



Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Summer 2020 Vol. 9, No. 4 General Editor Lynne Liberato Editor-in-Chief John G. Browning

Columns

Message from the President

By Cynthia K. Timms

It is my very great pleasure to serve as President of the Society this year and our efforts will be led by an excellent group.

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This issue explores how the courts have dealt with controversies that consumed the attention of the public and passions of the moment. [Read more...](#)



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Now that we have completed our third Taming Texas book, *The Chief Justices of Texas*, we are already planning the next book. [Read more...](#)



David J. Beck

Editor-in-Chief's Column

By John G. Browning

On a regular basis I deal with the quizzical looks or comments from colleagues when I mention my passion for history, and legal history in particular.

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Leads

District of Brazos: The Republic's Secret Court

By Hon. Ken Wise

From the glorious victory at San Jacinto until her first congress convened in December 1836, Texas was a land without (much of) a government.

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Benjamin C. Franklin, Judge of the District of Brazos

Who Is Governor? – The Texas Supreme Court Decides

By Judge Mark Davidson

Five times in Texas history, our Supreme Court has been called upon to decide the governor's election.

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New England Roots Run Deep in Texas: A 400th Anniversary Salute, Part 3 of 3

By David A. Furlow

Four hundred years ago this summer, a group of English settlers sailed to Cape Cod aboard the *Mayflower* to make the world anew.

[Read more...](#)



Plymouth's Forefathers Monument

Features

Law in a Time of Pandemic: How Texas courts and lawyers responded to the pandemic of 1918-1920.

By Stephen Pate

As horrible as the current COVID pandemic is, we should remember that this situation occurred before. [Read more...](#)



President Wilson, who was infected in 1919

An Essay: The Supreme Court of Texas in an Historic Crisis

By Hon. Nathan L. Hecht, Chief Justice

Every part of our lives has been affected by this pandemic. Texas courts have had two priorities throughout: stay open and stay safe.

[Read more...](#)



Chief Justice Hecht

The Cause...Making History... Saving History

By Francisco Heredia

In the late 1990s, one of my greatest duties was to inventory over 40,000 historical documents dating back to the Republic of Texas.

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Rotting 1920 unpreserved tri-fold court records



Book Review

Book Review:

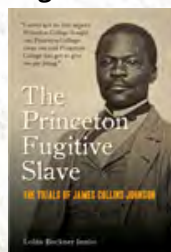
[The Princeton Fugitive Slave:](#)

[The Trials of James Collins Johnson](#)

Review by John G. Browning

The book is an illuminating example of how a topic of local lore or fascination can, once subjected to a legal historian's scrutiny and exhaustive research, yield important insights into larger subjects.

[Read more...](#)



News & Announcements

[Justice Sondock Award](#)

[Presented to Lynne Liberato](#)

By Warren W. Harris
Society Past President Lynne Liberato and the Honorable Alice Oliver-Parrott are the second recipients of the Houston Bar Association's Justice Ruby Kless Sondock Award. [Read more...](#)



Lynne Liberato (left) & Hon. Alice Oliver-Parrott

[John Browning Honored with](#)

[Outstanding Achievement in CLE Award](#)

Spencer Fane attorney John Browning was recently honored by the Texas Bar College, with the Patrick A. Nester Outstanding Achievement in CLE award. [Read more...](#)



John G. Browning

[Call for Applications:](#)

[2021 Larry McNeill Research Fellowship in Texas Legal History](#)

The Society and the TSHA are pleased to announce that applications are now being accepted for the 2021 Larry McNeill Research Fellowship in Texas Legal History. [Read more...](#)



Larry McNeill

[Hon. Priscilla R. Owen to Keynote](#)

[25th Annual Hemphill Dinner](#)

The Society is honored to have the Honorable Priscilla R. Owen, Chief Judge, United States Court of Appeals for the Fifth Circuit and former Texas Supreme Court Justice, as our keynote speaker. [Read more...](#)



Hon. Priscilla R. Owen

Membership & More

[Officers, Trustees & Court Liaison](#)

[2020-21 New Member List](#)

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FB: Texas Supreme Court Historical Society

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ASA BRIGHAM

ALCALDE OF
BRAZORIA MUNICIPALITY, 1835
SIGNER OF THE
TEXAS DECLARATION OF INDEPENDENCE,
1836
AUDITOR OF THE REPUBLIC, 1836
TREASURER OF
THE REPUBLIC, 1836-1840 AND 1841-44
BORN IN MASSACHUSETTS
1790
DIED IN WASHINGTON, TEXAS
JULY 2, 1844

Erected by the State of Texas
1936



Cynthia K.
Timms

Message from the *President*

It is my very great privilege to serve as the President of the Society for the 2020-2021 year. I follow one of the most ceaselessly enthusiastic individuals I have had the privilege of knowing—Dylan Drummond. Dylan brings an unmatched blend of eagerness and devotion to all his bar activities, of which there are many. Of course, Dylan and I both are following in a long line of outstanding Society leaders, including Marcy Greer, Dale Wainwright, Macey Reasoner Stokes, and Warren Harris. I could go on and on, and I can only hope I do half as well as my predecessors.

Our efforts this year will be led by an excellent group: Tom Leatherbury as President-elect; Honorable Ken Wise of the Fourteenth Court of Appeals as Vice President; Rich Phillips as Treasurer; and Lisa Hobbs as Secretary. I have also asked Honorable Xavier Rodriguez and Jasmine Wynton to serve on our executive committee. Justice Rodriguez and Ms. Wynton have already participated in meetings with our Journal staff to help shape and contribute to future articles.

As with everyone else, the Society is assessing how to move forward with its activities while coping with Covid-19. As we all turn to social distancing and wearing masks as a way of life, the Society's mission continues with its four journals a year, its maintaining of judicial portraits, assisting in teaching how the development of laws made Texas the powerful state it is today—all of which require financial resources.

Annually, the Society hosts the Hemphill Dinner, which has become the appellate bar's favorite social event. It is always a wonderful gathering for appellate lawyers and judges throughout the state, giving rise to its nickname "the Appellate Prom." As Dylan mentioned in the Spring issue, we will be hosting the dinner again this year on September 11 and will be moving it on-line due to COVID. That said, we are planning a special event, including:

- Fifth Circuit Chief Judge Priscilla R. Owen will be our speaker at this year's dinner. Texas Supreme Court Chief Justice Nathan Hecht will interview Chief Judge Owen in a "Chief-to-Chief" exchange. Both will share their experiences of dealing with the pandemic while managing their courts' workloads and providing parties with the same access to justice available pre-pandemic

- As with other years, the Texas Center for Legal Ethics will be presenting its annual Jack Pope Professionalism Award to an appellate lawyer or judge who epitomizes the highest level of professionalism and integrity.
- As a substitute for the usual pre-dinner cocktail hour that we all enjoy so much, we are providing zoom chat rooms with members of the Texas Supreme Court preceding the dinner presentation. The purchasers of the first 200 tickets will be able to participate in the chat rooms.

Tickets are available at the following sponsorship levels:

Hemphill Sponsorship (20 registrations): \$10,000
Pope Sponsorship (15 registrations): \$5,000
Advocate Sponsorship (10 registrations): \$2,500
Amicus Sponsorship (5 registrations): \$1,000
Gavel Sponsorship (3 registrations): \$500
Individual Registration: \$50

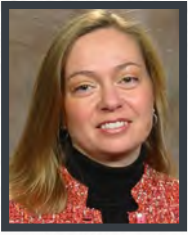
If you are interested in attending this year's event, you can purchase tickets online by going [here](#).

Your membership in and donations to the Society allows us to continue our ongoing projects, including:

- The Society's Journal is an award-winning publication that regularly features fascinating articles at the intersection of the law and history. The Journal's editors are already in the planning stages for future issues, which will focus on timely topics such as the civil rights movement in Texas and the important contributions of Hispanic members of the bar and judiciary.
- Coronavirus permitting, we are continuing teaching our Taming Texas series in schools. The program has been extremely successful in Houston. We have started to introduce it into the Dallas schools and are looking at expanding into the Austin schools as well.
- The Society is working with the Texas State Historical Association to sponsor the Larry McNeill Research Fellowship in Texas Legal History. This \$2,500 fellowship is awarded annually for the best research proposal on some aspect of Texas legal history. Applications are being accepted through October 16, 2020. The link to the page for the Fellowship on the TSHA site is [here](#).
- In addition to preserving the judicial portraits for the Texas Supreme Court, the Society has agreed to fill that same function for the First and Fourteenth Courts of Appeals.

This year is a great example of John Lennon's saying that "life is what happens to you while you're busy making other plans." Together, we can have a year that is even better than what we were otherwise planning.

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Sharon Sandle

Courting Necessary Trouble: The Art of Conflict Resolution and the Pursuit of Justice

No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as if a manor of thy friend's or of thine own were; any man's death diminishes me, because I am involved in mankind, and therefore never send to know for whom the bell tolls; it tolls for thee.¹

No man is an island/entire of itself." The poet John Donne wrote this line during a time when a plague afflicted England and when he himself suffered from illness. Written almost four hundred years ago, these words still resonate today. It seems ironic to insist that none of us are alone in a world where "social distancing," a term that didn't exist last year, is now a ubiquitous, even imperative, statement. We live in a time when many people have never felt so alone. But the human desire to be connected is obvious everywhere you look. Our constant videoconferencing with colleagues, friends, and family; our obsessive absorption of news media and social media; even the instances of our obstinate refusal to just stay safe at home illustrate the human desire to connect with each other, to be a community. The desire to be "[a] part of the main."

That impulse to involve ourselves in the lives of others is a driving force behind the work of lawyers and judges. The work of navigating the law may appear on its face to be a dry occupation, one that involves wading through volumes of text and disentangling complex legal concepts. Those are the daily tasks that make the law a difficult and demanding undertaking. But the work of a lawyer or a judge is much more than that. It involves taking on the questions, conflicts, and problems of others and taking responsibility for working towards a solution. It involves listening to the perspective of another person, even if that perspective differs from your own, and trying to understand that person's situation. It involves meeting the issues that face the community head on, one by one, and believing that making a difference in that case, for that client, makes a difference for us all.

This issue of the Journal looks at the law from this perspective by looking at some of the hard cases that challenged our state and the lawyers and judges who were willing to take on those challenges. Whether a political controversy over an election or the crisis of a pandemic,

¹ John Donne, "Meditation 17", *Devotions Upon Divergent Occasions*, 1623.

difficult questions involve conflict, and resolving those conflicts requires the willingness to wade into that conflict. The articles in this issue explore how the courts have dealt with controversies that consumed the attention of the public and passions of the moment and that ultimately made their way into the courts for resolution.

We live in an age of crisis, conflict, and, sometimes, fear. But it is not the first such age. U.S. Rep. John Lewis advocated in his speech to graduates of Bates College in 2016 “[Y]ou must find a way to get in the way and get in good trouble, necessary trouble. ... You have a moral obligation, a mission and a mandate, when you leave here, to go out and seek justice for all.”² This mandate to seek out conflict is a mandate to connect, not just to the problems of the age, but to the people around us as well. At our best, Texas lawyers and judges seek out conflict but treat each other and those who come before the court with the decency and respect that fosters resolution and that fosters justice. Although as lawyers we may not always rise to this ideal, we should be striving for it, and we should reflect on our past efforts and what we can learn from them and apply to the issues of this moment. For, as John Donne reminds us, we are all involved in humankind, *“Therefore, send not to know for whom the bell tolls, it tolls for thee.”*

² <https://www.bates.edu/news/2016/05/29/civil-rights-hero-john-lewis-to-class-of-16-get-in-trouble-good-trouble/>

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Fellows Column

By David J. Beck, Chair of the Fellows

Photo by Alexander's Fine Portrait Design-Houston



Now that we have completed our third Taming Texas book, *The Chief Justices of Texas*, which contains interesting stories about the twenty-seven Chief Justices of the Supreme Court of Texas, we are already planning the next book. Jim Haley and Marilyn Duncan, the authors of all three prior Taming Texas books, have just begun work on the fourth book in the series. That book will be entitled *Women in the Law* and will feature stories about some of the important women in Texas legal history. We would like to thank both Jim and Marilyn for their exceptional work on these excellent books.

The Houston Bar Association (HBA) will again use our Taming Texas materials to teach students during the 2020-21 school year. We appreciate the HBA and its President, Bill Kroger, partnering with us on Taming Texas again this year. It takes over a hundred volunteers to reach the thousands of students we teach each year, and we could not implement this vast program without the HBA's unprecedented support. In the past five years, Taming Texas has reached over 21,000 Houston-area students. HBA President Kroger has appointed Society Trustee Judge Jennifer Walker Elrod and Richard Whiteley as the HBA program co-chairs to recruit volunteer attorneys and judges to teach the seventh-grade students in the upcoming school year. If you would like to participate in this important program, please contact the HBA or one of the co-chairs.

We were saddened that, because of the school closings due to the pandemic, we had to cancel this year's program. We are monitoring developments and hope to be able to teach in the classroom in Spring 2021. We are exploring ways to take Taming Texas online so teachers can use it as part of their virtual curriculum.

The Taming Texas program had expanded to Dallas and we were in the process of expanding the program to Austin before the school closures. We appreciate the efforts of Fellow Ben Mesches who is working with the Dallas Bar Association to expand our program even more in the Dallas schools. In addition, the State Bar Judicial Section, coordinated by Judge Andy Hathcock, is partnering with us to provide judges for our program. Fellow Marcy Greer is working with Austin Bar Association Immediate Past President Todd Smith to implement the program in Austin schools. We plan to expand the program to San Antonio and South Texas in the near future. Justice Brett Busby and Fellow Warren Harris are coordinating our Taming Texas statewide efforts and our expansion to other Texas cities.

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

Finally, we are in the process of considering future projects. Please share with us any suggestions you may have.

If you would like more information or want to join the Fellows, please contact the Society office or me.

FELLOWS OF THE SOCIETY

Hemphill Fellows

(\$5,000 or more annually)

David J. Beck*

Joseph D. Jamail, Jr.* (deceased)

Richard Warren Mithoff*

Greenhill Fellows

(\$2,500 or more annually)

Stacy and Douglas W. Alexander

Marianne M. Auld

S. Jack Balagia

Robert A. Black

Hon. Jane Bland and Doug Bland

E. Leon Carter

Kimberly H. and Dylan O. Drummond

Michael Easton

Harry L. Gillam, Jr.

Marcy and Sam Greer

William Fred Hagans

Lauren and Warren W. Harris*

Thomas F.A. Hetherington

Jennifer and Richard Hogan, Jr.

Dee J. Kelly, Jr.*

Hon. David E. Keltner*

Kristen LaFreniere

Thomas S. Leatherbury

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Mike McKool, Jr.*

Ben L. Mesches

Nick C. Nichols

Jeffrey L. Oldham

Hon. Harriet O'Neill and Kerry N. Cammack

Hon. Thomas R. Phillips

Hon. Jack Pope* (deceased)

Shannon H. Ratliff*

Harry M. Reasoner

Robert M. (Randy) Roach, Jr.*

Leslie Robnett

Professor L. Wayne Scott*

Reagan W. Simpson*

Allison Stewart

Kristen Vander-Plas

Peter S. Wahby

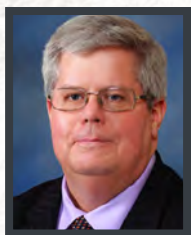
Hon. Dale Wainwright

Charles R. Watson, Jr.

R. Paul Yetter*

*Charter Fellow

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John G. Browning

a blind Goddess

On a regular basis, I deal with the quizzical looks or comments from colleagues when I mention my passion for history, and legal history in particular. “How can that possibly be relevant to or helpful in your practice?” they wonder. But in fact, history—and the study of history—is more germane than ever to what we do as lawyers and to what we are currently witnessing in society.

Consider, for example, one of the decisions handed down in the U.S. Supreme Court on the last day of its recent term, *McGirt v. Oklahoma*. The 5–4 decision was a surprise to many legal observers, and it held that the prosecutions of Native Americans who commit crimes on Indian reservations fall under federal, not state, jurisdiction. It also held that the eastern half of Oklahoma—3 million acres of land that encompasses the city of Tulsa—was considered Native American land for purposes of federal criminal law. Justice Gorsuch, writing for the majority, began his opinion by deliberately invoking the tragic history of Native Americans and their treatment by the U.S. government:

On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever.

Justice Gorsuch’s allusion to history was no accident, but a reflection of the legal strategy of the Creek Nation’s victorious attorney, Riyaz Kanji, who called historical research pivotal to the outcome. “Clearly it’s a case grounded in history,” Kanji says. “When we came into the case in the Tenth Circuit, we pretty quickly realized the only way to win the case was to really tell the story of the Creek treaty history, stretching back to the Trail of Tears. . . We had lawyers playing the role of amateur historian and researching like crazy and then we brought in historians to help us dig through materials.”

The articles in this issue of the Journal also reflect how much the events of the past resonate with our experience in the present. Stephen Pate’s article on how the pandemic of 1918 impacted the Texas legal system offers valuable insight into our current efforts to cope with the societal effects of Covid-19. With the twentieth anniversary of the U.S Supreme Court’s decision in *Bush v. Gore* looming, Judge Mark Davidson’s article “Who is Governor? The Texas Supreme Court Decides”

reminds us of the five times in Texas history that our state's highest court has been called upon to decide gubernatorial elections. Meanwhile, Justice Ken Wise's article "District of Brazos: The Republic's Secret Court" shares the fascinating history of how it all began with Texas' first court. Finally, with Independence Day celebrations still fresh in our minds, David Furlow concludes his wonderful three-part series on "New England Influences on Texas Law." In this final installment, we learn about the New England influences on such figures as Asa Brigham (the Republic of Texas' first Treasurer) and Anson Jones (the Republic's last President).

We are also privileged to feature a timely essay by Chief Justice Nathan Hecht of the Supreme Court of Texas, reflecting on the historic steps taken by the Court during this pandemic. The court system's twin priorities of staying open and staying safe have led to history being made, such as when the Supreme Court held oral argument via Zoom. Chief Justice Hecht's essay illustrates the resilience and leadership by the Court during these uncertain times.

History is indeed being made everywhere we look, and we need look no further than how recent Black Lives Matter protests across the country have revived debate over monuments and other institutional reminders of what many consider a painful and racist past. Here at the *Journal*, we hope to contribute to and help inform the discourse on how we learn from the racial injustices of the past by devoting our Fall issue to Texas' place in civil rights history. How one views the legal system is indelibly colored by one's experience with it, a fact that Langston Hughes reminds all of us of in his short poem "Justice," words that though written in 1923 still have meaning today:

*That Justice is a blind goddess
Is a thing to which we black are wise;
Her bandage hides two festering sores
That once perhaps were eyes.*

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District of Brazos: The Republic's Secret Court¹

By Hon. Ken Wise²

From the glorious victory at San Jacinto until her first congress convened in December 1836, Texas was a land without (much of) a government. The March 1836 Convention had elected a Provisional Government, as revolutionary movements often do. But after the fall of the Alamo and subsequent Goliad massacre, the fate of Texas was very much in doubt. Any purported Government governed with imperfect authority at best.

The success at San Jacinto meant that the new Republic of Texas needed to turn its attention to international relations. It became critical to the viability of the Republic to establish a functioning government. Events that occurred shortly before the battle of San Jacinto required immediate government action. In fact, the new republic had to scramble to establish some sort of legitimate justice system before the first congress of a newly independent Texas could even convene. It all began with a Texian naval victory in April 1836.

The Capture of the *Pocket*

April 3, 1836 dawned with the Texian Navy schooner *Invincible* patrolling the mouth of the Rio Grande. Commanded by Captain Jeremiah Brown, the *Invincible* was blockading the port at Matamoros³. A brig named the *Pocket* fell in with the *Invincible* but refused to show her papers when boarded by the Texians. Captain Brown soon discovered that her cargo did not match her manifest. Her cargo included dispatches to Santa Anna with intelligence on Texian naval strength. Also on board was a map of the entire Texas coast highlighting Texian vulnerabilities. The *Pocket* also transported powder, ammunition and military stores for the Mexican Army⁴. Brown seized the *Pocket* and sailed her to Galveston, where the Provisional Government had located after fleeing the advancing Mexican army.

The capture of the *Pocket* generated much excitement among the Texians. President David Burnet issued a public proclamation that the capture of the *Pocket*, "is not only highly beneficial to Texas by furnishing us with a large supply of provisions but by crippling the operations of

¹ This article is based on a presentation at the Society's joint session at the 2020 Annual Meeting of the Texas State Historical Association in Austin in February 2020.

² The author wishes to thank Michael Bailey of the Brazoria County Archives for his assistance in locating many of the 1836 records consulted and cited in this article.

³ C.T. Neu, "The Case of the Brig Pocket," *The Quarterly of the Texas State Historical Association* 12, No. 4 (Apr., 1909): 278

⁴ The supplies came in handy to the Texian Army at the battle of San Jacinto. Indeed, Judge B.C. Franklin likely transported some of the supplies to the Army personally. Benjamin C. Franklin, "The Battle of San Jacinto By One Who Fought In It," *Littell's Living Age*, September 7, 1844: 259.

the enemy..."⁵ He used the capture of the *Pocket* to encourage the population in the revolution, exclaiming, "the blood of our martyrs demands a speedy vengeance."⁶

While capturing a ship that is aiding the enemy is normal during the course of a war, the capture of the *Pocket* had a significant twist—the *Pocket* sailed under a United States flag. Interested parties in the United States were none too pleased with her capture. William Wharton, an agent for Texas in New Orleans, wrote to the Provisional Government on April 9, 1836, "There is some talk of piracy having been committed by one of our vessels. In the name of God let the act be disclaimed and the offenders promptly punished if such be the fact."⁷ An editorial in the New Orleans Bee declared, "It is high time that American commerce in the Gulf of Mexico should be protected from both Texas and Mexico..."⁸

Creating a Court

The Provisional Government immediately recognized the diplomatic problem posed by the capture of the *Pocket*. On April 9, 1836, prominent Texian Robert Triplett wrote to President Burnet, encouraging him to issue a decree establishing an admiralty court.⁹ Triplett stressed the importance of making the capture seem legitimate, "according to the law of Nations..."¹⁰ Triplett went so far as to suggest how an executive order might read should Burnet desire to create the court that Triplett recommended. Triplett suggested that, should anyone question Burnet's power to create the court, "the law of necessity, the strongest known to man, gives you the power."¹¹

Burnet understood that if Texas could at least appear to be functioning according to some sort of traditional legal process, perhaps the anger of interested parties in the United States could be partially alleviated. But whom to appoint Judge of the new court? Burnet wrote to James Collinsworth indicating the government had created a court and asking if Collinsworth would serve as the Judge.¹² Evidently Collinsworth turned down the position because on May 8, 1836, Burnet appointed Benjamin C. Franklin as the Judge of the District of Brazos.¹³

Benjamin C. Franklin had arrived in Texas from Georgia in 1835.¹⁴ He settled in Columbia and became an advocate for Texas independence.¹⁵ He served as a scout and messenger in the

⁵ John H. Jenkins (ed.), *Papers of the Texas Revolution*, 2666, Vol. 5, Pg. 398 (Presidial Press 1973).

