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

Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

Fall 2021 Vol. 11, No. 1 General Editor Lynne Liberato Editor-in-Chief Hon. John G. Browning

Columns

Message from the President

By Thomas S. Leatherbury

Thomas S. Leatherbury

This issue chronicles some of the significant legal cases and important individuals from the Native American community in Texas and beyond. Read more...

Executive Director's Page

By Sharon Sandle

Sharon Sandle

The examination of history is rarely a static retelling of events; it's a dialogue. This issue of the Journal is a dialogue as well. Read more...

Fellows Column

By David J. Beck

David J. Beck

We are nearing completion of the fourth book in the Taming Texas judicial civics and history series, which will be entitled *Taming Texas: Women in the Law*. Read more...

Editor-in-Chief's Column

By Hon. John G. Browning

John G. Browning

It is estimated that hundreds of thousands of Native Americans attended the more than 350 government-funded and church-run boarding schools that operated during the late 19th and early 20th centuries. Read more...

Leads

Who Was Texas' First Native American Lawyer? The Answer is Complicated

By Hon. John G. Browning

W. A. Price, a strong contender for the title

Answering the question of who was Texas' first Native American attorney is a difficult and uncertain task, owing at least in part to recordkeeping governing the legal profession in Texas. Read more...

The Coahuiltecan Quest for Ancestors' Bones: Why Texas Needs a State Native American Graves Protection and Repatriation Act

By Milo Colton and Alysia Córdova

Coahuiltecan Territory

Texas is the state with the fourth largest Indian population, but it has only 3 small federally recognized tribes—none of which inhabited Texas at the time of Europeans arrival. Read more...

Their Day in Court: The Rule of Law and the War on the Plains

By Hon. Ken Wise

Big Tree as a young chief

The Plains Indians wouldn't give up the only way of life they knew, and the United States wouldn't tolerate what it viewed as lawlessness on the frontier. Read more...

Features

Texas' First Native American Federal Judge: Ada E. Brown

By Hon. John G. Browning

Judge Ada Brown

Judge Brown is one of only three Native American federal judges out of the 890 authorized federal judgeships in the United States. Read more...

The Forgotten Federal Courts of Indian Country

By Hon. John G. Browning

The evolving relationship between the United States and sovereign Native American nations bore witness to the creation of a number of specialized Indian courts within the federal court system. Read more...

History of the Native American Law Section of the State Bar of Texas

On January 21, 1994, the State Bar Board of Directors approved the creation of the American Indian Law Section, now known as the Native American Law Section. Read more...

Book Reviews

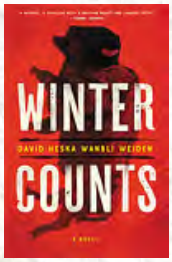
Book Review—*The Cherokee Supreme Court: 1823-1835* by J. Matthew Martin

Review by Hon. John G. Browning

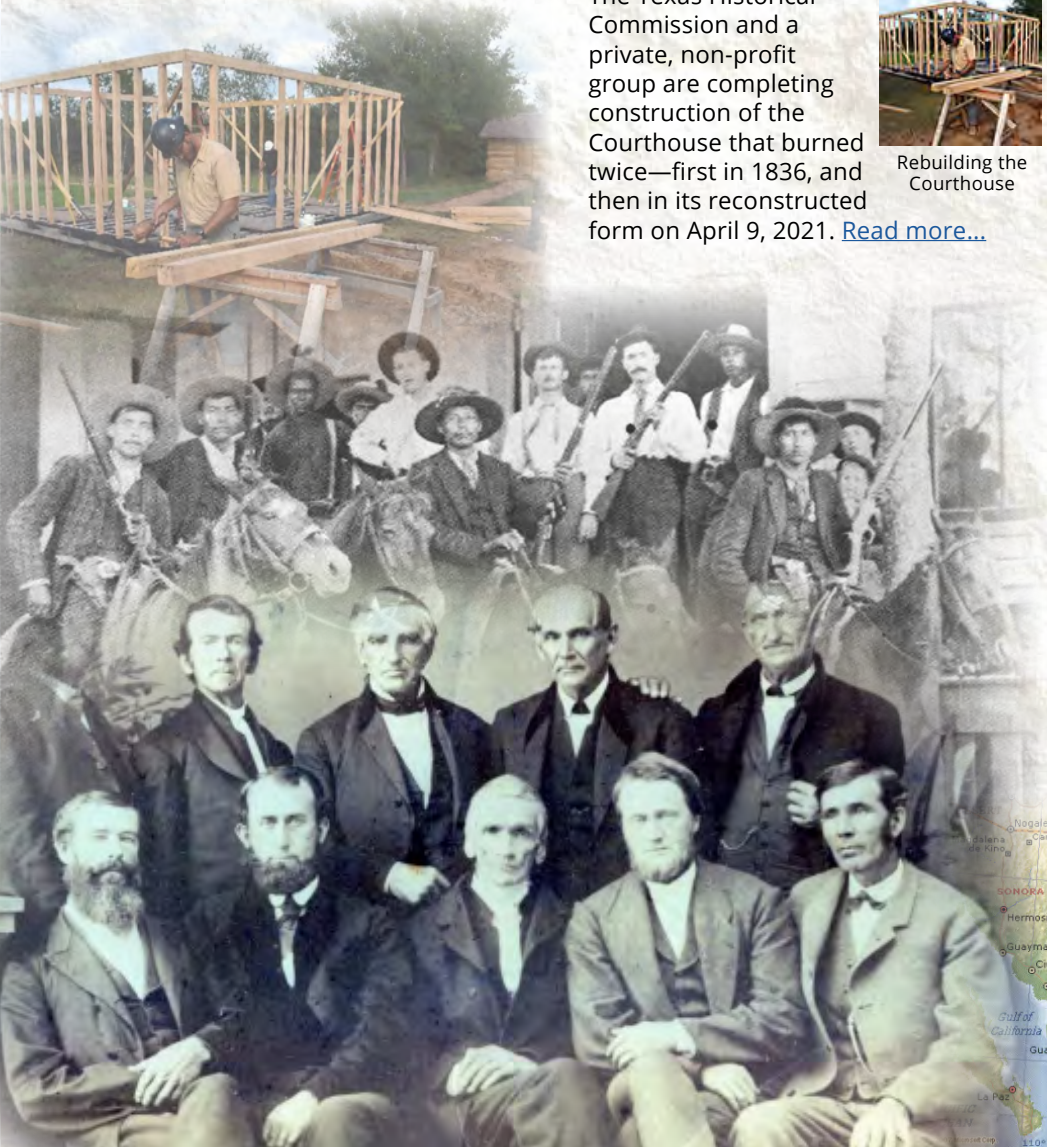
This book provides a fascinating legal history of the first tribal court while shattering long-held misconceptions about the origins of Westernized tribal jurisprudence. Read more...

Book Review—*Winter Counts* by David Heska Wanbli Weiden

Review by Hon. John G. Browning



Winter Counts is part crime thriller, part social commentary, and imbued throughout with history. The betrayal of Native Americans is a recurring theme. Read more...



News & Announcements

Society Trustee Appointed to Supreme Court

Evan Young

Texas Supreme Court Historical Society Trustee and Baker Botts partner Evan Young of Austin has been appointed by Gov. Greg Abbott to replace Justice Eva Guzman on the Supreme Court of Texas. Read more...

Journal Contributor Wins "Genius" Grant

Dr. Monica Muñoz Martinez

Dr. Monica Muñoz Martinez was honored for her groundbreaking work on the history of racial violence against Mexican Americans in Texas. Read more...

A Phoenix Rises from the Ashes

By David A. Furlow

Rebuilding the Courthouse

The Texas Historical Commission and a private, non-profit group are completing construction of the Courthouse that burned twice—first in 1836, and then in its reconstructed form on April 9, 2021. Read more...

Osler McCarthy's Legacy Endures

By David A. Furlow

Osler McCarthy

The Texas Supreme Court's first and only Staff Attorney for Public Information earned the gratitude of many as a reliable source of plain-speaking information about the Texas Supreme Court and the Texas judiciary. Read more...

Hemphill Dinner Announcement

Lisa Blatt

On December 3, 2021, the Society will hold its 26th Annual Hemphill Dinner live at the Four Seasons Hotel in Austin, with Keynote Speaker Lisa Blatt appearing via a pre-recorded interview. Read more...

Our Society Presents "The Lives and Legacies of Texas' Earliest Black Lawyers" at TSHA's 126th Annual Meeting in February 2022

By David A. Furlow

The Society will present at the Texas State Historical Association's 126th Annual Meeting beginning at 9:00 a.m. on Saturday, February 26, 2022. Read more...

Membership & More

Officers, Trustees & Court Liaison

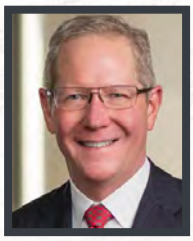
2021-22 Membership Upgrades

2021-22 New Member List

Join the Society

@SCOTXHistSocy

FB: Texas Supreme Court Historical Society



Thomas S. Leatherbury

Message from the President

Welcome to the Fall 2021 issue of the Texas Supreme Court Historical Society Journal! The Journal's award-winning content is reason enough to become and to stay a member of the Society. To those of you who have already supported the Society and its programs, including the Journal, this year with your membership, thank you. If you are not already a member, I hope you will join the Society by signing up online at www.texascourthistory.org.

This issue breaks new ground by chronicling some of the significant legal cases and important individuals from the Native American community in Texas and beyond. We have three wonderful lead articles in this issue:

In "Who was Texas' First Native American Lawyer? The Answer is Complicated" former Justice John Browning explores the enduring mystery of who was the first Native American lawyer in Texas.

In "The Coahuilecan Quest for Ancestors' Bones" Professor Milo Colton and Professor Alisia Córdova explain the fascinating and crucial battles of Native Americans to claim their rights to grave protection and repatriation, and they present a compelling case for the specific need in Texas for a state Native American Graves Protection and Repatriation Act.

And Justice Ken Wise spins a gripping tale of violence and justice full of unforgettable characters in "Their Day in Court: The Rule of Law and the War on the Plains" which brings to life the Indian Trial following an 1871 raid that proved a turning point in US/Native American relations.

We also have a profile of Federal District Judge and former Dallas Court of Appeals Justice Ada Brown and an overview of federally created Indian specialty courts. Finally, the Native American Section of the State Bar of Texas has provided us with a brief history of the section.

This is all made possible due to the work of the Journal Committee led by former Justice Browning and Stephen Pate and the inimitable Karen Patton.

The Board's other committees are also hard at work, as you can see in the following highlights. Huge kudos go to committee chair Alia Adkins-Derrick for her skill in navigating this ever-changing environment to make the Society's sold-out Hemphill Dinner, coming up on December 3rd, a huge success and to my presidential predecessor, Cynthia Timms, for securing our speaker, the extraordinary appellate advocate, Lisa Blatt of Williams & Connolly. Planning is already underway for the 2022 Dinner, scheduled for September 9th, under the leadership of Todd Smith. Please mark your calendars and watch for additional details.

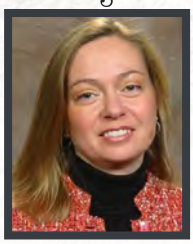
Our Fellows Committee, led ably by Warren Harris, is looking forward to getting back into even more 7th grade classrooms next spring to teach the civics program "Taming Texas." And we are eagerly anticipating our panel, "We Stand on Their Shoulders: The Lives and Legacies of Texas' Earliest Black Lawyers," at the Texas State Historical Association's annual meeting on February 26, 2022. Registration opens on November 15, see complete details at www.tshaonline.org. None of this work would be possible without our Executive Director Sharon Sandle and our administrator Mary Sue Miller.

