeals (W. H. Gill and Howard Templeton), a former associate justice of the Supreme Court (F. A. Williams), and some other prominent attorneys of Texas.¹⁴



In 1918, the William P. Hobby Campaign Committee challenged James E. "Pa" Ferguson's qualifications to run for office. Image courtesy of the Texas State Library and Archives.

Ferguson lost the primary election, but as a result of his campaign, there was a significant change in the Terrell election law. In 1919, the Legislature added a new provision requiring that a candidate in any special, primary, or general election had to be qualified to hold that office. Those qualifications could be challenged in court by a qualified voter and member of the political party involved prior to the certification of a candidate for office in any election.¹⁵

In 1922, Ferguson ran for the office of United States Senator. The State Democratic Executive Committee effectively decided by a vote of 12-11 that this was a federal office and not a state office and was therefore exempt from the disqualification clause. He lost in a runoff election, but, nonetheless, received over 250,000 votes, thereby demonstrating his continuing political appeal and power.¹⁶

In January 1924, Ferguson announced his candidacy for governor. He recognized that he

¹⁴ *Houston Daily Post*, June 2, part 1, p. 9 and June 3, part 1, p. 4, 1918. Also see J. H. Davenport, *The History of the Supreme Court of the State of Texas* (Austin: Southern Law Book Publishers, 1917), 69.
¹⁵ H.P.N. GAMMEL, *THE LAWS OF TEXAS* 19: 29 (Austin: Gammel Book Co. 1919).
¹⁶ *Dallas Morning News*, June 12, 1922, part 1, p. 1 and *Temple Daily Telegram*, September 3, 1922, part 1, p. 1.

could not even appear on the primary ballot if his conviction was not overturned. But that could be done only by the highest appropriate appellate court. Thus began a (flawed) plan to have his impeachment reviewed by the Texas Supreme Court.

On May 3, 1924, John Maddox, a friend and supporter of Ferguson, filed a petition in a Harris County district court complaining to the State Democratic Executive Committee (and Jim Ferguson) that Ferguson was not eligible to hold office. Maddox complained that, unless restrained by law, the Committee would in its meeting on the second Monday in June place Ferguson's name on the ballot, thereby violating the right of Maddox and others to choose among only eligible candidates. He asked the district court to grant a temporary injunction restraining Ferguson and the Committee from taking any action which would permit Ferguson's name to appear on the ballot. Judge Ewing Boyd scheduled a hearing on this petition to be held on May 16 in his chambers. As a result of that hearing, Judge Boyd granted Maddox's request for a temporary injunction. Both Ferguson and the Committee filed a notice of appeal to the First Court of Civil Appeals in Galveston on May 25, 1924.

Nevertheless, on May 21, 1924, another Houston attorney, Lewis Bryan, wrote to Presiding Judge R.A. Pleasants of the Court of Civil Appeals, suggesting that, to quickly get to the heart of the matter, certified questions be submitted to the Supreme Court as quickly as possible. This was to later prove a strategic mistake in Ferguson's plan to return to office. The Court of Civil Appeals adopted the suggestion; two days after its receipt on May 26 of an edited file of the proceedings of May 16, the Court of Civil Appeals certified what they considered the "controlling (certified) questions" to the Supreme Court for an opinion as to whether or not the temporary injunction granted by the district court should be made permanent.¹⁷ It was not until June 1, however, that five certified questions were received by the Texas Supreme Court.¹⁸

At least by this date, if not earlier, the probable involvement of the Supreme Court in Ferguson's action was known and preparations were made. Chief Justice Calvin Cureton and Associate Justice Thomas Greenwood recused themselves because of their earlier involvement in advisory roles in Ferguson's impeachment trial.¹⁹ Governor Pat Neff was absent from the state, so the responsibility of naming special justices fell to Lieutenant Governor T. Whit Davidson, an active candidate for governor in the pending election. As Maddox had emphasized in his original request to the Houston court, Ferguson had shown that he still had formidable political strength in Texas, as Davidson was certainly aware.

Lieutenant Governor Davidson needed to appoint only one judge to have a quorum. Nonetheless, he appointed Alex S. Coke of Dallas as acting Chief Justice and Howard Templeton of San Antonio as a special Associate Justice. But who were Templeton and Coke? Howard Templeton had formerly been a member of the Fifth Court of Civil Appeals at Dallas, but was the same Howard Templeton who in 1918 had declared that the judgment in Ferguson's trial was "final and conclusive."²⁰ Alex S. Coke was a prominent corporate lawyer in Dallas who received

¹⁷ *Ferguson v. Maddox*, 114 Tex. 85, 90, 263 S.W. 888, 888 (Tex. 1924).

¹⁸ *Houston Post*, June 1, 1924, part 1, p. 9.

¹⁹ *Dallas Morning News*, June 4, 1924, part 1, p. 1.

²⁰ *Houston Daily Post*, June 2, 1918.

his law degree from the University of Texas in 1892. He was also a charter member of the University's Ex-Students' Association, and a signer of that association's Blue Book shortly after World War I who had pledged \$50 a year for five years at a time when the association was almost broke.²¹ That was a significant amount of money at the time. Given the history of the Ex-Students' Association's involvement in the impeachment of Ferguson and Coke's participation in the association, a question arises about his disinterest in the outcome of the case.²²

The hearing began on June 9 and ended on Thursday evening, June 12, 1924. The statements that "[t]he action of the senate sitting as a court of impeachment is not exempt from the judicial power of the supreme court" and "as long as the senate acted within its constitutional jurisdiction, its decision is final and is not subject to review" appeared prominently.²³ The decision of the court was announced that evening, resulting in a headline in the *Dallas Morning News* that the impeachment of "Ex-Governor Constitutional and Valid."²⁴ There are no official notes of any arguments presented to the court—only a few newspaper comments.²⁵



Miriam Amanda Wallace "Ma" Ferguson while still First Lady of Texas. Library of Congress Prints and Photographs Division.

Nevertheless, Governor Ferguson had a "backup plan" should his appeal fail. His wife Miriam had previously applied for a place on the ballot. Her application was approved so that, on June 18, 1924, she formally began her gubernatorial campaign in Temple.²⁶ To the surprise of many, she came in second in the primary election and won the runoff election against Felix Robertson, an opponent supported by the Ku Klux Klan.²⁷ A formal written opinion in *Ferguson v. Maddox* was not sent to the First Court of Civil Appeals until after the nomination of Miriam Ferguson as the Democratic candidate for governor.

Ma Ferguson's candidacy was challenged because she was a woman. That led to another "certified question" to the Texas Supreme Court. But what is a "certified question"? What is the purpose of a ruling by an appellate court on such questions? A certified question is one which asks for an interpretation of a particular law. The Texas Supreme Court's decision in *Dickson v. Strickland* (with Chief Justice Cureton and Justice Greenwood back on the bench), in a specific reference to the earlier decision in *Ferguson v.*

²¹ Information from the files of the Ex-Students' Association as given to the author by Jim Nicar.

²² *Dallas Morning News*, July 18, 1924, part 1, p. 1. During the ensuing campaign, Ferguson said in relation to the judicial appointments, "I didn't have the chance of a snowball in Hades to get my name on the ticket." Ferguson specifically objected to the appointment of Howard Templeton as a judge.

²³ *Houston Post*, June 13, 1924, part 1, p. 1. The jurisdiction of the Supreme Court itself extends only to civil cases.

²⁴ *Dallas Morning News*, June 10, 1924, part 1, p. 3.

²⁵ *Houston Post*, June 10, 1924, part 1, p. 14.

²⁶ *Dallas Morning News*, June 18, 1924, part 1, p. 1. See also John D. Huddleston, "Ferguson, Miriam Amanda Wallace [Ma]," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/ffe06>.

²⁷ *Dallas Morning News*, August 12, 1924, part 2, p. 20; August 24, 1924, part 1, p. 1. Her election was characterized as an "anti-Klan" victory. Huddleston, "Ferguson, Miriam Amanda Walker [Ma]," *Handbook of Texas Online*.

Maddox, stated that “[t]his court, in answering certified questions, makes no determination, by implication or otherwise, with respect to anything save the precise questions answered, and enters no judgment thereon.”²⁸ The decision in *Ferguson v. Maddox* could not be considered a decision on the validity of Ferguson’s conviction.²⁹

Nonetheless, the certified questions in *Ferguson v. Maddox* and the rulings of the Supreme Court are important to this day.³⁰ The crucial question centered on the absence of specific impeachable offenses in the Constitution and laws of Texas. The Court ruled that while impeachable offenses are not defined in the Constitution, they are very clearly designated or pointed out by the use of the term “impeachment *which at once connotes the offenses to be considered and the procedure for the trial thereof.*”³¹

What are these offenses? The Court maintained that “these offenses cannot be defined, except in the most general way.” The Court stated that the framers of the Texas Constitution had both English and American parliamentary law in mind. In 1875 and 1876, it was much more likely that the members had in mind their experience with impeachment trials in 1871–1874—a number of them had either participated in or reported on these trials. The chairman of the Impeachment Committee, Fletcher S. Stockdale, was also a member of the Judiciary Committee, an experienced lawyer, and a former acting governor of Texas. In the Bill of Rights, there was added a reference to an impeachment case as a criminal case (Section 10); Section 7 in the Impeachment Article was reworded so as to emphasize the need for further legislative action; and all prior sections referencing impeachment were retained. Finally, drafters of the 1876 Constitution added a new section providing still another alternative to impeachment as a procedure for removal of judges. By their actions, the drafters clearly had Texas’s experience with impeachment in mind—not English or American history. It is better to evaluate the thinking of the Framers by what they did, rather than by speculation forty years later about their thinking.

Another interesting certified question involved the question of bills of attainder—did the lack of definition of impeachable offenses lead to bills of attainder? Using the Court’s decision on impeachable offenses, there was no problem; but if this reasoning is not accepted, Governor Ferguson’s impeachment raises an important question.³²

Similarly, in *Trigg v. State*, Chief Justice Roberts held that the section of the 1876 Constitution concerning the removal of a district clerk was not “self-executing.”³³ Because the Constitution of 1876 did not specify the grounds for removal, the *Trigg* court relied on the decision in *Gordon v. State*, where the appellant argued that,

²⁸ *Dickson v. Strickland*, 114 Tex. 176, 196, 265 S.W. 1012 (Tex. 1924). This case was a challenge to the right of a woman (Miriam Ferguson) to be Governor of Texas. See *Dallas Morning News*, September 30, part 1, p. 1, October 5, part 2, p. 2, and October 10, 1924, part 2, p. 15..

²⁹ *Houston Chronicle*, June 18, 1924. Both at the time and subsequently, it was understood by many that *Ferguson v. Maddox* validated the legality of Ferguson’s conviction.

³⁰ All of the questions were taken from Ferguson’s original response to Maddox’s request for an injunction. Note in this regard the letter of Bryan to Judge Pleasant previously referenced.

³¹ Emphasis added. The logic of that argument remains puzzling to the author.

³² Irving Brant, *Impeachment: Trials and Errors* (New York: Knopf, 1992), 133–54. “Rightly construed, the impeachment process must fall within the category of attainder if conviction results from charges not sanctioned by the Constitution.”

³³ 49 Tex. 643, 1878 Tex. LEXIS 91 (Tex. 1878).

It is a cardinal principle in the administration of justice that no man can be divested of his rights until he has had an opportunity of being heard. (7 How., Miss., 127; 1 Hill, N. Y., 139; 4 Hill, N. Y., 146; 1 Curtis, 325.). And many other authorities could be cited to the same effect.

Our Bill of Rights, section 16, says: "No citizen of this State shall be deprived of...property, privileges, ... or in any manner disfranchised, except by due course of the law of the land."³⁴

Justice Gould's opinion analyzed Article V, Section 18 of the Constitution of 1876, which made sheriffs "subject to removal by the judge of the District Court for said county for cause spread upon the minutes of the court":

It has been held, and we think rightly, that this power of removal is not absolute or arbitrary, either as to the manner in which or the causes for which it may be exercised. The sheriff is entitled to notice of the charges against him and to an opportunity to be heard in his defense. The fact of his election is conclusive of his right to the office, unless some subsequent cause justify his removal. "General allegations of incompetency" or unfitness constitute no sufficient cause. Some official delinquency, or, we will add, some act or default or occurrence since his election, showing his unfitness for the office, must be alleged against him. Where a removal is made irregularly or for insufficient cause the order or judgment is subject to be revised on appeal...

*As presented in the record, the order of removal appealed from, made March 5, 1875, was without notice to the sheriff, and for causes anterior to the election and commission under which he then held his office. It was therefore erroneous, and must be reversed.*³⁵

Without further legislation, a statutory removal provision that does not include basic procedural protections as notice, a right to be heard, and an objective standard articulating what it permitted from what is prohibited is void as a violation of the U.S. Constitution's Fourteenth Amendment right to due process and of the "due course of law" under Article I, Section 19 of the Texas Constitution, even if the Constitution expressly creates and authorizes the use of such a governmental power.