⁶ *Ibid.*

⁷ Neu, "The Capture of the Brig Pocket," Pg. 281.

⁸ *Ibid.*

⁹ Neu, "The Capture of the Brig Pocket," 282.

¹⁰ John H. Jenkins (ed.), *Papers of the Texas Revolution*, 2666, Vol. 5, Pg. 412 (Presidial Press 1973).

¹¹ *Ibid.*, 413.

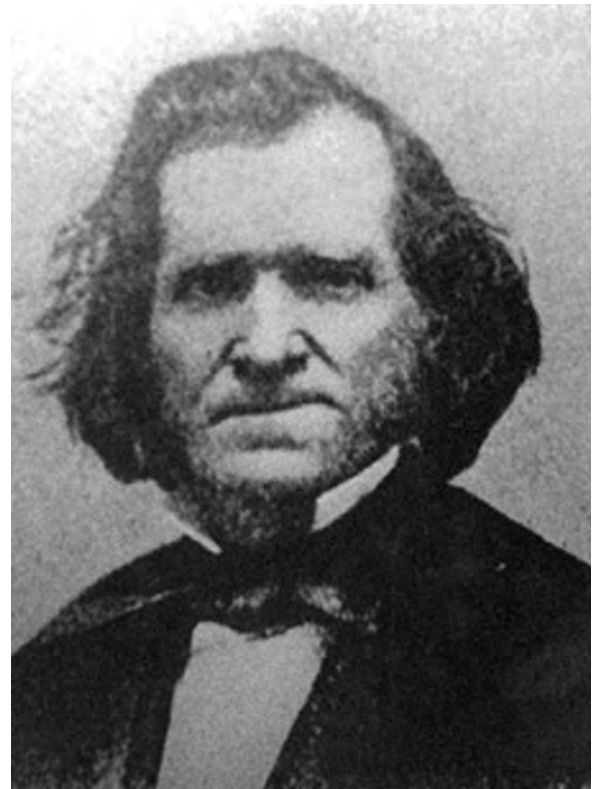
¹² Neu, "The Capture of the Brig Pocket," 282.

¹³ Executive Order, Benjamin Cromwell Franklin Papers, 1805-1915, Box 2D158, Dolph Briscoe Center for American History, The University of Texas at Austin.

¹⁴ Amelia M. Williams and Eugene C. Barker, *The Writings of Sam Houston*, Vol. 1, (1970), Pg. 484. Franklin had attended his namesake Franklin College in Athens, Georgia. His father had founded the school which eventually became the University of Georgia. Hon. Ken Wise, "Judge Benjamin Cromwell Franklin, the First Judge of the Republic of Texas", *Journal of the Texas Supreme Court Historical Society*, Vol. 5, No. 3 (Spring 2016), 11.

¹⁵ John Henry Brown, *History of Texas from 1685 to 1892* (St. Louis: L.E. Daniell, 1893), 430-431.

Texas Army during the march to San Jacinto.¹⁶ Two days before the battle of San Jacinto, Franklin was in Galveston, likely delivering dispatches from Houston to President David Burnet.¹⁷ Burnet appointed Franklin a Captain in command of some Galveston volunteers, as well as entrusting Franklin to deliver correspondence back to Sam Houston at San Jacinto.¹⁸ Franklin arrived at San Jacinto on April 20, the day before the battle.¹⁹ Having only a small command, Franklin decided to join Captain Robert Calder's infantry company as a private, but ended up assuming a command in Mirabeau Lamar's cavalry on the morning of the battle.²⁰ After the battle, Secretary of War Thomas Rusk charged Franklin with delivering the news of the Texian victory to the Provisional Government in Galveston.²¹ Franklin's education and background, as well as the fact that antagonists David Burnet and Sam Houston both relied upon Franklin, made him an excellent candidate for government service.



Franklin's appointment followed multiple correspondence between government officials contemplating the creation of an admiralty court, specifically. After all, an admiralty trial for the *Pocket* was the immediate need. Burnet's appointment order, however, says that Franklin holds the office with "all power[,] jurisdiction and emoluments by law pertaining to said office."²² Burnet's appointment did not limit



Two images of Benjamin C. Franklin

¹⁶ Stephen Moore, *Eighteen Minutes: The Battle of San Jacinto and the Texas Independence Campaign* (Lanham: Republic of Texas Press, 2004), 89. See Figure 2 on p. 13, a note from Sam Houston to James Collinworth and delivered by Franklin.

¹⁷ Benjamin C. Franklin, "The Battle of San Jacinto By One Who Fought In It," *Littell's Living Age*, September 7, 1844: 259.

¹⁸ *Ibid.*

¹⁹ Franklin, "The Battle of San Jacinto," 260.

²⁰ *Ibid.*, 262.

²¹ Charles W. Hayes, *History of the Island and City of Galveston* (Cincinnati: Jenkins Garrett Press 1974): 153.

²² Republic of Texas Claims, Benjamin C. Franklin Claim No. 1, accessed online at https://www.tsl.texas.gov/apps/arc/replclaims/storage/republic_media/imgs/33/view_03300103.jpg.

Of course, the only "power," "jurisdiction," or "emolument" the office had was whatever Franklin could exercise because newly independent Texas had yet to pass her first law.

Franklin's jurisdiction only to admiralty cases.²³

A larger question is under what authority, if any, could Burnet legally establish a court? On March 17, 1836, the Convention at Washington on the Brazos adopted the first constitution for Texas. Article 4, Section 3 of that Constitution provides that the district courts shall have, "exclusive original jurisdiction" in "all admiralty and maritime cases, ..." ²⁴

In his letter to Collinsworth, however, Burnet wrote that "[T]he government has passed a decree to establish the district court."²⁵ This seems to indicate that there had been some sort of legislative action, but Burnet could have been talking about the adoption of the Constitution. In any event, the developing circumstances didn't afford a lot of time for deliberation.

Burnet later explained the urgent need for the creation of the Court. He addressed the first Congress of the Republic of Texas as follows:

The judicial department of the government is in a very imperfect state. By the constitution the old system is abolished and an entirely new judiciary created, but it was not considered advisable by the Executive government to make any further innovation upon the established courts, than necessity imperiously demanded. The courts were closed to civil business, and they were thought adequate to the conservation of the public peace of the country. But I am apprehensive that that opinion is illusory, and that a more energetic administration of criminal justice is indispensable. The increase of crime is an inevitable concomitant to an increase of population.

Under the existing system, there was no tribunal in the country vested with maritime jurisdiction, and consequently, none competent to adjudicate questions arising from the captures on sea. Some prizes had already been taken, and it was due to the character of the Navy and of the country, that a regular and lawful disposition should be made of them. The government therefore concluded to appoint a District Judge for the district of Brazos, within which it was probable all prizes taken would be brought, or to which they could be easily transported. I accordingly appointed Benjamin C. Franklin, Esq., to that office. It remains to the wisdom of congress to determine how soon the new organization shall be perfected.²⁶

Burnet's explanation of his reason for creating the court certainly indicates the desire for an admiralty court, even though the court was created with general jurisdiction. However, that desire was largely informed by an urgent need for a legitimate adjudication of the *Pocket*, given that the Texian Navy had committed an act of war against American shipping. There is not a remaining record of the trial, but Franklin held that the *Pocket* was properly captured as a prize of war.²⁷

²³ *Ibid.*

²⁴ Constitution of the Republic of Texas, Art. 4, Sec. 3, March 17, 1836, <https://tarltonapps.law.utexas.edu/constitutions/texas1836/a4>, accessed July 3, 2020.

²⁵ Neu, "The Case of the Brig Pocket," 282.

²⁶ Journal of the House of Representatives of the Republic of Texas, 1st Cong, 1st Session, Legislative Reference library, https://lrl.texas.gov/scanned/CongressJournals/01/HJournal1stCong_1.pdf, accessed July 3, 2020.

²⁷ Neu, Pg 283. A most practical ruling, since much of the Pocket's cargo had been fired at the Mexican Army on April 21, 1836.

Blankets
 Cloth for tents
 cheap ready made cloathing
 Thread Needles &
 cheap ropes or cords.
 Mustards
 Flour
 Rice
 Coffee
 Sugar
 Brandy or whiskey
 Shoes
 Cooking Utensils
 Knives & Forks - Tin pans and cups for
 a mess - coffee pot & spoons. -
 Maj. J. Collinsworth
 Comm^d at Washington
 Head Qrs of the Army
 7th April 1836
 Sir
 You will please permit Regimental Qr Master
 Winfield to forward the above articles to the Head
 Quarters of the Army -
 by order
 Sam Houston
 Comm^d in Chief
 Wm. H. Miller
 Esq. Secy.

Figure 2: A note from Sam Houston to James Collinsworth and delivered by Franklin.

The Court Continues to Operate

The case of the *Pocket* was not the only admiralty case adjudicated by Franklin as Judge of the District of Brazos. The now-famous story of Issac Burton and his “Horse Marines” led to the condemnation of other ships aiding Mexico.²⁸ Attorney Patrick Jack filed petitions to condemn two Mexican ships in the Court of the District of Brazos.²⁹ Interestingly, these petitions were signed by Jack as “Attorney for Brazos District,” indicating an official appointment of some sort, but none has been found to date. Those cases were, however, prosecuted to successful conclusion on behalf of the Republic of Texas.

The population of the fledgling Republic didn’t concern itself with questions of jurisdiction. Rather, people flocked to the court to conduct the normal legal business a growing population generates. One typical example of the type of matters important in the new country involved property deeds. Texas was, at the time, truly a nation of immigrants. Immigrants from the United States constituted most of the non-native population. While many who were already established in Texas fought for their freedom, many flocked to the fight on the promise of a land grant in exchange for military service.

In 1836, land meant wealth. You could produce from it, or you could sell it. Both were common in the new Republic. There are many stories of veterans receiving land certificates and almost immediately selling the grants to one of the many speculators ready to purchase them. Of course, if a man were killed during the revolution, his heirs would inquire as to his land grant, which lead to the involvement of lawyers and, naturally, the court.

A typical example is a deed from Texas veteran Leon Dyer to Grace Lyons.³⁰ Mr. Dyer served in the Texas Army from May to November 1836.³¹ His six months of service entitled him to a bounty of 640 acres. He transferred the property to Ms. Lyons “under the law ‘non numerate pecunia no entrego y prueba.’” This term of art translates roughly to a situation whereby the sale takes place without cash payment or the actual transfer of the documents. The deed memorialized an act that took place before the court was created. Such was the haste and informality with which so many land sales took place after the Texas revolution.

Another example is a September 3, 1836 letter to Judge Franklin from W.C. White. He writes to inform the Court that Mr. Peletin W. Gordon died intestate at the battle of the Alamo.³² Mr. White informs Judge Franklin that Gordon’s father wished Mr. White to “apply to your honour for letters.”³³ White also reveals that Gordon owed him money so it seems as though White may have

²⁸ The story of the Horse Marines can be found on the Wise About Texas podcast, episode 41 at <http://wiseabouttexas.com/ep-41-horse-marines/> as well as Mike Cox, *Texas Ranger Tales* (Connecticut: Lone Star Books, 2016), 2.

²⁹ Jack is well known for his activities with William Barrett Travis during the Anahuac Disturbances of 1832. Petition for condemnation of the *Watchman*, Benjamin Cromwell Franklin Papers, 1805-1915, Box 2D158, Dolph Briscoe Center for American History, The University of Texas at Austin.

³⁰ Deed from Leon Dyer to Grace Lyons, Benjamin Cromwell Franklin Papers, 1805-1915, Box 2D159, Dolph Briscoe Center for American History, The University of Texas at Austin.

³¹ *Ibid.*

³² Letter from W.C. White to B.C. Franklin, September 3, 1836, Group I, No. 141, Brazoria County Archives.

³³ *Ibid.*

been the one pressing matters.³⁴ In any event, Mr. White's application was apparently successful because Franklin appointed him the administrator of Gordon's estate.³⁵

One deed remains that gives some indication that prominent Texas officials recognized the Court's authority in fact, if not in law. Republic of Texas provisional Vice President Lorenzo de Zavala sold a half-league of land on the San Jacinto River to Secretary of War Maribeu B. Lamar, the location of which was to be agreed upon by their sons.³⁶ That particular deed contained a warranty clause that served as a kind of title insurance policy for \$5000.00, a significant sum in 1836.³⁷ One can only speculate that this instrument may have settled some sort of dispute between De Zavala and Lamar.

Judge Franklin's "memorandum book," a sort of ledger, sheds some light on how the Court conducted business. To understand the entries, one must first understand how the *alcalde* system functioned in pre-revolution Texas. Under this system, a municipality was headed by an *alcalde* who served as a mayor, sheriff or judge, depending on the need. Legal disputes were subject to the decision of the *alcalde*.

The *alcalde* was entitled to collect fees for his services. On January 22, 1824, Stephen F. Austin promulgated a series of civil regulations which included a fee schedule for an *alcalde*'s services.³⁸ For example, under Austin's regulations, the *alcalde* was entitled to "4 bits" for issuing a criminal warrant, and "8 bits" for entering an appeal and writing the appeal-bond.³⁹

It appears as though Judge Franklin conducted his Court under this system. His memorandum book reflects, for example, that on October 29th, 1836 he issued a "certificate of citizenship" to Peter Griffin and charged him \$2.00.⁴⁰ That same day, Franklin collected \$1.00 from Thomas [last name illegible] for "writing affidavit and adm. of oath."⁴¹

Larger sums were collected for other services. Franklin charged J.M. Lyons \$10.00 for "powers of attorney and transfer of certificates."⁴² He charged another \$10.00 to J.C. Haskins as administrator for William Brown for letters of administration.⁴³ Both those charges were also on October 29, 1836, a busy and lucrative day for Judge Franklin.

³⁴ *Ibid.*

³⁵ Walter C. White, Administrator's Notice, *Telegraph and Texas Register*, (Columbia, Texas), November 9, 1836.

³⁶ Copy of Deed from Lorenzo de Zavala to Mirabeau B. Lamar, Benjamin Cromwell Franklin Papers, 1805-1915, Box 2D159, Dolph Briscoe Center for American History, The University of Texas at Austin.

³⁷ *Ibid.*

³⁸ Guy M. Bryan, "Official Documents, Laws, Decrees, and Regulations Pertaining to Austin's Colonies," in *A Comprehensive History of Texas*, ed. Dudley G. Wooten (Dallas: William G. Scarff, 1898), 486.

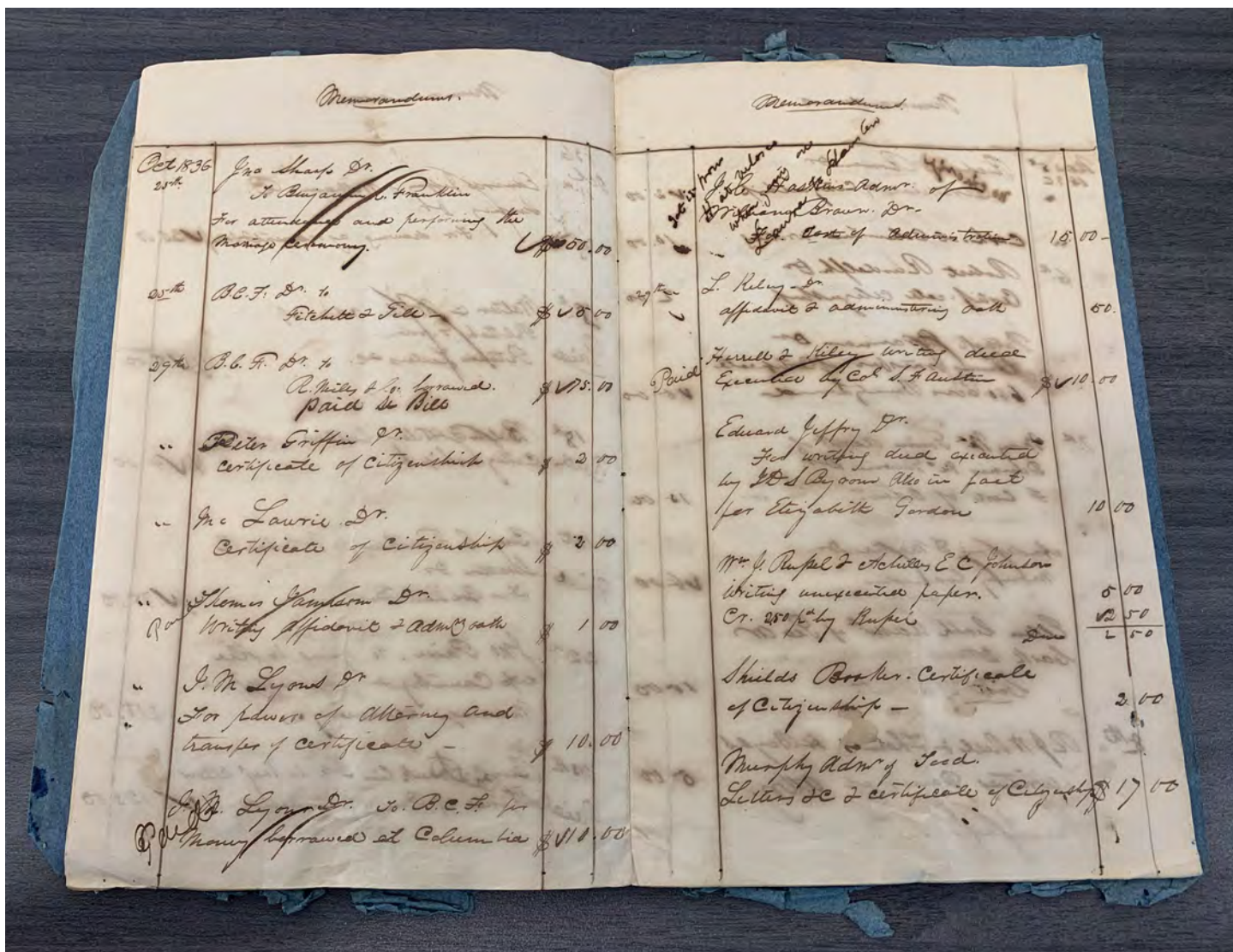
³⁹ *Ibid.*

⁴⁰ B.C. Franklin Memorandum Book, Benjamin Cromwell Franklin Papers, 1805-1915, Box 2D159, Dolph Briscoe Center for American History, The University of Texas at Austin. A \$2.00 fee would be approximately \$47.00 today.

⁴¹ *Ibid.*

⁴² *Ibid.* Approximately \$235.00 today.

⁴³ *Ibid.*



Two pages from Franklin's memorandum book.

Conflict of interest rules as well as anything resembling a code of judicial conduct were, of course, non-existent in the new Republic. All agree that Judge Franklin served honorably and without blemish, but certain entries would raise modern eyebrows. For example, on that same October 29, 1836, Franklin charged "Herrell & Kiley" \$10.00 for writing a deed that Stephen F. Austin executed to that party, presumably for a land grant or sale.⁴⁴ That deed, of course, would be filed with Judge Franklin for approval, as so many others were.

One interesting event occurred on November 8, 1836. On that day he records a wedding fee of \$50.00 for performing the wedding of "Col. Eberly."⁴⁵ This was the wedding of Jacob Eberly and Angelina Peyton.⁴⁶ They would go on to open the "Eberly House" in Austin. During his second term as

⁴⁴ *Ibid.*

⁴⁵ B.C. Franklin Memorandum Book, Benjamin Cromwell Franklin Papers, 1805-1915, Box 2D-159, Dolph Briscoe Center for American History, The University of Texas at Austin. The wedding fee amounts to a stunning \$1,300.00 today! Perhaps Judge Franklin recorded an extra zero.

⁴⁶ Wedding Notice of Col. Eberly and Mrs. A.B. Peyton, *Telegraph and Texas Register*, (Columbia, Texas), November 9, 1836.

president, Sam Houston resided at Eberly house, rather than what passed for an executive mansion. From Eberly house, Angelina heard the commotion that led her to fire a cannon at a team of men intending to take the Texas governmental records to Houston—the famous “archives war.”⁴⁷

The Court also handled criminal matters. One record indicates two individuals, James Neil and John Chaffin, were indicted for assault in the District of Brazos.⁴⁸ They were ordered brought to a “store” or “stone” house owned by Walter C. White, since no jail yet existed.⁴⁹ No record of the disposition of the case survives.

On August 25, 1836, Judge Franklin tried John Dougherty on a charge of larceny.⁵⁰ Mr. Dougherty robbed his “brother-soldier” John Shuck of \$35.00 by cutting the pockets out of Mr. Shuck’s pants while he slept.⁵¹ Mr. Dougherty was convicted, and Judge Franklin sentenced him to receive 40 lashes, stand for 2 hours in public view, plus court costs.⁵² The newspaper reported that, “[t]he sentence was immediately carried into execution.”⁵³

One important quasi-criminal matter involved the plot to free Santa Anna from his captivity near Columbia after the battle of San Jacinto. Once the plot was discovered, Bartolomé Pagés, one of the alleged co-conspirators, filed a sworn statement before Judge Franklin as to the events surrounding the plot.⁵⁴ Using the Court for this diplomatic matter reflects the fact that Judge Franklin presided over essentially the only functioning “official” department in the new Republic of Texas.

Apparently, Judge Franklin’s appointment was not well publicized. On May 15, 1836, James Bradley died “in a ‘tent,’ at Harrisburg.”⁵⁵ A Mr. W. Scott claimed to have been appointed administrator of Bradley’s estate by, “the Judge of the Jurisdiction of the county of Harrisburg.”⁵⁶ When Scott visited the house where Bradley died, presumably to take custody of his possessions, the owner informed him that the day before, two individuals had appeared with an appointment from Judge Franklin.⁵⁷ Mr. Scott derided these individuals who purported to show authority, “emanating in some way from David G. Burnet...”⁵⁸ Mr. Scott promised to file legal proceedings

⁴⁷ C. Richard King, “Eberly, Angelina Belle Peyton,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/feb02>, accessed July 03, 2020.

⁴⁸ Indictment of James Neil and John Chaffin, Records of Brazoria County District Clerk, Microfilm Box “Old Papers 1800’s” Roll No. 771, Title 11/17/77.