Working with the Society brings frequent opportunities to hear from Texas and legal historians about their ongoing research and scholarship. At our fall Board meeting, we heard from Professor Michael Ariens of St. Mary's University School of Law. Professor Ariens is well-known to readers of the Journal because his award-winning book, *Lone Star Law*, is often cited here. He told us the fascinating tale of the only American Bar Association President to be disbarred – a tale of hubris that started in the cornfields of Iowa and wound its way through grievance proceedings and courtrooms up to the United States Supreme Court. Professor Ariens will include this and other ethical cautionary tales in his upcoming book, *Remnants of Conscience*, due out sometime next year.

Professor Ariens's work caused me to reflect on the negative shift in American public opinion about lawyers over the years that I have been practicing. I went to law school in the immediate aftermath of Watergate, when lawyers were generally perceived much more positively than they are today. While our responsibility is to represent our clients zealously and ethically and not to curry favor with the public, the current public disdain and lack of respect for the legal profession is troubling because of its implications for our judicial system and our institutions. The Society's work is vital in furthering the public's understanding of the development of the Rule of Law and the legal system in Texas, including setbacks, failures, and miscarriages of justice. My hope is that each of us will redouble our efforts to educate the public about lawyers' role in advancing the Rule of Law and in working for a more equitable justice system that provides increased access to justice for all Texans. We thank you for your support and hope you enjoy this issue!

Return to Journal Index

Executive Director's Page



Sharon Sandle

Raising Our Voices:

The Dialogue of History and the Formation of the Future

History is above all else an argument. It is an argument between different historians; and, perhaps, an argument between the past and the present, an argument between what actually happened, and what is going to happen next. Arguments are important; they create the possibility of changing things.

— John H. Arnold, *History: A Very Short Introduction*

The examination of history is rarely a static retelling of events; it's a dialogue. This issue of the Journal is a dialogue as well. In this issue, the Society explores significant legal cases affecting the Native American community in Texas. These cases involve heated legal battles, such as the fascinating and crucial battles of Native Americans to claim their rights to grave protection and repatriation that Professor Milo Colton and Professor Alisia Córdova discuss in their article "The Coahuilecan Quest for Ancestors' Bones." Hon. Ken Wise's article "Their Day in Court: The Rule of Law and the War on the Plains" examines how the courts dealt with an 1871 raid and the violence that characterized relations between the U.S. and the Native American community at the time. This dialogue, started centuries ago, continues to the present day, with today's courts, judges, and attorneys participating. The Society thanks the Native American Section of the State Bar of Texas for providing a brief history of the section and its role in the ongoing dialogue.

An important part of the Texas Supreme Court Historical Society's mission is to sponsor scholarship relating to the history of the Texas judiciary and to raise public awareness about the judicial branch of government and its role in the development of Texas. The Journal is an important tool in accomplishing this goal, but it is not the only tool that the Society employs. The Society is also a regular participant in the Texas State Historical Association's Annual Meeting where it sponsors a panel focused on Texas legal history. This year, the TSHA will hold its Annual Meeting in Austin, and the Society's Panel "We Stand on Their Shoulders: The Lives and Legacies of Texas' Earliest Black Lawyers," will take place on Saturday, February 26, 2022. Registration to attend the TSHA Annual Meeting opened on November 15th. The Society also sponsors the Larry

McNeill Research Fellowship in Texas Legal History. The McNeill Fellowship is awarded annually for the best research proposal on an aspect of Texas legal history and the award for 2022 will be presented at the Texas State Historical Association Awards and Fellows Lunch at noon on Friday, February 25, 2022.

Preserving history is an admirable endeavor, but we also have a responsibility to engage in the dialogue history presents us, to argue, even, and to grapple with the important lessons that our history can teach us. It is my hope and belief that the Society does more than preserve history; we have a voice in the dialogue as well. Membership in the Texas Supreme Court Historical Society is open to all individuals, organizations, institutions, and corporations interested in advancing the Society's purposes. If you have a colleague who would be interested in joining, please encourage them to visit our website at texascourthistory.org for information about joining the Society. Thank you for your support of the Society and its mission, and I look forward to seeing many of our members at the Hemphill Dinner at the Four Seasons Hotel in Austin on December 3rd!

Return to Journal Index

Fellows Column

By David J. Beck, Chair of the Fellows

Photo by Alexander's Fine Portrait Design-Houston

We are nearing completion of the manuscript for the fourth book in the Taming Texas judicial civics and history series, which will be entitled *Taming Texas: Women in the Law*. This latest book will educate the readers on many of the important women in the legal history of our state. The book will contain biographical information on the featured lawyers and judges and also discuss the associated historical and political issues. The judges and lawyers we plan to feature include: Frances Cox Henderson, the prodigiously talented wife of the first governor who ran his law office without a license; Ruth Brazzil and Hattie Henenberg, two women attorneys who served on a temporary but ground-breaking Texas Supreme Court; Ione Stumberg, Virginia Grubbs, Mary Kate Parker, and Beth O'Neil, the first female lawyers to serve as briefing attorneys for the Texas Supreme Court who were temporary stand-ins for the men who left to serve in World War II; Louise Raggio, who spearheaded passage of the Texas Family Code, the world's first domestic relations law code; and Carolyn Wright, who had many firsts during her long career, beginning with Associate Judge of the 254th District Court in Dallas County and culminating in her election as Chief Justice of the Fifth Court of Appeals.

Jim Haley and Marilyn Duncan are the authors of all the Taming Texas books. Chief Justice Hecht has agreed to write the foreword for this new book, as he has done for the prior volumes. We appreciate the support for this important project given by Chief Justice Hecht and the entire Court.

Since 2016, our prior three acclaimed judicial civics and history books, *Taming Texas: How Law and Order Came to the Lone Star State*; *Law and the Texas Frontier*; and *The Chief Justices of Texas* have been taught in schools. The Houston Bar Association (HBA) is preparing to again use our Taming Texas materials to teach seventh-grade students in the Houston area. "The Teach Texas program is near and dear to my heart and one of the most rewarding volunteer opportunities I have ever participated in, and would not be possible without the Fellows and the excellent work they have done on the Taming Texas books," said Richard Whiteley, HBA program co-chair. If you would like to participate in this important program, please contact the HBA or one of the co-chairs of the HBA program.

The Fellows are a critical part of the annual fundraising by the Society and allow the Society to undertake new projects to educate the bar and the public on the third branch of government, and the history of our Supreme Court. If you are not currently a Fellow, please consider joining the Fellows and helping us with this important work.

Our exclusive event, the annual Fellows Dinner, is one of the benefits of being a Fellow. At the dinner each year, the Fellows gather with the Justices of the Texas Supreme Court for a wonderful evening of history, dinner, and conversation. Because of the pandemic, we were not able to have the dinner this year. Nevertheless, we are already working on plans now for next year's event at a unique Austin venue. Further details will be sent to all Fellows.

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
Robert A. Black
Hon. Jane Bland and Doug Bland
E. Leon Carter
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*
Thomas S. Leatherbury
Lynne Liberato*
Mike McKool, Jr.*
Ben L. Mesches
Hon. Harriet O'Neill and Kerry N. Cammack
Hon. Jack Pope* (deceased)
Shannon H. Ratliff*
Harry M. Reasoner
Robert M. Roach, Jr.*
Leslie Robnett
Professor L. Wayne Scott*
Reagan W. Simpson*
Allison Stewart
Cynthia Timms
Kristin Vander-Plas
Peter S. Wahby
Hon. Dale Wainwright
Charles R. Watson, Jr.
R. Paul Yetter*

*Charter Fellow

Return to Journal Index

Editor-in-Chief's Column

Hon. John G. Browning

To Be Known By *The Tracks We Leave*

Today, we also acknowledge the painful history of wrongs and atrocities that many European explorers inflicted on Tribal Nations and Indigenous communities. It is a measure of our greatness as a Nation that we do not seek to bury these shameful episodes of our past—that we face them honestly, we bring them to light, and we do all we can to address them.

— President Joseph R. Biden, in his October 8, 2021, proclamation marking Indigenous Peoples Day

Earlier this fall, many of us bid teary farewells to children as they headed back to school or went off to college. We worried about their safety and well-being in new learning environments, especially in a pandemic marked by debates over vaccination and mask mandates. But few if any of us worried that our children would never return home.

Native Americans across this country and Canada experienced a different reality in the late 19th and early 20th centuries. In the past year, the discoveries of unmarked graves of hundreds of children who died at Canadian and American residential schools made international headlines. Canada's Truth and Reconciliation Commission has identified 3,201 children who died in Canadian residential schools for members of the First Nations. U.S. Secretary of the Interior Deb Haaland (a member of the Lagura Pueblo Nation) has pledged to "address the intergenerational impact of Indian boarding schools to shed light on the unspoken traumas of the past."

The National Native American Boarding School Healing Coalition estimates that hundreds of thousands of young Native Americans attended the more than 350 government-funded and church-run boarding schools that operated during the late 19th and early 20th centuries. It was an experiment begun by U.S. Army General Richard Henry Pratt, who opened the Carlisle Indian Industrial School in 1879. Pratt's philosophy of "kill the Indian, save the man" was reflected in these schools' policies of forced assimilation and indoctrination. Children had their hair cut short, were forced to wear Western clothing and convert to Christianity, and were punished for speaking their native languages instead of English. The curriculum emphasized vocational training, and students were hired out to work as servants and laborers on farms and in the households of local white

families. Native American students experienced physical abuse, sexual abuse, and hunger; many died from diseases like tuberculosis and diphtheria. And while the first wave of students included many sent by their nations in hope of learning English and Western ways so that they could assist in treaty negotiations, by 1891, attendance became compulsory under federal law.

The dark and shameful chapter of these residential schools is merely one example of how Native American history has been neglected in our teaching of history overall. The educational standards of at least twenty-seven states make no mention of Native Americans in the K-12 curriculum; most states' history standards make no mention of Native Americans after 1900. That may be changing: North Dakota, Maine, Connecticut, and Oregon have all passed legislation requiring the addition of Native American studies across all school curricula. But efforts in South Dakota for Indigenous inclusion in education are the subject of heated debate, as Native American rights groups are protesting the erasure of references to Sioux history from proposed social studies standards. Even Montana—unique in the U.S. for a guarantee for Native American education that is part of the state's constitution—is facing a lawsuit by the ACLU and the Native American Rights Fund for allegedly not living up to the state's legal standards.

President Biden's proclamation of an "Indigenous People's Day"—joining the more than 100 cities and several states that already mark such a date—has been called historic. But against the backdrop of how the teaching of history in this country has largely overlooked Native American history, is it more than a hollow, symbolic gesture? Few would disagree that this country's treatment of Native Americans has been shameful; many have described it as genocidal. Yet consider this: despite official federal apologies for the internment of Japanese Americans in camps during World War II and for the Tuskegee syphilis experiments on African Americans (made, respectively, by President Reagan in 1988 and by President Clinton in 1997), it wasn't until 2010 that the U.S. expressed regret for its treatment of Native Americans. And that apology, made by President Obama, was not only watered down and buried in a defense spending bill (it was never publicly delivered), it came with a disclaimer that nothing in the resolution "authorizes or supports any legal claims against the United States."