Yet during Governor Ferguson's impeachment, the Court overlooked that precedent to rule that the same Constitution's impeachment article was self-executing. That issue played a prominent role in the unsuccessful impeachment of Land Commissioner W. L. McGaughey in 1893.³⁶ To this author, it seems obvious that the Supreme Court's decision in Ferguson's case was based primarily on political considerations. Its reasoning is badly flawed and it should not be considered as a precedent for future decisions involving impeachment of officials in Texas.

There are some important questions concerning the legality of impeachment in Texas under the present Constitution and laws of Texas. The Court's comment that "the primary purpose of an

³⁴ 43 Tex. 330, 1875 Tex. LEXIS 57 (1875) (see previous discussion in notes 4 and 5).

³⁵ 43 Tex. at 338-39 (italics supplied).

³⁶ *Proceedings of the High Court of Impeachment in the Matter of The State of Texas versus W. L. McGaughey, Land Commissioner* (Austin: Ben C. Jones & Co., State Printers, 1893).



Funeral monument to "Pa" and "Ma" Ferguson, Texas State Cemetery. Photo by Billy Hathorn, May 10, 2011.

impeachment is to protect the State, not to punish the offender" has been often repeated. Nonetheless, the accused offender, if convicted, is punished in a severe fashion, but is provided some safeguards in the Texas Bill of Rights.

But of what value is a right or privilege if there is no way to enforce it? The Texas Court of Criminal Appeals has ruled that "[t]he State is bound to afford adequate process for the enforcement of rights..."³⁷ In light of that principle, a good first step would be enactment of a law giving the Criminal Court of Appeals original jurisdiction in all impeachment

cases. In that way, a court could protect a defendant's rights whenever there is a prima facie allegation about a failure to provide a defendant with due process of law under the Fourteenth Amendment or due course of law under Article I, Section 19 of the Texas Constitution.

Enactment of such a law could motivate the Legislature to take a second reasonable step by defining a discrete list of impeachable offenses. There is adequate provision for both actions in Article III, Section 42 of the Constitution of 1876, which states that, "The legislature shall pass such laws as may be necessary to carry into effect the provisions of this Constitution."

³⁷ *Barnett v. State*, 42 Tex. Crim. 302 at 308.



Horace P. Flatt. Courtesy of State Preservation Board, Austin.

HORACE P. FLATT received a Ph.D. in mathematics from Rice Institute in 1958. He retired in 1991 as manager of the IBM Scientific Centers in the United States. He is the author of articles and books about the numismatic history of Peru and of Texas local history. He wishes to thank Lindsay Wickham of the Legislative Reference Library, Austin, Texas, for her untiring assistance in helping him research this article.

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In Memoriam

Justice Barbara Culver Clack, 1926-2016

By Osler McCarthy



Former Justice Barbara Culver Clack, the second woman to serve full time on the Texas Supreme Court when she was appointed in 1988, died in Midland on September 11, 2016.

“Small of stature, she was a towering figure in the judiciary, to the legal profession, and for the West Texas community she loved and who loved her,” Chief Justice Nathan L. Hecht said. “She was a mentor to many, an inspiration to all, and a dear friend.”

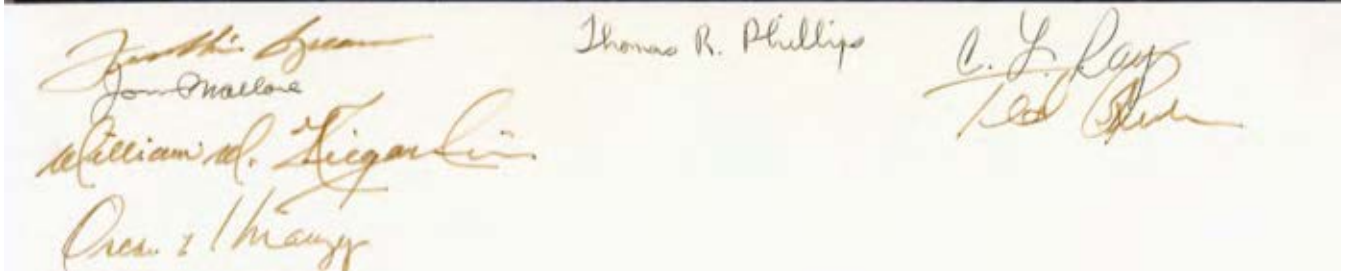
Last year Justice Eva M. Guzman, paying tribute to her in Midland, called her a pioneer in the law and a judicial trailblazer.

Then-District Judge Barbara Culver was Gov. Bill Clements’s pick for a vacancy on the Court in January 1988. She ran for election to keep her seat that November, but lost to Jack Hightower, and left the Court after ten months to return home to Midland and to retirement.

At five feet tall, her diminutive stature belied a larger-than-life and ferocious commitment, first to almost singularly changing Midland County politics in the early 1960s and then to juvenile justice. In her fifteen years as constitutional county judge she served as de facto juvenile court judge for Midland County, then spent ten years as judge of the 318th Family District Court. Two years ago she proudly drove past Midland County’s Barbara Culver Juvenile Justice Center. “I represented the kids,” she said. “If the staff and I could keep even one from going to the penitentiary, then that was worth it.”

Regional Presiding Judge Dean Rucker of Midland, who succeeded Culver Clack as district judge when Clements appointed her to the Supreme Court, called her endowed with grace, charm, wit and wisdom and, as a judge, fair, forthright, firm and decisive. “She loved the law, especially family law, and she considered it a privilege to serve families and children,” Rucker said.

When voters elected her Midland County Judge in 1962, she was the first Republican to hold county office in Midland and the first Republican woman to head a county government in Texas. Because Midland County did not have established county courts at law at the time, she led the county commissioners court, all men and at first all Democrats, and presided over probate, juvenile, and misdemeanor legal dockets.



Justice Barbara Culver (top row, far right) was a member of the Texas Supreme Court in 1988, along with (bottom row) Justice Franklin Spears, Chief Justice Tom Phillips, Justice C. L. Ray, (top row) Justice Oscar Mauzy, Justice William Kilgarlin, Justice Eugene Cook, Justice Ted Z. Robertson, and Justice Raul Gonzalez. Photo courtesy Texas Supreme Court Archives.

Barbara Green Culver Clack was born in Dallas and graduated from Texas Tech University in 1947. She and her first husband, John Culver, practiced law in Midland for ten years after their graduation from the Southern Methodist University Law School in 1951. Culver, a World War II veteran, lost his eyesight in the war but was determined to study law. She was paid at first to read for him in law school, but decided if she were going to read all that law she should get a law degree, too. They were married in November 1951.

John Culver died in 1981.

As Midland County judge, she helped found the Permian Basin Regional Planning Commission, served as its chair in 1974 and served as president of the National Association of Regional Councils in 1976.

Among her professional honors she was the first recipient, in 1984, of the Judge Sam Emison Memorial Award by the Texas Academy of Family Law Specialists, was a member of the state commission to rewrite the Texas Constitution in 1975-76 and served on the Family Code Project to codify marriage, divorce, custody, child-support and juvenile laws in Texas.

She was honored by Texas Tech and by SMU as a distinguished alumnus.

In November 1988 she married retired Judge James H. Clack of Andrews. Judge Rucker presided over the ceremony.

Judge Clack died in 2014. Also preceding her in death were her sons, Lawrence Lanier Culver and John Bryson Culver. She is survived by her grandchildren and great-grandchildren, who brought her great joy, as well as her many friends. "She counted scores of people among her friends," Rucker said. "And if she had any adversaries, they were not known.

"In her 90 years on this planet, Barbara made a profound difference in the lives of many. She was all goodness and light."

★ ★ ★ ★ ★

Justice Clack talks about her appointment as the second woman to serve on the Supreme Court full time: <https://vimeo.com/182872715>

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In Memoriam

Hans Wolfgang Baade, 1929-2016

By Marilyn P. Duncan



The Texas legal community lost one of its most distinguished scholars, teachers, and colleagues with the passing of Professor Hans Baade on September 14 in Austin.

Professor Baade, who held the Hugh Lamar Stone Chair Emeritus in Civil Law at the University of Texas School of Law, was an Old World legal scholar and gentleman beloved by many generations of students. An internationally renowned expert in comparative law, he was the coauthor of the fourth, fifth, and sixth editions of *Comparative Law: Cases, Text, and Materials* (1980–1998), the definitive casebook used in law schools.

An avid researcher and writer, Professor Baade also authored more than seventy scholarly articles and thirty-five book chapters on a range of topics in civil law and legal history. Among them was an article written in conjunction with the Texas Supreme Court Historical Society's History Book Project, published in *St. Mary's Law Journal* in 2008— "Chapters in the History of the Supreme Court of Texas: Reconstruction and 'Redemption' (1866–1882)." The article was an important source of information for the Society's *The Supreme Court of Texas: A Narrative History, 1836–1986*, by James L. Haley.

Professor Baade's interest in early Texas legal history is also reflected in such book chapters as "Rare Books and Rare Lawyers in Eighteenth-Century Texas," in *Collecting and Managing Rare Law Books* (1982); and "Law and Lawyers in Pre-Independence Texas," in *Centennial History of the Texas Bar (1882–1982)* (1981). On the history of Texas water law, he wrote "The Historical Background of Texas Water Law: A Tribute to Jack Pope," 18 *St. Mary's Law Journal* 1 (1986).

Another area in which Professor Baade was preeminent was matrimonial law. Among his articles in this area are "Women and the Law in Eighteenth Century Illinois Country," *Le Journal* (Spring 2012); "Reflections on the Reception (or Renaissance) of Civil Law in Texas [Tribute to Joseph W. McKnight]," 55 *SMU Law Review* 59 (2002); "Marriage Contracts in French and Spanish Louisiana: A Study in 'Notarial' Jurisprudence," 53 *Tulane Law Review* 1 (1979); and "The Form of Marriage in Spanish North America," 61 *Cornell Law Review* 1 (1975).

Hans Baade's birth into an intellectual German Jewish family in Berlin in 1929 and, later, his experience as a refugee contributed to his lifelong interest in international and comparative law. His father was Fritz Baade, a Social Democratic politician who opposed Hitler's rise, and his mother was Edith Grünfeld Wolff, a journalist at Berlin's financial daily, the *Berliner Börsen-Courier*—the Weimar Republic's equivalent of the *Wall Street Journal*. Fritz and Edith Baade recognized that Hitler's 1933 rise to power as Germany's Chancellor required them to leave Germany as soon as possible. Within a year, Fritz, Emily, and young Hans immigrated to Turkey.

After World War II, Hans Baade moved to the United States, where he earned a bachelor's degree from Syracuse University and LL.B. and LL.M. degrees from Duke University and served in the U.S. Army. He returned to Germany and received a J.D. degree from Christian Albrecht University of Kiel.

After teaching for a decade at Duke University, Professor Baade joined the faculty of the University of Texas Law School in 1971, where he remained for forty-five years. Upon his retirement from full-time teaching in 2001, his colleague Basil Markesinis called him "a man whom nature...and political adversity had turned into a polymath, an accomplished linguist, and a workaholic of unusual proportions." Professor Markesinis's tribute appears in the *Texas International Law Journal* under the title "Introduction: The Life and Work of Hans Wolfgang Baade," available online at <http://www.tilj.org/content/journal/36/num3/IntroductionMarkesinis403.pdf>.

Another UT Law colleague, Professor David Anderson, said of Professor Baade on his passing, "Hans was in the mold of a European legal scholar. His knowledge was encyclopedic—not just American law, but Roman law and German law, history, and politics. He seemed not to have forgotten anything he once learned." Professor Baade's obituary is posted at <http://wcfish.tributes.com/obituary/show/Hans-Baade-103950373>.

Professor Baade's colleagues at the University of Texas Law School will host a celebration of his life at the Law School at 4 p.m. on Monday, November 28. <https://law.utexas.edu/calendar/2016/11/28/25604/>



Hans Baade as a young professor at UT Law. Photo from Weed-Corley-Fish Tributes.

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Many Thanks to Our Summer Archives Intern, Victoria Clancy!

By Caitlin Bumford

One of the Texas Supreme Court Historical Society's most important goals is to collect and preserve information, papers, photographs, and artifacts relating to the Supreme Court and the appellate courts of Texas. Yet the exact contents of our Texas court history collection have largely remained a mystery in recent years, since the Society hasn't actively engaged in collecting for some time. This summer, we set out to solve that mystery. Thanks to Victoria Clancy, our first summer appraisal intern, we now have a better handle on the TSCHS archives than we've had in years!



TSCHS Archives intern Victoria Clancy.
Photo by Caitlin Bumford.

A native of Washington State, Victoria earned her B.A. in Family History–Genealogy from Brigham Young University in Provo, Utah. She is currently a graduate student specializing in archives and records management at the UT School of Information, and expects to graduate with her M.S. in Information Studies next year.