⁴⁹ *Ibid.*

⁵⁰ Police report, *Telegraph and Texas Register*, (Columbia, Texas), November 9, 1836.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *The Papers of Mirabeau Buonaparte Lamar*, Mirabeau Buonaparte Lamar; Charles A. Gullick, Jr. and Katherine Elliot, eds. (Austin, Tx, Texas State Library / Von Boeckmann-Jones Co., 1923), No. 440

⁵⁵ Notice of Alexander Russell, *Telegraph and Texas Register*, (Columbia, Texas), September 27, 1836.

⁵⁶ Notice of W. Scott, *Telegraph and Texas Register*, (Columbia, Texas), September 20, 1836.

⁵⁷ *Ibid.* The two individuals were Mr. Russell and Sherrieff R. J. Calder, Judge Franklin’s company commander at the battle of San Jacinto. It is unknown under what authority Calder was claiming the title of “sheriff.”

⁵⁸ *Ibid.*

against those interfering with his authority as administrator, “so soon as there are courts in which redress can be had for such lawless proceedings...”⁵⁹ Mr. Scott’s disappointment would have been complete when he read the October 11, 1836 edition of the *Telegraph*, which reprinted Burnet’s address to the first Congress of the Republic of Texas.⁶⁰ In that address, Burnet confirmed the creation of the Court of the District of Brazos.⁶¹

The first Congress of the Republic of Texas met in Columbia and, among other actions, established the court system under the Constitution as approved by the voters in September 1836. It created four judicial districts. Judge Franklin was named Judge of the 2nd District which included Brazoria and Harris counties. The first minute book of Brazoria County reflects several cases that were commenced in the District of Brazos and simply continued in the 2nd Judicial District Court. The transition was seamless, apparently, and I have found no challenges to the validity of any of Judge Franklin’s rulings before his appointment as a regular judge of the Republic. On June 12, 1837, the Congress of the Republic issued a Joint Resolution approving a District Judge’s salary in payment to Judge Franklin for his service as the Judge of the District of Brazos.⁶²

An organized society needs a system of justice. The peaceful adjudication of civil disputes, as well as the protection of the public from crime, necessitate the establishment of courts. While the newly independent Republic of Texas could have probably functioned under its existing Mexican system until the Congress convened in late 1836, actions during the war made it imperative to establish a court with admiralty jurisdiction. That urgency was more a matter of international relations than justice. Nevertheless, the Court of the District of Brazos served as an important step for the fledgling republic toward a system of justice more familiar to the majority of its citizens—and a sign to the world of the viability of the new Republic of Texas.

⁵⁹ *Ibid.*

⁶⁰ Message of the President, *Telegraph and Texas Register*, (Columbia, Texas), October 11, 1836.

⁶¹ *Ibid.*

⁶² Joint Resolution for the Relief of the Hon. B. C. Franklin, *Laws of the Republic of Texas*, (Houston: Texas Secretary of State, 1838), 276.



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Who Is Governor? – The Texas Supreme Court Decides¹

By Judge Mark Davidson

All of us remember the December 2000 opinion of the United States Supreme Court in the case of *Bush v. Gore*.² The justices were required to decide who would receive Florida's Electoral College votes, and become president, in a nation that was (and remains) evenly divided. The opinion has been called "unprecedented." But scholars of Texas Supreme Court history know that it was *not* unprecedented. Five times in Texas history, our Supreme Court has been called upon to decide the governor's election. In each case, the court acted quickly and decisively. In three of the cases, the court clearly acted without regard to politics. In two others, it is possible that the reality of our judges being elected on the same ballot as other officials or knowing the candidates on a personal basis might have influenced some of the justices.

***Ex parte Rodriguez* - 1874³**

This is the most cussed and discussed case of its time, and it has led to the historic denigration of the court that issued the opinion as "The Semicolon Court."⁴ I believe that the case was correctly decided within the law and also that the case represents a sad time in Texas history.

Reconstruction Republicans had run Texas government since the end of the Civil War, largely because anyone who had taken an oath of allegiance to the Confederacy was prohibited from voting. That effectively limited the franchise to male "Carpetbaggers", "Scalawags" and former slaves, all of whom were overwhelmingly Republican. Women were not eligible to vote.

After Governor Edmund J. Davis and all other Republicans received 30 percent of the vote, or less, in the 1873 election, the fun started. The defeat was predictable, because Congress had given ex-Confederates the right to vote in all elections that took place after the Amnesty Act of 1872.⁵ Most of the Republican incumbents in legislative, judicial and other local offices around the state shared the governor's electoral fate. One of the defeated officials was Harris County Sheriff A. B. Hall. On December 13th, Hall arrested Joseph Rodriguez (also known as José Rodriguez) on

¹ This article is based on a presentation at the Society's joint session at the 2020 Annual Meeting of the Texas State Historical Association in Austin in February 2020.

² 531 U. S. 98 (2000) (per curiam).

³ 39 Tex. 705 (1874).

⁴ See e.g. <http://www.tshaonline.org/handbook/online/articles/jps01>.

⁵ A General Amnesty Act of 1872 (17 Stat. 142).

a charge of voting twice in the election. On December 16th, a writ of habeas corpus was filed seeking Rodriguez's release from jail on the grounds that the 1873 election was void. Then all hell broke loose.

The legal basis of the petition originated in a bill the Republican legislature had passed in 1873.⁶ Before then, each county could have only one polling place. To prevent towns outside the county seat from having to shut down on election days, elections took place over a four-day period. The 1873 bill, which Governor Davis signed, allowed polling places outside of the county seat of each county and mandated that the 1873 election would take place in one day. This was not unreasonable, because the justification for having a four-day polling period was the inaccessibility of the polls for many farmers. The question raised in the petition was whether the statute ran afoul of Section 6, Article 3 of the Texas Constitution, which said:

All elections for state, district and county officers shall be held at the county seats of the several counties, until otherwise provided by law; and the polls shall be opened for four days, from 8 o'clock A. M. until 4 o'clock P. M. of each day.⁷

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

The Democrats smelled a rat. They quickly concluded that the charges were trumped up to enable Sheriff Hall and other Republicans, including Governor Davis, to stay in office by setting aside all election results. They presented the court an affidavit signed by George Goldwaithe, a prominent (Democratic) lawyer from Houston, who swore that he had been told by Geronimo Perez that Rodriguez had been employed by Sheriff Hall and was being paid one hundred dollars a month to sit in jail. The newly elected District Attorney of Harris County, Frank Spenser, a Democrat, told the court that he would not prosecute Rodriguez, because there was no evidence he had voted once, let alone twice. This statement was double hearsay being offered for the truth of the matter asserted, and would not have been admissible in any court in the land. But it fueled Democratic suspicions.

The district attorney quickly filed a motion to dismiss the application for the writ. He told the court that the Harris County Grand Jury would not indict Rodriguez. The district attorney, who ordinarily would try to prove that an offense took place, presented affidavits from four people that Rodriguez had not voted. The attorneys representing Rodriguez, who ordinarily would try to prove him innocent of those charges, responded with affidavits from three people – Charles Wilson, John Limas and William House – attesting that they had seen Rodriguez vote twice.

The Court made a note that Wilson was "of African descent" and that House, who was

⁶ Section 12 of Election Act of March 31, 1873.

⁷ Texas Constitution of 1866, Sec.6, Art 3.

from Austin, claimed to have been in Houston on Election Day after voting in Austin. Bear in mind that this was before Southwest Airlines flew or Highway 71 opened. Neither Rodriguez's name nor signature was on the list of voters; the clerk of the Supreme Court, W. P. DeNormandie, examined the poll list and reported to the Court that Rodriguez's signature appeared not at all. The arguments before the Supreme Court of Texas all but ignored Rodriguez, who was sitting in jail. (If he was, in fact, getting paid \$100 a day for sitting in jail, he was getting paid more than President Grant.) The next day, the court, in an opinion by Judge J. D. McAdoo, issued a ruling that ignored the claim that this was a trumped up claim brought for political ends, except to note that Rodriguez was without any doubt in jail. The court reviewed the many precedents, starting with *Marbury v. Madison* and many other state precedents, and ruled that the Texas Supreme Court had the ability to declare an act of the Legislature unconstitutional.⁸ It declared that the statute allowing a one-day election was contrary to the requirement of the Constitution and ordered Rodriguez released. What happened to Rodriguez after that is lost to history.

The opinion was denigrated from the moment it was issued. The Democratic candidates that had been elected ignored the opinion, because they were not parties to the case, and were sworn in. Richard Coke, the Democratic candidate for governor, took office and ruled from the first floor of the Capitol. Governor Davis declined to leave office and ruled from the second floor of the Capitol. The standoff continued until President Grant declined to send federal troops to remove the Democrats from the first floor. In all probability, the supply of whiskey ran out on the second floor as well. Davis vacated the premises, and the new Democratic legislators, calling themselves the Redeemers of Texas, swore themselves in.

Reasonable minds can differ on the merits of the *Ex Parte Rodriguez* or Reconstruction, but we can agree today that a crowd disregarding a decision of a court is unacceptable in a nation or state governed by the rule of law.

Maddox v. Ferguson (1924)⁹

The next three cases involve the man, and somewhat tangentially, the woman, who dominated Texas politics from 1914 until 1933 – James A. Ferguson and his wife, Miriam Amanda “Ma” Ferguson.

Ferguson was perhaps the most loved and hated figure in Texas political history. Very few Texas voters were neutral on his merits. Among the many groups he alienated were educators, University of Texas alumni, advocates for women's suffrage, prohibitionists and residents of the state's growing cities. Elected in 1914 and reelected in 1916, he was impeached in 1917. The night before the final vote on his removal from office, but after he had been found guilty of ten of the twenty-one counts of misconduct by the Texas Senate, he resigned from office. Notwithstanding his resignation, the Texas Senate voted to remove him from office and prohibit him from holding public office in Texas again.¹⁰

⁸ *Rodriguez*, at pp.751-772.

⁹ 263 S. W. 888, 114 Tex. 185 (Tex 1924).

¹⁰ Minutes, Impeachment Trial of James A. Ferguson, pp. 853-854.

Ferguson did not see the Senate's action as ending his political career. In 1918, he ran against his successor, Governor William P. Hobby. He was unsuccessful. In 1920, he ran for President of the United States, appearing on the ballot only in one state – Texas. He did not do well. In 1922, he challenged Senator Charles Culberson's re-election. He defeated Culberson and made the runoff but lost to Ku Kluxer Earle B. Mayfield. In 1924, he decided to run for governor again. Governor Pat Neff had announced that he would not seek a third term.¹¹

John Maddox, a Houston voter, filed a lawsuit seeking to prohibit Ferguson's name from appearing on the ballot. The argument was that because Ferguson had been prohibited from serving as governor, his name could not appear on the ballot for the office.

Ferguson responded in four ways:

- 1) He, Ferguson, had not included his own impeachment in the agenda for the special session in which he had been impeached and removed. Therefore, the act was a nullity.
- 2) Ferguson had resigned; therefore he could not be removed from office.
- 3) Because the act of conviction was quasi-criminal, he could not be removed; removal from office was not one of the penalties for violating any of the statutes he had been convicted of violating.
- 4) Neither the state constitution nor the statute gives the Senate the power to prohibit the governor from regaining office following an impeachment trial.

All four of Ferguson's arguments were rejected. Broadly stated, the opinion stated that the Senate was sitting in the context of a judicial proceeding and not a legislative one during an impeachment trial, and that temporal or other restrictions on its ability to sit or consider questions were not applicable. Therefore, the court reasoned, neither inclusion of impeachment in the call nor the time limitations on special sessions was applicable. As to the penalty assessed by the Senate, the judges ruled that the senators' powers were broad and not subject to appeal because the Senate was the ultimate body empowered to hold an impeachment trial. James Ferguson was therefore prohibited from running for governor and was removed from the ballot.

Dickson v. Strickland (1924)¹²

After James Ferguson was delisted, a new candidate appeared at Democratic headquarters to file – Miriam Amanda Ferguson, the former first lady of Texas. The gubernatorial ballot was long that year – nine people had filed. A new force had entered Democratic Party politics – the Ku Klux Klan. The Klan had recruited a slate of people to run for office statewide and locally. Its candidate for governor was District Judge Felix Robertson of Dallas. A number of other candidates ran, including Lieutenant Governor T. Whitfield Davidson, former Lieutenant Governor Lynch Davidson, and State Senator Andrew Jackson Pope, uncle of a future chief justice. No one anticipated Mrs. Ferguson's candidacy, and few saw her as a credible threat. She was, after all, a woman. Until the votes were counted. Felix Robertson led the race with 27% of the vote, and Mrs. Ferguson got 20%. The Davidsons had made attacks on each other; and eliminated each other from the runoff.

¹¹ No Texas Governor would seek more than four years on the job until Allan Shivers in 1954.

¹² 265 S. W. 1012; 114 Tex. 176 (Tex 1924).

Lynch Davidson received 19.9 percent of the vote but missed a runoff by less than 5,000 votes.¹³ In the runoff, all the support for all of the other candidates went to Ferguson and against the Klan candidate, and she won the Democratic nomination for governor going away.

Mrs. Ferguson had stated throughout the race that her husband would be “her number one advisor” and nothing else. Their “newspaper” – the Ferguson Forum –said that if Miriam were elected, the people of Texas would get “Two Governors for the Price of One!”

In early October, San Antonio lawyer Charles M. Dickson brought a lawsuit seeking to prevent Mrs. Ferguson’s name from appearing on any ballot. The lawsuit was brought in Bexar County.

The grounds of the lawsuit were:

- 1) Mrs. Ferguson was a woman, and therefore ineligible to be governor.
- 2) As a married woman, Miriam Ferguson could not serve, because she was the property of her husband under the common law principle of coverture.
- 3) James Ferguson had been rendered ineligible to serve in any public office. Because his wife would draw the salary of the governor, he would receive money from the state as part of his community property.
- 4) Jim Ferguson was going to be the real governor if she were elected, and he had been declared ineligible to serve.

The Supreme Court considered these arguments, first deciding that Mr. Dickson had no standing to bring the suit. But the court went on to carefully analyze each argument, probably unnecessarily. In doing so, the judges almost certainly went into a lot of dicta not necessary to determine the case. They gave an analysis of the history of women’s rights in Texas and determined that women had equal rights to run for office. There were a number of women serving as district or county clerks in Texas counties at the time, and a contrary opinion would have caused disruption around the state. Furthermore, Annie Webb Blanton had been elected state superintendent of schools in 1918, and no one had claimed her ineligible to serve.

Only slightly more troublesome was the argument regarding the language of Section 4 of Article 4 of the Texas Constitution which stated the qualifications of the governor:

He shall be at least 30 years of age, a citizen of the United States, and shall have resided in this state at least five years immediately preceding his election.¹⁴

The argument made was that the word “He” implied a requirement that all governors must be male. The Court’s response was outstanding. First, it stated that in this context, the word “He” must include persons of both genders and cited cases from around the nation so holding. The opinion then cited provisions of Section 10 of Article 1, relating to the rights of an accused in criminal cases:

¹³ No relation to your author.

¹⁴ This article was not amended to remove the word “He” until 1967.

*He shall have the right to demand the nature and cause of the accusation against him...
He shall not be compelled to give evidence against himself, etc. (Italics in original)*¹⁵

If followed, Dickson's argument would either make criminal prosecution of women unconstitutional or would take away basic rights of the accused in criminal cases from all women.

To prove that Mrs. Ferguson's candidacy was a subterfuge to put an impeached and disqualified person back in the Governor's mansion, the plaintiff had offered flyers and brochures distributed by the Fergusons. Declining to serve as a jury in a disputed question of fact, no matter how true, the court succinctly ruled:

After carefully considering the circular and articles, we conclude they negative the claim that Mrs. Ferguson was not the real candidate for Governor, and are wholly insufficient to establish as a matter of law any conspiracy to use her name as a subterfuge to escape the effect of the impeachment decree.¹⁶

The impartiality of Justice Greenwood, author of the opinion, is noteworthy. The same court that ruled five months before that Jim Ferguson could NOT serve as governor now ruled that his wife could do so. This fact alone speaks volumes about the integrity of the court and its justices.

Sterling v. Ferguson (1932)¹⁷

Governor Ma Ferguson would serve one term and was defeated in the 1926 election by Attorney General Dan Moody. In 1930, she (along with her primary political adviser) decided that it looked like a good year for Fergusonism. Although she led the first primary, she did not get a majority. In the runoff, the second place finisher, Ross Sterling, decisively defeated her.

She (actually, he) saw the election results as a minor detour. In 1932, she ran again, on a platform that, in part, blamed the worldwide Great Depression on Governor Sterling – quite a compliment to Sterling's power in what had traditionally been thought of as a weak gubernatorial system. Again, there was a runoff, but in the rematch, Ferguson won by about 3,800 votes.

Governor Sterling filed an election contest in Travis County, claiming, among other things, that the rules of the Texas Democratic Party limited voting rights to whites, and that about 50,000 African-Americans had been allowed to vote. Sterling claimed that if they had been excluded, he would have won the election. This was not an implausible claim, given both Pa and Ma Ferguson's opposition to the Klan dating from their bitter 1922 senate and 1924 gubernatorial primary runoffs. Still, the Fergusons were not exactly civil rights advocates.

The lawsuit was not filed until September 29, 1932, because of the requirement that no election contest could be filed until after the canvassing authority, here the State Democratic Convention, had canvassed the results on September 22nd. The problem was that the secretary

¹⁵ *Dickson*, at 1014.

¹⁶ *Ibid*, 1015.

¹⁷ 53 S.W.2d 753 (Tex. 1932).

of state needed to certify the results to each county clerk in time for absentee voting to start on October 14th. On application of Governor Sterling, an injunction was granted prohibiting the printing of ballots.

It would have been difficult, and probably impossible, for the trial judge to convene a trial, hear evidence and make a ruling challenging 50,000 votes in the 16 days between the filing of the case and October 14th. Travis County District Judge W. F. Robertson mooted that difficulty by deciding that an election contest could be brought only to challenge the results of a general election, and that the party organization could determine the result of a primary election. When Governor Sterling gave notice of appeal, Judge Robertson ordered the secretary of state to certify the results of the election to the county clerks anyway. The Court of Appeals affirmed the denial of supersedeas.¹⁸ To do otherwise would have meant there would be no Democratic candidate on the ballot in the November election. It was possible that the election could come down to the Republican candidate, Orville Bullington, and any write-in votes that Governor Sterling and Mrs. Ferguson could inspire.

Governor Sterling appealed to the Supreme Court asking that the injunctive relief be reinstated, and that Mrs. Ferguson be removed from the ballot. She claimed a right to be on the ballot, because she won the election and was certified by the Democratic Convention as the party's candidate. The Supreme Court agreed, and ordered her on the ballot, even though it said that the trial judge was incorrect in his belief that courts had no power to conduct an election contest in a primary election.¹⁹ Again, the court was impartial. The opinion was signed by the three members of the court – Chief Justice C.J. Cureton and Associate Judges Greenwood and William Pierson, none of whom had been appointed by Ferguson.

Looney v. Barnes, et al (1972)

1972 was one of the most tumultuous years in Texas political history. The Sharpstown Bank scandal was in the news, and the conviction of the speaker of the Texas House of Representatives shortly before the primary put voters in a testy mood.²⁰ Before the year was over, Texans would vote out a majority of non-judicial statewide public officials and a significant portion of the Texas Legislature.

History does not reflect how close the state came to a real political earthquake – the election of either an eccentric Democratic Austin lawyer or an eccentric Republican Houston schoolteacher as governor and the majority of our officials elected on write-in campaigns. The Supreme Court of Texas prevented this by quick and, then and now, unknown action in *Robert Everett L. Looney v. Benny Frank Barnes*.²¹

The facts were straightforward. Mr. Looney was an Austin attorney known for quixotic battles that were often successful. He was apparently recognized as a “character” by other lawyers,

¹⁸ *Sterling*, at p. 129. The Austin Court of Appeals did not issue an opinion on the appeal of the denial of supersedeas.

¹⁹ *Ibid*, 133.

²⁰ Perhaps the best book about the Sharpstown Scandal is *Texas Under a Cloud*, by Sam Kinch, Jr. and Ben Procter (1973).

²¹ Cause No. B-3341 (1972).

including many who loved him. He decided to file to run for governor. He obtained the application, which contained a loyalty oath. The Texas Election Code required that the application and oath be signed and sworn to before a notary public. Mr. Looney signed his application before his legal secretary, who was a notary in good standing with the secretary of state's office.²²

A complication developed when all six of the other candidates for governor went to the office of the Texas Democratic Party to get and sign their applications. The party had a notary on site – a woman named Jo Ann Pool. According to Mr. Looney's petition, Ms. Pool's notary public license had expired. This meant that the four "major" candidates for governor – the incumbent Governor Preston Smith, Lieutenant Governor Ben Barnes, Texas Representative Frances "Sissy" Farenthold, and Uvalde rancher and former state Representative Dolph Briscoe could have their applications to appear on the primary ballot challenged.²³ Let's repeat that – all of the candidates for governor except Robert Looney could have been thrown off the ballot.

On Saturday, April 22, 1972, Looney filed his application for a writ of mandamus with the clerk of the court. His pro se petition contains numerous typos and blanks that were filled in by hand. Recognizing that absentee voting would begin the next day, he asked that the court remove the other candidates from the ballot, and that the Democratic party and each county clerk place white tape over all of his opponents' names. Looney's research apparently uncovered the fact that the notarial services of Ms. Pool had been extended to most of the other candidates for statewide office, including all or most of the candidates for the offices of lieutenant governor, attorney general, land commissioner and the Railroad Commission. Oddly, no member of the Texas Supreme Court was named as using the Democratic Party's notary – including the unopposed candidate for chief justice, Joe R. Greenhill, the unopposed incumbent Zollie Steakley or the unopposed candidate for Greenhill's vacant seat, Associate Justice Sam Johnson of the Fourteenth Court of Appeals. Perhaps some other notary was used, or perhaps Mr. Looney wisely decided to avoid numerous recusals by members of the court.

Looney went on to lodge an additional allegation against one of his opponents. Frances Farenthold had asked that her ballot name be "Mrs. Frances Farenthold." Looney asked that the title "Mrs." be removed from the ballot, because it constituted electioneering within the voting booths. He did not cite any facts or law in support of that allegation.

The Supreme Court took up the matter immediately. The court had a bell, which was rung loudly whenever a "hot" application for mandamus was filed.²⁴ Even though it was a Saturday, Chief Justice Robert Calvert summoned his present colleagues by bell and his absent colleagues by telephone to the conference room to take up the matter.

Calvert was an outstanding jurist who had also been a very, very good country politician.

²² The Looney family was certainly known to the Court. His father, Everett Looney, had served as President of the State Bar of Texas in 1953.