This issue, published during National Native American Heritage Month, represents our effort at acknowledging and raising awareness of the complicated legal history of Native Americans in Texas, and of the contributions made by Native American lawyers and judges in the Lone Star State. Our articles include Justice Ken Wise's painstakingly researched look at the first case in Texas in which Native American raiders were tried criminally in a civilian court; Prof. Milo Colton's and Alysia Córdova's article on the history and status of legal efforts to protect Native American gravesites; a special look at the history and mission of the State Bar of Texas' Native American Law Section; a profile of the Hon. Ada E. Brown, Texas' first United States District Court judge of Native American ancestry; and my own attempt to solve the mystery of who was Texas' first Native American lawyer. The people of the Dakota Nation believe that "We will be known forever by the tracks we leave." The recording and discussion of history represent some of these tracks, and we hope your understanding is enriched by these tracks.

Return to Journal Index

Who Was Texas' First Native American Lawyer? The Answer is Complicated

By Hon. John G. Browning

I. INTRODUCTION

Years ago, the *Texas Bar Journal* published a special "We Were First" issue profiling the legal trailblazers among Texas' diverse communities—the first African American woman admitted to practice in Texas, the first Asian American male judge, etc. But there were a number of glaring omissions, including the first Native American lawyer in Texas. As it turns out, answering the question of who was Texas' first Native American attorney is a difficult and uncertain task. There are a number of factors contributing to this uncertainty, not the least of which is the nature of recordkeeping governing the legal profession in Texas. The State Bar Archives' earliest membership records date from 1939, and so searching for members licensed before that year is problematic.[1] Similarly, the Supreme Court of Texas was the sole licensing authority in the Lone Star State beginning in 1919, but its records are silent as to lawyers' racial backgrounds and it cannot offer assistance concerning lawyers admitted prior to that year.

Yet the coldness of the trail is also the product of factors far more serious than government recordkeeping. Looming over all of these is the historical treatment of Native Americans in the United States. There are 566 federally recognized Native American tribes in America today, most of which engage lawyers in seeking and protecting their political self-determination, cultural and religious freedom, and socioeconomic well-being.[2] However, Native Americans' legal history is one in which "law has often been used to legitimize egregious moments of European conquest and American colonization—such as the dispossession of Indian lands, relocation of Indian people, and destruction of Indian religions and culture."[3] Indeed, the rule of law was used to displace or attempt to displace tribes' own legal traditions and systems.

Such experience with the American legal system undoubtedly led to Native Americans' distrust of it, and likely discouraged many Native Americans from pursuing legal careers.[4] Native

1 July 28, 2020 email to author from Caitlin Bumford, Director of Archives, State Bar of Texas.

2 Kirsten A. Carpenter & Eli Wald, "Lawyering for Groups: The Case of American Indian Tribal Attorneys," 81 *Fordham Law Rev.* 3085, 3087 (2013).

3 *Ibid.*, 3092–93.

4 *See generally* Walter R. Echo-Hawk, *In the Courts of the Conqueror: The 10 Worst Indian Law Cases Ever Decided* (Fulcrum Publishing: 2010).

President Calvin Coolidge poses with four Osage Indians after signing the Indian Citizenship Act. Wikimedia Commons.

Americans weren't even granted U.S. citizenship until 1924, creating another barrier to entering the legal profession.[5] Prior to this "Indian Citizenship Act," Native Americans "were not allowed to vote in city, county, state, or federal elections; testify in courts; serve on juries; attend public schools; or even purchase a beer, for it was illegal to sell alcohol to Indians."[6] This exclusion also created obstacles to entering the legal profession, and the effects of this continue to be reflected in the dismally low percentage of Native American lawyers. According to a 2014 study by the National Native American Bar Association, Native Americans comprised 1.6 percent of the U.S. population in 2010, yet only .3 percent of all attorneys that year (a total of 2,640 lawyers).[7] Even by January 1, 2020, that percentage had only inched up to .4 percent of the 1,328,692 active lawyers in the

[5] Willard Hughes Rollings, "Citizenship and Suffrage: The Native American Struggle for Civil Rights in the American West, 1830–1965," 5 *Nevada Law Journal* 126, 127 (Fall 2004).

[6] *Ibid.*

[7] "The Pursuit of Inclusion: An In-Depth Exploration of the Experiences and Perspectives of Native American Attorneys in the Legal Profession," *National Native American Bar Association* (2014), https://www.nativeamericanbar.org/wp-content/uploads/2014/01/2015-02-11-final-NNABA_report_pp6.pdf.

United States.[8] And this exclusion extends to employment for Native American lawyers. According to the National Association for Law Placement (NALP), nearly 80 percent of 2019 white law school graduates had secured employment for which a J.D. was required within ten months of graduation, while only 62 percent of Native American and African American law graduates had done so.[9]

In Texas specifically, the experience of Native Americans is yet another reason for not only their underrepresentation in the profession, but for why deciding the question of Texas' first Native American attorney is so difficult. As one historian pointed out, when the first Europeans entered what would one day be called Texas, "they found a place that contained more Indian tribes than any other would-be American state at the time," yet by 1900, Native Americans were nearly extinct in Texas, with only 470 people identified as such in the U.S. Census.[10] By 2010, that population had increased to 315,264—a result of not only the end of the genocide practiced against Native Americans, but also the erasure of racial stigmatizations about identifying as having Native American ancestry, as well as changes in federal census methodology. The history of Texas' open warfare against Native Americans during the 19th century has been well-documented, dating at least as far back as President Mirabeau Lamar's declaration of war against them. Oddly enough, it was not until 1999 that the Texas legislature got around to formally repudiating this policy by deleting it from the governor's powers as commander-in-chief of the state military forces "and to protect the frontier from hostile incursions by Indians or other predatory bands."[11]

II. EARLY NATIVE AMERICAN LAWYERS IN CONTEXT

Texas' first Native American lawyer must necessarily be considered within the larger context of early Native American lawyers in the United States. As prominent Native American historians have acknowledged, "There is great debate and interest in the question of who was the 'first' American Indian attorney . . . this question is complicated by the fact that in early American history, individuals could read for the bar without being formally admitted to practice."[12] While scholar Rennard Strickland has contended that Cherokee John Rollin Ridge was America's first Native American lawyer,[13] later examination of Ridge's life more accurately identified him as California's first Native American attorney, not the first in the United States.[14] Ridge, who practiced in California beginning in the early 1850s, was certainly among the first Native American lawyers,

---

[8] Laura Bagby, "ABA Profile of the Legal Profession: Diversity and Well-Being," 2Civility (Aug. 13, 2020), https://www.2civility.org/aba-profile-of-the-legal-profession-diversity-and-well-being/.

[9] Karen Sloan, "New Data on Racial Disparities in Lawyer Hiring Is 'Wake-Up Call' for the Profession," *Law.com* (Oct. 21, 2020 11:12 AM), https://www.law.com/2020/10/21/new-data-on-racial-disparities-in-lawyer-hiring-is-a-wake-up-call-for-the-profession/?slreturn=20210710165203.

[10] Milo Colton, "Texas Indian Holocaust and Survival: McAllen Grace Brethren Church v. Salazar," 21 *The Scholar* 51 (2019).

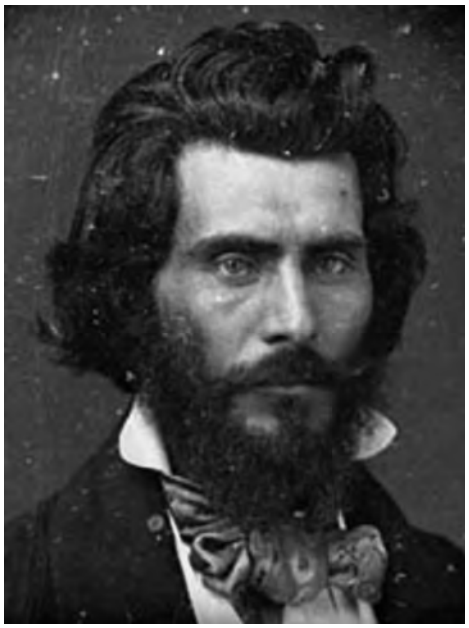
[11] Tex. Const. art. VI, § 7, as amended Tex. H.R.J. Res. 62, 76th Leg., R.S. (1999).

[12] Carpenter & Wald, "Lawyering for Groups," 3100 n.57.

[13] Rennard Strickland, "Yellow Bird's Song: The Message of America's First Native American Attorney," 29 *Tulsa Law Journal,* 247 (1994).

[14] John G. Browning, "Stranger in a Strange Land: The Story of Yellow Bird, California's First Native American Attorney," *California Supreme Court Historical Society Review* (Fall/Winter 2020).

but the distinction of being first most likely belongs to James McDonald (1801–1831). McDonald was a Choctaw, and like Ridge, was of mixed white and Native American ancestry and educated in white schools. McDonald was sent to boarding school in Baltimore, Maryland. He "read the law" initially while working in Washington, D.C. for Thomas L. McKenney, the head of the Office of Indian Trade (later to become the Bureau of Indian Affairs). McKenney was so impressed with McDonald that he arranged for the Native American youth to study with former Congressman, Ohio Supreme Court Justice (and future U.S. Supreme Court Justice) John McLean at McLean's Ohio law office. McKenney said of McDonald that "such was his capacity that in about one-half of the time ordinarily occupied by the most talented young men of our race, he had gone the rounds of his studies and was qualified for the bar."[15]



Left to right: John Rollin Ridge, Thomas L. McKenney, John McLean

In 1823, McDonald returned to Choctaw land in Mississippi, and by the following year was assisting tribal leaders in preparation for a delegation to visit Washington, D.C. to negotiate with the U.S government. Due to illness and death involving two of the Choctaw leaders, the young lawyer found himself as the de facto head of the delegation. With McDonald conducting negotiations, drafting the Choctaw Nation's proposals and responses to the government's demands, the Choctaw were successful in signing a new treaty in January 1825 that reflected many of their key objectives—the first time a Native American nation had its own Native American lawyer.[16]

Sadly, the legal victory was short-lived. The federal government and other interests continued to press the Choctaw, like other tribes, for removal from their ancestral lands. That removal became a certainty with the Treaty of Dancing Rabbit Creek in 1830, the first removal treaty taking effect under the Indian Removal Act. Suffering from depression and alcoholism, and despondent over his spurned marriage proposal to a white woman, James McDonald committed suicide in September 1831.[17]

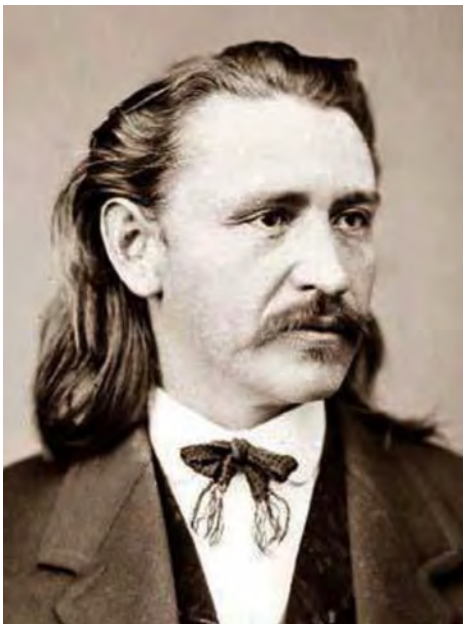
[15] Frederick E. Hoxie, "Four American Indian Heroes You've Never Heard Of," 14 *American Indian Magazine,* 1 (Spring 2013); https://www.americanindianmagazine.org/story/four-american-indian-heroes-youve-never-heard.