Victoria brought to this internship valuable Texas history knowledge and appraisal experience gained over the past year and a half while working on the William P. Clements, Jr. Papers Project at UT's Dolph Briscoe Center for American History (where she continues to work part time). For the Clements Project, she selects and describes material from the papers of Texas Governor Bill Clements for digitization and inclusion in a digital archive. (See some of the digitized documents for yourself at clementspapers.org!)

Before Victoria came to us this past May, the Society had only a rough box-level inventory of all the various records and historical materials held by the Society. Most of the boxes held mixed contents that were inefficiently housed, making it difficult to know the exact volume of any individual archives collection, or even the exact volume of the Society's archives in general.

Over the course of the summer, Victoria examined the contents of nearly 200 boxes of records and archival material held by the Society. While doing so, she identified record groups, improved records housing, and gathered detailed information about their contents. As a result of her hard work, we now have a complete and accurate date range, volume, description, and folder-level inventory of each of the Society's 23 archival collections. Through her appraisal and

rehousing efforts, Victoria also drastically reduced the volume of records boxes the Society pays monthly to store offsite.

Victoria's inventory reveals that the most comprehensive collections in the archives, in terms of volume, date range, and subject matter, are the papers of Chief Justices Robert Calvert and Joe Greenhill. We also have a wide variety of judicial election and campaign materials in our collection. Among the gems rediscovered by Victoria is a hand-annotated, oversized campaign map from the hotly contested 1958 Texas Supreme Court race between Justice Joe Greenhill and Judge Sarah T. Hughes.

This summer, in addition to a much better understanding of the TSCHS archives, Society Administrative Coordinator Mary Sue Miller and I gained a diligent, positive, and insightful colleague in Victoria. We hated to see her leave to go back to school, but are excited to see where her career takes her after graduation. Please join us in thanking Victoria Clancy and wishing her the best of luck in her future endeavors!

For more information on the Society's collections, please contact me at caitlin.bumford@texasbar.com or 512-427-1312.



CAITLIN BUMFORD is Director of Archives at the State Bar of Texas, where she has worked as an archivist since 2011. She also assists the TSCHS in archives and preservation matters. Caitlin is a Certified Archivist and holds an M.S. in Information Studies from UT Austin and a B.A. in Anthropology from the University of Michigan.

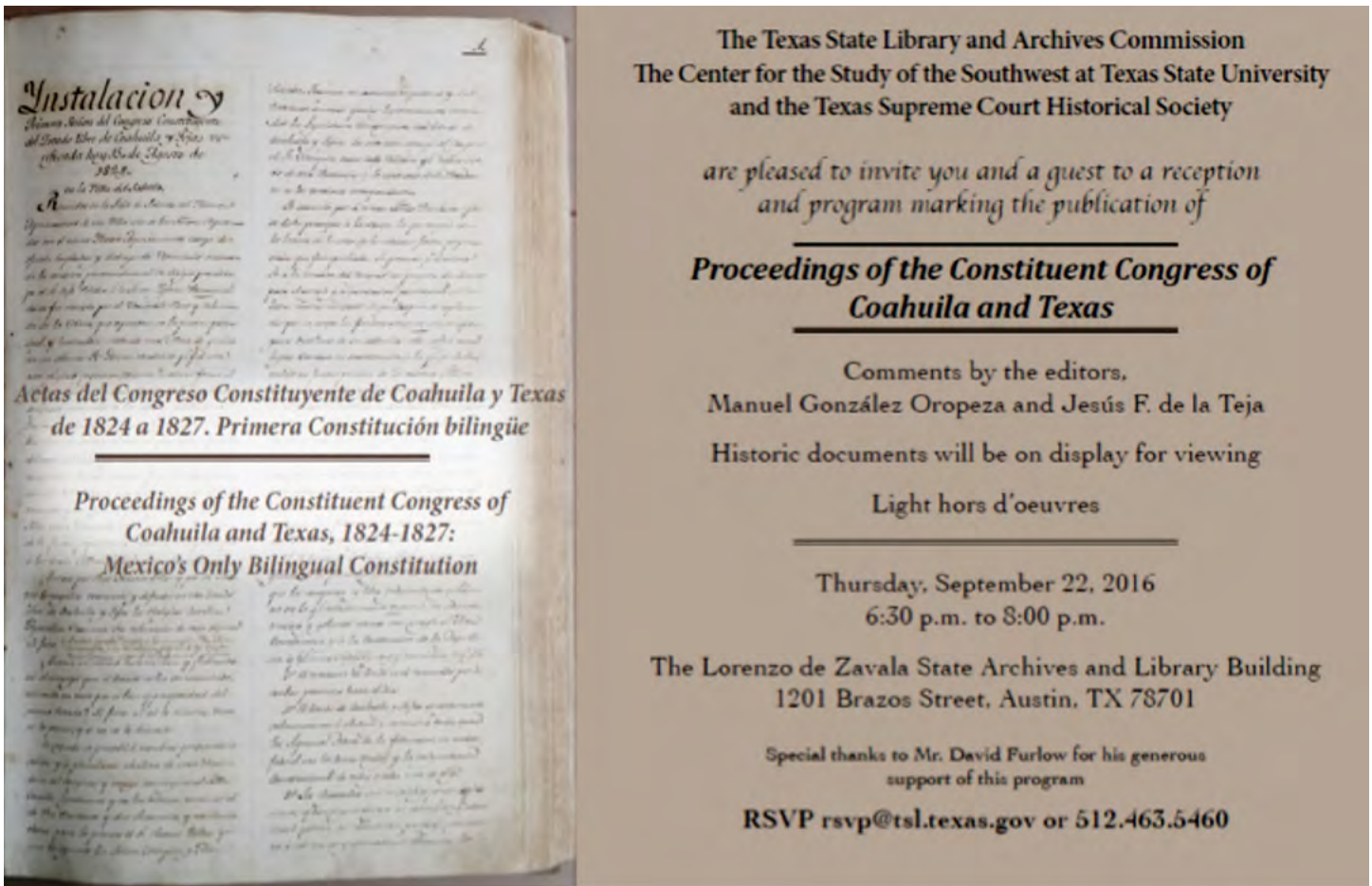
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We're All Coahuiltexanos Now

By David A. Furlow

On Thursday evening, September 22, 2016, the Texas Supreme Court Historical Society joined with the Texas State Library and Archives Commission and the Center for the Study of the Southwest at Texas State University to host a reception and program marking the publication of *Actas del Congreso Constituyente de Coahuila y Texas de 1824 a 1827: Primera Constitución bilingüe, a/k/a, Proceedings of the Constituent Congress of Coahuila and Texas, 1824-1827: Mexico's Only Bilingual Constitution*.

This event originated in discussions Texas State Librarian Mark Smith and I began during the early summer of 2016. We sought to offer the Texas and Mexican legal and academic communities an opportunity to hear the coeditors of this important scholarly treatise, the Hon. Manuel González Oropeza and Dr. Jesús Francisco "Frank" de la Teja, describe the early



The Texas Supreme Court Historical Society invited historians, archivists, judges, and attorneys to celebrate publication of the *Actas*.



Above: The Supreme Court Historical Society-sponsored reception took place at the Texas State Library and Archives. Below: Texas State Librarian Mark Smith served as Master of Ceremonies. Photos by David A. Furlow.



constitutionalism Texas, Coahuila, and Mexico shared from 1821 until 1836. The event occurred before a packed Barker Center room at the Lorenzo de Zavala State Archives and Library Building next to the Capitol in Austin.

In his opening remarks, State Librarian Mark Smith noted that the program fell within National Hispanic Heritage Month, from September 15 to October 15, 2016, which began in 1968 as Hispanic Heritage Week under President Lyndon Johnson and expanded to a thirty-day period under President Ronald Reagan in 1988. Mr. Smith thanked our Society and the Center for the Study of the Southwest at Texas State University for joining in a program that transcends the border between Texas and its former sister-state Coahuila.



The two-volume Actas treatise on display at the Reception.
Photo provided by Jillian Beck, *Texas Bar Journal*.

Mr. Smith then passed the microphone to me so I could introduce two of the Southwest's most distinguished scholars and a treatise that delineates Texas's earliest state constitution. I hailed the publication of this scholarly, much-needed two-volume treatise organized and translated by the Hon. Manuel González Oropeza, a Justice of Mexico's Federal Electoral Tribunal, and Dr. Jesús Francisco de la Teja, the Jerome H. and Catherine E. Supple Professor of Southwestern Studies, Regents' Professor of History, and Director of the Center for the Study of the Southwest at Texas State University.

The 1827 Constitution of Coahuila y Texas lies at the heart of Volume 1 of the treatise, on pages 191–221 in Spanish and on pages 225–257 in English. This Constitution sheds new light on Texas's 1836 Constitution. After a proclamation by the Governor of the State of Coahuila and Texas addressed to all residents of the twin-state, Article I states that, "[t]he State of Coahuila and Texas is the union of all the *Coahuiltexanos*."

Article 12 of the Coahuila and Texas Constitution of 1827 (on page 314 of Volume 1), for example, guaranteed the twin-state's settlers affirmatively worded guaranties of free speech, printing, and publishing:

The state is also obligated to protect all its inhabitants in the exercise of

the right they possess of writing, printing, and freely publishing their sentiments and political opinions, without the necessity of any examination, or critical review previous to their publication, under the responsibility and protections that are now, or shall be hereafter established by the general laws on the subject.

Article 12 reflected an effort to memorialize “imprescriptible,” that is, inalienable, constitutional rights falling somewhere between those granted in French declarations of universal rights and American restrictions on the power of their federal government such as the Bill of Rights.

In marked contrast, the negatively worded First Amendment to the U.S. Constitution declared that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances” without limiting the power of states to grant greater or fewer rights to citizens of that state.

By 1833, when Texans drafted a proposed constitution for an independent state of Texas, their leaders proposed a provision, Article 16, that affirmatively guaranteed their right to “freely speak, write, print and publish, on any subject,” echoing the ideas set forth in Article 12 of Coahuila and Texas’s 1827 Constitution:

Art. 16. ***The free communication of thoughts and opinions, is one of the inviolable rights of man; and every person may freely speak, write, print, and publish, on any subject,*** being responsible for the abuse of that liberty: but in prosecutions for the publication of papers investigating the official conduct of men in public capacity, the truth thereof may be given in evidence, as well as in personal actions of slander; and in all indictments for libels, the jury shall have the right to determine the law and the facts, under the direction of the court as in other cases. (Emphasis supplied.)

By 1836, delegates writing a constitution of the Republic of Texas at Washington-on-the-Brazos, including Sam Houston and Lorenzo de Zavala, used affirmative language to express the expansive freedom of speech, writing, and press that would grant citizens of the Republic greater freedoms than those of contemporary U.S. citizens.

Fourth. Every citizen shall be at liberty to speak, write, or publish his opinions on any subject, being responsible for the abuse of that privilege. No law shall ever be passed to curtail the liberty of speech or of the press; and in all prosecutions for libels, the truth may be given in evidence, and the jury shall have the right to determine the law and fact, under the direction of the court.

The right of Texans to freely write, speak, and publish now enshrined in Article I, Section 8 of Texas’s 1876 Constitution resulted from the combination of Sections 5 and 6 in Article I of the Republic’s Constitution. A direct line of constitutional descent links the 1827 Constitution of Coahuila and Texas to the Constitution of 1876 that now governs the freedom to speak, write, and publish opinions about any matter.



The Hon. Manuel González Oropeza.
Photo by David A. Furlow.



Dr. Jesús Francisco de la Teja.
Photo by Jillian Beck.

Publication of the *Actas* resulted from the collaboration between a judge and legal scholar, on the one hand, and a university professor who served as the first official Texas State Historian on the other hand.

The Hon. Manuel González Oropeza, a Justice of Mexico's Federal Electoral Tribunal, served as the *coordinador*, or coordinator, of the transnational scholarly partnership. He graduated from the UNAM (National Autonomous University of Mexico) Law Faculty. He obtained his Master of Public Law degree from California University in 1992 and, in December 1995, he obtained the degree of Doctor of Laws. Judge Oropeza has also taught courses on local procedural law, comparative law, and constitutional law in Mexico and at the University of Houston, the University of Montreal, and the University of Texas in Austin. He has written more than thirty-six books as an author, thirty-one as a coauthor, and hundreds of articles and book chapters.

Judge Oropeza emphasized the liberal political traditions that Miguel Ramos Arizpe and other lawmakers in the General Command of the Internal Eastern Provinces analyzed in his *Memoria, que el Doctor D. Miguel Arizpe* in Mexico and at the 1812 Spanish Cortez in Madrid during the last years of the Spanish viceroyalty of Mexico and further developed in Coahuila and Texas's Constituent Congress in 1827. He noted the effort that went into securing control over the original minutes of the Constituent Congress and the value of original records that showed the many conflicts and compromises early Coahuiltexanos experienced from 1824 to 1827.