²³ There were two other candidates – William H. "Bill" Posey and Gordon F. Wills. Both used the services of Ms. Pool to notarize their ballot applications.

²⁴ The bell still exists, but is never used. According to Justice Scott Brister, its use was terminated in about 2004. Today, electronic notice by computer is used to notify the members of the Court of a filing that deserves immediate judicial attention.

He had been a city and county attorney and served on a local school board and in the state legislature, where he was speaker of the house. He would later serve as the Chairman of the Texas State Democratic Executive Committee and presided for the vote to accept the results of Lyndon Johnson's narrow and controversial victory over former Governor Coke Stevenson. He was elected to the Supreme Court and became its chief justice in 1958.

According to one justice who was there, Calvert said, "Boys, I know I wrote an opinion stating that an application was void with an expired notary, but we just can't let Bob Looney become governor."²⁵

The court had ruled that an oath was a strict requirement several years before.²⁶ Calvert had apparently written the opinion. Calvert's recommendation to his colleagues was that the mandamus application be denied without an opinion and without any comment. That is exactly what happened. In what must be the shortest appellate opinion ever, or at least a tie for that honor, the court rubber-stamped the word OVERRULED on Looney's application, and went home.

All of the "Pool" candidates stayed on the ballot. It is unlikely that any was ever served with the mandamus application. It is certainly true that none ever filed an answer or made an appearance before the court in this matter. It is not certain that any of them ever knew that the matter had been filed, at least until after it had been denied.

Looney received 10,125 votes statewide, or .47% of the vote. Briscoe and Mrs. Farenthold went on to a runoff, which Briscoe won. He defeated Republican State Senator Hank Grover, a world history teacher at Houston's Lamar High School, that fall, getting a plurality of 47.8% of the vote to Grover's 45.0, in the closest governor's race since Reconstruction. If it had been Looney running against Grover, Texas becoming a two-party state might have happened a decade sooner than it did.

Conclusion – Political decision making by judges in a partisan era

The ability of the judicial branch to determine, under certain circumstances, who will head the executive branch is one of the most controversial things in our system of government. It almost certainly can happen only when the electorate is evenly divided. The judicial branch is empowered to act in these cases because it is trusted to rule in a non-political way – to disregard the political preferences or affiliations of its members.

Texas elects judges by party label. Judges who take up these cases are faced with the prospect of political defeat by their own party if they vote one way, or a charge that their votes were partisan if they vote the other. Have all members of the Texas Supreme Court always put all political inclinations behind them before ruling in election cases? Doubtful. Have most done so? Probably. The fact that the 1924 Court ruled *against* Jim Ferguson in May of 1924 and *for* Miriam Ferguson in October of 1924 shows that, even in a toxic political environment (which certainly

²⁵ This is from an interview by the author with Justice Joe Greenhill in 2001.

²⁶ The author has looked for an opinion by the Court on this subject, but was unable to do so. This may have been a good Greenhill story, or it could have been Chief Justice Calvert making short shrift of an unexpected bit of Saturday work.

existed in 1924), the court can do its job.

The authors of the opinions prove the impartiality of the Ferguson cases. The *Dickson v. Strickland* opinion that let Ma Ferguson win the election was written by Judge Greenwood. He was on the University of Texas Board of Regents that James Ferguson had a very public feud with. He had been appointed to the court by Governor Hobby, who was no friend of the Fergusons. He would later be a law partner of Governor Moody, who defeated Miriam Ferguson in 1926. The *Sterling v. Ferguson* case was decided by the three members of the court jointly. Two of the three (Chief Justice Cureton and Justice William Pierson) had been appointed by Governor Neff, who was also anti-Ferguson. The Rodriguez and Looney cases, on the other hand, can more plausibly be characterized as result-oriented.

It is virtually impossible to imagine a circumstance in which the members of the Texas Supreme Court do not know at least one of the candidates running for governor. And yet, they could be asked to decide who is governor. Should we have mass recusals? Should we assume that they can all be fair? Should we assume that they cannot be fair?

If and when serious discussion occurs about changing our system of judicial selection, some consideration should be given to the extent to which party affiliation should be a factor in appointments or elections. It's important to have a judiciary that is respected as non-political and to have one that follows the law and does nothing else.



JUDGE MARK DAVIDSON served as Judge of the 11th District Court in Harris County 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 then-Chief Justice Wallace Jefferson and the Multi-District Litigation Panel of the Texas Supreme Court.

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New England Roots Run Deep in Texas: A 400th Anniversary Salute, Part 3 of 3

By David A. Furlow

Four hundred years ago this summer, a group of English settlers sailed to Cape Cod aboard the *Mayflower* to make the world anew—and did so by signing the Mayflower Compact in what is now Provincetown Harbor, on Cape Cod, on November 11, 1620. The first part of this three-part series began by examining how Pilgrims and the Puritans created a “New England” along the North Atlantic coast of America. The second part showed how Moses Austin, Stephen F. Austin, John Austin, and Mary Austin Holley brought New England values, traditions, and law to early Texas. This final part of “New England Roots Run Deep in Texas” examines several New Englanders who shaped the law of Mexican Texas and the Republic. We begin with Asa Brigham.

Asa Brigham (1788-1844): Alcalde, Revolutionary, Auditor, and Treasurer

Asa Brigham started out as a humble tailor in Marlborough, Massachusetts, a town his seventeenth century Puritan English ancestors founded. He was born to Lewis Brigham and Mary Rice on August 31, 1788.¹ His mother Mary Rice descended from Edmund Rice (1594-1663) of Suffolk, England, a Puritan who moved to the Bay Colony in 1638.² Asa's father Lewis Brigham descended from Thomas Brigham “the Puritan” of Watertown, Massachusetts.³ After arriving in Watertown (just outside of Boston), Edmund Rice founded Sudbury in 1638, became a church deacon, and rose to leadership positions in town between 1638 and 1657. “[N]ot only did Rice become the largest individual landholder in Sudbury, but he represented his new town in the Massachusetts legislature for five years and devoted at least eleven of his last fifteen years to serving as selectman and judge of small causes.”⁴

¹ Willard Irving Tyler Brigham, Emma E. Brigham, Emma E., and William E. Brigham, editors, *The History of the Brigham Family; a Record of Several Thousand Descendants of Thomas Brigham the Emigrant, 1603-1653* (New York: Grafton Press, 1907), 329-30 (Entry 403: “Hon. and Maj. Asa, son of Lewis and Mary (Rice) Brigham, born in Marlboro, Mass., 31 Aug. 1788, died in Washington, Texas 3 July 1844...”), <https://archive.org/details/historyofbrigham01brig/page/n397>.

² “Asa Brigham, 1788-1844,” WikiTree genealogical webpage, <https://www.wikitree.com/wiki/Brigham-649>; Robert Charles Anderson, *Puritan Pedigrees: The Deep Roots of the Great Migration to New England* (Boston: New England Historic Genealogical Society, 2018), 11, 170; Robert Charles Anderson, “Philemon Whale’s English Account Book, 1632-1633,” *American Ancestors* 18, 4 (Winter 2018): 45-51.

³ Brigham, Brigham, and Brigham, *The History of the Brigham Family*, 330. Born in London in 1603, Thomas Brigham came to America aboard the *Susan and Ellen* in April 1635, earned freeman status in 1637, and became town constable and a selectman. *Ibid.*, 11-33.

⁴ Sumner Chilton Powell, *Puritan Village: The Formation of a New England Town* (Middletown, Ct.: Wesleyan University Press, 1963), 21.

Along with twelve other petitioners, Edmund Rice founded Marlborough, Massachusetts in 1656, where he served as a selectman, a judge, and an elected member of the Great and General Court, the legislature and judicial court of Massachusetts. In response to Parliament's enactment of the Intolerable Acts, a family member, George Brigham served on the Committee of Five to draw up a "Covenant of Non-Consumption of British Goods" and as a representative of Marlborough in the "Provisional Government," while his relative Captain William Brigham led a militia company on April 19, 1775, the day of the battle of Lexington and Concord.⁵

In 1830 Asa left Alexandria, Louisiana, where he had taken his wife Elizabeth Swift Babcock and their three children, immigrated to Austin's colony, and settled in Brazoria—a town another entrepreneurial New Englander, John Austin of New Haven Connecticut, had founded the previous year.⁶ The year Asa Brigham arrived in Austin's colony, Massachusetts attorney Francis Baylies of Taunton lauded the *Mayflower Compact* in *An Historical Memoir of the Colony of New Plymouth, etc*: "This brief and comprehensive instrument established a most important principle[,]...the foundation of all of the democratic institutions of America...[I]n this remote wilderness among a small and wandering band of remote outcasts, the principle that the will of the majority of the people shall govern, was first conceived, and was first practically exemplified...[to lay] the foundations of American liberty."⁷

After arriving in Brazoria in 1830, Brigham acquired land where he grew sugar, cotton and corn. He raised cattle, bought land in Brazoria, Galveston, and Bastrop counties, and earned the trust of both Mexican officials and fellow settlers. Six months after his arrival, the *ayuntamiento* (town council) of San Felipe de Austin elected Brigham as *síndico procurador* ("city attorney") in the Precinct of Victoria (Brazoria) in December 1830.⁸

Ambitious, Asa obtained a position as the Precinct's *comisario* (commissary) and secured an appointment to its Board of Health in 1831.⁹ "You may ask why we leave the United States of America for the United States of Mexico," Asa Brigham wrote to his ancestors in Massachusetts on February 28, 1832. "In answer, I can only say, that it was through choice, with a view of bettering my fortune, which has been realized."¹⁰ Brigham missed New England, he wrote, but not its icy winters.

⁵ Charles Elmer Rice, *By the Name of Rice: An Historical Sketch of Deacon Edmund Rice The Pilgrim 1594-1663 and His Descendants to the Fourth Generation* (Alliance, Ohio: Williams Printing, 1911), 28 <https://archive.org/stream/bynameofricehist00riceiala#page/n3/mode/2up>.

⁶ L. W. Kemp, "Brigham, Asa," *Handbook of Texas*; "Asa Brigham, 1788-1844," *WikiTree Genealogy*, <https://www.wikitree.com/wiki/Brigham-649>.

⁷ Francis Baylies, *An Historical Memoir of the Colony of New Plymouth, from the Flight of the Pilgrims into Holland in the Year 1608, to the Union of that Colony with Massachusetts in 1692* (Boston: Hilliard, Gray, Little, and Wilkins, 1830), vol. I, 30.

⁸ Eugene C. Barker, editor, "Minutes of the Ayuntamiento of San Felipe de Austin, 1828-1832," 12 parts, *Southwestern Historical Quarterly*, 21-24 (January 1918-October 1920); Kemp, "Brigham, Asa," *Handbook of Texas*.

⁹ Charles Hudson, *History of the town of Marlborough, Middlesex County, Massachusetts* (Boston, MA: T R Marvin & Son, 1862), 342.

¹⁰ Eric R. Schlereth, "Voluntary Mexicans: Allegiance and the Origins of the Texas Revolution," in Sam W. Haynes and Gerald D. Saxon, editors, *Contested Empire: Rethinking the Texas Revolution* (College Station: Texas A&M University Press, 2015), 11.

United States of America

Western Colony, Texas,

Box of Brazeria February 28. 1832

Dear Brother & Sister

I write in answer to your letter of the 29 of August 1832, which came direct to hand by the way of Mail from Cincinnati, I acknowledge to have committed a great fault and perhaps a sin in not answering your letter before this; the changes which have taken place among my relations and acquaintances in the short space of ten years quite surprise me - my mind frequently rests upon past occurrences in my youthful days when I was with you and all of my relations - but it must confess that I have not the least desire to return to New England in order to settle and spend my days there, although I should be glad to visit my native place if my circumstances would permit but not to spend a winter, we moved from Alexandria to this place in 1831 - In October 1831 Adalga was married to Edwin Robinson a Virginia Planter - he is not rich but of correct principles, we all live together, and are at present engaged in merchandizing, but intend soon to turn our attention to agriculture, we have each of us a League of Land, and that paid for, a League measures three miles on each side and lies between four and five thousand acres, my League is situated within seven miles from Salvestra Bay, and about 25 miles from this Town, Mr Robinsons League is situated 75 miles from the Bay of Matagorda and about 120 miles from Town, the land is fine for the cultivation of Sugar, Corn and Cotton, our Cattle run out Summer and Winter, require no attention and increase very rapidly always kept fatter than you can possibly make yours by Starvation. I am Grandfather to a fine little Girl 31 months old, her name is Susan Elizabeth Robinson, she has red hair black eyes, healthy and handsome, very sensible and loves her Grandmother very much, she is mistress of all the Chickens, Pigs, Cows and Negroes on the place, Samuel my eldest Son is taller than I am, lives with us and does all of our writing, and tends the Store, Benjamin is living in a large mercantile establishment in this place, my Sons are both attentive to business, Mrs R. bears her age better than I do, she does not look older than at the time she left New England, we all feel perfectly satisfied here and have settled for life in this Country (Western Colony) which is about 350 miles square, 11 years ago it contained nothing but Indians but now we have upwards of 8000 inhabitants, this Town 3 years ago had not one house. now near 50. our Society is composed of people from each of the United States of the North, I know a number from the States of Maine, New Hampshire, Massachusetts, Connecticut, Vermont and

In his February 28, 1832 letter to relatives in Massachusetts, Asa Brigham described Mexican Texas and its advantages. Photo by David A. Furlow reproduced by permission of the Briscoe Center.

By 1832, Brigham was running a ferry at Brazoria, where he operated a store with his son-in-law.¹¹ Later he purchased stock in the San Saba Colonization Company and invested in what was then a technological wonder, the Brazos and Galveston Railroad.¹² Brigham purchased slaves, too, but later in life, reverted to New England ways and began signing petitions against slavery.¹³ He signed a petition on June 20, 1832 that memorialized his readiness to take arms to secure Texas's independence and Texan rights. That year's Anahuac Disturbances, Battle of Velasco, and Turtle Bay Resolution made a rebellion against Mexico appear imminent. Stephen F. Austin and other leaders avoided that rebellion only by aligning Texas's Anglo American settlers with then-liberal Antonio López de Santa Anna.¹⁴

Asa Brigham contributed to Texas law in a direct way. He presided over a jury trial as Comissario in a Mexican court in the Precinct of Victoria in September, 1832. The trial determined whether a free African American, William Chephas, committed a theft warranting temporary enslavement as his punishment when he came to Texas aboard a steamer.¹⁵

Asa Brigham lost his wife, a daughter, and a son-in-law in 1833.¹⁶ He soon turned aside from his grief to add another dimension to Texas civic life. Together with Dr. Anson Jones, another Massachusetts-born resident of the Brazoria District, Dr. James Aeneas E. Phelps of Orozimbo Plantation (who may have been born in Hartford, Connecticut in 1800),¹⁷ and several other settlers, Brigham met at the former home of John Austin to organize the first Masonic Lodge in Mexican Texas.¹⁸ They petitioned the Worshipful Master of the Grand Masonic Lodge of Louisiana, John Henry Holland, on March 1, 1835.¹⁹ The Louisiana Masons granted their pleas and Holland Lodge No. 36 met on December 27, 1835, with Dr. Jones presiding as its Worshipful Master.²⁰

¹¹ Levonne Durham Rochelle, "Life and Times of Asa Brigham: Treasurer of the Republic of Texas," Master's Thesis in History, University of Texas, 1956.

¹² Andrew Forest Muir, "Railroad Enterprise in Texas, 1836-1841," *Southwestern Historical Quarterly*, 47 (April 1944); Kemp, "Brigham, Asa," *Handbook of Texas*.

¹³ James P. Bevill, *The Paper Republic: The Struggle for Money, Credit, and Independence in the Republic of Texas* (Houston: Bright Sky Press, 2009), 173.

¹⁴ Margaret Swett Henson, "Anahuac Disturbances," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/jca01>.

¹⁵ David A. Furlow, "The Separation of Texas from the Republic of Mexico was the Division of an Empire": The Continuing Influence of Castilian Law on Texas and the Texas Supreme Court, Part II: 1821-1836, *Out of Many, One*, *Journal of the Texas Supreme Court Historical Society*, 1, No. 3 (Spring 2012): 1-16, https://www.texascourthistory.org/Content/Newsletters/TSCHS_JournalSpring2012.pdf.

¹⁶ Asa Brigham (1788 - 1844), *WikiTree*, <https://www.wikitree.com/wiki/Brigham-649>.

¹⁷ Merle Weir, "Phelps, James Aeneas E.," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fph02>.

¹⁸ Texas State Historical Association, "Austin, John," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fau09>.

¹⁹ Jones, *Republic of Texas*, 10-11; Gambrell, *Last President*, 55. See also Masonic Marker honoring Asa Brigham, *Washington on the Brazos* website, <http://wheretexasbecametexas.org/fearless-fifty-nine-asa-brigham/>. Even after his death in an 1833 cholera epidemic, John Austin shaped Texas history. On August 26, 1836, his widow Elizabeth and her new husband Thomas F.L. Parrott sold for \$5,000 the lower half of the John Austin league on Buffalo Bayou to Augustus C. and John K. Allen, who soon divided and developed that land as the township of Houston. See also Texas State Historical Association, "Austin, John," *Handbook of Texas Online*.

²⁰ Many Texas leaders were Freemasons, including Stephen F. Austin, Sam Houston, and five who died at the Alamo: James Bonham, Jim Bowie, David Crockett, Almeron Dickenson, and William Barrett Travis. William Preston

While participating on a resolution-drafting political committee in Columbia in 1835, Asa Brigham joined Anson Jones, Stephen F. Austin, Sam Houston, Lorenzo de Zavala, and other prominent Texians in asking his fellow settlers whether Texas should declare its independence of Coahuila and dictator Santa Anna's Mexico. In February 1836, Brazoria voters elected Asa Brigham and James Aeneas E. Phelps to attend the Consultation of 1836 in Washington-on-the-Brazos as Brazoria's representatives.²¹

As fellow New Englander Anson Jones put it, "There were but two alternatives left us: absolute submission to, or absolute independence of, Mexico."²² In an old gun-shop more a barn than a house, Asa Brigham and 58 other delegates signed the Declaration of Independence on March 2, 1836.²³ Confronted with a time of crisis, Asa Brigham called for creation of special three-man "body politic" committees to prepare every Texas county to confront Santa Anna—using the language that signers of the Mayflower Compact to describe the settlement they were creating.²⁴

On the night before the Battle of San Jacinto, Asa Brigham's son Sergeant Benjamin Rice Brigham of Company C of Sam Houston's First Regiment asked his fellow soldiers to switch guard duty with him. "Boys," he said, "I've stood guard two nights, and am detailed for the third. I want to be in the battle tomorrow. Will somebody take my place tonight?" A comrade, F. J. Cooke, made the switch and Sergeant Brigham went to sleep. Brigham charged the Mexican line the next afternoon about 3:00 p.m.—and fell mortally wounded during the first minutes of the Texian attack on April 21, 1836. Benjamin Brigham died a little later that afternoon.²⁵

Asa Brigham signed the receipt pictured on the next page— "Rec[ieve]d of Mssrs Horton (&) Clements [a mercantile firm headquartered in Matagorda] twenty one shovels and thirteen spades for use of the Republic [sic] of Texas. By order of the president. Galveston Bay Ap[ri]l 1836." Brigham was with ad Interim President David G. Burnet and the Republic's cabinet on the steamboat *Cayuga* at that time, in Galveston. Asa Brigham signed on April 26, 1836, since a duplicate of this receipt bearing the same language and dated April 26, 1836 is found in Texas's State Archives. A little earlier that day, Burnet received news of the battle at San Jacinto, before

Vaughn, "Freemasonry," *Handbook of Texas Online*, <https://tshaonline.org/handbook/online/articles/vnf01>; *Historic Marker at the Alamo Erected by the Grand Lodge of Texas*, March 5, 1975, <https://grandlodgeoftexas.org/author/presencebuilders/page/10/>.

²¹ Jones, *Republic of Texas*, 113-114. See also Ralph W. Steen, "Convention of 1836," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/mjc12>.

²² Jones, *Republic of Texas*, 13.

²³ Ralph W. Steen, "Texas Declaration of Independence," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/mjtce>.

²⁴ Paul D. Lack, *The Texas Revolutionary Experience: A Political and Social History 1835-1836* (College Station: Texas A&M University Press, 1992), 96.

²⁵ Stephen L. Moore, *Eighteen Minutes: The Battle of San Jacinto and the Texas Independence Campaign* (Lanham, Md. and New York: Taylor Trade Publishing, 2003), 492 (Appendix A, Texian Casualties at San Jacinto); Sons of the Republic of Texas, San Jacinto Chapter, *San Jacinto Patriot*, <https://educationdocbox.com/amp/65618616-Homeschooling/San-jacinto-patriot-dedicated-to-the-memory-of-those-who-fought-at-the-battle-of-san-jacinto-april-21-st-april-th-anniversary.html>; "The B. R. Brigham Monument," *Historical Markers Database*, <https://www.hmdb.org/m.asp?m=126243> (an obelisk marker commissioned by Galveston citizens in 1881).

Recd of Messrs Horton Elements
twenty one Shovels and thirteen Spades
for the use of the Republic of Texas
By order of the president
Galveston Bay apr 1836 —
A. Brigham
at 16¢ Each —

We fearlessly and confidently Commit
the issue to the decision of the Supreme
Arbiter of the destinies of Nations.
Richard Ellis Prevan
of the Convention & Delegate
from Red River.
Charles D Stewart
Edwin Wall
Mr. Barnett
Asa Brigham

Top: Asa Brigham, "Receipt for Shovels and Spades," April 1836, Galveston Bay. Image courtesy of James Bevill, author of *The Paper Republic*, Image 5.17. Bottom: Asa Brigham signed the 1836 Texas Declaration of Independence. Texas State Library and Archives Commission.

Burnet and his staff took the steamer *Yellowstone* back to the battlefield where Buffalo Bayou intersects the San Jacinto River.