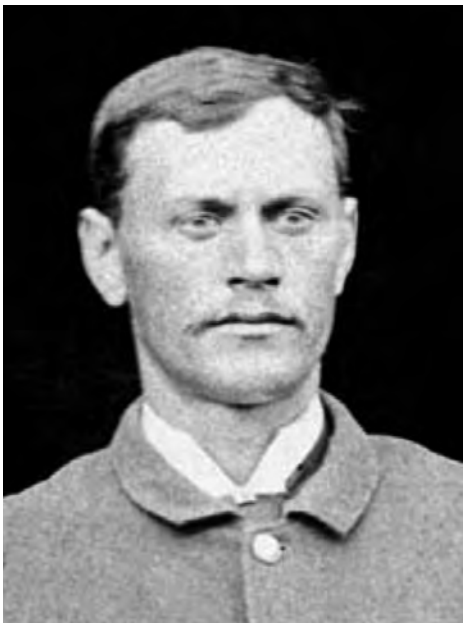
[16] *Ibid.*

[17] Frederick E. Hoxie, *This Indian Country: American Indian Activists and the Place They Made* (New York : Penguin Press, 2013), 94.

Other early Native American lawyers would follow. Elias C. Boudinot, a Cherokee and contemporary of John Rollin Ridge, was admitted to practice in Arkansas in 1856. His notable legal career achievements included successfully defending his uncle, Stand Watie, on murder charges and taking a case over tax immunities in the Cherokee's 1866 treaty with the United States to the Supreme Court, where he lost.[18]

Thomas Sloan, a member of the Omaha Nation, graduated as valedictorian of the Hampton Institute in Virginia in 1889, and was supposed to attend Yale Law School. However, stung by the bureaucracy of the Indian Office in denying his request for a land allotment under the Dawes Act, Sloan vowed to become a lawyer dedicated to helping the Native American community. After "reading the law" under the tutelage of his future law partner (and fellow Omaha) Hiram Chase, Sloan was admitted to the Nebraska bar in 1892. He sued the Indian Office over its denial of his land allotment and, in 1904, won that case before the U.S. Supreme Court. Sloan and Chase represented many Native American individuals and nations, and even opened a Washington, D.C. office. Sloan and Chase were instrumental in the 1911 founding of the Society of American Indians, the first national Native American rights organization run by and for Native Americans.[19]





Clockwise from top left: Elias C. Boudinot, Stand Watie, Robert L. Owen, Thomas Sloan

Yet another Native American legal trailblazer was the Cherokee Robert L. Owen, who would eventually serve as a U.S. Senator from Oklahoma from 1907 to 1925. Born in Virginia in 1856, Owen excelled scholastically, earning both his bachelor's

[18] The Cherokee Tobacco Case, 78 U.S. 616 (1870).

[19] Hoxie, "Four American Indian Heroes."

and master's degrees at Washington & Lee University, along with valedictory honors and the top debater award in 1877. He moved to Oklahoma and began work as a teacher while studying law as well. He was admitted to the Oklahoma bar in 1880. His signature win as a lawyer for Native American causes came in 1906, with a U.S. Supreme Court win on behalf of Eastern Cherokees seeking compensation for lands from which the Cherokee had been forcibly removed. In the case, the Court agreed with Owen that the Cherokee were owed interest on unpaid compensation of over $1 million for tribal land, causing the debt to swell over $4 million.[20] Newspapers in Texas described Owen's argument and victory in florid terms. The *Brownsville Daily Herald* wrote:

> After seven years' unremitting work by Robert L. Owen, lawyer of Muskogee, Indian Territory, in whose veins the blood of the red man mingles with that of the Caucasian, the United States government must pay to the Cherokee Indians a debt of $4,000,000 . . . Mr. Owens has been the life of the case, having undertaken it in 1899 and managed it for seven years. His argument was said by Senator Clapp of Minnesota to have been pronounced by a justice of the supreme court one of the ablest presentations ever made before that court.[21]

An earlier account in the *El Paso Daily Times* emphasized the eloquence of Owen's argument, including a dramatic pause described with an emphasis on his appearance:

> Overcome in the zenith of his long-cherished ambition to win an Indian claim of nearly a million dollars, standing before the United States Supreme Court, his half-Indian mother a spectator, whose bosom heaved with pride, Robert Owen, in his efforts to picture the terror of an episode in 1838, stood speechless . . . His black eyes were glaring at the solemn judges before him. His coal black hair gleamed under the chandelier and his ruddy complexion looked as bronze as he stood, apparently searching his brain for words to utter.[22]

Owen's dramatic and well-publicized victory helped propel him to political prominence, enabling him to secure one of the fledgling state of Oklahoma's first two U.S. senatorial positions the following year.

III. A CANDIDATE EMERGES FOR TEXAS' FIRST NATIVE AMERICAN LAWYER

Set against the backdrop of early Native American lawyers, where does Texas' first indigenous attorney fit in, and who is the most likely candidate? A search of attorneys in the early 20th century in the State Bar's membership revealed a couple of promising leads, including attorney Earl P. Hale, licensed in 1926, and Hugh B. Musick, licensed in 1939. Unfortunately, a check of both lawyers' original Bar registration cards indicates that both listed themselves as "White." Moreover, a check of each lawyer's obituary reveals no mention of any tribal affiliation.

The search continued, including searches in Texas newspaper digital archives (using terms

---

[20] United States v. Cherokee Nation, 202 U.S. 101 (1906).

[21] "Indian Lawyer Wins Suit," *Brownsville Daily Herald,* Vol. 14, No. 276, Ed. 1 (May 22, 1906).

[22] "Indian Lawyer Overcome with Emotion While Pleading," *El Paso Daily Times,* Vol. 26, Ed. 1 (Apr. 20, 1906).

such as "Indian lawyer") as well as the archives of the *Texas Bar Journal*. From these searches, a candidate emerged who appeared to be not only Texas' first Native American attorney, but its first Native American judge as well. The obituary for Dallas attorney Aubrey J. Roberts in the September 1968 *Texas Bar Journal* revealed tantalizing clues into the life of a person with a facially valid claim to being Texas' first Native American lawyer.[23] It painted a vivid picture of the commercial litigator whose nickname was "Chief" and who received his law degree in 1917 from the Dallas School of Law, after attending both Columbia University and the Jefferson School of Law as well.[24] Roberts was described as "born in the Florida Everglades March 13, 1895, a member of the Cherokee Indian tribe." In addition, this obituary portrayed Roberts as having generously given back to the Native American community, and having "represented Indians in suits across the country," acted as "chief counsel for the Seminoles in their claim to ownership of the Everglades," and performed "legal counseling free of charge to the Indians."[25] Equally impressive, Roberts—a World War I veteran—had served as judge of Dallas County Court-at-Law No. 1 in 1927, which would make him the first Native American judge in Texas. In addition, Roberts had been active in local and state bar associations, serving as first vice-president of the Dallas Bar Association in 1948, and as chair of the State Bar's Unauthorized Practice of Law Committee from 1947–1948.

AUBREY J. ROBERTS

Dallas attorney Aubrey J. "Chief" Roberts died June 25, 1968. Mr. Roberts was born in the Florida Everglades March 13, 1895, a member of the Cherokee Indian tribe. He had represented Indians in suits across the country and was chief counsel for the Seminoles in their claim to ownership of the Everglades. He did legal counseling free of charge to the Indians.

Mr. Roberts attended the Dallas School of Law from 1915 to 1917, receiving an LL.B. He also attended the Jefferson School of law and Columbia University. He served as judge of the Dallas County Court at Law No. 1 in 1927, and was first vice-president of the Dallas Bar Association in 1948.

During 1947-48 he was chairman of the State Bar Unauthorized Practice of Law Committee. He had also been a member of the Dallas Bar's equivalent committee, as well as its Grievance Committee.

A World War I veteran, he was the first government appeals agent in the Dallas County Selective Service system. He was a founder of the Irving Savings & Loan Association and member of the Dallas Bonehead Club, serving as its "Big Chief" during 1953.

Mr. Roberts belonged to the Dallas Athletic Club, the DAC Country Club, the Oak Cliff Masonic Lodge 705, the Dallas Commandery No. 6, Hella Temple Shrine and the First Baptist Church. He had a special interest in children, helping to find homes for destitute ones and supporting them through school.

He is survived by his wife; a son, A. J. Roberts Jr. of California; a brother, S. A. Roberts of Dallas; and one grandson.

The obituary for Roberts that appeared in the *Texas Bar Journal*

---

[23] "Obituary – Aubrey J. Roberts," *Texas Bar Journal,* 799 (Sept. 1968), 31.

[24] For more information on both Dallas School of Law and Jefferson School of Law, please see our article "The Lost Law Schools of Texas," 10 *Journal of the Texas Supreme Court Historical Society*, 10 (Winter 2021), 46.

[25] "Obituary – Aubrey J. Roberts."

Research into Texas newspaper archives appeared to confirm Roberts' status as Texas' first Native American judge. In a front page story in Fannin County's *Ladonia News* in August 1927, a glowing portrayal appears of Roberts, "the only Indian to sit on the bench in Texas so far as can be determined," noting his election "as special Judge of the County Court of Dallas County at Law No. 1 at Dallas to serve during the absence of Judge Paine L. Bush on his vacation."[26] Here, Roberts' purported Native American ancestry becomes both more muddled and more embellished: he is identified not as Cherokee, but as a "descendant of the Florida Seminoles" whose "grandfather was a chief of that tribe."[27] "Judge Roberts" is also described not only as "a graduate of Columbia University" but also as "the editor of several books."[28] Adding a dash of derring-do to Roberts' background, he is not only listed as a World War I veteran, but as a military aviator who "now uses his own machine for cross-country trips."[29]

As impressive as all of this sounded, certain things didn't ring true. For example, why would an Ivy League graduate take his Columbia degree and seek a legal education not at a more established law school but at two of Dallas' night law schools? A check with Columbia University quickly confirmed no evidence of an Aubrey J. Roberts ever officially enrolled at Columbia, much less graduating from the university. He appears in no records, including alumni records or student directories, for the period 1900 to 1919.[30] Attempts at verifying biographical information of Roberts with surviving family were fruitless, since his only son died not long after Roberts passed away. The last law firm Roberts practiced with in Dallas, the venerable Burford & Ryburn, contains no mention of Roberts in the official history of the 110 year-old firm.[31]

Knowing Roberts' status as a World War I veteran, next up on the verification trail was the parade of official records. Working backwards, Roberts' death certificate reveals his date of birth not in 1895 (as personally indicated) but on September 13, 1899. It lists his birthplace as "Florida," and his father as U.F. Roberts and his mother as Rebecca. Curiously, the question of asking if the deceased was ever a member of the armed forces is checked "No." Under "Color or Race," Roberts is listed as "White."