Judge Oropeza emphasized that Article 11 of the twin-state's Constitution guaranteed, in both Spanish and English, that "[e]very man who resides within the limits of the state, although but transiently, shall enjoy the imprescriptable rights of liberty, security, property and equality;

and it is the duty of said state to preserve and protect by wise and equitable laws, these universal rights of men.”

Judge Oropeza’s partner Dr. Frank de la Teja is better known to the members of this Society because of his publication of an article about the entwined constitutional history of Coahuila and Texas in the Spring 2015 issue of this *Journal* and because of his presentation to this Society’s Board of Trustees at its Fall 2015 meeting. He thanked the Society for making him feel as if it had adopted him.

Dr. de la Teja was the historian in this Texas/Mexico scholarly partnership. He has researched deeply and published broadly about Spanish, Mexican, and Republic-era Texas, most recently *Faces of Béxar: Early San Antonio and Texas* (Texas A&M University Press, 2016) and *Lone Star Unionism, Dissent, and Resistance: The Other Civil War Texas* (University of Oklahoma Press, 2016). He serves on the boards of directors of Humanities Texas and the San Jacinto Museum of History.

Developing the theme he previously presented to this Society’s Board of Trustees in October 2015, Dr. de la Teja emphasized the “forced marriage, messy divorce” aspects of Texas’s and Coahuila’s union during the period from 1821 through 1836. He offered a perspective on Texas history as viewed from the south rather than the north or east.

Dr. de la Teja put the *Actas* of the Constituent Congress into context by showing that Mexican authorities authorized extensive American and European settlement of their northeastern territories to create an armed buffer zone protecting central Mexico from the incursions of Apache and Comanche raiders.

He pointed out that Mexico’s central government and its Coahuilan lawmakers permitted the electoral participation of all citizens living in Coahuila and Texas in either state, including thousands recently arrived from north of the border, while post-Revolution Texas lawmakers did not show reciprocal respect for the Lone Star Republic’s Hispanic citizens. He noted that Mexico permitted Anglo-American Texians to use the English language, conduct jury trials, maintain their Protestant religious tradition despite Roman Catholicism’s status as Mexico’s official religion, and continue their use of slaves brought into Texas despite Mexican emancipation decrees dating back to 1811.

Judge Oropeza and Dr. de la Teja then provided free copies of their treatise to the Texas State Library and Archives, the Texas General Land Office, and the Society. The evening ended with refreshments, recognition of the common Texas, Coahuilan, and Mexican legal heritage that the wars of 1835 and 1848 did not end, and new appreciation of cultural traditions that transcend the Rio Grande.

In the days after the reception, both Judge Manuel González Oropeza and Dr. de la Teja thanked the Society for its support of the reception and their book project. In a separate, handwritten note, State Librarian Mark Smith thanked the Society for “an evening that was nothing short of spectacular...an impressive and international gathering....I think everyone

present learned much they did not know.” Each pledged to work with our Society as partners on future projects and programs involving the history of Texas and of Texas, Coahuilan, and Mexican law.

My review of the *Actas* is in the Summer 2016 issue of this *Journal* at: <http://texascourthistory.org/Newsletters.aspx?CategoryID=1&PageID=181&DocumentID=27>.



Above, left to right: Mark Smith; David Furlow; Mark Lambert, Deputy Director, Archives & Records, Texas General Land Office; Dr. Frank de la Teja; and the Hon. Manuel González Oropeza. Photo by Jillian Beck.

The reception ended with food, drinks, and the examination of Texas State Library and Archives records of a shared Coahuiltexano past. Photo by David A. Furlow.



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On the Road Again, from El Paso to Houston

By David A. Furlow

The Society presents programs about the history of the Texas Supreme Court for county bar associations, schools, and libraries. The Society will work with local bar organizations, historical societies, archaeological groups, and individuals to investigate and publicize the history of Texas law and Texas courts.

For a year, the Society worked with leaders of the El Paso County Bar Association to present a program about the contributions of Castilian Spanish, Mexican, and Tejano law to Texas jurisprudence. Prominent El Paso attorney, bar association leader, and Texas historian Colbert N. Coldwell, a descendant of Reconstruction-era Texas Supreme Court Justice Colbert Coldwell, offered to let me stay in his and his wife's house while I brought a Society program to El Paso, the nation's twentieth largest city.

On April 11, Colbert Coldwell picked me up at the airport, took me on a tour of El Paso's mountain, the richly fertile Rio Grande valley, and historic El Paso. Colbert then took me to Julio's Corona Mexican restaurant to meet with local historians and attorneys. *El Paso Bar Journal* Editor, political activist, and long-time attorney Clinton Cross brought up the story of how Lawrence A. Nixon, a black physician and member of the El Paso chapter of the NAACP, challenged the All-White Primary in a lawsuit that reached the U.S. Supreme Court and resulted in *Nixon v. Herndon*, the March 7, 1927 decision in which the Supreme Court unanimously declared the white primary statute unconstitutional for violating the Equal Protection clause of the Fourteenth Amendment.

Local prosecutor and family historian Ballard Coldwell Shapleigh discussed the long history of El Paso. We began with colonial America's first "Thanksgiving," when Spanish conquistador Juan de Oñate, hundreds of Spanish settlers, and a friar emerged from northern Mexico's deserts on April 30, 1598 near the present-day San Elizario Mission southeast of modern El Paso, to thank God for preserving them on their northern trek to found Peralta, New Mexico and to take formal possession of the entire territory drained by the Río del Norte, a/k/a the Rio Grande.

A great four-way conversation ensued about El Paso's place in Spanish colonial and early Texas history, the origins of the All-Woman Court appeal, *Johnson v. Darr*, in an El Paso district court judgment and in the El Paso Court of Civil Appeals, the Civil Rights Movement, and transnational litigation over Texas's border with Mexico. That evening's conversations have informed and shaped this *Journal's* coverage of Texas legal history ever since then.



Colbert Coldwell and his wife Elinor hosted the Society's speaker in their beautiful, environmentally friendly El Paso home in the mountainous area above El Paso. Photos by David A. Furlow.

The next morning, after Elinor Coldwell's delicious homemade breakfast in the kitchen of her and Colbert's architecturally innovative, award-winning home atop a hill looking over El Paso, Colbert Coldwell drove me to downtown El Paso. After being introduced by another trustee of our Society, Eighth Court of Appeals Justice Ann Crawford McClure and El Paso County Bar Association Executive Director Nancy Gallegos, I presented a forty-five-minute C.L.E. program to some sixty El Paso attorneys about Spanish, Mexican, and Tejano contributions to Texas jurisprudence.

The Society's program ended with the delivery of two copies of *Taming Texas*, the legal civics textbook Society historians Jim Haley and Marilyn Duncan co-wrote, to Justice Ann Crawford McClure and Executive Director Nancy Gallegos. Both urged El Paso County Bar Association lawyers and judges to volunteer to bring Warren Harris's *Taming Texas* judicial civics project to El Paso when Warren takes the project statewide in 2017.



El Paso County Bar Association Executive Director Nancy Gallegos became a supporter of the Society's *Taming Texas* judicial civics project.

Prosecutor Ballard C. Shapleigh then guided us to the El Paso Justice Center to visit the law library and the prosecutors' offices he has offered to make available to our Society to host volunteer-meetings when the Society brings the *Taming Texas* project to El Paso.



The El Paso County Justice Center celebrates the city's rich heritage.

Clinton Cross ended our time together by presenting me with his rare, personal copy of Conrey Bryson's book *Dr. Lawrence A. Nixon and the White Primary* (El Paso: Texas Western Press, 1974) to assist this *Journal* in publishing an article about the case that changed the way Texans vote. I'm delivering a copy of Clint's book to Mimi Marziani, Executive Director of the Texas Civil Rights Project, for her use in writing a 2017 *Journal* article. After taking me on a final tour of El Paso history museums and sites, Colbert Coldwell took me back to the airport.

Colbert, Clint, Ballard, Nancy, and Justice McClure, thank you for introducing the Society to El Paso and for supporting the Taming Texas judicial civics and history project!

American Board
of Trial Advocates



In 2015, our Society joined with the American Board of Trial Advocates (ABOTA) to help Texas teachers learn more about the history of Texas law and Texas courts so they could share that information with their students. At the invitation of Harris County 61st Judicial District Court Judge Erin Lunceford, and Cay Dickson, the Executive Director of TEX-ABOTA (the Texas chapters of American Board of Trial Advocates), I requested permission from the Society's Executive Director, Pat Nester, to present the Society's *Magna Carta 2015* State Bar of Texas Annual Meeting program to Texas high school teachers.

First Court of Appeals Senior Justice Terry Jennings and City of Houston Judge “Kin” Spain joined with me to present *Magna Carta's 800-Year Legacy* for the Texas Chapter of ABOTA's Second Annual Teacher's Law School in Houston on Friday, June 12, 2015. Forty-five teachers and administrators participated and asked the leaders of ABOTA's Houston Chapter to take that joint Society/ABOTA program on the road.

On August 18, 2015, I joined Jerry Young to present the Magna Carta program to a large audience of middle school and high school teachers and administrators interested in improving the way they teach the history of Texas law to their students. Leigh Rappaport, Curriculum Coach for Secondary Social Studies in the Instructional Support Center of the Cypress-Fairbanks Independent School District, organized the program.

On June 17, 2016, the Society again participated in a two-day ABOTA Law School for Texas high school students at the invitation of Judge Lunceford, Jerry Young, and Jennifer Armendariz. Houston area Attorneys Murray Fogler and Gwen Richard began by presenting a demonstration of voir dire jury selection, followed by an examination of affirmative action provided by the Hon. Keith P. Ellison, United States District Judge for The Southern District of Texas. I presented the Society's *Magna Carta* program to over sixty teachers and administrators, while another of the Society's trustees, Multi-District Judge Mark Davidson, led the high school teachers and administrators on his *History and Its Making* tour of the Historical 1910 Harris County Courthouse.

Attorneys Dicky Grigg, Arturo G. Michel, Mitchell Katine, James T. Fallon, and Alistair Dawson taught more ABOTA classes the next day to give teachers a better understanding of the legal issues that shape and divide our society today.

In May of 2016, former U.S. senatorial candidate Barbara Radnofsky, a Democrat, asked Andrea White and me to create a PowerPoint about the history of slavery in Texas. Barbara said she'd like to follow up on the sponsorship of the Houston Grand Opera libretto *What Wings They Were* by Judge Mark Davidson, Baker Botts, and the Houston Bar Association. That opera celebrated Houston attorney, and later Texas Supreme Court Justice Peter Gray, for his representation of Emeline, a wrongfully enslaved woman of color who successfully sued to win her freedom in a Harris County District Court.

Multi-District Court Judge Mark Davidson lent Andrea and me the PowerPoint he presented a few weeks earlier in his introduction to the HGO *Emeline* HGO program. Andrea and I combined painted images from her book *Emeline* with Judge Davidson's PowerPoint slides and images from the *Journal*. On June 21, 2016, Andrea White and I made our *Emeline* presentation to the Fourth Annual Harris County Democratic Lawyers' Association's Summer CLE and Party. Ninety-eight attorneys and judges attended. Barbara Radnofsky and Dinesh Singh thanked Andrea, the Society and me for the event.

To borrow and paraphrase a few of Willie Nelson's most famous lines, the Society has speakers ready, willing, and able to bring superb Continuing Legal Education programs and the Fellows' Taming Texas judicial civics project state-wide:



Left: The invitation to the June 21st event. Right: Two images from the Harris County Democratic Lawyers' Association's Facebook page.

**Just can't wait to get on the road again
 The life we love is sharing history with our friends
 And we can't wait to get on the road again
 Goin' places we've never been
 Seein' things we may never see again . . .
 We can't wait to get on the road again . . .**

Any school group, bar organization or historical society that wants to schedule a Society program should contact David A. Furlow at 713.202.3931 or at dafurLOW@gmail.com.

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Thank You, Mary Sue Miller

By David A. Furlow

At the beginning of this year, Texas Supreme Court Justice John Devine told me that our Society's display case across from the Clerk's Office did not reflect well on the Society. Justice Devine was right. Photos of several portraits of famous justices had fallen down, along with the labels that identified who they were and what they did for Texas. He was kind enough to make us aware of an easily overlooked problem. Further

investigation revealed that no one from the Society had been able to open the display cabinet since the Society's only key went missing in 2011.

Mary Sue Miller stepped forward and immediately fixed the problem. She secured Executive Director Pat Nester's authority to hire a locksmith, then made sure that Texas Supreme Court Clerk Blake Hawthorne knew the day, time, and reason the locksmith was coming over, and then did what needed to be done. She removed the old materials, repaired the portraits, photos, and labels that tell the history of the Texas Supreme Court, and then spiffed things up nicely. Everything is in good order.

Thank you, Mary Sue.