Robert James Calder was among those who traveled to Galveston to inform Burnet about the outcome of the battle. Calder, captain of Company K of the Texas Volunteers, reported the news. Brigham must have rushed to hear the news from Calder, who was also his son Benjamin's commanding officer. Calder must have choked back tears as he told the terrible news that his son Benjamin was one of only nine Texians who died. The same day that Asa learned that Texas had won her independence, on April 26, 1836, he learned that his own son died in the fighting—and then signed the receipt acknowledging the Republic's debt to Horton & Clements for the shovels and spades soldiers used to bury the Texian dead at San Jacinto—including Benjamin.²⁶

Asa Brigham brought his financial knowledge and Brazoria District treasurer's experience to bear on behalf of a cash-strapped Republic. He prepared a comprehensive Report to Congress on November 4, 1836 that identified all claims made against the Republic. With Sam Houston convalescing from wounds, and with the Mexican dictator a prisoner at Velasco, Interim President David G. Burnett appointed Brigham to serve as the Republic's first Auditor at the old Velasco coastal fort.²⁷

Asa Brigham's payment to Augustus V. Sharpe at Velasco on August 26, 1836 occurred only because Augustus Sharpe escaped the massacre at Goliad. Sharpe served in Captain Isaac Ticknor's company as a private and then under Capt. B.H. Duval under the command of Col. James W. Fannin, Jr. Sharpe and twenty-seven other men escaped the Centralist murder squads at Goliad. By May 6, 1836, Sharpe was in Galveston. Brigham's Treasury warrant for \$100.66 represented his pay for service from January 17 to August 19, 1836, when the Texian Army discharged him from further service. The warrant reads as follows:

No. 366 To *The Secr[etary] of the Treasury* \$100.66

The Treasurer of the GOVERNMENT OF TEXAS will pay to *Augustus V. Sharpe* or order, *One Hundred Dollars, 66 Cents*, out of any money In the TREASURY not otherwise appropriated.

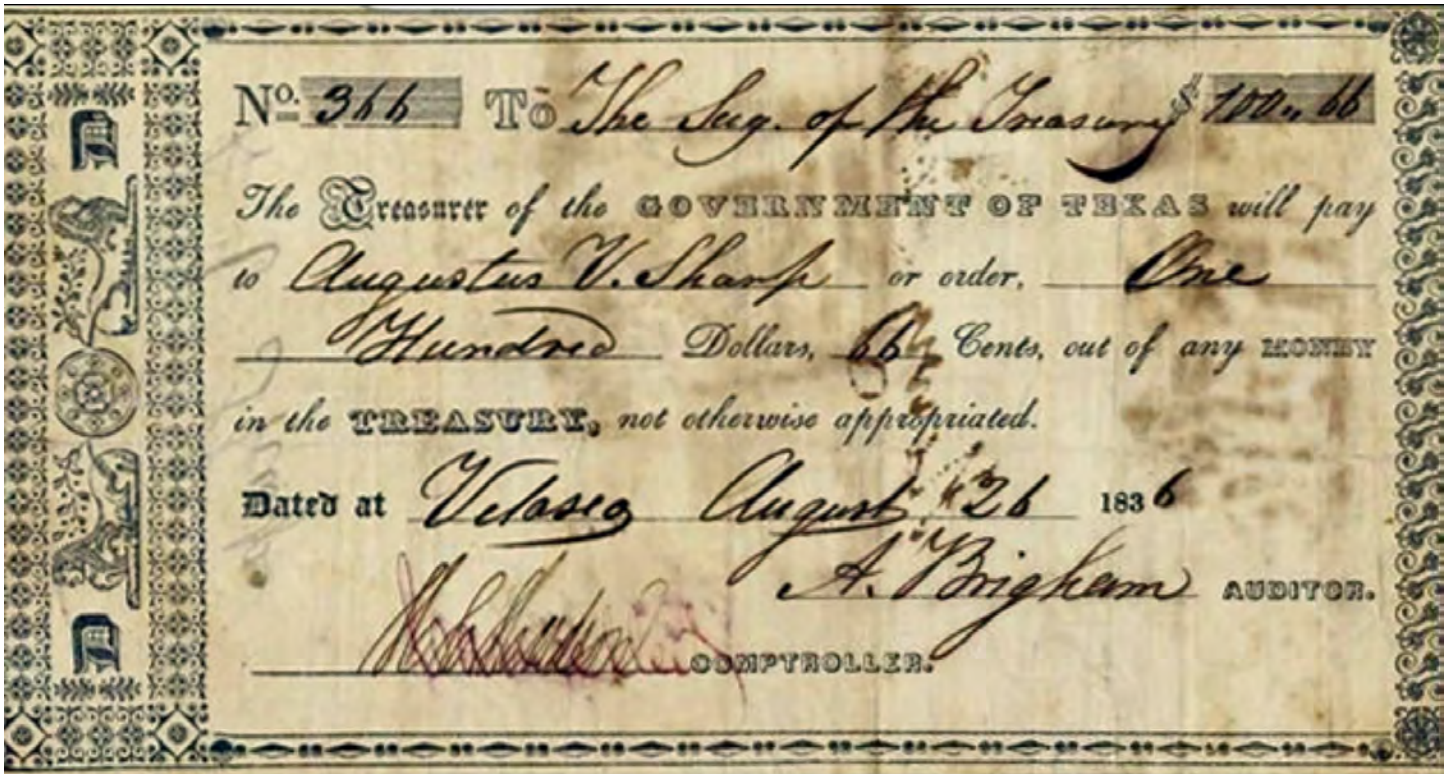
Dated at *Velasco August 26, 1836*

(Signed) *A. Brigham, Auditor*, (Signed, at left) *H.C. Hudson Comptroller*

Sharpe lived in Harrison County and married Emily LeSeur Hayes, a wealthy widow, on February

²⁶ Bevill, *The Paper Republic*, 134-39 and 159-66.

²⁷ Weir, "Phelps, James Aeneas E.," *Handbook of Texas Online*; Bevill, *The Paper Republic*, 149-150 and 335-37, Appendix H. After signing the Treaty of Velasco, Santa Anna remained a prisoner at Dr. Phelps's Brazoria County home, Orozimbo Plantation, from July to November 1836, during which time Phelps saved Santa Anna from suicide. If Dr. Phelps was a son of New England, his kindness in keeping Santa Anna alive helped win respect for the Republic in Washington, D.C. and the world. See Wilfred H. Callcott, "Santa Anna, Antonio Lopez de," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fsa29>.



Asa Brigham, Republic of Texas Sphinx Note, payable to Augustus V. Sharpe, at Velasco, August 26, 1836. Private Collection, Cr. V2, O-130. Image courtesy of James Bevill, from *The Paper Republic*, Image 6.10.

8, 1852. They lived together sixteen years before Sharpe passed away.²⁸

The Republic's first elected president, Sam Houston, appointed a heart-broken Asa Brigham who later served as the Republic's first treasurer on December 20, 1836.²⁹ Things went well for the former New Englander. In an 1837 letter to his New England relatives, he wrote "Emigration [sic] flows in rapidly, the country is improving beyond account."³⁰ Asa Brigham enjoyed the fellowship of Dr. Anson Jones, Sam Houston, and other Brazoria County friends when he became a charter member of the Masonic Grand Lodge of Texas in Houston on December 20, 1837.³¹

Mirabeau B. Lamar, the Republic's second president, reappointed Brigham as Treasurer in January 1839. Brigham hedged his bets on his future by becoming a City of Houston alderman on February 16, 1839, while continuing to serve as the Republic's treasurer at the new capital in Austin. Four years after the death of his first wife Elizabeth Swift Babcock in 1835, Asa Brigham married Mrs. Ann Johnson Mather, on July 8, 1839.³² Friends frequently expressed kind wishes to her in their correspondence with him.³³

²⁸ Sharpe's tombstone and Texas Military Muster Rolls; Bevill, *The Paper Republic*, --.

²⁹ Kemp, "Brigham, Asa," *Handbook of Texas Online*.

³⁰ Schlereth, "Voluntary Mexicans," *Contested Empire*, 36.

³¹ *Ibid.*

³² Kemp, "Brigham, Asa," *Handbook of Texas Online*.

³³ Letter from Garl Borden, Jr. to Anson Jones, March 11, 1843, in Jones, *Republic of Texas*, 203-204.

As a descendant of “people of the book” in England and New England, Asa Brigham grew concerned about the safety of the books and records that Mirabeau Lamar sent on the road from the old capital at Houston to the new one in Austin. On August 25, 1839, Brigham wrote Lamar that transportation of the Republic’s archives “produces considerable anxiety in my mind...The Books and valuable papers belonging to the office together with all the receipts and vouchers (which are quite voluminous) that cannot be packed in the Iron Chest will have to be packed in a Box Water-tight, and placed in charge of a responsible Teamster, (which I presume you are aware cannot be found every day.)”³⁴

The next year, 1840, began with the *Austin City Gazette*’s favorable report about Asa Brigham’s supervision of the City’s first elections.³⁵ Five days later, 187 men meandered down to Spicer’s Tavern to cast a ballot, have a beer, and give Austin’s municipal government an auspicious beginning. The city passed its first ordinances within the month.³⁶

When Thomas Rusk presided as Chief Justice over the first session of the Supreme Court of Texas on January 13, 1840, he convened it in Austin at the house “belonging to Maj. A. Brigham, in the lower part of the city,” at what is now the southwest corner of Congress Avenue and Second Street.³⁷ Rusk was the third Chief Justice, and the first to convene the Court, after his election by a joint ballot of Congress on December 2, 1838.³⁸ After convening the Court in Brigham’s house, Chief Justice Rusk issued the court’s first five opinions.³⁹

Asa Brigham left the Republic’s Treasury Department on April 12, 1840. Soon after, he faced charges for misappropriating government money for public purposes, but a presentation of the facts cleared those charges soon thereafter.⁴⁰ Once Sam Houston was elected to serve a second term as President, he reappointed Brigham as Treasurer in December 13, 1841. After organizing elections for the Republic and the City of Austin, Asa Brigham won election as Austin’s fourth mayor.⁴¹

³⁴ Letter, Asa Brigham to Mirabeau Lamar, August 25, 1839, in Charles Adams Gulick, Jr., editor, *The Papers of Mirabeau Buonaparte Lamar* (Austin: Texas State Library, 1922), item 1420, quoted in Jeffrey Stuart Kerr, *Seat of Empire: The Embattled Birth of Austin, Texas* (Lubbock: Texas Tech University Press, 2013), 107, 245 n.12.

³⁵ Kerr, *Seat of Empire*, 130 and 250 n. 9; *Austin City Gazette*, January 8, 1840.

³⁶ Kerr, *Seat of Empire*, 129 and 250 n. 7; Frank Brown, *Annals of Travis County and the City of Austin* (Austin: Austin History Center 1892-1913), chapter 7; Mary Starr Barkley, *History of Travis County and Austin 1839-1899* (Austin: Austin Printing Company, 1981), 54.

³⁷ Dylan O. Drummond, “San Jacinto Justice: The Future Supreme Court Judges Who Won Texas Her Freedom at San Jacinto,” *Texas Supreme Court Historical Society Journal*, vol. 7, no. 3 (Spring 2018): 51-67, 55-56, <https://www.texascourthistory.org/Content/Newsletters//TSCHS%20Journal%20Spring%202018.pdf>; James L. Haley, *A Narrative History of the Texas Supreme Court, 1836 to 1986* (Austin: University of Texas Press, 2013), 20, 258 n.13; Michael Ariens, *Lone Star Law: A Legal History of Texas* (Lubbock: Texas Tech University Press, 2011), 19; James W. Paulsen, “A Sesquicentennial Celebration: The Establishment of a Unique Texas Institution,” 53 *Texas Bar Journal* 43, 43 (Jan. 1990); Gambrell, *Last President*, 204.

³⁸ Paulsen, “Judges of the Supreme Court,” 306, 316; Haley, *Texas Supreme Court*, 258 n.13; Michael Ariens, *Lone Star Law: A Legal History of Texas* (Lubbock: Texas Tech University Press, 2011), 19.

³⁹ *Whiteman v. Garrett*, No. XVI, Dallam 374 (Tex. 1840); *Board of Land Commissioners of Milam County v. Bell*, No. XI, Dallam 366 (1840); *Goode v. Cheshire*, No. VII, Dallam 362 (Tex. 1840); *Yeamans v. Tone*, No. VI, Dallam 362 (Tex. 1840); *Republic of Texas v. McCulloch*, No. I, Dallam 357 (Tex. 1840).

⁴⁰ Kemp, “Brigham, Asa,” *Handbook of Texas Online; The Paper Republic*, 220-21.

⁴¹ L. W. Kemp, “Brigham, Asa,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fbr49>.

Asa Brigham remained loyal to the people who elected him mayor of Austin while others deserted the city. William Able, a New Yorker, packed his store's merchandise and fled town. "When I returned to Austin it was painful to see the desolation, but a few families remained—Major Brighams—Mrs. Wooldridges & Mr. Eberlys and a few others—I stayed but a day or so and then went on a mustang hunt for 3 or 4 days and two days later—I left old Austin."⁴² Brigham served as Austin's mayor for two years before he died on July 3, 1844, in Washington-on-the-Brazos, Texas.

Asa Brigham held office as the Republic's first auditor in 1836, as its first Treasurer from 1836-1840 and again as its Treasurer from 1841-1844. The State erected a monument to honor him in 1936 and moved his body to Washington-on-the-Brazos.⁴³ His tombstone memorializes his eventful life in the Washington County Cemetery. The Briscoe Center for American History at the University of Texas contains four of Asa Brigham's letters.⁴⁴ He is a forgotten founding father of Texas who deserves to be better remembered. Yet Brigham was only one of the New Englanders who played historic roles in the Texas Revolution and the Republic that followed.



Tombstone of Asa Brigham, Washington County Cemetery.
Photo by David A. Furlow.

Emily D. West of New Haven, Connecticut (1801-?): A Free Woman of Color—and the Yellow Rose of Texas?

The easiest way to fail a Texas history test is to rely on the History Channel's 10-hour 2015 miniseries *Texas Rising* as history. None of its ridiculous absurdities of fact, set, and character

⁴² Letter, William Abel, April 11, 1843, Austin File Chronological, 1843, Section 3, Austin History Center.

⁴³ "Asa Brigham," Texas Historical Markers collection, Waymarking.com website, <https://www.waymarking.com/gallery/image.aspx?f=1&guid=bce59497-e95c-432b-9ac1-8f0086c23ce8>; Bevill, *Paper Republic*, 137.

⁴⁴ See "A Guide to the Asa Brigham Papers, 1832-1837," Briscoe Center for American History at the University of Texas in Austin website, <https://legacy.lib.utexas.edu/taro/utcah/02014/cah-02014.html>.

was worse than its depiction of Emily D. West. A talented and beautiful actress, Cynthia Addai-Robinson, portrayed Emily West as a sultry seductress from New Orleans who survived the battle of the Alamo, where her brother, a free black man, was executed after the battle by order of cruel, arrogant Generalissimo Antonio López de Santa Anna. Emily sets out on a revenge-mission to destroy Santa Anna and free Texas. A paramour of General Sam Houston (Bill Paxton) in *Texas Rising*, she tells Santa Anna, "I want a warm bath. With you in it."

No, no, no—and hell, no. Face-palm #1.

Texas military historian Stephen L. Moore applied his considerable skills to reconstruct Emily West's life in his book *Eighteen Minutes: The Battle of San Jacinto and the Texas Independence Campaign*. Much of this story re-examines his narrative of her life.

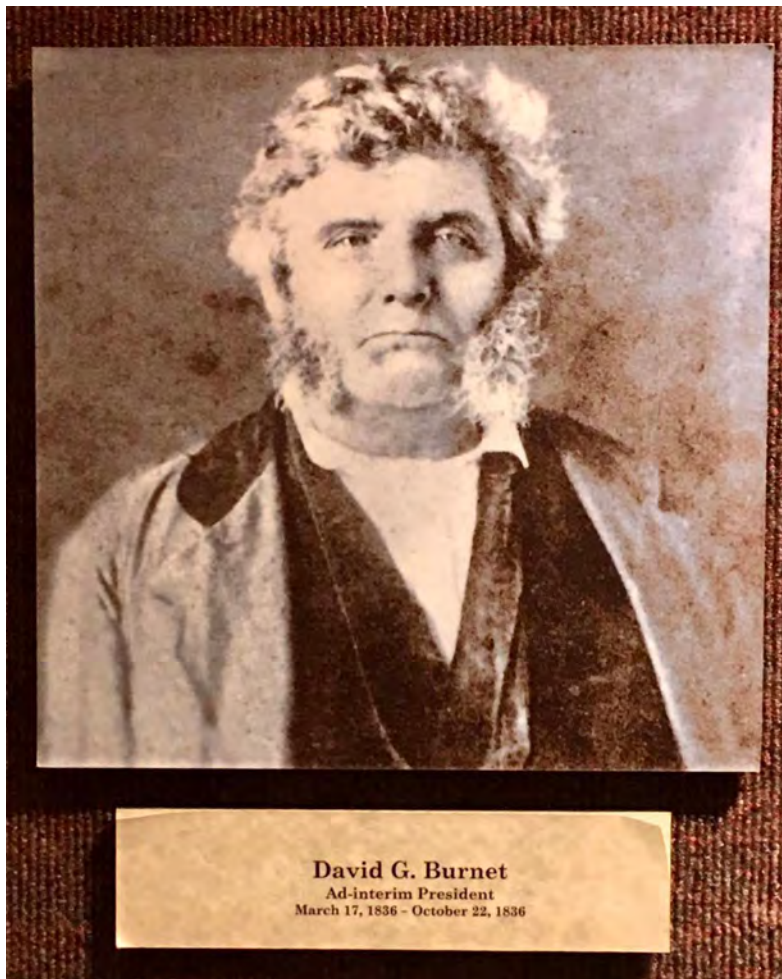
The real Emily D. West was a free-born, New England born African American woman of New Haven, Connecticut sometimes known as "Miss Emily." She came to Texas in time to experience, and perhaps determine the outcome of, the Texas Revolution. You may have read histories that refer to Emily West as Emily Morgan because those historians believe, erroneously, that any African American woman in Mexican Texas had to be a slave. *Face-palm #2.*

A free woman of color, Emily West signed a contract in New York to work at a new hotel in Texas. She chose that course; she had agency. A prominent New Haven philanthropist, Simeon S. Jocelyn, witnessed the execution of that contract; he signed it on October 25, 1835, along with agent James Morgan in New York City. She agreed to work as a housekeeper, a maid, for a one-year period, at the New Washington Association's hotel. It was at Morgan's Point, Texas, nine to ten miles south of Lynch's Ferry. James Morgan agreed to pay her \$100 a year and transport her, on a company-owned schooner, to Galveston Bay, along with thirteen craftsmen and laborers, in November 1835. When she arrived, Texas was in turmoil.

Simeon Jocelyn witnessed that contractual execution, probably because he was Emily West's foster-father. A renowned engraver, preacher, and abolitionist, he sponsored antislavery and free-black associations in New Haven. The Federal Tax Census of 1830 identifies a "free colored female" between the ages of 10 and 24 living in Jocelyn's New Haven house, which was probably Emily D. West.⁴⁵ Like John Austin and Mary Austin Holley, Emily P. West was a New Havener who came to Texas.

Emily Morgan arrived in Texas in December 1835, on the same vessel as Federalist revolutionary Lorenzo de Zavala's wife Emily de Zavala and the de Zavala children. Contrary to *Texas Rising*, there is no evidence she stopped at New Orleans on the way from New York to Texas. Nor is there any evidence of any connection between her and the Crescent City. Emily was never Sam Houston's lover. There is no evidence that she ever had a brother, or that she ever visited the Alamo.

⁴⁵ Moore, *Eighteen Minutes*, xv, 416, and 493 n.7, citing the work of North Carolina State University Professor James E. Crisp; Philip Thomas Tucker, *Emily D. West and the "Yellow Rose of Texas" Myth* (Jefferson, N.C., and London: McFarland & Co., 2014), 11-14 and 38-43; Margaret Swett Henson, "West, Emily D.," *TSHA Online*, <http://www.tshaonline.org/handbook/online/articles/fwe41>; W. Eugene Hollon and Ruth L. Butler, editors, *William Bollaert's Texas* (Norman: University of Oklahoma Press, 1956); B. R. Brunson and Andrew Forest Muir, "Morgan, James," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fmo50>.



Portrait of David G. Burnet at the Star of the Republic Museum at Washington on the Brazos.
Photo by David A. Furlow.

Emily West entered history because Mexican Colonel Juan Nepomuceno Almonte and fifty Mexican cavalry dragoons galloped into New Washington, Texas on April 16, 1836. At the time, she was still working at James Morgan's hotel. Morgan was absent that day because he was in Galveston commanding the Texians' Fort Travis. Colonel Almonte's Mexican cavalry sought to seize Interim President David Gouverneur Burnet in fulfillment of Santa Anna's plans to capture the Texas Cabinet and crush Sam Houston's army near the Lynchburg Ferry.

David G. Burnet, his family, and his servants were then loading a flatboat at Colonel Morgan's warehouse to take to the Texas schooner *Flash* in Galveston Bay. "We were severally employed in the warehouse, and loading boats," Dr. George Moffitt Patrick observed, "not dreaming of immediate danger." But he saw Burnet's messenger, Texian courier Mike McCormick, riding into New Washington. "Make haste, Mr. President, the Mexicans are coming!"⁴⁶

Burnet's servants ran a skiff to the beach where they loaded the Interim President aboard as the Mexican cavalry closed in. Other Cabinet officers shoved off in a flatboat while Almonte's dragoons lined the shore. "We had not made more than thirty or forty yards from the shore when the enemy dismounted on the beach." David Burnet stood up in his boat to present himself as a target to save his wife. To avoid killing the women aboard the skiff, Col. Almonte ordered his men to cease firing. David and Hannah Burnett sailed away to Galveston Island on a schooner while Almonte and his men watched them from shore.⁴⁷

On April 18, 1836, General Santa Ana's soldiers captured Col. Morgan's servants, including Emily West. "Legend has it that Santa Ana first spotted this attractive girl at the wharf as she was assisting with loading a flatboat with supplies," Texas historian Stephen L. Moore reports. They also captured a young "yellow boy," that is, a mulatto, named Turner. General Santa Ana rested,

⁴⁶ Martha Anne Turner, *The Yellow Rose of Texas: Her Saga and Her Song* (Austin: Shoal Creek Publishers, 1976), 9-10, referenced in Moore, *Eighteen Minutes*, 230-32; Henson, "West, Emily D.," *Handbook of Texas Online*, <https://tshaonline.org/handbook/online/articles/fwe41>; Margaret Swett Henson, "BURNET, DAVID GOUVERNEUR," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fbu46>.

⁴⁷ Moore, *Eighteen Minutes*, 230-32; Henson, "West, Emily D.," *Handbook of Texas Online*.

burned New Washington, and looted warehouses.⁴⁸

When he left New Washington on the way to Buffalo Bayou, he forced Emily to accompany him. Santa Ana “married” a 17-year-old girl in San Antonio, using a Mexican Army officer to impersonate a priest.⁴⁹ Emily West *may* be the origin of the “Yellow Rose of Texas” legend. The legend is that Emily was in Santa Ana’s red and white striped tent when General Houston and the Texian Army swept across the San Jacinto Battlefield on April 21, 1836.