Roberts' race is also listed as "White" in the 1900, 1910, 1920, 1930, and 1940 U.S Census. His World War II draft registration also lists him as "White." Interestingly, this document (completed by Roberts when he was 47) lists his date of birth as March 13, 1895 (not 1899), and his place of birth as "Navarro County, Texas," not Florida. If Roberts was "living a lie" as to his origins, and had convinced his wife he was a Native American born in Florida in 1899, that might explain the discrepancies on his death certificate. In fact, it is only on Roberts' World War I draft registration card (filled out and signed by Roberts himself) that we find the then 22 year-old shipping clerk identifying as "Indian" under race. However, he still lists his date of birth as March 13, 1895, and his place of birth as Winkler, Texas (in Navarro County).

---

[26] "Only Indian Judge to Occupy Bench," *Ladonia News*, Vol. 47, No. 32, Ed. 1 (Aug. 12, 1927), https://texashistory.unt.edu/ark:/67531/metapth914446/m1/1/.

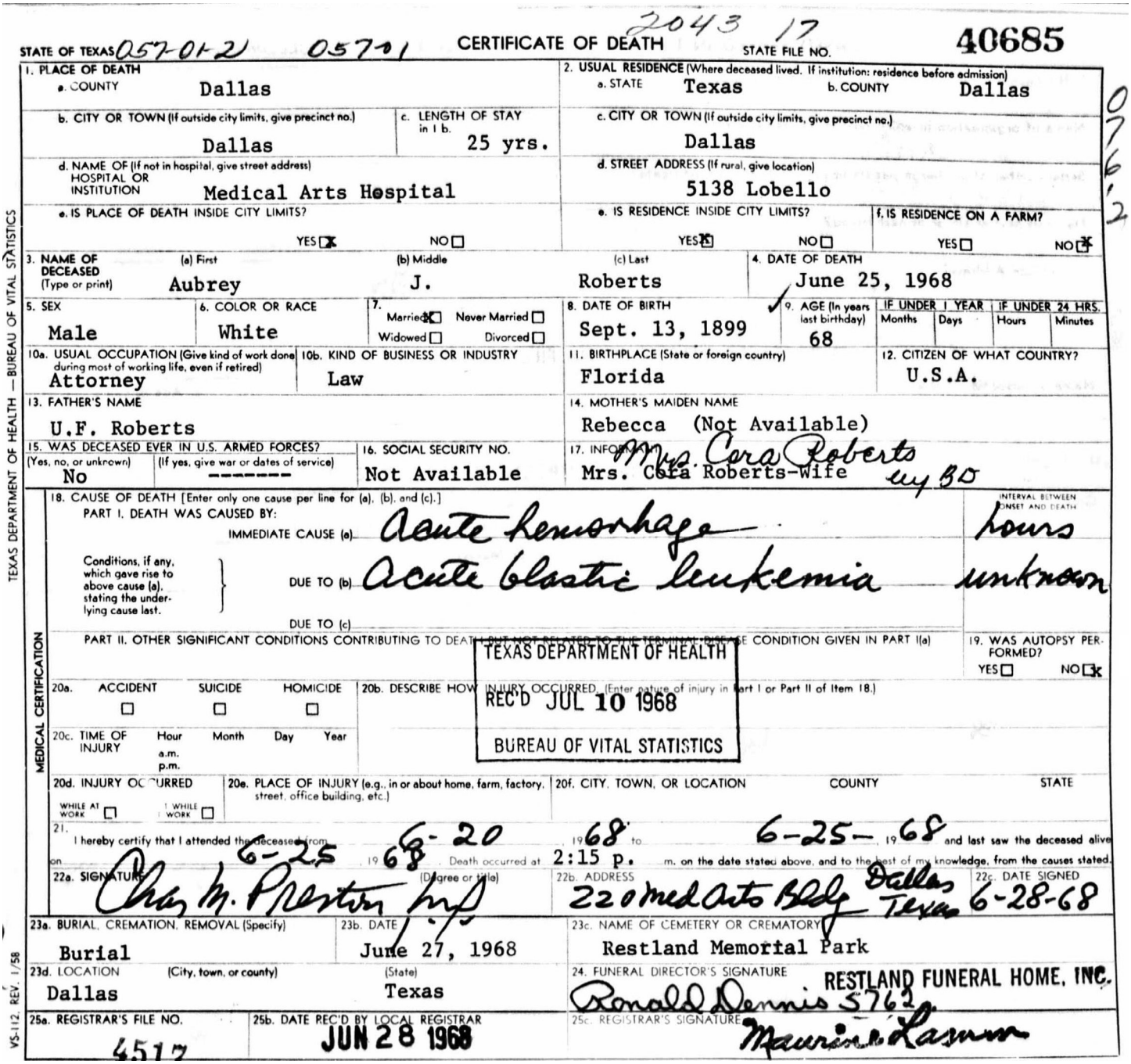
[27] *Ibid.*

[28] *Ibid.*

[29] *Ibid.*

[30] October 16, 2020 email to the author from Jocelyn K. Wilk, University Archivist for Columbia University (on file with author).

[31] March 19, 2021 email from Robert Begert of Burford & Ryburn to the author (on file with author).



STATE OF TEXAS 057012 05701 CERTIFICATE OF DEATH 2043 17 STATE FILE NO. 40685

1. PLACE OF DEATH
a. COUNTY: Dallas
b. CITY OR TOWN (If outside city limits, give precinct no.): Dallas
c. LENGTH OF STAY in I b.: 25 yrs.
d. NAME OF HOSPITAL OR INSTITUTION (If not in hospital, give street address): Medical Arts Hospital
e. IS PLACE OF DEATH INSIDE CITY LIMITS? YES ☒ NO ☐

2. USUAL RESIDENCE (Where deceased lived. If institution: residence before admission)
a. STATE: Texas b. COUNTY: Dallas
c. CITY OR TOWN (If outside city limits, give precinct no.): Dallas
d. STREET ADDRESS (If rural, give location): 5138 Lobello
e. IS RESIDENCE INSIDE CITY LIMITS? YES ☒ NO ☐
f. IS RESIDENCE ON A FARM? YES ☐ NO ☒

07612

3. NAME OF DECEASED (Type or print): (a) First: Aubrey (b) Middle: J. (c) Last: Roberts
4. DATE OF DEATH: June 25, 1968
5. SEX: Male
6. COLOR OR RACE: White
7. Married ☒ Never Married ☐ Widowed ☐ Divorced ☐
8. DATE OF BIRTH: Sept. 13, 1899
9. AGE (In years last birthday): 68
IF UNDER 1 YEAR: Months / Days — IF UNDER 24 HRS.: Hours / Minutes
10a. USUAL OCCUPATION (Give kind of work done during most of working life, even if retired): Attorney
10b. KIND OF BUSINESS OR INDUSTRY: Law
11. BIRTHPLACE (State or foreign country): Florida
12. CITIZEN OF WHAT COUNTRY?: U.S.A.
13. FATHER'S NAME: U.F. Roberts
14. MOTHER'S MAIDEN NAME: Rebecca (Not Available)
15. WAS DECEASED EVER IN U.S. ARMED FORCES? (Yes, no, or unknown): No (If yes, give war or dates of service): ————
16. SOCIAL SECURITY NO.: Not Available
17. INFORMANT: Mrs. Cora Roberts Mrs. Cora Roberts-Wife my BO

MEDICAL CERTIFICATION

18. CAUSE OF DEATH [Enter only one cause per line for (a), (b), and (c).]
PART I. DEATH WAS CAUSED BY:
IMMEDIATE CAUSE (a): Acute Hemorrhage — INTERVAL BETWEEN ONSET AND DEATH: hours
Conditions, if any, which gave rise to above cause (a), stating the underlying cause last.
DUE TO (b): Acute blastic leukemia — unknown
DUE TO (c):
PART II. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO THE TERMINAL DISEASE CONDITION GIVEN IN PART I(a)

19. WAS AUTOPSY PERFORMED? YES ☐ NO ☒

TEXAS DEPARTMENT OF HEALTH
REC'D JUL 10 1968
BUREAU OF VITAL STATISTICS

20a. ACCIDENT ☐ SUICIDE ☐ HOMICIDE ☐
20b. DESCRIBE HOW INJURY OCCURRED. (Enter nature of injury in Part I or Part II of Item 18.)
20c. TIME OF INJURY: Hour a.m. p.m. Month Day Year
20d. INJURY OCCURRED WHILE AT WORK ☐ WHILE NOT AT WORK ☐
20e. PLACE OF INJURY (e.g., in or about home, farm, factory, street, office building, etc.)
20f. CITY, TOWN, OR LOCATION COUNTY STATE

21. I hereby certify that I attended the deceased from 6-20 1968 to 6-25 1968 and last saw the deceased alive on 6-25 1968. Death occurred at 2:15 p. m. on the date stated above, and to the best of my knowledge, from the causes stated.

22a. SIGNATURE (Degree or title): Chas M. Preston M.D.
22b. ADDRESS: 220 Med Arts Bldg Dallas Texas
22c. DATE SIGNED: 6-28-68

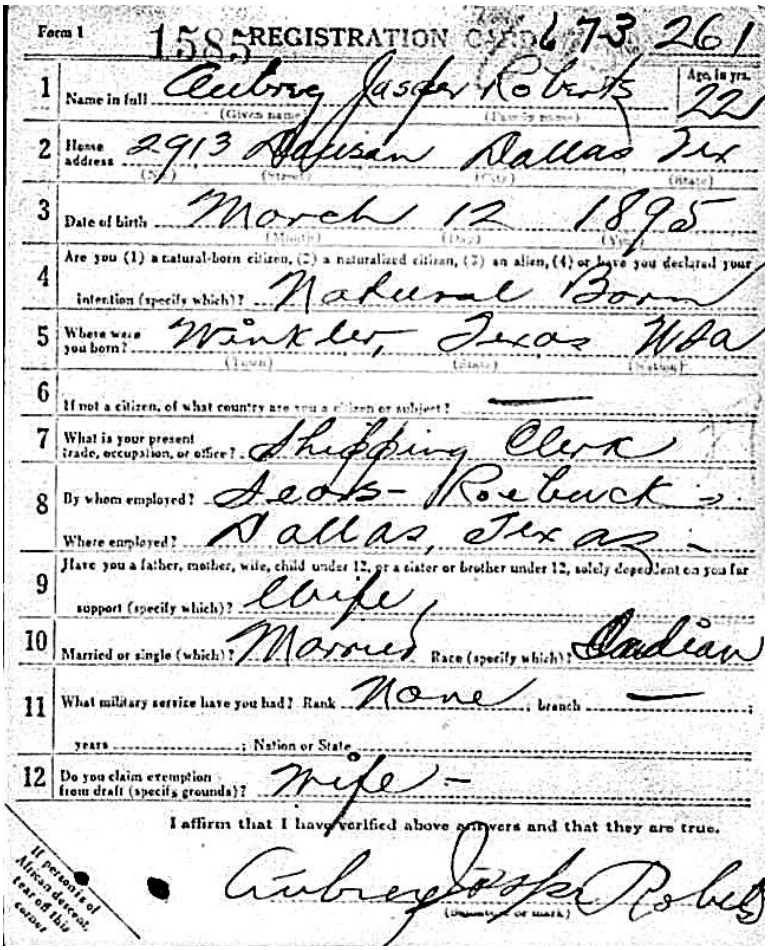
23a. BURIAL, CREMATION, REMOVAL (Specify): Burial
23b. DATE: June 27, 1968
23c. NAME OF CEMETERY OR CREMATORY: Restland Memorial Park
23d. LOCATION (City, town, or county): Dallas (State): Texas
24. FUNERAL DIRECTOR'S SIGNATURE: Ronald Dennis 5762 RESTLAND FUNERAL HOME, INC.