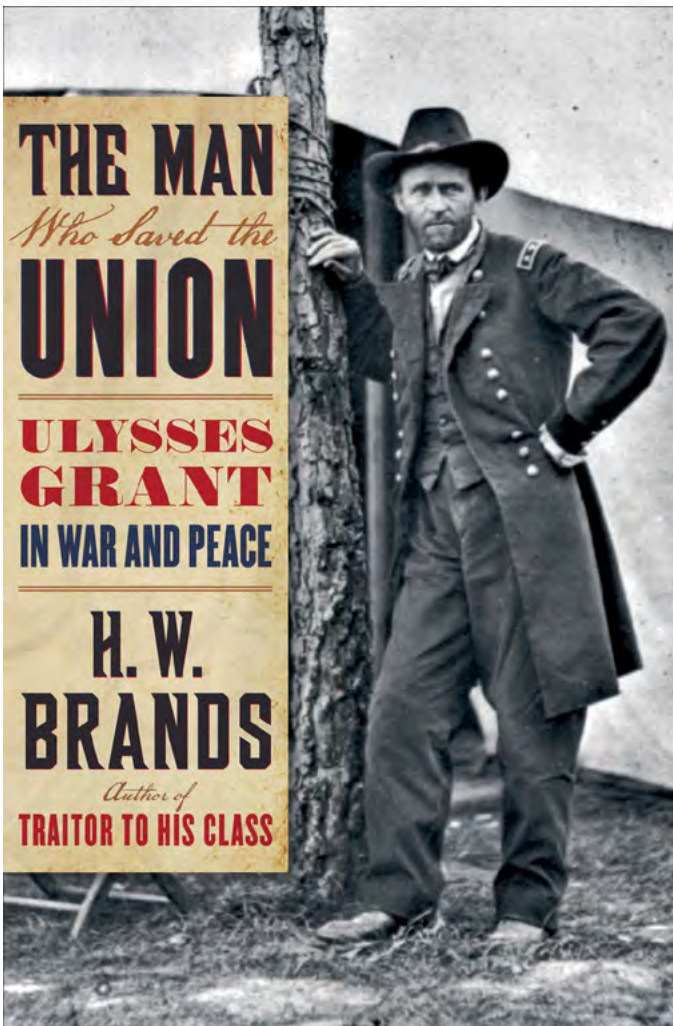
Mary Sue's revitalized display

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The Journey of the American Ulysses

**A Review of H. W. Brands's Biography,
*The Man Who Saved the Union: Ulysses Grant in War and Peace***

By Marie R. Yeates and John F. McInerney



The cover of H. W. Brands's book shows Ulysses Grant during the Battle of Cold Harbor. Mathew Brady/Levin C. Handy Photographic Collection, Library of Congress.

He was born Hiram Ulysses Grant and only became Ulysses S. Grant when, as a new cadet, Grant saw his birth name accidentally altered by West Point. The new name stuck. His wife Julia called him "Ulys." In H. W. Brands's beautifully written biography, Grant's life story—including his years as victorious Union general and U.S. president—is a journey befitting the classical Ulysses (to whom Brands compares Grant), filled with triumph and tragedy. And while Grant, like his classical counterpart, endured many hardships and overcame a myriad of obstacles, when his life's journey reached its apex, he succeeded in saving his country in perhaps the greatest threat to our national survival the nation ever confronted. The North (and Grant) saw the Civil War as a rebellion of Southern states against the United States. It was a war that pitted brother against brother and resulted in over 600,000 American dead, counting both Union and Confederate casualties. Grant, the most successful Union general, was given the title of Lieutenant General, a title the nation had not bestowed on a military leader since George Washington a century before.

That his countrymen appreciated how Grant's military skills had contributed to the nation is stated in stone: when Grant's fellow Americans raised funds for Grant's tomb in New York City, that mausoleum was largely modeled after Napoleon Bonaparte's tomb at Les Invalides in Paris. Like Napoleon, Grant was ultimately interred under a great white marble dome, in a

red granite sarcophagus surrounded by busts of the other generals who served under him. In the silence of Grant's tomb, Sherman, Meade, Sheridan and other Union generals maintain an eternal vigil over their commander. But the magnificence of Grant's final resting place belies the humble beginnings and personality of this great American hero—all of which come to life in H. W. Brands's wide-ranging and fast-paced biography.

As Brands explains, Grant's career at West Point was unremarkable; Grant did not excel academically or otherwise, although he was an accomplished horseman. His early career in the army was equally undistinguished and was tainted by a period, while he was stationed in California away from his beloved Julia, of heavy drinking—a problem that would haunt him later. When he left the army in the mid-1850s, Grant engaged in a series of unsuccessful civilian endeavors.

Grant, who would later lead the Union forces, even had difficulties rejoining the army when the Civil War broke out. First, the army lost Grant's letter offering his services, and then George McClellan, at that time a major general, was too busy to see Grant when he sought a position on McClellan's staff. But like the classical Ulysses who was saved by the Gods of Olympus, Grant was rescued from a bad situation when Illinois Governor Richard Yates made



General Ulysses S. Grant, on horseback to the right, commands Union forces in Thure de Thulstrup's *Battle of Shiloh*. Library of Congress Photographs and Images Division.

him a colonel with command of the Illinois regiment. As a result, Grant rejoined the U.S. Army through the back door when his Illinois regiment became part of the Union's military force.

He was stationed in what was called the Western Theatre. With victories in the West at Belmont, Fort Henry, and Fort Donaldson, Grant began to emerge as an effective military commander who could see opportunities and was willing to seize upon them. It was at this point that Lincoln began to take notice of him. But once again, Grant suffered setbacks when the Union's victory at Shiloh came at a great cost of life on both sides.

After Shiloh, criticism of Grant in the media and unsubstantiated tales of his drinking allowed Henry Hallack, Grant's superior in the West, to take command of the army Grant had led. At perhaps his lowest ebb, Grant was rescued once again, this time by General William T. Sherman, who talked him out of leaving the army—an event that cemented the deep friendship with Sherman that would characterize the remainder of Grant's military career. After the Shiloh fallout, when detractors wanted Lincoln to fire Grant, Lincoln famously responded, "I can't spare this man; he fights." And the fates further shined on Grant when Lincoln, dissatisfied with McClellan, named Henry Hallack, who had been Grant's nemesis in the West, as general in chief of the Union army. Hallack's reassignment to Washington allowed Grant to retake command of the Western army. That command brought with it the siege of Vicksburg, Mississippi—a military operation in which Grant would ultimately bring Vicksburg, and thus the Mississippi River, under Union control.

Grant the risk-taker was on full display at Vicksburg. He chose to send his supply vessels and gunboats on a one-way trip down the Mississippi, thus exposing the flotilla to Confederate guns on the heavily fortified bluffs of Vicksburg that overlook the mighty river. But Grant's gamble paid off, allowing him to land his troops beneath the city. Grant also, against Sherman's warnings, took the risk that Union troops could successfully take on the two armies of Confederate Generals John Pemberton and Joseph Johnston. Once Grant had Pemberton surrounded at Vicksburg, Johnston's troops were intended to reinforce and relieve Pemberton's position. But Grant succeeded in repulsing both Johnston's and Pemberton's forces. That successful gamble ensured Grant's victory at Vicksburg. When Pemberton asked Grant for terms of surrender, Grant (as always) demanded unconditional surrender, thus supporting his admirers' claim that U.S. Grant stood for "Unconditional Surrender Grant." Pemberton surrendered Vicksburg on July 4, 1863—just one day after Robert E. Lee's army was defeated at Gettysburg and forced to retreat.

Following his victory at Vicksburg, many in Washington wanted Grant to take over as head of the Army of the Potomac. But Lincoln honored Grant's wish to remain in the West and gave him command of the Army of the Tennessee. With that army, Grant defeated Confederate General Braxton Bragg at Lookout Mountain and Chattanooga. Speaking about Grant, Lincoln exclaimed, "[he] is the first general I've had! He's a general." Grant was then given command of the Army of the Potomac, with which he pursued Lee's army, ultimately leading to Lee's surrender at Appomattox in April 1865.

Military victories came easier to Grant than success on the political battlefield. Even though he was a wildly popular president, he hated politicians and dreaded public speaking. Being president was nothing like commanding an army where defeating the enemy was a well-defined

objective. Grant had to compromise, something unusual for “Unconditional Surrender” Grant.

Brands’s biography reminds us that Grant was a champion of civil rights. During his administration, President Grant wanted to win the peace by protecting the rights of former slaves that the Union had fought to make free. He championed the 1875 Civil Rights Act, which Brands characterizes as the most ambitious civil rights legislation before the Civil Rights Act of 1964.

Along with protecting the rights of freedmen, President Grant attempted to improve the lot of Native Americans. He created the first reservations, reformed the Bureau of Indian Affairs, and sought fully to uphold and honor treaties signed with western tribes. He appointed a Seneca attorney, engineer, and tribal diplomat, Lt. Col. Ely S. Parker (born *Hasanoanda*, later *Donehogawa*), as the Bureau’s first Native American Commissioner of Indian Affairs.

Brands points out that Grant’s success in securing rights for all Americans was modest, “not because bad men defeated him but because good men, weary of the strife of sectional crisis, war and reconstruction, found other things to worry about.”

Grant declined an invitation to order federal troops to Texas in connection with an election contest between incumbent Reconstruction Republican Governor Edmund Davis and his Democratic challenger, Richard Coke. Davis, described by Brands as a “Texas Unionist,” had raised a regiment of Texans to fight in the Union army. Davis warned President Grant that violence could ensue in Texas over the disputed election results. That election contest found its way to the Texas Supreme Court which held, in a controversial decision, that a semicolon was important in deciding the election contest in favor of Davis. The case, *Ex Parte Rodriguez*, 39 Tex. 706, 776 (1874), involved a writ of habeas corpus for the delivery of Joseph Rodriguez of Travis County, who had been arrested under a Harris County warrant charging that he voted more than once in the election.

The controversial “Semicolon Court” decision resulted in violence when an armed rebellion in Austin ran Governor Davis out, replacing him with Governor Coke. Perhaps Davis should have heeded Grant’s earlier advice to accept the electorate’s judgment and allow Coke to take office. After fighting one civil war, Grant had no desire to provoke yet another one in Texas.

Brands largely absolves Grant of any fault in the scandals that plagued his presidency. And Grant showed statesmanship by refusing, like George Washington, to run for a third term as president, even though the electorate would have returned their hero to office again.



Lt. Col. Ely S. Parker. Mathew Brady. Photographs of Civil War-Era Personalities and Scenes, 1921–1940, U.S. National Archives Series.

When Grant's second term ended in March 1877, he thought his struggles were over. He went on a world tour (meeting Otto von Bismarck, among others), in part (Brands tell us) to give the new president, Rutherford Hayes, a chance to establish his presidency. Grant invested in his son's law firm, but his financial demons would come back to menace him again. His son's law firm went under and the financial security of Grant and his family was compromised.

Once again a savior appeared to rescue Grant. Oddly enough, the savior was Samuel Clemens, better known as Mark Twain. To the great good fortune of posterity, Clemens convinced Grant to write his memoirs, including his life as a Civil War general. Clemens helped Grant secure a publishing contract that was fair and profitable. But then trouble found Grant once more. He was in the fight of his life when, having been diagnosed with throat cancer, he raced death to finish his writings. Winning this, his final battle, Grant succeeded in completing his two-volume work shortly before he died on July 23, 1885. His memoirs, the *Personal Memoirs of Ulysses S. Grant*, netted his wife Julia and their children a profit of \$400,000, a substantial sum in 1885, thus ensuring the family's future financial viability. The memoirs are candid and readable. Clemens compared Grant's memoirs to Julius Caesar's writings on the *Conquest of Gaul*.

If Grant's massive white marble tomb were located in Washington DC, rather than River Side Park in New York City (a site selected by his wife Julia), no doubt it would be visited by the millions who flock to see the other stately monuments to American heroes in the nation's capital. Grant's huge, classically proportioned mausoleum, while grand, does not stand out amongst the hustle and bustle of the large metropolis that is Grant's final home. Like Grant's place in history, his tomb is overlooked.

H. W. Brands's lively biography of Grant brings back to life the personal, military, and political history of this American Ulysses. As the man who saved the Union, Grant richly deserves the recognition that the title Brands's biography bestows. The author has done the public a welcome service by resurrecting Ulysses S. Grant and placing him, once again, in the pantheon of America's great leaders.



MARIE R. YEATES is a partner and practice group leader in Vinson & Elkins's firm-wide Appellate Practice Group. In 2015, Benchmark Litigation named her as a member of its elite annual list of the Top 250 Women in Litigation. She served as president of the Texas Supreme Court Historical Society in 2014-15.



While pursuing a history major at Arizona State University, **JOHN F. MCINERNEY** collaborated with Marie Yeates on the review of the U. S. Grant biography while a summer intern at Vinson & Elkins. He is now, in his own words, "a pseudo expert on Grant."

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William J. Boyce and John H. Torrison with John DeMers: *Miss Fortune's Last Mission: Uncovering a Story of Sacrifice and Survival*¹

Book review by David A. Furlow

"The week of 20-26 February, 1944, may well be classed by future historians as marking a decisive battle of history, one as decisive and of greater importance than Gettysburg."