If Emily West was in Santa Ana’s tent, she was a victim of rape, and entitled to be remembered as a survivor rather than a seductress. None of the Mexican Army officers who reported about the battle afterwards mentioned her, or a rape (or dalliance) in Santa Ana’s tent, though several were critical of *El Presidente* before and during battle. If the sounds of Texian rifle fire and the Twin Sisters roused Santa Ana, he dressed quickly. He escaped battle in white silk drawers, a diamond-studded linen shirt, leather morocco slippers, and a gold-buttoned gray cloth vest.⁵⁰ There is no evidence that Emily West delayed his entry into the fighting.

Soon after the battle, a smirking story began to circulate around Texian Army’s campsites and the bars that outnumbered churches in the new city of Houston: “Miss Emily,” those men said, had helped win the Battle of San Jacinto by “distracting” the Mexican dictator with a dalliance. The story found its way into an important primary source: visiting Englishman William Bollaert’s journal, where that Victorian era gentleman recorded a tale told by a Texian veteran during an 1842 steamship trip to Galveston.

“The battle of San Jacinto was probably lost to the Mexicans,” William Bollaert recorded, “owing to the influence of a Mulatta Girl (Emily) belonging to Col. Morgan who was closeted in the tent with G’l Santana, at the time the cry was made, ‘The Enemy! they come! they come! & detained Santa Ana so long order could not be restored.” Bollaert attributed the story to “an officer who was engaged in it (the battle of San Jacinto), in his own words”—an officer believed to be Sam Houston.⁵¹

William Bollaert did not identify the source of his information. It only came to light in 1956, in a footnote with Bollaert’s name attached, a fact that led many readers to believe the note original to the historical manuscript. The 1956 footnote launched a juvenile obsession on the part of amateur historians who filled the vacuum of historical fact. Journalist Francis X. Tolbert imagined Emily West, in *The Day of San Jacinto*, as a “decorative long-haired mulatto girl...Latin looking woman of about twenty.” *Face-palm* #3. Tolbert offered no supporting evidence to support his speculation—and no one has shown there was any.⁵²

⁴⁸ Moore, *Eighteen Minutes*, 236-37; Henson, “West, Emily D.,” *Handbook of Texas Online*.

⁴⁹ Moore, *Eighteen Minutes*, 328.

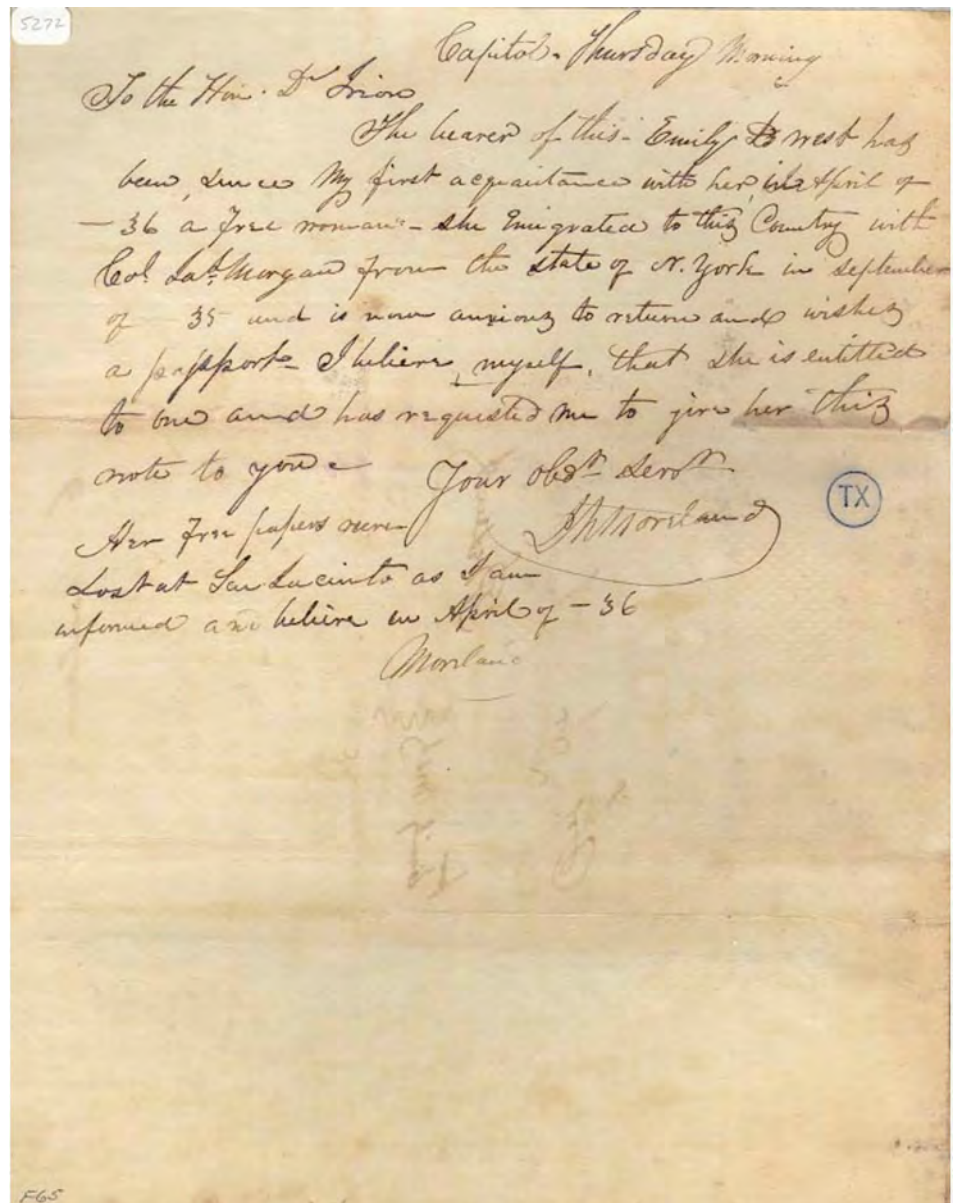
⁵⁰ Moore, *Eighteen Minutes*, 328 and 371; Henson, “West, Emily D.,” *Handbook of Texas Online*,

⁵¹ Moore, *Eighteen Minutes*, 328 and 415. Historical researcher James Lutzweiler reasoned, persuasively, that Emily West told her story to Captain James Moreland, who on his deathbed passed the story to Sam Houston in 1842, who related it as a piquant tale to William Bollaert. *Ibid.*, 415. See also Henson, “West, Emily D.,” *Handbook of Texas Online*; Bob Tutt, “New Twists Discovered in Saga of ‘Yellow Rose of Texas,’” *Port Arthur News*, March 13, 1997, at 4B.

⁵² Henson, “West, Emily D.,” *Handbook of Texas Online*. See also Jeffrey D. Dunn and James Lutzweiler, “Yellow Rose of Texas,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/xey01>; Francis X. Tolbert, *The Day of San Jacinto* (New York: McGraw Hill Book Co., 1959).

Since Texas was a slave republic, visitors to the Moreland home erroneously assumed that Emily West was James Morgan's slave simply because she was black. A year later, Emily D. West received a passport authorizing her to leave Texas and steam back to her Connecticut home. Isaac Moreland noted, at the time, that he met Emily West, a thirty-six-year-old free woman who had lost her "freedom" papers at the San Jacinto battlefield—a contemporaneous reference to her presence at that battlefield.⁵³

Emily declared that she had come from New York to Texas in 1835 with Colonel Morgan. The passport application is undated, but circumstantial evidence suggests that it was 1837. Lorenzo de Zavala, first elected Vice President of the Republic, was by then dead, and his widow, Mrs. Lorenzo de Zavala, was planning to return to New York on board



The Texas State Library and Archives contains Emily West's passport.

Morgan's schooner in March of 1837. The evidence suggests a connection between Emily D. West and the de Zavala family in connection with Emily's return to New York in 1837. The trail leads from New Washington to New York and back to New England—where Emily West disappears from history. Emily West came to Texas, a free woman, seeking to find work in Mexican Texas.⁵⁴

Anson Jones of Great Barrington, Massachusetts (1788-1858): Physician Soldier, Diplomat, and Last President of the Republic.

An extraordinary man who considered himself a sad little loser when he "drifted" (his word) to Stephen F. Austin's colony in October 1833, Anson Jones, the thirteenth child of Solomon and

⁵³ Moore, *Eighteen Minutes*, 416; Henson, "West, Emily D.," *Handbook of Texas Online*.

⁵⁴ Henson, "West, Emily D.," *Handbook of Texas Online*. Cf. Don Guillermo, "Emily D. West, Emily de Zavala and The Yellow Rose Legend," *Sons of DeWitt Colony, Texas website*, <http://www.sonsofde Wittcolony.org/mckshorts4.htm>.



Portrait of Anson Jones at the Star of the Republic Museum at Washington on the Brazos.
Photo by David A. Furlow.

Sarah (Strong) Jones, came into the world at Seekonkville, a suburb of Great Barrington, Massachusetts, on January 20, 1798.⁵⁵ Jones was a plain-spoken, practical New Englander who exemplified the region's preference for plain-spoken speech and simple manners. His earliest memories were of rural Massachusetts and that "pleasant little village in Berkshire County, on the banks of the Housatonic...about five miles from the line of the State of New York, and ten from that of Connecticut."⁵⁶

Inspired to equal the ancestors he emulated, Anson Jones began his life anew in Stephen F. Austin's colony, founded Texas's first Masonic lodge, called a convention to consider Texas independence, served as a judge advocate and surgeon of Sam Houston's Second Regiment while remaining an infantry private in the San Jacinto campaign, represented the Republic as President Sam Houston's Minister to the United States, and, as "Architect of Annexation" and the Republic's last President, negotiated Texas's admission to the Union.⁵⁷ Cursed with an illustrious English and New England ancestry, he chastised himself for not having done better at an earlier age—yet seethed with hatred and resentment when the Texas Legislature chose Supreme Court of Texas Chief Justice John Hemphill to serve in the U.S. Senate.⁵⁸

⁵⁵ Gambrell, "Jones, Anson," *Handbook of Texas Online*.

⁵⁶ Herbert Gambrell, *Anson Jones: The Last President of Texas* (Austin: University of Texas Press, 2nd ed., 1964), 3.

⁵⁷ Herbert Gambrell, "Jones, Anson," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fjo42>.

⁵⁸ Determined to "out" Hemphill, Jones wrote a scathing missive to John Henry Brown, publisher of the Galveston Civilian newspaper. "It is a most significant fact connected with the recent election of Hon. J. Hemphill as Senator... that...I, who for twenty-four years have been constantly sacrificing myself for the welfare of Texas...should have been the very first...to be sacrificed for the pretended...welfare of the party!! *Credat Judaeus!!!*" Anson Jones, *Memoranda and Official Correspondence Relating to the Republic of Texas, Its History and Annexation, 1836-1846, with my Endorsements and Notes at the Time* (New York: D. Appleton & Co., 1859; reprint, Chicago: Rio Grande Press, 1966), 640-41. Herbert Gambrell, *Anson Jones: The Last President of Texas* (Garden City, N.Y.: Doubleday, 1948), 434-35. See also Erma Baker, "Brown, John Henry," *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fbr94> (accessed Sept. 13, 2015).



The Barrington Living History Farm, preserved at Washington, Texas, was the last home of Anson Jones. Photo by Stuart Seeger of College Station, Texas, made available by the Anson Jones Home.

In an 1845 column about Texas's four presidents, Corinne Montgomery introduced Jones to her American readers. "Dr. Anson Jones...promises to imitate closely the moderate non-committalism [about U.S. annexation] of his predecessor...He is a plain, practical New Englander, ready for a speculation, either in his public or private capacity, so that it be safe or decorous; but he will run no disagreeable risk...will take care not to venture beyond his depth for friend or foe... will make no personal sacrifices...Jones will be a miniature edition of [Sam] Houston in water colors, as Houston himself is an imperfect copy of General Jackson—without disrespect to the old hero be it said—done in chalks."⁵⁹

Anson Jones died, by his own hand, in 1858 at the Houston hotel that had once served as the new nation's capital. Jones's bookshelves at his Barrington plantation home included genealogical charts and records that resulted from months of research—and "a deed to two acres of barren Massachusetts soil, sentimentally more precious than the forty-four square miles of Texas he owned—because there his people had lived when America was young."⁶⁰ He made Texas an American state, but his heart remained in another state—in New England.

When Anson Jones came to Brazoria in October 1833, he was dirt-poor, depressed, and "drifting," to use his own word. Yet what he lacked in confidence, he compensated for with Cromwell. William Jones, son of English Army Colonel Sir John Jones, was the first of Anson's ancestors in America. William's wife was Catherine Cromwell, sister of Oliver Cromwell, the Puritan hero who rebelled against King Charles I, organized the Ironsides army, defeated the king in battle, arrested him, tried and convicted him for treason, and executed him.⁶¹ William Jones then served

⁵⁹ Corinne Montgomery, *The United States Magazine and Democratic Review*, XVI (1845), 282, 291, quoted in Gambrell, *Last President*, 485.

⁶⁰ *Ibid.*, 422.

⁶¹ Charles Elmer Rice, *By the Name of Rice: An Historical Sketch of Deacon Edmund Rice The Pilgrim 1594-1663 and His Descendants to the Fourth Generation* (Alliance, Ohio: Williams Printing, 1911), 3-4, <https://archive.org/details/>

as Deputy Governor of New Haven and Connecticut from 1683 until 1698.⁶²

Anson Jones was proud of his Puritan English and New England ancestry and his family's traditions—so much so that he named his youngest son Anson Cromwell Jones.⁶³ “The silver top of his humidor bore the Cromwell arms,” biographer Herbert Gambrell noted, “as did all the plate and flat silver of the Barrington establishment. He could not eat a bite without recalling that he was a Cromwell; that his people had created the British Commonwealth, had helped found America; and that in that tradition he had done his part to create this new corner of the Anglo American world. He knew that, even if other men had forgotten.”⁶⁴

Elisa Marshall Pease (1812–1883) of Enfield, Connecticut: Minute Man, Congressman, and Governor of Texas.

Elisha Marshall Pease was born to Lorrain Thompson and Sarah (Marshall) Pease on January 3, 1812.⁶⁵ His parents sent him to school at Westfield Academy in Massachusetts. He held a clerkship in the post office at Hartford, Connecticut. He left New England in 1834, arrived in Texas in 1835, and settled in the Municipality of Mina, that is, Bastrop. Although initially hopeful that conciliation could resolve Texas's problems with Mexico, he took arms at the Battle of Gonzales on October 2, 1835. He threw himself into the Texas Revolution, received a position as Secretary of Texas's Provisional Government, attended the Convention at Washington-on-the-Brazos in March 1836, and drafted part of the 1836 Constitution.⁶⁶

After completing legal studies begun in Connecticut, he obtained his law license in April 1837. Through hard work he became the Republic's first Comptroller of Public Accounts. Appointed Chief Clerk of the Departments of the Republic's Navy and its Treasury, he served also as Clerk of the First Congress's Judiciary Committee and drafted the Republic's criminal code. He represented Brazoria County in the first three post-annexation sessions of the Legislature. He developed a thriving legal practice and drafted the 1846 Probate Code.

Pease won election and re-election as Texas's Governor. Elisha Marshall Pease married Lucadia Christiana Niles, of Poquonock, Connecticut, in 1850, whose diary records close friendships with other New Englanders. By 1851, Elisha aimed to become the Governor of Texas. Although he lost his first gubernatorial campaign, he won the office in 1853 and won re-election in 1855. The governorship gave Elisha an opportunity to bring New England values to Texas politics. He convinced the Legislature to establish a comprehensive system of free public education and create a state university. His efforts resulted in a permanent school fund. He supervised construction of

bynameofricehist00riceiala/mode/2up.

⁶² *Ibid.*, 3.

⁶³ Gambrell, *Last President*, 421.

⁶⁴ *Ibid.*, 422. Anson Jones's bookshelves at his Barrington plantation at Washington-on-the-Brazos included genealogical charts and records that resulted from months of research—and “a deed to two acres of barren Massachusetts soil, sentimentally more precious than the forty-four square miles of Texas he owned—because there his people had lived when America was young.” *Ibid.*

⁶⁵ Roger A. Griffin, “Pease, Elisha Marshall,” *Handbook of Texas Online*, <http://www.tshaonline.org/handbook/online/articles/fpe08>.

⁶⁶ *Ibid.*



Left: Elisha Marshall Pease, 5th and 13th Governor of the State of Texas. Image public domain, courtesy of the Texas State Library and Archives. Right: Governor Pease organized the first Texas School for the Deaf. The Texas State School for the Deaf, in Austin, memorializes one of Governor Pease's most important achievements. Photo by David A. Furlow.

the Governor's Mansion, the General Land Office, the State Orphans' Home in Corsicana, and a new Capitol. His fiscal reforms paid the State debt, leaving funds to organize schools for the deaf and blind, and a hospital for the mentally ill. Elisha retired from office in 1857.⁶⁷

As previously noted, the governorship gave Elisha an opportunity to bring his New England values to Texas politics. He sought to convince the Legislature to establish a comprehensive system of public education and to create a state university. He did not achieve everything he sought to obtain, but his efforts resulted in the legislative creation of a permanent school fund. Living up to the thrifty New England stereotype, his fiscal reforms paid off the State's debt.⁶⁸

When election to Texas's governorship enabled him to work in a city on a hill, Pease's fiscal reforms left sufficient funds to establish Texas's Permanent University Fund, School for the Deaf, and School for the Blind.⁶⁹ He put New England educational values into practice in his adoptive state. In Texas, he lived up to the challenge Bay Colony Governor John Winthrop expressed in his 1630 "Model of Christian Charity" sermon, where Winthrop declared that "we must be willing to abridge ourselves of our superfluities, for the supply of others' necessities, we must uphold a familiar commerce together in all meekness, gentleness, patience and liberality...always having before our eyes our commission and community in the work, our community as members of the same body..."⁷⁰

Elisha Pease retired in 1857. In the face of increasing support for Southern secession, Elisha maintained his loyalty to the nation. He served the post-war government of Texas in positions of controversy and responsibility, including General Philip H. Sheridan's appointment of him to serve as Governor. U.S. President Rutherford B. Hayes appointed him as Collector of Customs in

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Griffin, "Pease, Elisha Marshall," *Handbook of Texas Online*.

⁷⁰ Fischer and Eric Hinderaker, editors, *Colonial American History*, 85-88.

Galveston, a lucrative and prestigious position. After a life of extraordinary public service, Elisha Pease died on August 26, 1883.⁷¹

Other New Englanders made important contributions to Texas, too, but they are too numerous to mention. When we think of those early Texans, we should think not just of Virginians, Tennesseans, Carolinians, Alabamans, and Louisianans, but New Englanders, too.

New England's Early Texans

Each New England Texan came from a humble background. Each was entrepreneurial, as educated as circumstances allowed, and each was ready to take up business, law, medicine, and politics to get ahead, just as the Pilgrims did when they stepped ashore in Plymouth in 1620. They were proud of their Protestantism, their English language, and their traditions. Each found common ground with people of different faiths, tribes, and backgrounds, as the Pilgrims did when Plymouth Colony Governor John Carver signed a treaty of peace and alliance with Wampanoag chief Massasoit in 1621.

Each of the men discussed here learned how to solve differences without violence, like the Pilgrims whose litigation, mediation, and arbitration records fill Massachusetts' archives. Each read books, kept records, signed petitions and remonstrances, as Pilgrims did in England, Holland, and New England. Each stood ready to rebel against arbitrary authority and religious oppression, recalling how their ancestors burned as Marian Martyrs, resisted Archbishop Laud's plans to slip Catholic rituals into English churches, won the English Civil War to end Charles I's divine-right rule, and launched the Glorious Revolution to stop James II from restoring Catholic rule over England. Each joined committees of public safety, drilled in Minute-Man militias, defended cannons that protected them from Indians and preserved Magna Carta rights that safeguarded them from tyrants—as their ancestors did at Lexington, Concord, and Bunker Hill.

Each was born in New England after the Declaration of Independence, John Adams' Massachusetts Constitution of 1780, and Washington's victory at Yorktown showed them how to wage and win a revolutionary war for freedom. These New Englanders made homes along Texas's violent frontier in ways that echoed those of their Pilgrim and Puritan ancestors.

⁷¹ Griffin, "Pease, Elisha Marshall," *Handbook of Texas Online*.



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Law in a Time of Pandemic:

How Texas courts and lawyers responded to the pandemic of 1918-1920.

By Stephen Pate

William Faulkner once wrote, “The past is never dead. It’s not even past.”² He was correct. Today, because of the coronavirus, Texas lawyers are faced with quarantines, court closures, continued trials, and more importantly, the illness of colleagues. As horrible as this pandemic is, we should remember that this situation occurred before, during the so-called “Spanish flu” pandemic of 1918-1920.



President Woodrow Wilson

Spanish flu was a global pandemic. Almost 50 million people died worldwide in a world already ravaged and weakened by World War I.³ In the United States, an estimated 25 million—some 25% of the population—had the disease; over 550,000 died.⁴ Even President Woodrow Wilson was infected while at the 1919 Paris Peace Conference. The most prominent Texan infected was Wilson’s closest adviser, Col. Edward House, who had the illness three times.⁵ Almost 106,000 Texans were victims. Eventually more than 2,100 would die.⁶



Edward House

The Spanish flu’s first wave, which began in March 1918, was brief, and perhaps the advent of warmer weather contained it.⁷ The next wave struck the world in fall 1918. This was the deadliest wave and lasted in virulent form for some four to six weeks.⁸ It was this second wave that would

¹ This article was originally published in the June 2020 issue of the *Texas Bar Journal* and has been reprinted with permission.

² Faulkner, William, and Ruth Ford. *Requiem for a Nun: a Play*. New York: Random House, 1951.

³ Alison Medley, “Here’s How Houston Handled the Horrific Spanish Flu Pandemic 100 Years Ago,” *Houston Chronicle*, March 13, 2020, 8:08 AM, <https://www.houstonchronicle.com/local/article/Here-s-how-Houston-handled-the-horrific-Spanish-15126650.php>.

⁴ Chester R. Burns, “Epidemic Diseases,” *The Handbook of Texas Online*, Texas State Historical Association (TSHA), June 12, 2010, <https://tshaonline.org/handbook/online/articles/sme01>.

⁵ John M. Barry, in *The Great Influenza: The Story of the Deadliest Pandemic in History* (New York: Penguin Books, 2018), pp. 381-383.

⁶ Alison Medley, “Here’s How Houston Handled the Horrific Spanish Flu Pandemic 100 Years Ago,” *Houston Chronicle*, March 13, 2020, 8:08 AM, <https://www.houstonchronicle.com/local/article/Here-s-how-Houston-handled-the-horrific-Spanish-15126650.php>.