25a. REGISTRAR'S FILE NO.: 4517
25b. DATE REC'D BY LOCAL REGISTRAR: JUN 28 1968
25c. REGISTRAR'S SIGNATURE: Maurine Lasmon

TEXAS DEPARTMENT OF HEALTH — BUREAU OF VITAL STATISTICS
VS-112. REV. 1/58

Death certificate for Aubrey Roberts

U.S. Census records do list Roberts' parents, Ulysses Floyd Roberts and Rebecca Roberts as living in Navarro County in 1910, and as early as 1890—which certainly seems to dispel the romanticized "born Cherokee in the Florida Everglades" account. His mother's side of the family was originally from Georgia. Communications with the two major Seminole Nation organizations in Florida and Oklahoma reveal no record of either Aubrey Roberts or his mother being Seminole, a conclusion also verified by the Seminole Nation Historical Society. Even more troubling, communications with the Seminole Nation's longtime general counsel revealed that there is no record of Roberts ever handling any case for the Seminoles, much less leading their decades-long struggle to reclaim more of their ancestral lands in the Florida Everglades. A Westlaw search of reported cases in which Aubrey J. Roberts was listed as counsel of record reveals a number of



Form 1 1585 REGISTRATION CARD 673 261

1 Name in full: Aubrey Jasper Roberts — Age in yrs.: 22
2 Home address: 2913 Addison Dallas Tex
3 Date of birth: March 12 1895
4 Are you (1) a natural-born citizen, (2) a naturalized citizen, (3) an alien, (4) or have you declared your intention (specify which)? Natural Born
5 Where were you born? Winkler, Texas USA
6 If not a citizen, of what country are you a citizen or subject?
7 What is your present trade, occupation, or office? Shipping Clerk
8 By whom employed? Sears-Roebuck Co.
Where employed? Dallas, Texas
9 Have you a father, mother, wife, child under 12, or a sister or brother under 12, solely dependent on you for support (specify which)? Wife
10 Married or single (which)? Married Race (specify which)? Indian
11 What military service have you had? Rank None; branch —; years ; Nation or State
12 Do you claim exemption from draft (specify grounds)? Wife

I affirm that I have verified above answers and that they are true.

Aubrey Jasper Roberts
(Signature or mark)

If person is of African descent, tear off this corner

World War I registration card for Aubrey Roberts

state court cases from the 1920s through the 1960s—none of which involve Native Americans. None of the handful of federal court cases in which Roberts' name appears involve the Seminole or any other Native American tribal organizations.

Allowing for the possibility that the *Texas Bar Journal* obituary description of Roberts as Cherokee might be more accurate, I checked the Dawes Rolls of enrolled members of the Cherokee Nation. I also consulted Gene Norris, the lead genealogist of the Cherokee National Historical Society. Both confirmed that Roberts cannot be documented as either a Cherokee or a Seminole.[32] The same goes for Roberts' parents.

So, was Aubrey J. Roberts Texas' first Native American lawyer and judge, or was his Cherokee persona a carefully-crafted tale, concocted by a young man from sleepy Winkler, Texas, who felt that being an Ivy League-educated Native American dedicated to using his legal acumen to help "his people" reclaim their Everglades lands sounded much more exotic and appealing than the truth? Sadly, the evidence points to the latter. Why would Roberts undertake and perpetuate such a ruse? For virtually all of his life, there was no affirmative action-related benefit to asserting such racial status. In fact, at the time Roberts self-identified as "Indian" on his World War I draft registration, Native Americans did not even enjoy the benefits of U.S. citizenship (something prominent Native American activists like Thomas Sloan pressed for the more than 10,000 Native American servicemen after they returned home from World War I).

Did Roberts simply "pull an Elizabeth Warren"? The U.S. senator and former presidential candidate infamously claimed to be Native American for decades, identifying herself as "American Indian" on her State Bar of Texas registration card in April 1986, on her employment paperwork for law professorships at the University of Pennsylvania and Harvard University, and in her listing as a "minority" in the Association of American Law Schools directory.[33] Warren even contributed multiple recipes to a cookbook, *Pow Wow Chow: A Collection of Recipes From Families of the Five*

[32] October 16, 2020, email from Gene Norris, lead genealogist of the Cherokee National Historical Society to the author (on file with author).

[33] Annie Linskey & Amy Gardner, "Elizabeth Warren Apologizes for Calling Herself Native American," *Washington Post* (Feb. 5, 2019), https://www.washingtonpost.com/politics/elizabeth-warren-apologizes-for-calling-herself-native-american/2019/02/05/1627df76-2962-11e9-984d-9b8fba003e81_story.html.

REGISTRATION CARD—(Men born on or after April 28, 1877 and on or before February 16, 1897)

SERIAL NUMBER U 1713 | 1. NAME (Print) Aubrey (First) J. (initial only) (Middle) Roberts (Last) | ORDER NUMBER

2. PLACE OF RESIDENCE (Print)
613 South Brighton St., (Number and street) Dallas (Town, township, village, or city) Dallas (County) T exas (State)

[THE PLACE OF RESIDENCE GIVEN ON THE LINE ABOVE WILL DETERMINE LOCAL BOARD JURISDICTION; LINE 2 OF REGISTRATION CERTIFICATE WILL BE IDENTICAL]

3. MAILING ADDRESS
611 Republic Bank Bldg., Dallas Dallas T exas
[Mailing address if other than place indicated on line 2. If same insert word same]

4. TELEPHONE
CENTRAL 3210
MADISON 9925 (Exchange) (Number)

5. AGE IN YEARS
47
DATE OF BIRTH
3 (Mo.) 13 (Day) 1895 (Yr.)

6. PLACE OF BIRTH
NOVARRO CO (Town or county)
TEX (State or country)

7. NAME AND ADDRESS OF PERSON WHO WILL ALWAYS KNOW YOUR ADDRESS

8. EMPLOYER'S NAME AND ADDRESS
SELF

9. PLACE OF EMPLOYMENT OR BUSINESS
611 Republic Bank BLDG (Number and street or R.F.D. number) DALLAS (Town) DALLAS (County) TEX (State)

I AFFIRM THAT I HAVE VERIFIED ABOVE ANSWERS AND THAT THEY ARE TRUE.
Aubrey J Roberts (Registrant's signature)

D. S. S. Form 1
(Revised 4-1-42) (over) 16—21630-2

World War II registration card for Aubrey Roberts

Civilized Tribes, as "Elizabeth Warren, Cherokee."[34] After touting the results of a DNA test that purportedly indicated that she may have a Native American ancestor six to ten generations back (the average white person in America can also be described as having a Native American ancestor nine to ten generations back), Warren ultimately apologized.[35]

Like Elizabeth Warren, Aubrey J. Roberts had no identifiable Native American ancestor, no clan affiliation, and no meaningful connection to Cherokee language, customs, or culture. Neither could trace their genealogy to an ancestor on the "Dawes Rolls," or show adoption into a clan by a Clan Mother. Sociologist James L. Simmons listed six ways of defining Native American status: (1) legal definition (such as enrollment in a recognized tribe); (2) self-declaration (such as in U.S. Census responses); (3) community recognition; (4) recognition by non-Native Americans, either in reaction to self-declaration, descent from an enrolled tribal member, birth certificates, or other legal documents; (5) biological criteria (such as through a DNA test); and (6) cultural

[34] Musa Al-Gharbi, "DNA Irrelevant – Elizabeth Warren Is Simply Not Cherokee," *Hill.com* (Oct. 19, 2018 5:30 PM), https://thehill.com/opinion/white-house/412321-dna-is-irrelevant-elizabeth-warren-is-simply-not-cherokee.

[35] Linskey & Gardner, "Elizabeth Warren Apologizes." The Cherokee Nation's Secretary of State, Chuck Hoskin, Jr., called Warren's use of her DNA test to claim tribal membership "inappropriate and wrong." Mahita Gajanan, "Cherokee Nation Calls Elizabeth Warren's DNA Test 'Inappropriate and Wrong'," *Time* (Oct. 15, 2018 7:03 PM), https://time.com/5425427/cherokee-nation-responds-elizabeth-warrens-dna-test/.

criteria (demonstrating Native American heritage through participation in cultural practices and ceremonies, such as peyote services or powwows).[36]

Oddly enough, the person with the most verifiable claim to being Texas' first Native American lawyer is the same individual who was Texas' first African American attorney—William Abram Price, who was admitted to practice in Matagorda County in October 1873.[37] Price was born a free man in 1848 to free parents of mixed Native American and African American heritage living near Mobile, Alabama. There is no record of Price discussing the specifics of his Native American ancestry, but pre-Civil War Alabama was home to numerous Indian tribes, the most prominent among them being four of the Five Civilized Tribes—Cherokee, Chickasaw, Choctaw, and Creek. Price received his formal education at Wilberforce University in Xenia, Ohio, before moving to Texas during Reconstruction. Although he started out farming, Price eventually became a lawyer after "reading the law" and serving as a Justice of the Peace for Matagorda County's Precinct No. 2. In addition to being Texas' first lawyer and judge of color, Price's election as Fort Bend County Attorney in 1876 made him the first Black (and Native American) to serve as a county or district attorney.

William Abram Price

But with the end of Reconstruction, Price, along with thousands of other "Exodusters" would flee the racial violence and intolerance of the South for the presumably more tolerant land of opportunity, Kansas. There, Price co-founded the state's first African American law firm as well as a newspaper, *The Afro-American Advocate*, "published in the interest of the Negro race of Southern Kansas, and the Freedmen of the Five Civilized Tribes of the Indian Territories." Before his death in 1893, Price made history again with his victory in a landmark school desegregation case before the Kansas Supreme Court in 1891—one that helped form the precedent for the civil rights milestone of *Brown v. Board of Education of Topeka* more than half a century later.[38]

While Price himself apparently did not self-identify as Native American, others were quick to make note of it. In keeping with the casual racism of the times, newspapers would remark upon his racially mixed lineage, seemingly equating Price's achievement and intelligence with the fact that he was not "full-blooded" African American. One article after he was elected county attorney devoted an inordinate amount of attention to Price's appearance, noting that the new county attorney was "of light or bright copper color, very black, yet almost straight hair and whiskers, and like Galveston's quondam Senator—'Ruby'—has very little African blood in his veins, both his mother and father being half Indian and half bright mulatos."[39] The author goes on to describe

[36] James L. Simmons, "One Little, Two Little, Three Little Indians: Counting American Indians in Urban Society," 36 *Human Organization*. 76 (1977).

[37] John G. Browning & Hon. Carolyn Wright, "And Still He Rose: William A. Price, Texas' First Black Judge and the Path to a Civil Rights Milestone," *Journal of the Texas Supreme Court Historical Society* 8 (Winter 2019), 41.

[38] Knox v. Bd. Educ. of the Cty. of Independence, 45 Kan. 152 (1891).

[39] "Colored District Attorney," *Galveston Daily News* (Mar. 19, 1876).