— General Henry H. "Hap" Arnold,
Commanding General of the United
States Army Air Force, in his
February 27, 1945 report to
Secretary of War Henry L. Stimson

Magistrates can write magisterial histories. Although most people understand judicial history as narratives about courts, chief justices, and the rule of law, it can also include works of history written by judges. John Marshall authored a five-volume biography of a fellow Virginian, *The Life of George Washington, Commander in Chief of the American Forces* between 1804 and 1807, while serving as Chief Justice. Justice William O. Douglas published *Farewell to Texas: A Vanishing Wilderness* (1967) while on the Warren Court. After presiding over Bill Clinton's impeachment trial, William Rehnquist made time to write *Centennial Crisis: The Disputed Election of 1876* (2004) while presiding as Chief Justice.

In *Miss Fortune's Last Mission: Uncovering a Story of Sacrifice and Survival*, 14th Court of Appeals Justice Bill Boyce, Connecticut-based genealogist and family historian John Torrison, and a veteran reporter turned editor, John DeMers, have written not about courthouse trials but about the trials that afflict men's souls during war and that haunt their families long afterwards.

Miss Fortune's Last Mission tells the story of Bill's father, William D. Boyce, and the agonizing memories that kept him from describing his experience in World War II. Beginning with his own incomprehension at his father's angry outbursts and long silences, Boyce described how he came to call his father's last surviving crew-mate, Ray Noury, long after his father died of cancer in November 1988:

Twenty-five years after his death, I wanted to know the things my father would not discuss about his time as a 19-year-old waist gunner in a B-24 bomber. I found the man who could tell me. He was Ray Noury, who flew with my father over Europe in late 1943; saved my father's life; and, after my wounded father was shipped home, became the lone survivor of a doomed crew....When I met Ray in

¹ (Houston: Bright Sky Press, 2016).

2013, only five months before his own death at age 90, he told me the story of a B-24 nicknamed *Miss Fortune*... [her] crew members, their families, and a village that continues to honor the crew's sacrifice seven decades later....

Ray told Justice Boyce about saving his father's life in an air-raid over Augsburg, Germany on December 19, 1943. Although the military's top brass hoped that 15th Air Force bombers could fly missions from sunny Italy while 8th Air Force bombers remained grounded in fog-shrouded England, things did not work out as planned. Bombers could lift off into the blue over their bases at Foggia and Brindisi, Italy, but when they climbed over the Alps, their crews faced icy winds, walls of swirling fog, and towering storms. Crossing into German, Austrian, and Czechoslovak air-space, bomber crews confronted deadly anti-aircraft fire and swarms of German fighters. Death filled the skies.

During a bombing mission over a German aircraft factory at Augsburg, an anti-aircraft shell clawed its way up through thinning air to explode into the underside of the B-24 Justice Boyce's father was defending with a .50 caliber machine-gun. Although the flak shredded his leg and filled it with shrapnel, the elder Boyce fought on, downing a twin-engine rocket-firing Messerschmitt 110 fighter with his machine gun. Ray Noury, the right-waist gunner, lifted the critically injured waist gunner to the cockpit area to bind his wounds and give him the oxygen he needed to survive. Justice Boyce's father spent nearly two years in hospitals recovering. Meanwhile, the other members of the *Miss Fortune's* crew continued their bombing missions over Germany.



As in an episode of PBS's *History Detectives*, John Hartley Torrison pursued his own effort to learn more about his uncle Wayne Nelson. Family scrapbooks kindled a curiosity later stoked by unit histories, service narratives, and flight records that consumed Torrington during the thirteen years before he met Justice Boyce. Beginning with the correspondence of stenographer Grace Malloy, Torrington read and re-read records, harmonizing seemingly inconsistent stories, and sought the details of a B-24 tail-gunner's hours in *Miss Fortune's* firing twin .50 caliber guns



Left: The crew of the *Miss Fortune* included Bill Boyce, Sr. (second from left) in an Irish pub on their way to the Italian front in November 1943. Right: The crew, minus Bill Boyce, Sr., on February 15, 1944. Photos courtesy of Justice Boyce.



The *Miss Fortune's* wing after her last mission.
Photo courtesy of Justice Boyce.

from a turret of iron armor and cold, clear Plexiglass. Torrison's family remembered Wayne as a quiet, introspective young man whose constant stream of letters assured his family that he was safe—until a day in February of 1944 when the letters ceased coming. Torrison set out on a search to find out what happened to his Uncle Wayne and, as this book reveals, finally did so.

In this book, Justice Boyce, Torrison, and DeMers introduce each member of the *Miss Fortune's* crew, offering black and white photos and vignettes of the lives of eleven young Americans at war. The coauthors join those young American airmen to describe

their last mission over enemy territory, during the "Big Week" Allied bombing missions of February 1944. In the skies high above Czechoslovakia on February 22, 1944, another young man in an airplane, Egan Albrecht, a fierce Luftwaffe ace wearing the coveted Knight's Cross, closed in on the *Miss Fortune* and her eleven-man crew, aiming his Messerschmitt 109's two machine guns and 20 millimeter cannon at the looming four-engine bomber in his cross-hairs.

To piece together what happened not only to the *Miss Fortune's* crew but to his father, Justice Boyce and his coauthors take the reader into Central Europe. Guided by the eighty-nine-year-old veteran Ray Noury, Justice Boyce meets family historian Torrison, whose uncle, Wayne Nelson, had served as the *Miss Fortune's* tail-gunner during her last mission. Sifting through military records, fading photographs, and the memories of aging Czech villagers who

Justice Bill Boyce loves history, as reflected in his book *Miss Fortune's Last Mission* as well as in his volunteer teaching with the Houston Bar Association's Teach Texas program.



witnessed the end of *Miss Fortune's* final mission, they uncover secrets concealed for more than five decades. The story that unfolds is one of scars never healed, tragic losses never restored, of the toll total war takes on families decades after the fighting ends, and of children who aspire to earn the love and respect of their Greatest Generation fathers.

In addition to working as an appellate judge and a World War II historian, Justice Bill Boyce serves as a member of the Texas Judicial Council, a director of the Texas Center for the Judiciary, an elected member of the American Law Institute, and an executive committee member of the Garland R. Walker American Inn of Court.

I recommend *Miss Fortune's Last Mission* to anyone interested in the history of the Second World War. It is not only a war story but a touching, very personal post-war examination of an injured veteran's strained relationship with his wife and son. Justice Boyce's father was one of many veterans who long remained unable to share their war experiences with wives and children. This book offers an example of how diligent descendants can preserve historical memories that might otherwise be forever lost.

Miss Fortune's Last Mission is available on [Amazon.com](https://www.amazon.com) and through other booksellers in hardback and softcover editions. The e-book version is available for pre-order on Amazon for delivery to Kindles on November 1, 2016. Justice Boyce will soon take the book on the road to share the story of the *Miss Fortune's* mission, her crew, and his father.

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21st Annual John Hemphill Dinner

Hon. Paul Clement Was the Featured Speaker

By Marilyn P. Duncan
Photos by Mark Matson

A keynote speech by former U.S. Solicitor General Paul Clement was the highlight of this year's John Hemphill Dinner. About 420 appellate attorneys, judges, their spouses, and other members of the community filled the Grand Ballroom of the Four Seasons Hotel in Austin on Friday, September 9, to enjoy dinner and the evening's program, which also included several award presentations.

The program began with a welcome by outgoing Society President Ben Mesches, followed by the Pledge of Allegiance led by the Bedichek Junior Marine Corps.



Two photos at left:
2015-16 Society
President Ben Mesches
welcomes dinner guests.

Below, left to right:
- A cadet leads the
award-winning Bedichek
Middle School Junior
Marine Corps into the
ballroom.
- A flag ceremony is held.
- Dinner guests recite the
Pledge of Allegiance.



President Mesches then presented this year's President's Award for Outstanding Service to Society Fellow and Board of Trustees member Warren W. Harris. In presenting the award, Mr. Mesches noted Mr. Harris's leadership of the Society's Taming Texas Judicial Civics and Court History Project. The project had its rollout in Spring 2016 with the publication of the first book in the Taming Texas Series and the presentation of a multi-week classroom teaching program in partnership with the Houston Bar Association's Teach Texas Committee.



The Texas Center for Legal Ethics then presented the annual Chief Justice Jack Pope Professionalism Award to William J. Chriss. TCLE Executive Director Jonathan Smaby announced the award, and Chief Justice Nathan Hecht made the presentation on behalf of TCLE (see separate story, p. 83).



David Beck, Chair of the TSCHS Fellows, reported on the activities and accomplishments of the Fellows, including the publication of the first *Taming Texas* book and the highly successful launch of the Taming Texas Judicial Civics and Court History Project. He also noted the success of the Fellows-sponsored reenactment of the All-Woman Texas Supreme Court's *Johnson v. Darr* case last summer. (See Fellows Column in this issue, p. 3.)



Judge Jennifer Elrod introduced Mr. Clement, noting that they were in the same study group at Harvard Law School and that she therefore had a unique perspective to share. He excelled in law school as in everything else he did, and it was not surprising that he progressed from serving as Supreme Court editor of the *Harvard Law Review*, to clerking for Justice Antonin Scalia, to holding the position of Solicitor General of the United States. She pointed out that Mr. Clement held the record for the number of cases argued before the Supreme Court since the year 2000—more than eighty, a phenomenal number.



Now a partner at Bancroft PLLC in Washington, D.C., Mr. Clement focused his remarks on the late Justice Scalia's

Top: President's Award recipient Warren Harris (left) and President Ben Mesches. Upper middle: Chief Justice Nathan L. Hecht congratulates Pope Award recipient Bill Chriss. Lower middle: David J. Beck describes the programs and priorities of the Society's Fellows. Bottom: Judge Jennifer Elrod introduces the keynote speaker.



Top: Paul Clement. Upper middle: Justice Paul Green administers the president's oath of office to Macey Reasoner Stokes. Lower middle: President Stokes. Bottom: Justice Debra Lehrmann and former Chief Justice Tom Phillips.



impact on the Supreme Court and on the law in general. Among those impacts, he said, was that Justice Scalia fundamentally changed oral argument before the Supreme Court. He observed that the year 1987—the year Justice Scalia joined the Court—was a turning point in the way the Supreme Court heard oral arguments. Prior to that, members of the Court mostly listened to lawyers argue their cases, asking few questions. From his first day on the Court, Justice Scalia turned that process on its head, peppering counsel with questions. The other Justices, not to be outdone, soon followed suit. Mr. Clement noted that lawyers who argue before the Supreme Court now expect to spend more time answering questions than offering testimony—the change is profound and enduring, he said.



Mr. Clement also talked about Justice Scalia's brilliance as a legal scholar and writer of opinions. He did not use his clerks in writing his opinions, he said, but rather engaged them in a vigorous discussion of the cases, which resembled nothing so much as an oral argument before the Court. He suggested that this training gave him the experience to face any court, including the High Court, with confidence.



At a broader level, he said, the clarity of the Justice's memorable prose style means that an entire generation of law students learned the law, in large part, by reading Scalia opinions. That means that his opinions are perhaps having a disproportionate impact.

To conclude the evening's program, Justice Paul Green, Supreme Court liaison to the Society, administered the oath of office to incoming Society President Macey Reasoner Stokes. President Stokes thanked outgoing president Ben Mesches for his year of outstanding leadership and thanked the dinner attendees for their support of the Society, with a special thanks to the law firms who sponsored tables (see list of sponsors below).

Pre-Dinner Reception with Paul Clement

Prior to the beginning of the Hemphill Dinner, members of the Court, Society Fellows, and other guests met with Mr. Clement in the Four Seasons San Jacinto Room. The photos below offer a sampling of this occasion and the open reception that followed.



(left to right) Paul Clement, Judge Jennifer Elrod, and P. G. Clement



(left to right) Nadine Schneider, former Justice Dale Wainwright, and former Justice Adele Hedges



(left to right) Justice Cindy Bourland, Harriet Miers, and Cynthia Timms



(left) Justice Phil Johnson and Paul Clement



(left to right) Warren Harris, Amy Robertson, and Ben Mesches



Justice Paul Green and Judge Priscilla Owen



Justice John Devine and Nubia Devine



(left to right) David Keyes, Justice Evelyn Keyes, Susan Daniel, and Josiah Daniel



(left to right) Former Justice Woodie Jones, Justice Jim Worthen, former Justice Adele Hedges, and Dan Hedges



(left to right) Laura Gibson, Bill Ogden, and Ben Mesches



(left to right) Former Justice Dale Wainwright, Justice Harvey Brown, Cindy Brown, Bob Stokes, Macey Stokes, and Justice Paul Green



(foreground, left to right) Former Chief Justice Tom Phillips, Bob Howell, and Rob Gilbreath

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Bill Chriss Receives the 2016 Chief Justice Pope Award for Integrity, Professionalism

By Marilyn P. Duncan



The Texas Center for Legal Ethics has named attorney and TSCHS board member William J. Chriss as the recipient of the 2016 Chief Justice Jack Pope Professionalism Award. The award is given each year to a judge or attorney who personifies the highest standards of professionalism and integrity in the field of law. It is named for former Texas Supreme Court Chief Justice Jack Pope, one of TCLE's founders and the first recipient of the award in 2009.