⁷ Laura Spinney, in *Pale Rider: the Spanish Flu of 1918 and How It Changed the World* (New York: Hachette, 2017), p. 4.

⁸ Martinez-Catsam, Ana Luisa. “Desolate Streets: The Spanish Influenza in San Antonio.” *Southwestern Historical Quarterly* 116, no. 3 (2013): 287-303. [doi:10.1353/swh.2013.0010](https://doi.org/10.1353/swh.2013.0010).

wreak havoc on Texas courts, and indeed, all of Texas. Wartime conditions fostered the flu's spread. In the U.S., this second wave began in an army camp in Massachusetts. By mid-September 1918, soldiers at several Texas military installations were ill. The disease quickly jumped to the civilian population.⁹

Sadly, public awareness of the pandemic was slow in coming. In those months, the front pages of Texas' newspapers were full of stories about the end of the Great War and Germany's impending defeat. Yet by mid-October, the growing number of cases could not be ignored. On October 16, San Antonio was put under quarantine.¹⁰ Houston barred public gatherings, and Dallas closed "places of public amusement."¹¹

Courts began to close in October—but not all of them and some with much reluctance. In Fort Worth, lawyers themselves forced the issue. On October 21, 1918, the Tarrant County Bar Association met and unanimously passed a resolution to adjourn all courts until the flu epidemic had subsided. A committee of three then notified all four state judges of the resolution—and all four recessed their courts. One court was impaneling a jury when it received the resolution and immediately adjourned. The criminal district court dismissed a venire panel of 200.¹² In Austin on October 25, Travis County District Judge George Calhoun announced a postponement of jury trials for a week based on advice from the health board and different physicians. Judge Calhoun did this despite having been told (quite wrongly) that "the epidemic is beginning to wane[.]" He said that "the fact remains those who have had [the influenza] are yet carrying and it would be next to impossible for the crowd that will assemble at the courthouse Monday should court be held to be free altogether as carriers."¹³ Both federal and state courts adjourned in El Paso in October.¹⁴ Smaller counties were not exempt. In Ballinger, a murder trial was already under way when the trial judge adjourned it until the next term.¹⁵ In rural Bowie County, trials were adjourned from October until November.¹⁶



Judge George Calhoun

Some federal courts remained open even as state courts closed.¹⁷ In Dallas County, jurors already hearing cases were allowed to vote regarding whether to recess their trials in light of the pandemic. They voted 27 to 24 to continue.¹⁸ Some judges still conducted non-jury trials.¹⁹ Even

⁹ *Ibid.* at 293-295.

¹⁰ *Ibid.* at 297.

¹¹ "Influenza Encyclopedia," *Dallas, Texas and the 1918-1919 Influenza Epidemic | The American Influenza Epidemic of 1918: A Digital Encyclopedia*, n.d., <https://www.influenzaarchive.org/cities/city-dallas.html>.

¹² "Bar Association Causes Closing of the Courts," *Dallas Morning News*, Oct. 22, 1918, at 9.

¹³ "The District Courts Jury Cases Postponed Again on Physician's Advice," *Austin American Statesman*, Oct. 25, 1918, at 8.

¹⁴ "To Avert Influenza Spread, Courts Suspend For A Week," *El Paso Herald*, Oct. 7 1918, at 13.

¹⁵ "Influenza Epidemic," *Dallas Morning News*, Oct. 17, 1918, at 2.

¹⁶ "Influenza Epidemic," *Dallas Morning News*, Oct. 28, 1918, at 7.

¹⁷ "Federal Court Open Monday; Juries to Meet," *Houston Post*, Oct. 21, 1918, at 6.

¹⁸ "Jurors Vote to Hold Court Despite Epidemic," *Dallas Morning News*, Oct. 15, 1918, at 8.

¹⁹ "Jury Trials Will Be After Epidemic In Austin Courts," *Austin American Statesman*, Oct. 22, 1918, at 6.

so, many courts that wanted to go forward simply could not. In Travis County (before Judge Calhoun ordered a postponement), 10 potential jurors out of 60 summoned could not appear because they had the flu.²⁰ In San Antonio, just before the quarantine, both the fact that potential jurors were in the Army and others were sick depleted the venire panels.²¹ Obviously, many summoned for jury duty were not reporting because of fear of contagion. In El Paso, Judge W.D. Howe solemnly warned a jury panel not to dodge jury duty.²² The Dallas Morning News wrote, "Judges find it difficult to get cases to trial. Often witnesses can not be found. At other times lawyers can not be present."²³



Judge W. D. Howe

The pandemic did not exempt the judiciary from its victims, and this put more strain on courts that did stay open. By late October, Judge Calhoun was handling the duties of all three Travis County district courts because one judge was on war duty and another was suffering from what many called "La Grippe."²⁴ Eventually Texas' federal judges paid the price for having kept their courts open. Three of the four Texas judges contracted influenza and could not hold their regular terms of court. Only Judge DuVal West, of the Western District, carried on, and he was holding court in every district in the state and for every judge.²⁵ Judge West was an avid and hardy outdoorsman; there are those who would say this aided him in his immunity to the disease.



Chief Justice
Nelson Phillips

How did the appellate courts fare? On October 5, the U.S. Supreme Court went into recess because of the epidemic.²⁶ Nevertheless, all three of Texas' highest courts—the Supreme Court, the Court of Criminal Appeals, and the Commission of Appeals—met on October 7 to begin their terms of court. Noticeably absent from the proceedings was Texas Supreme Court Chief Justice Nelson Phillips, who had left for Troy, New York, the night before after he learned that his son, Lt. Nelson Phillips Jr., had taken ill with influenza at his Army posting.²⁷ We know that the son fortunately survived; after Justice Phillips left the bench, father and son practiced law together for many years.²⁸ Despite absence and illness, Texas appellate courts soldiered on in issuing decisions.²⁹

As has happened today, some lawyers saw a way to generate business from the pandemic. In early December 1918, this headline appeared in the Austin American Statesman: "Chance for

²⁰ *Ibid.*

²¹ "Jurors Hard to Find," *San Antonio Light*, Oct. 17, 1918, at 10.

²² "Do Not Dodge Jury Duty, Says Judge Howe," *El Paso Herald*, Dec. 16, 1918, at 10.

²³ "Jurors Vote To Hold Court Despite Epidemic," *Dallas Morning News*, Oct. 15, 1918, at 8.

²⁴ "One Austin Judge Handles All Three District Courts," *Austin American Statesman*, Oct. 22, 1918, at 3.

²⁵ "Federal Courts Hit Hard By The Influenza," *Austin American Statesman*, Dec. 7, 1918, at 3.

²⁶ "Court Takes Recess," *Fort Worth Record-Telegram*, Oct. 13, 1918, at 19.

²⁷ "Appellate Courts of Texas Reconvene," *Dallas Morning News*, Oct. 8, 1918, at 9.

²⁸ "Nelson Phillips (1873-1939)," Nelson Phillips, n.d., <https://tarltonapps.law.utexas.edu/justices/profile/view/79>.

²⁹ "Seven Court Decisions," *San Antonio Light*, Oct. 30, 1918, at 9.

Damage Suits Looms Big Say Texas Lawyers.”³⁰ The accompanying article noted that attorneys were discussing the “revival of the damage suit industry” in Texas because of the flu. The theory was that owners of theaters and other public gathering places owed a duty to the public to keep their premises safe and influenza free.³¹ A review of caselaw, however, reveals no appellate decisions on this point.

In Texas, the pandemic crested in October 1918.³² Thereafter courts, though understaffed, reopened and remained open despite flare-ups that occurred throughout winter 1919. After that, the pandemic subsided, though some new infections continued into 1920. The last deaths occurred in March 1920.³³ The flu’s disruption of Texas courts had been brief, but troubling.

³⁰ “Chance for Damage Suits Loom Big Say Texas Lawyers,” *Austin American Statesman*, Dec. 6, 1918, at 6.

³¹ *Ibid.*

³² Martinez-Catsam, Ana Luisa. “Desolate Streets: The Spanish Influenza in San Antonio.” *Southwestern Historical Quarterly* 116, no. 3 (2013): 287-303. [doi:10.1353/swh.2013.0010](https://doi.org/10.1353/swh.2013.0010).

³³ Paul J. Gately et al., “1918 Pandemic’s Impact in Central Texas Was Swift, Deadly,” <https://www.kwtx.com>, n.d., <https://www.kwtx.com/content/news/1918-pandemics-impact-in-Central-Texas-was-swift-deadly-568706031.html>; Spinney, Pale Rider 4.



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An Essay: The Supreme Court of Texas in an Historic Crisis

By Hon. Nathan L. Hecht, Chief Justice

I, like most of you, first heard of a novel coronavirus last New Year's Eve from reports of people being treated for pneumonia in Wuhan, China. Three weeks later, a resident of Snohomish County, Washington, north of Seattle, just returned from Wuhan, became the first reported case in the United States. The first case in Texas is thought to have been March 4, in Fort Bend County, although there may have been unrecognized cases earlier. Nine days later, on Friday, March 13, Governor Abbott declared a state of disaster, and the Supreme Court and Court of Criminal Appeals issued their first emergency order.

As I write this on the Fourth of July, that was 18 emergency orders, 190,000 COVID cases, and 2,600 deaths ago. Every part of our lives has been affected. Texas courts have had two priorities throughout: stay open and stay safe. Texas' 3,220 judges disposed of more than 8.9 million cases last year—more than 35,000 per workday. We could not close the courts to people coming for justice. But safety was a challenge—and not just for staff, security, lawyers, parties, and judges, but also for the public. The Office of Court Administration (OCA) estimates that Texas' 254 counties have 1,192 courthouses or court facilities, to which some 325,000 people go every workday. The courts are easily the biggest government convener of people in the country.

The Supreme Court's First Emergency Order Regarding the COVID-19 State of Disaster, which was joined by the Court of Criminal Appeals, had two main purposes. The first was to give judges flexibility. They were authorized to modify or suspend all deadlines and procedures, allow remote participation in proceedings, and sit away from their usual locations. The second was to give direction in these uncharted waters. Judges were required to take all reasonable steps to avoid exposing court proceedings to the threat of COVID-19. The Third Emergency Order six days later prohibited courts from conducting non-essential proceedings in person contrary to generally applicable local, state, or national directives. All deadlines for filing and serving civil cases were suspended by the Eighth Emergency Order on April 1 and remain suspended.

The Fourth Emergency Order, issued March 19, imposed a 30-day statewide moratorium on residential evictions. Court lawyers consulted with landlords' representatives, legal aid lawyers, and justices of the peace before fashioning the terms of the Order. The Order was extended to the end of April and was joined by a similar moratorium on consumer debt collection cases, also after consultations with stakeholders, and also to the end of April. As the State was beginning to reopen, both moratoria were extended to May 18 and then allowed to expire. The federal CARES Act, passed in late March, temporarily bars evictions from certain federally subsidized properties and properties covered by federally backed mortgages.

By the time the two Orders expired, it appeared to the Court that local procedures tailored to a particular jurisdiction should replace some statewide procedures. For evictions and debt collections, the expiration of the moratoria allowed Texas' 802 justices of the peace to adjust procedures based on local conditions. To ensure communication and collaboration among them, with the support of the Texas Justice Court Training Center, I convened a Justice Court COVID-19 Working Group of justices of the peace and lawyers who frequently practice in their courts. The Working Group quickly prepared a Practical Guide & FAQ for Emergency Order 18 (posted at tjctc.org) that gives enormous help with justice court dockets. And if the pandemic continues to lessen or spike in particular areas, the Working Group can help justices of the peace in those areas respond.

To provide more detailed assistance to other trial courts, the Court approved OCA's publication of a "Guidance" addressing procedures in more detail than Supreme Court orders can. Emergency orders have changed to allow courts in a particular jurisdiction to resume operations under an OCA-approved plan. The purpose of the plan is to allow local judges flexibility in fashioning their own procedures but ensuring that in doing so they have taken all factors into consideration.

Surely the pandemic's most profound impact on the courts to date has been the use of remote conferencing. Before March, I suspect most judges were like me: I thought "Zoom" meant hurry. Now OCA has provided Zoom licenses for all Texas judges, and while judges (and lawyers) are notoriously tech-unsavvy, most are regularly using the licenses. Texas judges have held hundreds of thousands of hours of Zoom hearings, keeping up with pressing work and sparing participants not only health risks but unnecessary expense and delay. Efforts are made to provide public access ensuring transparency, as well as to bridge the "digital divide" by making the required technology—a computer or phone and WiFi—accessible to those with limited means. The Supreme Court was among the first high courts in the country to hear oral argument remotely. It has heard five cases and conducted eight Court conferences using Zoom. Without Zoom, cases would either have been decided without argument or delayed, and the Court could not again have cleared its docket of argued cases by the end of June, as has been its habit.

Only one problem with returning to something approaching normal functioning resists solution despite best efforts here and across the country: how to conduct jury trials. Probably the first remote jury proceeding in the nation was conducted in a Texas district court with Supreme Court approval. The proceeding was a summary, non-binding "trial" used for settlement, but it showed that a virtual trial is at least possible. Two other district courts have tried a total of three in-person criminal cases between them. Other pilots are planned, all with OCA guidance and approval. Participants in these cases have been generally positive about their experience. But the preparation for each case is time-consuming and expensive. Polls show that the public can be resistant to, even resentful of, the prospect of being summoned for jury duty in this environment. And lawyers are understandably wary that juries will not be representative of their communities, and that presenting cases cannot be done as effectively with the distractions of necessary health protections. Last year, Texas tried 8,863 cases to verdict—6,629 criminal and 2,067 civil. With courts' best efforts, it does not seem possible to try more than a few without a vaccine or a rapid, reliable test. But the Supreme Court continues to encourage all these efforts, on which OCA is to report by mid-August.

Statistics for April and May generally show that Texas courts clearance rates are close to 100%, but the number of dispositions, and the number of filings, are down by 50%-75%. So, while courts are keeping up with their work, there may be a surge in filings when the pandemic eases, straining court resources. At the same time, economic pressures on the State may well require reductions in those resources. We must begin to prepare for a recovery that may well be as difficult as the pandemic has been.

Restrictions on travel and gatherings, business closures, and societal stresses have given rise to frustrations with our situation. Some judges feel the justice system is not returning to full operation fast enough, others are afraid reopening is unnecessarily exposing parties, lawyers, court staffs, judges, and the public to risk. But both have been the exceptions. By and large, Texas judges have pulled together in an historic crisis to continue to do their best to provide justice for all. As President of the national Conference of Chief Justices, I see other states' judiciaries all trying to meet the same challenges. I could not be prouder of Texas judges.

What does justice look like going forward? What will be the new normal? There will almost certainly be increased use of remote conferencing. But we will have to learn what can better be done remotely and what must be done in person. We will have to learn how to build public trust and respect when court operations are seen less in majestic courtrooms and more on video screens. We may find that online, the justice system can be made much more accessible to the poor and those with limited means. The pandemic may force us to make improvements we would otherwise have been reluctant even to consider. We will have been reminded how precious justice is to us all, and that every effort to preserve it is our duty and privilege.



NATHAN L. HECHT *is the 27th Chief Justice of the Supreme Court of Texas. He has been elected to the Court six times, first in 1988 as a Justice, and most recently in 2014 as Chief Justice. He is the longest-serving Member of the Court in Texas history and the senior Texas appellate judge in active service.*

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The Cause...Making History...Saving History

By Francisco Heredia¹

As curator of the Historical Document Room for the Harris County District Clerk, Honorable Marilyn Burgess, I serve in various capacities: public servant, deputy clerk, tour guide, preservationist, and researcher, to name a few. In the late 1990s, one of my greatest duties as a preservationist was to inventory over 40,000 historical documents dating back to the Republic of Texas. In addition, I inventoried another 1,200 court records of indices, case dockets, court fee dockets, and court minutes. Most records were stored in un-air-conditioned warehouses; one of which was about 100 feet from Buffalo Bayou. The request for this inventory came after Judge Mark Davidson made our District Clerk, Honorable Charles Bacarisse, aware that some of the oldest records were rotting and turning into confetti! The Records Center, realized we had a [BIG] problem and had to take action immediately. Looking back, these court records were not just old papers but, in fact, were valuable primary sources of Texas' and Houston's history.



By 2002, we had a centralized air-conditioned storage space housed on the 8th floor of the county jail that was vacated in 2001. The records would now have a safe space from rodents, floodwaters, and thieves. We were now able to proceed with the Historical Document Preservation Project, and we sent out the first preservation phase of the earliest Republic of Texas records. As most records were brittle, tri-folded, and in very poor condition, the process for preservation required experts trained in historical documents, as the documents needed to be handled with extreme care. They are unfolded, dry cleaned, de-acidified, imaged, and then encapsulated in polyester Mylar envelopes. This process ensured that these records would be preserved for up to 300 years!

Restoring 19th-century documents after many decades of neglect is very costly but a worthwhile undertaking. Preserving a case file can cost as little as \$100 and a large book can cost as much as \$2,500.² The District Clerk continues to raise funds still needed to complete the Historical Document Preservation Project target year of 1951. As of this year, we have preserved documents from 1836 to 1908. Those efforts have been honored with a 2004 Good Brick Award from the Greater Houston Preservation Alliance and the Liberty Bell Award from the Houston Young Lawyers Association, in 2009.

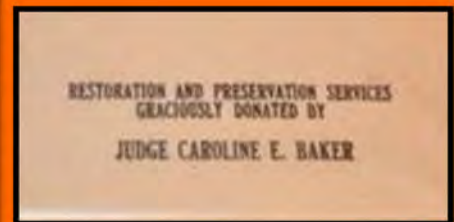
¹ This article is based on a presentation at the Society's joint session at the 2020 Annual Meeting of the Texas State Historical Association in Austin in February 2020.

² To donate to the project, you can submit your tax-deductible donation through the Houston Bar Foundation.

**BEFORE 2006: WAREHOUSE NEAR
BUFFALO BAYOU (NO CLIMATE CONTROL)
ROTTING 1920 UNPRESERVED
TRI-FOLD COURT RECORDS**



**AFTER 2006: CREATION OF HARRIS
COUNTY'S HISTORIC DOCUMENTS
ROOM PRESERVES TEXAS HISTORY**



In October 2006, the Historical Document Room was opened to the public to view the once inaccessible records. As the news got out, the historians, lawyers, and researchers started to visit. They came searching for new stories, for ancestors, and for pleadings with valuable historical information only found in these court records. Some records include pictures, letters, interrogatory questions and answers, stamps, wax seals, and of course, signatures of the parties. The basic information found on these records includes the full names of the parties, type of case, dates of pleadings, court judgment outcomes, and whether the case was appealed.

The following are records rescued from further damage. In Case No. 20, filed in April 6, 1839, petitioner Sam Houston v. Mirabeau B. Lamar, president of the Republic of Texas. The case was brought before the Honorable Benjamin C. Franklin. Houston, former president of the Republic of Texas, alleged Lamar had damaged some of his furniture and had taken other personal possessions he left in the “presidential mansion”. In December 1838, the two were already bitter political rivals. Lamar became angry when guests of Sam Houston at a festive night that cold December, fed the fireplace with wood planks from the floor of the mansion. The case documents do not record if Houston paid for any repairs or if he tried to make a deal with Lamar for his personal items. But interestingly enough, Houston’s list of items included a coffee pot, six linen mosquito nettings, feather pillows, four mattresses, and plated candlesticks.³ The case dragged on for about six years. At one point, Lamar sought a delay because a key witness was on duty with the Texas Army in San Antonio, where the threat of a Mexican invasion seemed constant. In 1843, the City of Houston jury returned their verdict for Sam Houston. Lamar appealed but on December 30, 1845, the day after Texas entered the Union, the Texas Supreme Court of the Republic of Texas affirmed the jury’s verdict.⁴ The opinion is preserved in the file. By the way, I provided the funds to preserve this record in memory of my father, Wulfrano Heredia Gomes.

Another preserved case rescued by the Houston law firm of Baker Botts is dated 1847. It is styled, “Emeline, a free woman of color v. Jesse P. Bolls.” Bolls had taken Emeline by force into slavery. Calling herself “a free woman of color” in the language of the day, in 1847, she filed a “suit for freedom.” Through the dedicated representation of early civic leader Peter W. Gray, Emeline won her freedom a second time. Gray got an injunction order preventing Bolls from selling Emeline’s two children, Thomas and William. He had to get interrogatories answered by persons in other states to support her claim that she had been freed. The trial was conducted before a judge who himself owned slaves. The jury verdict reads, “We the jury find for the plaintiff Emeline that her and her children are free as claimed by her and assess her damages at one dollar, signed A. Briscoe, the foreman.”⁵

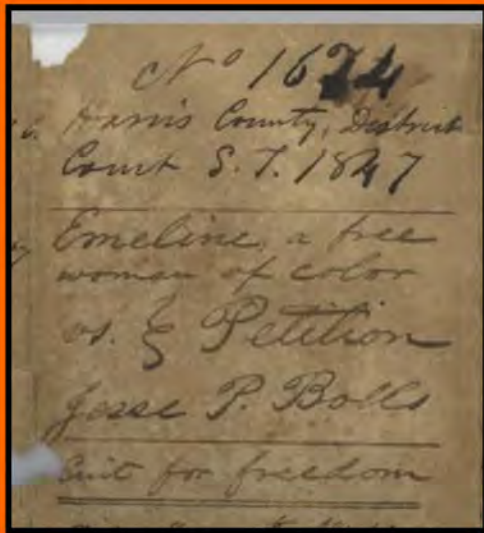
In regards to Justice Wise’s presentation, my role as a researcher required me to search for any record of the District of Brazos, The Republic’s Secret Court. After days of research, Houston we have success! Through the clear Mylar protective envelope I could see, Department of Brazos-Jurisdiction of Harrisburgh, filed on January 12, 1836. The case is styled by John W. Moore v. Violet Hamlet, a colored woman. The plaintiff Moore respectfully submitted that in the year 1834 and

³ Houston v. Lamar, president, civil case 20. Harris County District Clerk. Historical Documents Records Center.