Price's personal appearance as resembling "that of an Indian; his features are rather delicate than otherwise; his hands and feet slender and tapering and his conversation indicates that he has not neglected the opportunities afforded him."[40] The bigoted journalist even goes so far as to contrast Price's physical appearance with that of Fort Bend County's newly-elected sheriff, whom he characterizes as "of the regular cornfield darky appearance."[41]

But while William A. Price may not have publicly identified as Native American, there is at least one indication besides his newspaper endeavors that he had Native American interests at heart. While in Kansas, Price served as president of the Colored Men's Protective Union and represented Kansas in the National Colored Conference. In 1882, he was part of the committee sent to petition Congress to split the Oklahoma and Indian Territories into two states in 1884—one of which would be earmarked for Black and Native American settlers. Ultimately, efforts by Native American and African American leaders did not succeed, and the "Twin Territories" were admitted into the Union as one state in 1907.

IV. CONCLUSION

Unfortunately, the true identity of Texas' first fully Native American lawyer will likely remain enshrouded in mystery. No amount of self-embellishment, false media narratives, or "family lore" can take the place of documentable, historical fact. But instead of dwelling on the negative, the lack of a definitive answer to the question that began this article should spur greater efforts to illuminate and share the long-neglected history of Native American lawyers and judges. As Americans welcomed the election of Kamala Harris as the first female vice president of color, some media outlets incorrectly reported her as the first person of color to hold that office. That distinction belongs instead to Charles Curtis, vice president under Herbert Hoover from 1929 to 1933. Curtis, an enrolled member of the Kaw Nation, became one of the first Native American lawyers in Kansas when he was admitted to that state's bar in 1881. There have been at least five Native Americans to serve as U.S. district court judges: (1) Frank Howell Seay, a Cherokee appointed by President Carter in 1979; (2) Billy Michael Burrage, an enrolled member of the Choctaw Nation of Oklahoma appointed by President Clinton in 1994; (3) Diane Humetawa, a Hopi appointed by President Obama in 2014; (4) Ada Brown, an enrolled member of the Choctaw Nation appointed to the U.S. District Court for the Northern District of Texas by President Trump in 2019; and (5) Muscogee Creek Nation member Lauren King of Washington state who was appointed to the federal district bench in October of 2021. Native Americans have served as United States Attorneys, and as law school deans. As a people whose relationship with the federal government alone has been defined by at least 367 ratified treaties, 73 ratified agreements, and more than 100 individual statutes, Native American legal history is rich if often tragic. It merits greater exploration in Texas and nationally.

---

[40] *Ibid.*

[41] *Ibid.*

Return to Journal Index

The Coahuiltecan Quest for Ancestors' Bones:
Why Texas Needs a State Native American Graves Protection and Repatriation Act

By Milo Colton and Alysia Córdova

INTRODUCTION

Today, there are 574 federally recognized American Indian tribes.[1] *There are more than 300 tribes without federal recognition.*[2] *Of the non-federally recognized tribes, more than 60 have state recognition.*[3] *California is the state with the largest Indian population,*[4] *including more than 100 federally recognized tribes and dozens of state recognized tribes. Texas, on the other hand, is the state with the fourth largest Indian population,*[5] *but it has only 3 small federally recognized tribes (Ysleta del Sur, Alabama/Coushatta, and Kickapoo with a combined total population of about 5,000 Indians)—none of which inhabited Texas at the time of Europeans arrival. It also has 3 small state recognized tribes (Lipan Apache Tribe of Texas, Miakan-Garza Band of Coahuiltecans, and Yaqui Tribe of Texas also with a combined total of about 5,000 Indians)—with only the Miakan-Garza Band of Coahuiltecans originally from Texas.*

At the time of the arrival of Columbus in the New World, the land that would become Texas had more Indian tribes than any other future state in North America. However, war, disease, and genocide, nearly eliminated the Indians in Texas. Today, Indian descendants of the original inhabitants have begun to claw their way back. One of the factors that sparked their recovery was the looting and desecration of the graves of their ancestors. PART ONE of this article describes recent efforts of Texas Indians to protect the graves and to repatriate the remains held in churches, museums and universities. PART TWO discusses the modern Indian graves protection and repatriation movement and the need for legislation in Texas.

Show me the manner in which a nation or a community cares for its dead, and I will measure with mathematical exactness the tender sympathies of its people, their respect for the laws of the land, and their loyalties to high ideals.[6]

---

1 Bureau of Indian Affairs, "Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs," *Federal Register* (Jan. 1, 2020).

2 "List of Unrecognized Tribes in the United States." Wikipedia. Also https://www.indian-affairs.org/researching-your-ancestry.html

3 Martha Salazar, "State Recognition of American Indian Tribes," *National Conference of Legislatures*, Vol. 24, No. 39 (Oct. 2016) https://www.ncsl.org/research/state-tribal-institute/state-recognition-of-american-indian-tribes.aspx

4 362,801 American Indians according to 2010 U.S. Decennial Census.

5 315,264 American Indians according to 2010 U.S. Decennial Census.

6 Jack F. Thrope & Walter R. Echo-Hawk, "An Unraveling Rope: The Native American Grave Protections and Repatriation Act: Background and Legislative History," in *Repatriation Reader: Who Owns Indian American Remains?*, ed. Devenon A. Mihesuah (Lincoln : University of Nebraska Press, 2000), 123, 124. (quoting British Prime Minister William Ewart Gladstone).

PART ONE:
HOW IT ALL BEGAN AND WHY TEXAS NEEDS A STATE NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION ACT (NAGPRA)

I. INTRODUCTION: THE COAHUILTECAN NATION

Without a doubt, the oldest and longest surviving Indian nation in Texas is the Coahuiltecan Nation. Coahuiltecans have inhabited the southcentral part of the state, as well as a big chunk of northeastern Mexico,[7] for over 14,000 years.[8] Europeans made contact with them nearly 600 years ago.

Coahuiltecan Territory

On a cold November day in 1528, Karankawa Indians[9] returning to their village on an island near present-day Galveston encountered 90 shipwrecked Spaniards and one African slave.[10] The Indians had never seen human beings like these. They were as pale as a flounder's belly and short in stature,[11] except an African[12] who was black as a moonless night. All had beards thicker than any Indian could grow.

Who were these beings? Where did they come from? How did they get here? Why were they here? These were the kind of questions that must have formed in the minds of the natives as they eyed the newcomers.

---

7 See Map attached. SOURCE: Tap Pilam Coahuiltecan Nation Homepage.

8 Ryan Chandler, "Indigenous group petitions UT President to return native human remains after university denies request," KXAN (Austin, Texas), Sep. 11, 2020. https://www.kxan.com/news/local/austin/indigenous-group-petitions-ut-president-to-return-native-human-remains-after-university-denies-request/

9 The Karankawa were a coastal tribe of Texas, ranging from Galveston Bay to Corpus Christi Bay and up to 100 miles inland. Some scholars speculated they may have migrated from the Islands of the Caribbean about 2,000 years ago. *See* Shannon Selin, "The Extinct Karankawa Indians of Texas," *Imagining the Bounds of History*.

10 Donald E. Chipman, "Cabeza de Vaca, Alvar Nunez (ca. 1490-ca. 1559)," *Handbook of Texas* (1996).

11 The average height of European men in the 1500s was about five and one-half feet. https://www.answers.com/Q/What_was_the_average_height_of_man_in_the_1500s. The Karankawan men were described by early explorers as between six and seven feet in height. *See* Tim Seiter, *Sizing-up the Karankawans: Were the Karankawans Giants?* March 30, 2019, https://karankawas.com/2018/06/10/sizing-up-the-karankawa-were-the-karankawa-giants/

12 His name was Estevanico who showed a mastery of different languages, including six different Indian tongues, plus sign language. *See* Anne B. Allen, "Estevanico the Moor: August '97 American History Feature," *History* 1-7 (Downloaded May 15, 2021). https://www.historynet.com/estevanico-the-moor-august-97-american-history-feature.htm.

The castaways were, in fact, the remnants of the disastrous Panfilo Narvaez Expedition of 600 people that had set out the year before to conquer and colonize Florida and lands west. All were starving and weak, dressed in tattered rags or naked.

They recoiled in fear as the powerfully built natives approached. Two Spaniards arose from the ground to meet them. One made gestures with his hands, indicating they were hungry and thirsty. His name was Alvar Nunez Cabeza de Vaca,[13] who would record in a journal eight years later that the Indians "sat down with us and all began to weep out of compassion for our misfortune."[14] They signaled to Cabeza de Vaca that they would return. And they did return the very next day and for several days thereafter, bringing the castaways food and water. As Cabeza de Vaca noted, his men were treated "so well that we became reassured, losing somewhat our apprehension of being butchered."[15]


Alvar Nunez Cabeza de Vaca

However, seeing the Spaniards condition worsening, the Indians decided to invite them to their village where they could share their huts and fires. Most of the Spaniards were so weak they could barely walk. Others had to be physically carried by the Indians. But five, fearing ritualistic torture and death, refused to go.

At the Indian village, the castaways soon began to recover. Then, they started to die from a stomach ailment. So did the Indians. By the following spring, only fifteen of the castaways and barely half of the native villagers remained alive. Ethnohistorian John C. Ewers speculated they probably succumbed to cholera.[16]

To make things worse, the Indians and their guests made the shocking discovery that the Spaniards left behind had turned to cannibalism. Appalled to find the Spaniards were man-eaters, combined with the grief and anger at the death of so many loved ones, some Indians came to believe that the newcomers were making them sick and killing them with a dark magic. They lashed out at the Spaniards, beating and forcing them to dig up edible roots in the marshes till their fingers bled.

In April 1529, fourteen of the Spaniards slipped away from the Indian camp and fled to the mainland. They planned to walk westward following the coast back to the Spanish settlement of Panuco (a city in present-day Veracruz, Mexico).

---

[13] He served as treasurer, marshal and second-in-command of the Narvaez Expedition.

[14] Anne B. Allen, "Estevanico the Moor," *History* 1-7.

[15] *Ibid.*

[16] John C. Ewers, *Plains Indian History and Culture: Essays on Continuity and Change* (University of Oklahoma Press 1997), 88.

Only Cabeza de Vaca stayed behind, because his comrades thought he was so ill that his death was imminent. However, he recovered and remained under the protection of a respected elder who argued on his behalf that the Spaniards were more cursed than the Indians, having suffered a greater death toll than the Indians.

When Cabeza de Vaca regained his strength, he too fled to the mainland where he was welcomed by another band of Karankawas, called the Charrucos. There, he soon established himself as a trader and a medicine man (or shaman) among his hosts and other tribes. As a trader, he wrote:

> This occupation served me well, because practicing it, I had the freedom to go where I wanted, and I was not constrained in any way nor enslaved.[17]

As a medicine man:

> His usual treatment was a laying on of hands, and fervent praying, to which the Indians responded miraculously. However, with what tools he had, (he) also practiced surgery when necessary. In one historic operation in 1535, he removed an arrowhead from deep inside an Indian's chest (sagittectomy). This surgical cure made him famous among the Indians and was responsible for his eventual safe return to civilization.[18]

His trading forays inevitably brought him into the interior of Texas which was dominated by the Coahuiltecan Nation. At that time, they were the largest tribe in the region, composed of hundreds of autonomous groups ranging in size from a few extended families to villages with five hundred or more people.[19]

Among the goods Cabeza de Vaca carried were shells from the coast that were popular with the Coahuiltecans. He had large shells which were sharp enough to cut leather, roots, hides, and mesquite beans. He had smaller shells and pearls that could be fashioned into jewelry. Other shells of ornate shapes could be used to make different sounds and music. He traded his goods for Coahuiltecan deer and buffalo hides, along with flint and ochre, which were highly prized by the coastal tribes.