Mr. Chriss practices in the Corpus Christi office of San Antonio-based Gravely & Pearson, L.L.P. He has been board certified in Civil Trial Law and Personal Injury Trial Law by the Texas Board of Legal Specialization for over twenty years.

"Bill Chriss is one of the most recognizable figures in the world of ethics statewide," said Marc Gravely, a name partner at Gravely & Pearson. "He has devoted a huge amount of time to improving both the profession and its education, ethical and otherwise. In Texas, if you are a lawyer and you want to know what is the right thing to do, Bill Chriss is one of the handful of people that everybody knows to ask."

In 2005, Mr. Chriss was recognized by the Texas Bar Foundation as the recipient of the statewide Dan R. Price Award for service to the legal profession and excellence in teaching and scholarly writing. Over the years, he has provided ethics and compliance training to a number of government agencies and major corporations, including the State Bar of Texas, the Attorney General of Texas, the U.S. Army, and American Airlines, and various professional and industry groups.

Mr. Chriss holds graduate degrees in law, theology, and history, and politics. He was one of the youngest members of his graduating class at Harvard Law School, where he received a Howe fellowship in Civil Liberties and Anglo-American Legal History and earned his law degree at the age of twenty-three. In 2015, he earned a Ph.D. in history from the University of Texas at Austin under renowned historian H. W. ("Bill") Brands.

He is the author of numerous articles and papers as well as a book, *The Noble Lawyer*, which examines the history and current state of the legal profession. He also wrote an extended biographical essay on Chief Justice Jack Pope for *Common Law Judge: Selected Writings of Chief*

Justice Jack Pope of Texas, published by the Texas Supreme Court Historical Society.

The Pope Award was presented to Mr. Chriss by Texas Supreme Court Chief Justice Nathan Hecht at the Society's Hemphill Dinner on September 9, 2016 in Austin (see story on p. 77).



Pope Award recipient Bill Chriss (center) received accolades from Texas Center of Legal Ethics Executive Director Jonathan Smaby (left) and Chief Justice Nathan Hecht during the John Hemphill Dinner. Photo by Mark Matson.

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BA Breakfast Brings Court Colleagues Together for Annual Reunion

By Amy Warr



Amy Warr (standing at the podium) welcomes attendees on behalf of this year's BA Breakfast planning committee.

On September 10, approximately one hundred current and former justices, briefing attorneys, staff attorneys, staff, and their guests gathered for the Briefing Attorney Breakfast at the Texas Law Center. This annual event is a cherished tradition, providing an opportunity to celebrate the shared experience of serving at the Supreme Court of Texas.

Responsibility for planning the event has been transferred from Court staff to a rotating committee of former briefing and staff attorneys. This year the committee experimented with a new format intended to maximize the time spent visiting with former colleagues. Next year's committee welcomes feedback on that change and suggestions for future breakfasts. Please send comments to Lisa Hobbs, lisa@kuhnhobbs.com, or Amy Saberian Prueger, asaberian@enochkever.com.



Justice Jeff Brown thanks the planning committee for making the breakfast a success and invites new volunteers to participate.



Left to right: BA Breakfast planning committee members Amy Warr, Leila El-Hakam, Amy Saberian, Lisa Hobbs, and Dylan Drummond. Photo by Mary Sue Miller.

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2016 Inductees to Texas Appellate Hall of Fame Announced

By Jackie Stroh

Three new honorees were inducted posthumously into the Texas Appellate Hall of Fame in September: Chief Justice James Patterson Alexander, appellate practitioner Marvin S. Sloman, and appellate practitioner David W. Holman.

The Hall of Fame was created in 2011 by the Appellate Section of the State Bar of Texas and the Texas Supreme Court Historical Society to honor and recognize jurists and practitioners who made unique contributions to the practice of appellate law in the State of Texas. This year's inductees were selected by a Board of Trustees that consisted of the Chair of the Appellate Section, the President of the Historical Society, and other appellate practitioners from throughout Texas.



Chief Justice James P. Alexander. Photo courtesy of Tarlton Law Library.

The inductees were selected based on their written and oral advocacy; professionalism; faithful service to the citizens of Texas; mentorship of newer appellate attorneys; pro bono service; participation in appellate continuing legal education; and other indicia of excellence in the practice of appellate law in our state.

James P. Alexander served as Chief Justice of the Supreme Court of Texas from 1941 to 1948. After he received his law degree from the University of Texas in 1908, he practiced as an attorney in McGregor, Texas and was county judge of McClennan County. Later, he served as a district judge in Waco, a professor at Baylor Law School, and an associate justice on the Waco Civil Court of Appeals before winning election to the Texas Supreme Court. Chief Justice Alexander helped to promulgate the Texas Rules of Practice and Procedure in Civil Actions in 1941, was a director of the State Bar of Texas, and was appointed to the Texas Civil Judicial Council. His nomination materials stressed his willingness to guide young people—both those who landed in trouble and those who would become future lawyers. He reportedly made a practice of taking first-time juvenile offenders to his home as guests, and his law students referred to him as “Judge Alec.”

Marvin Sloman graduated from the University of Texas School of Law in 1950, where he served on the Board of Editors of the *Texas Law Review*. He was an original founding member of Carrington, Coleman, Sloman & Blumenthal, focusing on arguing matters of law and jurisprudence in motions, briefs, and appeals. He was a founder



Marvin Sloman. Photo courtesy of Carrington Coleman LLP, Dallas.

and first president of the 5th Circuit Bar Association, a longtime member of the American Law Institute, and early chairman of the Appellate Law and Advocacy Section of the State Bar of Texas. Sloman argued twice in the Supreme Court of the United States, winning both times, and appeared frequently before the Supreme Court of Texas and the intermediate courts of appeal. His nomination materials included glowing commentary by jurists and attorneys alike on his integrity and willingness to mentor younger lawyers in the art of advocacy and the power of preparation. Those materials included an essay, written by Bryan Garner and entitled “Finding Good Writing Mentors,” the focus of which was Marvin Sloman.



David Holman. Photo from Legacy.com.

David Holman was a distinguished appellate practitioner who graduated first in his class from South Texas College of Law in 1985, summa cum laude, and obtained best brief and oral advocate honors in numerous moot court competitions. Upon graduation, he worked as an appellate attorney, forming one of the earliest appellate boutiques in Texas—Holman, Hogan, Dubose & Townsend. He argued many times before the Supreme Court of Texas and other appellate courts (both state and federal) and routinely appeared on the list of top appellate lawyers, both for Houston and for the State of Texas. Demonstrating his commitment to future and young lawyers, he served as a Director of the South Texas College of Law Board of Directors and presented over forty-five papers on Continuing Legal Education topics. He was an avid reader and writer, both in the law and creatively—the latter resulting in the publication of his novel, *No Greater King*.

The three inductees were honored at a ceremony held in connection with the Appellate Section’s annual meeting on September 8, 2016 in Austin. Frank Elliott, the nephew of Chief Justice Alexander and himself an attorney, spoke on behalf of his uncle. Ken Carroll, a partner with Carrington Coleman and an appellate specialist, spoke on behalf of Marvin Sloman. And Chelsea Holman, daughter of David Holman, traveled from Houston to attend the Austin ceremony and spoke on behalf of her father.

JACKIE STROH is an attorney with the Law Office of Jacqueline M. Stroh, P.C., in San Antonio.

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GLO's Save Texas Symposium Remembers the Alamo in a New Light

By Pat Nester



How are the Alamo and the new 9/11 Memorial in New York City alike? This and many other bedeviling questions about how historical phenomena evolve, transform, and resonate today were the focus of the Save Texas History Symposium presented on September 17 by the Texas General Land Office at the Menger Hotel next door to the Alamo in San Antonio.

The Texas Supreme Court Historical Society was a gold sponsor of the event and was represented by board member Dylan Drummond, executive director Pat Nester, and administrative coordinator Mary Sue Miller, who set up a display showing the activities of the Society.

The goal of the symposium was a deep dive into the history of the Alamo, and it gathered together the best and brightest on the subject. Dr. Bruce Winders, the official curator of the Alamo, addressed an expanded vision of the famous siege that includes the importance of the Spanish missions, the role of women and slaves, and the link of Texas to Mexican and European history.

Dr. Paul Andrew Hutton contrasted the halo of glory with which the Alamo is remembered by many modern audiences with facts on the ground in 1836. General Antonio López de Santa Anna considered it “but a small affair,” a minor battle in which a relative few defenders were subdued by the overwhelming force of his army. And so its history would have been written except for what happened afterward. “Remember the Alamo” became a rallying cry not just for General Sam Houston’s army at San Jacinto but for the creation of an independent Texas. Now it has gone much further, a modern meme giving strength to soldiers—or really anybody—facing overwhelming odds.

Dr. Andrés Tijerina reminded a standing-room-only audience of the place of the Alamo, and of Texas generally, in cultural and international history. From that perspective, it represents an insurgency against, in the terms of the times, increasingly enlightened Spanish and Mexican governments that had ruled the region for centuries. It is ironic that the common notion of the Alamo as a fight for liberty and freedom against a tyrannical Santa Anna was also a fight for Anglo settlers to keep their slaves, since slavery had been outlawed in Mexico decades before. Much of the heritage of the Alamo and of modern Texas, Dr. Tijerina reminded us, derives from more ancient roots, the Tejanos who included Spanish soldiers, missionaries, and government officials; a wide variety of native populations; and mixed race mestizos. They invented everything from ranches to rodeos to the special horse-mounted military formation that attempted to bring order to an often bloody frontier—later mimicked by Jack Hays and his Texas Ranger companies.

Ian Oldaker, chief operating officer of the Alamo, and formerly vice president of operations and planning for the National September 11 Memorial and Museum in New York, presented a fascinating slide show on the development of the memorial and provided throughout a thoughtful colloquy on how tragedies from our past are remembered in physical buildings and art today. Government, business, cultural, and artistic communities have pulled together at the Alamo and the 9/11 Memorial to “champion the call to Never Forget.” The Texas General Land Office is orchestrating a major effort to preserve and enhance the Alamo and nearby real estate, to render it an even more fitting remembrance of its cultural importance.

The symposium included many more presentations and frames of reference of possible interest to the members of our Society. Lee Spencer White, for example, presented a paper on “Joe the Slave Who Became an Alamo Legend.” Joe was a slave to Lt. Colonel William Barret Travis and lived through the battle. He later testified before the revolutionary Texas government. It is again ironic and reflective of the turbulent times that many details of a battle for Texas freedom are in substantial measure the memories of a slave. It turns out, according to White, that Joe was the younger brother of escaped slave and abolitionist William Wells Brown and was—small world—a grandson of Daniel Boone.

More details about the symposium are available at the Texas General Land Office website: www.glo.texas.gov/save-texas-history/symposium/index.html.

Dr. Andrés Tijerina reminds the audience that the Alamo's heritage has ancient Hispanic roots. Photo by Mary Sue Miller.



Pat Nester and Dylan Drummond wait for one of the sessions to begin. Photo by Mary Sue Miller.



One of many exhibits at the symposium was Stephen F. Austin's 1837 "Connected Map of Austin's Colony," which depicts the original land grants issued within Austin's Colony between 1833 and 1837. It became the model for subsequent land ownership maps housed at the Texas General Land Office. Photo by Mary Sue Miller.



Chief Justice Tom Phillips (right) reviews some collectible documents with Ollie Crinkelmeyer of CRINKSTUFF—ALL ABOUT TEXAS. Photo by Mary Sue Miller.



The TSCHS exhibit displays some of the Society's programs and publications.
Photo by Mary Sue Miller.

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Harris County Law Library Awarded for Centennial Historical Program

By David A. Furlow

The Harris County Law Library was honored to receive the 2016 Excellence in Marketing Award—Best Campaign from the American Association of Law Libraries (AALL). The Excellence in Marketing Award recognizes outstanding achievement in public relations activities by a library or other group affiliated with AALL.

Keith Ann Stiverson, President of AALL, presented the award to the Harris County Law Library in recognition of the marketing campaign created by the Law Library's staff for its Centennial Celebration, held on October 1, 2015. Director Mariann Sears accepted the award on behalf of the Law Library in July at AALL's 109th Annual Meeting and Conference in Chicago.

Harris County Attorney Vince Ryan was honored by the Government Law Libraries section of the American Association of Law Libraries (AALL) with the 2016 Law Library Advocate Award in recognition of his tireless efforts in support of the Harris County Law Library. Created in 2009, the Law Library Advocate Award is presented annually to a law library supporter in recognition of his or her substantial contributions towards the advancement and improvement of a state, court, or county law library's service or visibility. The Harris County Law Library is a part of the Office of the Harris County Attorney. Harris County Law Library Deputy Director Joseph Lawson also was present at the awards ceremony.