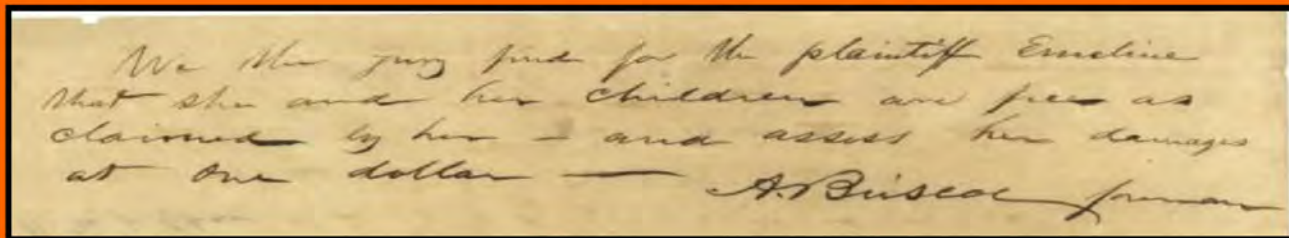
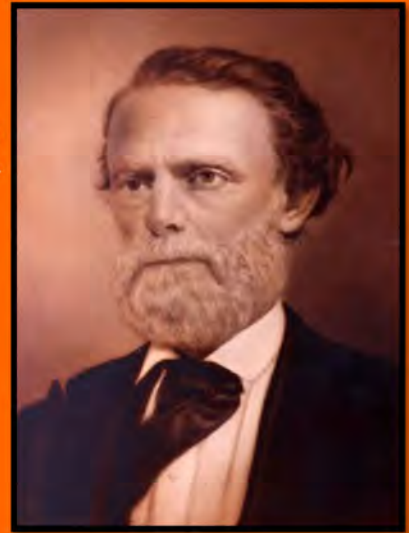
⁴ C. T. Neu, “Annexation,” *Handbook of Texas Online*, accessed February 21, 2020, <http://www.tshaonline.org/handbook/online/articles/mga02>.

⁵ Emeline, a free woman of color v. Bolls, civil case 1674. Harris County District Clerk. Historical Documents Records Center.

EMELINE—LAW SUIT FOR FREEDOM 1847



IN THE LONE STAR STATE PETER GRAY



1835, Violet Hamlet became justly indebted to the petitioner by a sworn account in the amount of forty-seven dollars and thirty cents. In the petition, Moore alleged that the debtor had or was about to transfer herself from the Harrisburgh jurisdiction so that the ordinary process of the law could not reach her. He made a request to the Court that Hamlet be arrested and be brought before the Court Office in the Town of Harrisburgh, in order that Moore would have justice in the premise-signed John W. Moore. The verdict: Judgment for the plaintiff, \$47.30, January 13, 1836. Then by September 28th, 1836, after added court costs, sheriff mileage, attorney fees, and judgment, the accrued amount was now \$262.36 and levied upon the now orphaned daughter of the deceased Hamlets.⁶

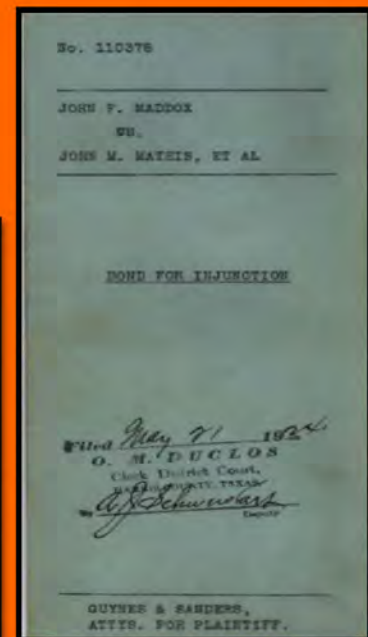
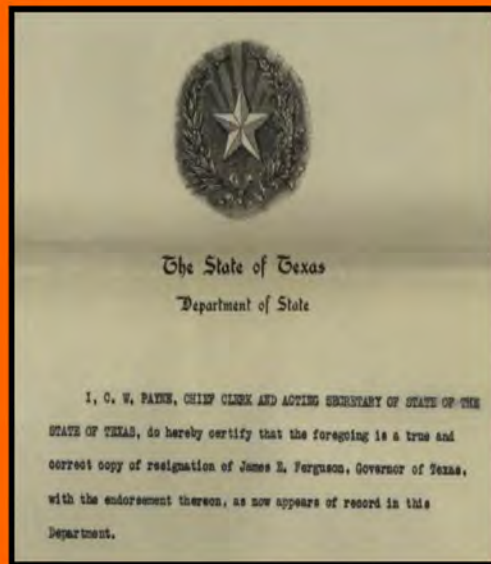
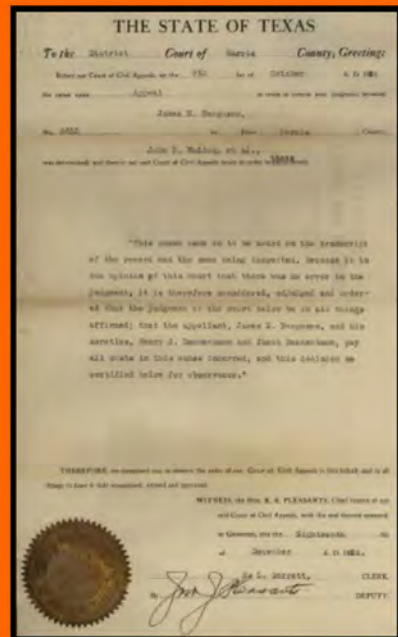
In Judge Davidson's presentation, *Maddox v. Ferguson* was a familiar case from past research. James A. Ferguson had been elected Texas Governor in 1914 and 1916. However, Ferguson was impeached by the Texas House of Representatives in 1917.⁷ The petition was filed on May 3, 1924, where Maddox argued that Ferguson was ineligible to hold the office of Governor since the Senate of Texas had rendered judgment on September 25, 1917. The judgment was to impeach Ferguson and ordered him disqualified to hold any office of honor, trust, and profit under the

⁶ Moore v. Hamlet, colored woman, civil case 46. Volume 9 Bound Civil Records 46-51. Harris County District Clerk. Historical Documents Records Center.

⁷ Cortez A. M. Ewing, "The Impeachment of James E. Ferguson," *Political Science Quarterly*. Vol. 48, No. 2 (Jun., 1933), pp 184-210.

MADDOX VS. FERGUSON

1924



State of Texas. The 61st District Court granted Maddox's injunction keeping Ferguson's name off the official ballot as a candidate for nomination by the Democratic Party to the office of Governor at the ensuing primary to be held by said party. However, Ferguson appealed the Court of Civil Appeals in Galveston where it was decided to adjudge and order that the judgment of the court below be in all things affirmed.⁸

We have thousands of records! And the reason I bring these records to your attention is to show how the power of "old courthouse records" shape and re-shape the history of Texas. The fact is that very few historians have bothered to examine these record. Some of the most important cases are found in Harris County. I would like to leave you with two more cases.

First, Susanna Wilkerson Dickinson's divorce, the first granted in Harris County. She divorced John Williams, on March 24, 1838, due to his beatings of her and her only child, Angelina. She was widowed after the death of Almaron Dickinson on March 6, 1836, a Texian soldier and defender during the Battle of the Alamo. Dickinson is best known as one of the only three non-Mexican survivors to live through the Battle of the Alamo, whose life was also spared.⁹

⁸ Maddox v. Ferguson, civil case 110378. Harris County District Clerk. Historical Documents Records Center.

⁹ District Court Minutes (7th Dist., later renumbered 11th Dist.), Vol. A (1837), page 92. Harris County District Clerk. Historical Documents Records Center. Margaret Swett Henson, "Dickinson, Susanna Wilkerson," *Handbook of*

FIRST DIVORCE: ALAMO SURVIVOR SUSANNA DICKINSON WILLIAMS, 1838

92
Susan Williams
vs
John Williams
Pet. for Divorce

This day came the Plaintiff by her attorney, and the Defendant failing to appear and answer, as was required on the first day term, and, still failing to appear and answer as he was bound to do, It was therefore considered and ordered by the Court that the petition and all the facts therein contained be taken Pro Confesso and the prayer of the petition granted, and it is further ordered by the Court that the bonds of Matrimony heretofore existing between the said Susan Williams and John Williams be hereby dissolved.



Last, an un-preserved mandamus lawsuit filed on October 19, 1920, styled Mrs. Mary F. Hinckley v. E. V. Ley, the presiding officer of the Woodland Heights voting precinct. The plaintiff was represented by attorneys, C. F. Stevens, William Henry Ward, and women's rights suffragist, Hortense Ward.¹⁰ On August 26, 1920, the Nineteenth Amendment to the United States Constitution granted all women the right to vote.¹¹ Judge J. D. Harvey of the 80th District Court declared unconstitutional the poll tax law enacted at the last called session of the legislature affecting women voters. On October 28, 1920, in the opinion of the court, Judge Harvey decreed that "The law attempting to impose on women a poll tax prerequisite to their voting in the general election next month or in any other election held during the current year, is void and women have the constitutional right to vote in all such elections without payment of a poll tax."¹² This year's national election will mark the 100th anniversary of all women's right to vote.

Texas Online, accessed February 21, 2020, <http://www.tshaonline.org/handbook/online/articles/fdi06>. Wikipedia contributors. (2019, November 12). Almaron Dickinson. In Wikipedia, The Free Encyclopedia. Accessed, February 21, 2020, from https://en.wikipedia.org/w/index.php?title=Almaron_Dickinson&oldid=925870868

¹⁰ Janelle D. Scott, "Ward, Hortense Sparks," *Handbook of Texas Online*, accessed February 27, 2020, <http://www.tshaonline.org/handbook/online/articles/fwa83>.

¹¹ Wikipedia contributors. (2020, June 11). Women's suffrage in states of the United States. In Wikipedia, The Free Encyclopedia. Accessed, June 23, 2020, from https://en.wikipedia.org/w/index.php?title=Women%27s_suffrage_in_states_of_the_United_States&oldid=962063843

¹² *Hinckley v. Ley*, civil case 91196. Harris County District Clerk. Historical Documents Records Center.

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Today is your opportunity to sponsor a cause for preservation. Interested? Here's how to donate to this project, please visit us at [Harris County District Clerk](#) website or you can submit your tax-deductible donation through the Houston Bar Foundation. Donors have an option to add an inscription on the sponsored record that will last for 300 years. Special thanks to Honorable Marilyn Burgess, Judge Mark Davidson, Justice Ken Wise, and Mr. David Furlow for their continued support of the Historical Records Preservation Project.



FRANCISCO HEREDIA is the Curator of The Charles Bacarisse Historical Documents Room for Harris County District Clerk, Marilyn Burgess.

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• Book Review •

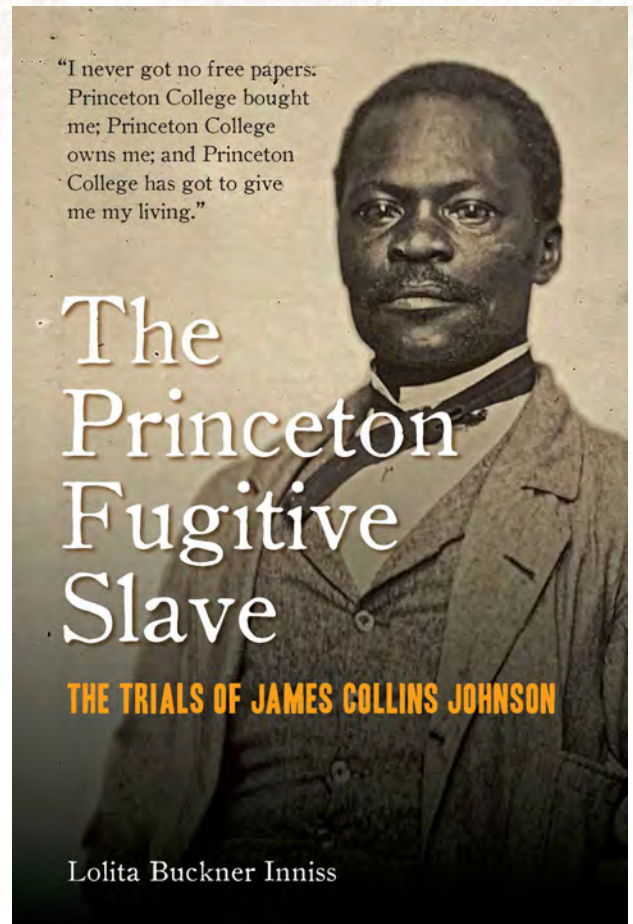
The Princeton Fugitive Slave: The Trials of James Collins Johnson

Review by John G. Browning

The *Princeton Fugitive Slave: The Trials of James Collins Johnson* (Fordham University Press 2019) is a fascinating piece of historical detective work by SMU Dedman School of Law Professor and Senior Associate Dean for Academic Affairs Lolita Buckner Inniss. Dr. Inniss, herself a Princeton alum who first learned of James Collins Johnson as an undergraduate, painstakingly reconstructs Johnson's life and sensational trial from a wealth of primary source materials. As she describes Johnson's story, it is "one of slavery in the Mid-Atlantic, of slavery in the context of universities, of antebellum black life in New Jersey and the northern United States, and of justice and law more broadly."

Born in 1816 in Maryland, James Collins (he would add the "Johnson" later) was enslaved by the family of Phillip Wallis. Collins escaped in 1839, traveling to Princeton, New Jersey. There, he carved out a life as a janitor and bootblack at the college, until he was recognized by a Princeton student from Maryland who alerted Johnson's owners in 1843. Relying on the Fugitive Slave Act of 1793 and an established New Jersey statute for claiming a fugitive slave, the Wallis's dispatched a slave-catcher named Madison Jeffers. Johnson was arrested and his trial on the charge of being a fugitive slave began just a few days later on August 1, 1843, in the Inferior Court of Common Pleas of Mercer County, New Jersey. The trial received extensive press coverage and was attended by both pro-slavery Southern students and members of Princeton's African American and abolitionist communities as well. Ironically, the one person court spectators would not hear from was James Collins Johnson himself, since enslaved black persons were not permitted to testify in court proceedings—described by Dr. Inniss as a "gaping chasm of legal silence."

But as the book describes, the trial took an unexpected turn when a wealthy white philanthropist, Theodosia Prevost (step-granddaughter of Aaron Burr), stepped in and "rescued" Johnson by paying \$550 for his freedom. This seeming fairy tale ending ushered in the "feel good"



mythos of the remainder of Johnson's life, in which he plied his trade as a jovial food vendor on campus, beloved by Princeton students until his death in 1902 and memorialized with a headstone proclaiming him "The Students Friend." Yet even here, the truth revealed by Dr. Inniss is darker and more complicated when one looks beyond the superficial "white savior" trappings of the story. Like many free African Americans in Princeton and the North generally, Johnson's life after being "saved" was characterized by demeaning menial work (he received the cruel nickname "Jim Stink" from Princeton students for his labor cleaning latrines), and limited economic opportunity and social mobility. At one point, angered that a white Union Army veteran had been granted a campus permit as a competing vendor, Johnson supposedly yelled "I never got no free papers. Princeton College bought me; Princeton College owns me; and Princeton College has got to give me my living." Dr. Inniss' plural reference to Johnson's "trials" has ample reason.

The Princeton Fugitive Slave: The Trials of James Collins Johnson is an illuminating example of how a topic of local lore or fascination can, once subjected to a legal historian's scrutiny and exhaustive research, yield important insights into larger subjects like antebellum treatment of formerly enslaved people or the ongoing conversation about universities' past relationships with slavery. Her work also serves as an important reminder that while fugitive slaves have been a subject of American literature from Harriet Beecher Stowe to Toni Morrison and beyond, the voice of the fugitive slave himself is a narrative that must not be ignored. Just a few years after James Collins Johnson's trial, Congress would appease the outcries of slaveholders by passing the Fugitive Slave Act of 1850, which strengthened the federal mandate for arresting and returning escapees. The Act galvanized both abolitionists and Southerners and ushered in what historian Andrew Delbanco has described as "The War Before the War" in his 2019 book about the history of the fugitive slave issue. Dr. Inniss' work—woven from archival sources, family histories, court records, and contemporary newspaper accounts—is an important contribution to the rich and complex tapestry of the quest for racial justice in America.

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Justice Sondock Award Presented to Lynne Liberato

By Warren W. Harris

Society Past President Lynne Liberato and the Honorable Alice Oliver-Parrott are the second recipients of the Houston Bar Association's Justice Ruby Kless Sondock Award. The Houston Bar Association presents the award to a woman lawyer or judge for exceptional achievement and leadership in the law. This award recognizes a record of outstanding accomplishments by a woman attorney including exceptional service as a role model, mentor, and advocate in the legal profession, and a lifelong commitment to professionalism.

The award was established in 2019 and is named in honor of former Texas Supreme Court Justice Ruby Kless Sondock, the award's inaugural recipient. Justice Sondock was the first woman Justice to serve on the Court since 1925, when a special all-woman Court heard a single case involving the Woodmen of the World.

Lynne was the first woman president of the Houston Bar Association and the third woman president of the State Bar of Texas. She was the 2019 recipient of the Texas Bar Foundation's Gregory S. Coleman Outstanding Appellate Lawyer of Texas Award. Lynne was recently appointed to serve on the Texas Commission on Judicial Selection. She is a Fellow of the American Academy of Appellate Lawyers and a Charter Fellow of the Texas Supreme Court Historical Society Fellows.

Lynne is a partner in Haynes and Boone's Appellate Practice Group in Houston.



Lynne Liberato



Hon. Alice Oliver-Parrott



Justice Ruby Kless Sondock

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John Browning Honored with Outstanding Achievement in CLE Award

Spencer Fane attorney [John Browning](#) was recently honored by the Texas Bar College, with the Patrick A. Nester Outstanding Achievement in CLE (Continuing Legal Education) award.



According to the Texas Bar College the Nester award is “to honor a Texas attorney for outstanding achievement in CLE as a course director, speaker, author, creator of a new course, or in this case, dedicating an entire career to enhancing legal education for lawyers on a state and national level.” For years, John has been one of the State Bar of Texas’ most in-demand speakers, delivering as many as 50 presentations annually on a wide range of topics across many practice areas, particularly in the areas of legal ethics and technology and the law. John also frequently speaks for bar associations in other states, as well as at national legal conferences for specialty bar associations like the International Association of Defense Counsel, Defense Research Institute, and the American Board of Trial Advocates. As a faculty member for the Texas Center for the Judiciary, the Federal Judicial Center, and the Appellate Judges Educational Institute, John also regularly teaches state and federal trial and appellate judges.

As the author of numerous articles and several books on social media’s impact on the law, John is frequently sought out by national and international media on the subject. He has appeared on television, radio, and podcasts discussing social networking and the law, and has been quoted in such publications as The New York Times, The Wall Street Journal, TIME magazine, Law360, the National Law Journal, the ABA Journal.

To read more about the award, please click [here](#).

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Call for Applications: 2021 Larry McNeill Research Fellowship in Texas Legal History

The Texas Supreme Court Historical Society and the Texas State Historical Association are pleased to announce that applications are now being accepted for the **2021 Larry McNeill Research Fellowship in Texas Legal History**. Established in Summer 2019 in honor of former TSCHS and TSHA President Larry McNeill, TSHA's 2021 Larry McNeill \$2,500 annual fellowship will be awarded to an individual who submits the best research proposal on some aspect of Texas legal history. Competition for the fellowship is open to any applicant pursuing a legal history topic, including judges, justices, lawyers, higher-education students, and academic and grass-roots historians.



The application, which should be no longer than two pages, should specify the purpose of the research and provide a description of the end product (article or book). The deadline for applications is **October 15, 2020** (more than two months earlier than last year's deadline). Individuals wishing to apply should submit an application form (and attach the proposal and a curriculum vita) by October 15, 2020. Only electronic copies submitted by the deadline will be considered. If you have trouble submitting the new application form, please email AMawards@TSHAonline.org or call: (512) 471-2600. The award will be announced at the Association's Annual Meeting in March 2021. For application forms and submission information, see the TSHA's announcement at <https://tshaonline.org/awards-and-fellowships/2562>.

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Hon. Priscilla R. Owen to Keynote 25th Annual Hemphill Dinner

The Society is honored to have the Honorable Priscilla R. Owen, Chief Judge, United States Court of Appeals for the Fifth Circuit and former Texas Supreme Court Justice, as our keynote speaker for the 25th Annual John Hemphill Dinner.

Prior to her confirmation to the federal bench in 2005, Chief Judge Owen served with distinction for a decade on the Texas Supreme Court. First elected in 1994, she was just the second female Justice to be elected to the Court in its history. On the Fifth Circuit, she succeeded former Texas Supreme Court Justice, Judge William Garwood, in the seat he had held since 1981. Alongside the late Judge Garwood, Tom Reavley, Sam Johnson, and current Fifth Circuit Judge Don Willett, Chief Judge Owen is the fifth former Texas Supreme Court Justice to serve on the Fifth Circuit. In addition, Chief Judge Owen is the first and only former Texas Supreme Court Justice to serve as Chief Judge of not only the Fifth Circuit, but any U.S. circuit court of appeals. Elevated to Chief Judge in October 2019, Owen will serve in the post until 2024. She is the first Chief Judge of the Fifth Circuit to be based in Austin, Texas.



A native of Palacios, Texas, Chief Judge Owen received both her undergraduate and juris doctor degrees from Baylor University, and was the high scorer on the Texas Bar Exam the year she was licensed.

This year, due to the concerns and governmental restrictions surrounding large gatherings, the Dinner will be held virtually on Friday September 11, 2020, at 7:00 p.m. Although the Society won't be able to gather in person for the Hemphill Dinner, attendees will be able to watch Judge Owen's keynote address online, which will take place in a "fireside chat" format with Texas Supreme Court Chief Justice Nathan Hecht. The Hemphill Dinner is the annual awards event for the Society, and this year will be no different. 2019-20 Society President Dylan O. Drummond will present the Texas Supreme Court Society President's Award, and—for the first time ever—the Society's Lifetime Achievement and Distinguished Service Awards. The Texas Center for Legal Ethics will also present the Chief Justice Jack Pope Professionalism Award. The Dinner will culminate with the swearing in of 2020-21 President Cynthia K. Timms.

The contributions of Hemphill Dinner sponsors are vital in making the event a success and in providing support to the Society's activities in support of the judiciary and civics education. In addition to the traditional sponsorship levels (Hemphill \$10,000, registrations for 20 firm guests to

view the Dinner; Pope \$5,000, 15 registrations; and Advocate \$2,500, 10 registrations), the Society has two new sponsorship categories this year—Amicus \$1,000, 5 registrations; and Gavel \$500, 3 registrations. In addition, individual registrations may be purchased for \$50. Members of the Texas Supreme Court are traditionally guests of the Society at the Hemphill Dinner. A reception via Zoom with the justices will be open to the first 200 guests who purchase tickets to the event.

Table reservations and individual tickets may be purchased through our website at <https://www.texascourthistory.org/hemphill>.

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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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2020-21 New Member List

The Society has added 22 new members since June 1, 2020, the beginning of the new membership year. Among them are 19 Law Clerks for the Court (*) who receive a complimentary one-year membership during their clerkship.

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eJnl appl 5/20



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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