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Haley Shares History of Texas Law and Courts at AAAL Annual Meeting

Noted author-historian James L. Haley was the luncheon speaker at the American Academy of Appellate Lawyers' fall meeting in San Antonio on September 30.

Haley's talk, titled "Taming Texas: A History of the Texas Courts," spotlighted stories and photos from two books he wrote for the Society—*The Texas Supreme Court: A Narrative History, 1836-1986* and *Taming Texas: How Law and Order Came to the Lone Star State*.

Most members of the audience were from out of state, so Haley used the opportunity to acquaint them with some of the unique elements of Texas history—the pre-Republic years under Spain and Mexico, the Revolution, and the Republic era with its new constitution and budding court system.

"You may be surprised to learn," he said, "that the Texas Revolution was not an Anglo land grab, that four Mexican states rebelled against Santa Anna's dictatorship." He noted that several Tejanos died alongside the Anglos in the Alamo, including Gregorio Esparza, whose body was recovered by his brother, Francisco, who was in Santa Anna's army. "It was more like the American Civil War: families divided, even brother against brother."

Haley went on to trace Texas's legal progress through statehood, the Confederacy, Reconstruction, and the closing of the frontier. Along the way, he entertained the audience with colorful stories from the history of the Texas courts, such as the Supreme Court reversing an 1854 murder conviction because the bailiff had been serving whiskey to the jury during their deliberation.

Society Fellow and board member Warren Harris, who was co-chair of the AAAL meeting planning committee, invited Haley to speak.

The American Academy of Appellate Lawyers is a nonprofit organization committed to advancing the administration of justice and promoting the highest standards of professionalism and advocacy in appellate courts. Its membership consists of Fellows from around the United States who have been elected to the Academy. Those nominated for membership must have at least fifteen years of practice experience in appellate law.



Jim Haley and Warren Harris pause for a photo after the luncheon.
Photo by Michael Rathsack.

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Calendar of Events

Society-related events (*) and other events of historical interest**

Current through
December 31, 2016

The Bryan Museum's galleries offer artifacts and records from all periods of Texas and Southwestern history. J. P Bryan, a descendant of Moses Austin and a former Texas State Historical Association President, founded this museum at 1315 21st Street, Galveston, Texas 77050, phone (409) 632-7685. Its 70,000 items span 12,000 years. <https://www.thebryanmuseum.org/>

Current through
2017

The "La Belle: The Ship That Changed History" exhibition re-opens in the Bob Bullock Museum of Texas History's first floor Texas History Gallery. The hull of the sunken *La Belle* is open for viewing. <http://www.thestoryoftexas.com/la-belle/the-exhibit>.

The "Mapping Texas" exhibition continues in the Bob Bullock Museum of Texas History. Significant historic maps made available through the Texas General Land Office will interest the Society's members. <https://www.thestoryoftexas.com/visit/exhibits/mapping-texas>

Through
February 15, 2017

The Star of the Republic Museum at Washington-on-the-Brazos focuses on March 1836 with its exhibition "Legacy of Leadership: The Signers of the Texas Declaration of Independence." The exhibit is at 23200 Park Rd 12, Washington, Texas 77880. <http://www.starmuseum.org/exhibits/#featured>

Through
January 2, 2017

The Bob Bullock Texas State History Museum in Austin hosts the exhibition, "American Flags" from September 30, 2016 through January 2, 2017. Flags, art, and memorabilia are at the Museum, 1800 Congress Avenue, Austin, Texas 78701, (512) 936-8746. <http://www.thestoryoftexas.com/visit/exhibits/american-flags>

October 5, 2016

The Texas State Historical Association (TSHA) *Exploring Texas Workshop* will focus on Texas history from 1682 to the present at the Region 19 Education Service Center in El Paso, Texas. <https://tshaonline.org/education/teachers/exploringtexas>.

October–
November, 2016

*****The Houston Bar Association Teach Texas Committee will conduct Taming Texas judicial civics classes in Houston area Seventh Grade History classes during October and November 2016.**

October 8-29, 2016

The Caprock Canyons State Park and Trailways Center offers tours about the park's role in Texas history on four weekends in October: *Comanche: Lord of the Plains...And Canyons:* Oct 8, 2 - 3 p.m.; *The Red River War:* Oct. 15, 2-3 p.m.; *The Texan Santa Fe Expedition:* Oct. 22, 2 - 3 p.m.; *The Comancheros:* Oct. 29, 2 -3 p.m. Free with park admission, Caprock Canyons. http://tpwd.texas.gov/state-parks/caprock-canyons/park_events.

October 15, 2016

The 10th Annual Rio Grande Delta International Archeology Fair will occur at Palo Alto Battlefield National Historical Park. The fair is free and will last from 10 a.m. to 2 p.m. <https://www.archaeological.org/events/21687>.

Thursday,
October 20, 2016

*****The Texas Supreme Court Historical Society will hold its Fall 2016 Board of Trustees Meeting from 10 a.m. to 1 p.m. in the Hatton W. Sumners Room on the First Floor of the State Bar's Texas Law Center. Alicia ("Ali") James, Texas State Preservation Board Director, will present a colorful PowerPoint history of the Texas Capitol Complex, including the history of the Texas Supreme Court.**

Thursday,
October 20, 2016

The Texas Historical Commission will conduct a museum ceremonial groundbreaking at the San Felipe de Austin Historic Site. The richly historical ceremony will occur at 15945 FM 1458, San Felipe, Texas 77473, west of Sealy on I-10. See <http://www.thc.texas.gov/news-events/events/museum-ceremonial-groundbreaking>.

October 21, 2016
6:30-8:30 p.m.

The Third Annual Currents in Texas Archaeology Symposium will take place in San Antonio's Witte Museum Russell Hill Rogers Gallery of the Helen C. and Robert J. Kleberg South Texas Heritage Center, 3801 Broadway St., San Antonio, Texas 78209. <http://www.wittemuseum.org/programs-and-events/events/3rd-annual-currents-in-texas-archaeology-symposium>

October 28-30, 2016

The Texas State Genealogical Society Conference will occur from Friday, October 28 through Sunday, October 30, 2016. Crowne Plaza Dallas Downtown, 1015 Elm St., Dallas, Texas 75202. See <http://www.txsgs.org/conference/>.

- October 28-30, 2016 **The 87th Annual Texas Archeological Society Meeting will shed new light on Texas history, 9 a.m., October 28, through noon, October 30.** Stephen F. Austin University Student Center, 1936 North St., Nacogdoches, 75965 <http://www.txarch.org/forms/annualmeeting/index.php>
- November 2, 2016 **Dallas Bar Association Legal History C.L.E. Lunch Meeting: "They Hang Horse Thieves, Don't They? History of the Death Penalty: Texas Executions,"** by Chuck Lanehart. See <http://www.dallasbar.org/event/cle-legal-history-discussion-group>.
- November 3, 2016 **San Jacinto Museum of History will honor Gene Kranz, former Director of NASA Mission Operations.** One Monument Circle La Porte, Texas 77571-9585. http://www.sanjacinto-museum.org/About_Us/News_and_Events/Upcoming_Events/Special_Evening_with_Texas_History_2016/
- November 5, 2016 **Father of Texas Day at San Felipe de Austin.** 15945 FM 1458, San Felipe, Texas 77473. Hands-on activities for families; tours. <http://www.thc.texas.gov/news-events/events/father-texas-celebration>
- November 5, 2016 **Texas Book Festival in Austin.** <http://www.texasbookfestival.org/>
- November 14-15, 2016 **The Texas State Historical Association (TSHA) *Energizing Texas History Workshop* will focus on teaching Texas history from 1836 to 1900 at the Old Red Museum, Dallas, Texas.** See <https://tshaonline.org/education/teachers/exploringtexas;charles.nugent@tshaonline.org>.
- November 17, 2016 **Dallas Bar Association *History of Belo Mansion* program** See <http://www.dallasbar.org/site-page/history-belo-mansion-dallas-bar-association>.
- February 6-7, 2017 **The Texas State Historical Association *Energizing Texas History Workshop* will teach Texas history from 1900 to 2016, Thompson Conference Center, Austin, February 6 and Bob Bullock Texas State History Museum, Austin, February 7, 2017.** See <https://tshaonline.org/education/teachers/exploringtexas>. charles.nugent@tshaonline.org.
- Spring 2017 *****The Society will roll out Taming Texas judicial civics classes in some school districts throughout Texas.** Please consult future issues of this *Journal* for location, course, and registration information.

Thursday,
March 2, 2017

*****The Texas Supreme Court Historical Society and the Texas State Historical Association will present the Society's panel program "Semicolons, Murder and Counterfeit Wills: Texas History through the Law's Lens" in Session 14, 2:30 to 4 p.m., TSHA Annual Meeting in Houston.** Hyatt Regency Houston Downtown Hotel, 1200 Louisiana St., Houston, 77002. The Society's President, Macey Stokes, will open the panel presentation. Multi-District Litigation Judge and legal historian Mark Davidson will present his paper, "The 'Semicolon Court': An Honorable Texas Supreme Court." Baker Botts partner and legal historian Bill Kroger will present his paper, "Captain James A. Baker, the Murder of William Marsh Rice, and the Flowering of Rice University." Former Texas Supreme Court Chief Justice Wallace Jefferson will comment upon those presentations as Panel Commentator.

Thursday,
March 2, 2017

*****The Texas Supreme Court Historical Society will conduct its Spring 2017 Board of Trustees and Members Meeting in Houston, Texas from 11 a.m. to 1:30 p.m.**

March 2-4, 2017

The Texas State Historical Association will conduct its 121st annual meeting at the Hyatt Regency Houston Downtown hotel in Houston, Texas. See <https://tshasecurepay.com/annual-meeting/>.

April 27-28, 2017

*****The State Bar of Texas and the Texas Supreme Court Historical Society will present the 2017 *History of Jurisprudence and Practice Before the Supreme Court* courses at the Texas Law Center in Austin, Texas.** Please consult future issues of this *Journal* for additional location, course, and registration information.

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The *Journal of the Texas Supreme Court Historical Society* welcomes submissions, but the Editorial Board reserves the right to determine what will be published in every issue. The Board does not discriminate based on viewpoint, but does require that an article be scholarly and interesting to the *Journal's* readership. The *Journal* includes content concerning activities of public figures, including elected judges and justices, but that chronicling should never be construed as an endorsement of a candidate, a party to whom a candidate belongs, or an election initiative. Publication of an article or other item is neither the Society's nor the *Journal's* endorsement of the views expressed therein.

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2016-17 New Member List

The Society has added 8 new members since June 1, 2016,
the beginning of the new membership year.

TRUSTEE

Clyde J. "Jay" Jackson, III
Richard B. "Rich" Phillips, Jr.
Hon. Sue Walker

CONTRIBUTING

Roy Brantley
John G. Browning
Fred Jones

REGULAR

Barbara Radnofsky
Kenna Seiler

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2016-17 Membership Upgrades

The following Society member has moved to a higher dues category since June 1, 2016, the beginning of the membership year.

TRUSTEE

Evan A. Young

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Membership Benefits & Application

Hemphill Fellow \$5,000

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

Greenhill Fellow \$2,500

- Complimentary Admission to Annual Fellows Reception
- Complimentary Hardback Copy of Society Publications
- Preferred Individual Seating and Recognition in Program at Hemphill Dinner
- Recognition in All Issues of *Quarterly Journal of the Texas Supreme Court Historical Society*
- All Benefits of Trustee Membership

Trustee Membership \$1,000

- Historic Court-related Photograph
- Discount on Society Books and Publications
- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- Complimentary Admission to Society's Symposium
- All Benefits of Regular Membership

Patron Membership \$500

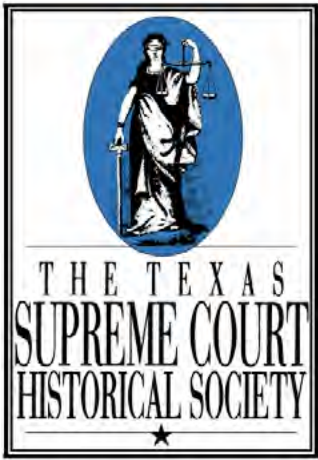
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- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

Contributing Membership \$100

- Complimentary Copy of *The Laws of Slavery in Texas* (paperback)
- Personalized Certificate of Society Membership
- All Benefits of Regular Membership

Regular Membership \$50

- Receive *Quarterly Journal of the Texas Supreme Court Historical Society*
- Receive Quarterly Complimentary Commemorative Tasseled Bookmark
- Invitation to Annual Hemphill Dinner and Recognition as Society Member
- Invitation to Society Events and Notice of Society Programs



Membership Application

The Texas Supreme Court Historical Society conserves the work and lives of the appellate courts of Texas through research, publication, preservation and education. Your membership dues support activities such as maintaining the judicial portrait collection, the ethics symposia, education outreach programs, the Judicial Oral History Project and the Texas Legal Studies Series.

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