In spring 1533, he was taken captive by a band of Coahuiltecans called the Mariames who occupied a territory in the vicinity of San Pedro Springs in present-day San Antonio. His white skin and bearded face made him a unique human being, and his ability to heal made him an especially valuable asset.

---

[17] Steven Harrigan, *They Came from the Sky: The Spanish Arrive in Texas* (University of Texas Press 2017), 29.

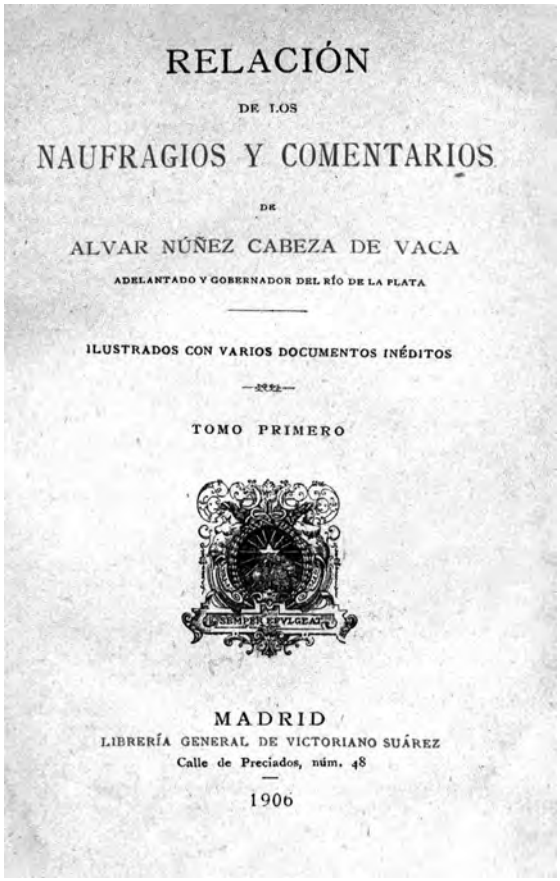
[18] Jesse E. Thompson, M.D., "Sagittectomy-First Recorded Surgical Procedure in the American Southwest, 1535-The Journey and Ministrations of Alvar Nunez Cabaza de Vaca," *N Eng J Med* 289, (1973): 1403-1407.

[19] One scholar compiled a list of 614 Coahuiltecan group names and estimated the average population per group at 140 Indians. *See* Frederick Henry Ruecking, "The Coahuiltecan Indians of Southern Texas and Northeastern Mexico," Master's Thesis, The University of Texas, August 1955. *Also see* https://www.tshaonline.org/handbook/entries/coahuiltecan-indians

For Cabeza de Vaca, life with the Mariames was harsh and demanding. Like the rest of the members of the tribe, he was expected to forage for food, carry firewood on his back, along with mats and poles for the huts when the village moved. However, he soon assimilated and profited in his role as a healer. His respect for the Coahuiltecans was manifest when he later commented:

> I believe these people see and hear better, and have keener senses than any other in the world. They are great in hunger, thirst, and cold, as if they were made for the endurance of these more than other men by habit and nature.[20]

Not long after his capture, the Mariames came together with other members of their band in the pecan forests along the River of Nuts (now called the Guadalupe) for the annual harvest. In another group, he was surprised to find three of the fourteen men who had left him behind four years earlier. Like him, they were held as captives, and, as it turned out, they, too, were regarded as respected healers or shamans. Also, as it turned out, these four were the only remaining survivors of the Narvaez Expedition.[21] In 1534, they made their escape and began the 2,400 miles trek to Mexico City.


RELACIÓN

DE LOS

NAUFRAGIOS Y COMENTARIOS

DE

ALVAR NÚÑEZ CABEZA DE VACA

ADELANTADO Y GOBERNADOR DEL RÍO DE LA PLATA

ILUSTRADOS CON VARIOS DOCUMENTOS INÉDITOS

TOMO PRIMERO

MADRID

LIBRERÍA GENERAL DE VICTORIANO SUÁREZ

Calle de Preciados, núm. 48

1906

Title page from a 1906 publication of Cabeza de Vaca's journal

In 1542, Cabeza de Vaca published a journal[22] of his 8-year exile among the Indians. For nearly two centuries afterward, his journal proved a valuable guidebook for anyone intent on conquest, proselytizing, colonizing, and exploiting the resources of northern Mexico and central Texas.

In the late seventeenth and early eighteenth centuries, Spaniards began establishing presidios and missions in the southern Texas, at first along the Rio Grande, then northward to San Antonio. The Coahuiltecans were the first Texas Indians to convert to Catholicism. Many provided the sweat and labor for building the five missions along the San Antonio River.[23] Hundreds lived at the missions, where they worked the fields and cared for the livestock. When they died, they were buried in consecrated cemeteries attached to the missions.

---

[20] W.W. Newcomb, Jr., *The Indians of Texas: From Prehistoric to Modern Times* (University of Texas Press 1961, 1980), 29.

[21] The others were Alonso del Castillo Maldonado, Andres Dorantes de Carranza and his African slave Estevanico.

[22] "Relacion de los naufragios y comentarios," edited by Manuel Serrano y Sanz, *Colecion De Libros y Documentos Referentes a La Historia de America* Vol. 5. (1906).

[23] They are: Mission San Antonio de Valero (the Alamo)-1744, Mission San Jose y Miguel de Aguayo-1720, Mission San Juan Capistrano-1731, Mission San Francisco de la Espada-1731, and Mission Concepcion de la Purisma de Acuna-1755.

By the nineteenth century, epidemics of smallpox, measles, and other diseases, along with warfare had taken a terrible toll on the Texas Indian population. With the creation of the Republic of Texas in 1836, total Indian extermination became the official policy of the ruling whites.[24]

In 1886, ethnologist Albert Gatschet declared the Coahuiltecans all but extinct, when he found what he thought were the last 28 Coahuiltecan survivors (25 Comecrudo, 1 Cotoname, and 2 Pakawa) near Reynosa, Mexico.[25]

In 1955, Frederick Henry Ruecking wrote:

> (T)hese people were either displaced or exterminated during the process of European settlement. . . The Indians of this region, known as the Coahuiltecans, have acculturated and assimilated. . . None remains that can describe the old way of life. After nearly two hundred years of constant contact with the Spanish settlers, the Coahuiltecans have lost their ethnic identity.[26]

This version of Coahuiltecan history would set the stage for a bitter struggle between the modern Indians and non-Indians of Texas that continues to this day.

II. A FIELD TRIP TO SEMINOLE CANYON

On April 1-2, 2006, members of St. Mary's University Native American Student Association in San Antonio, along with faculty and staff, traveled to Seminole Canyon State Historical Park and the White Shaman Shelter at the Rock Art Foundation's Galloway White Shaman Preserve[27] 45 miles west of Del Rio, Texas. The purpose of the trip was threefold: (1) to view some of the world's best and most beautiful rock art of prehistoric Indian culture, (2) to experience the great outdoors of southcentral Texas, and (3) to enjoy a respite from the academic grind before the mad dash of completing assignments and final examinations for the spring semester.

They stopped first at the White Shaman Shelter Preserve located one mile west of Seminole Canyon State Historical Park on U.S. 90. At the trailhead to the shelter, they posed for pictures at a replica of an ancient Indian village. Then, they descended into a ravine to a small rock shelter. On a limestone wall nine feet long and four and one-half feet high, Indian inhabitants of the area 4,000 years ago painted more than 30 anthropomorphic figures, birds, animals and monsters, including the White Shaman.

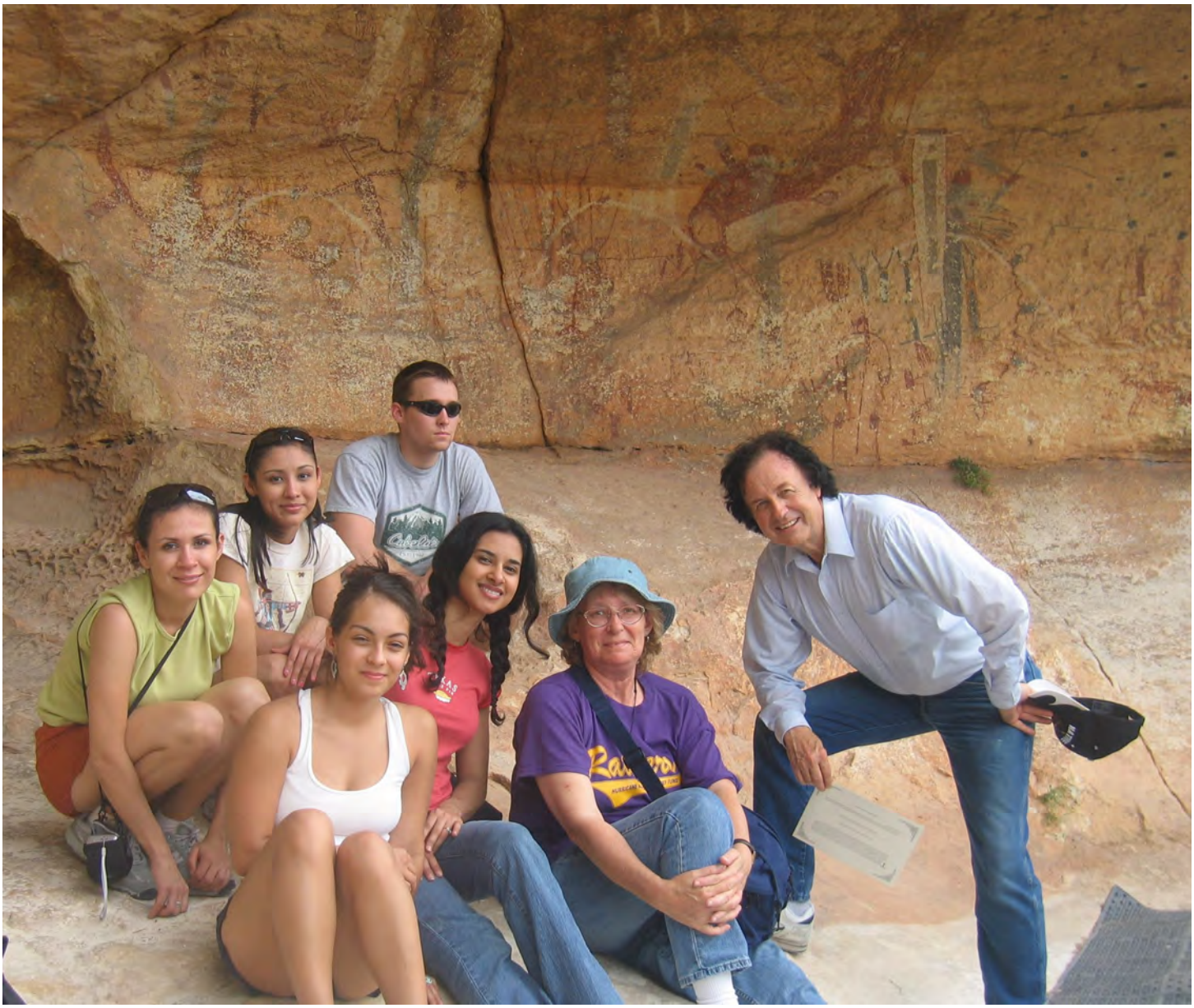
After a couple of hours at the White Shaman site, the St. Mary's party moved on to explore Seminole Canyon and the rock art paintings at Fate Bell Shelter, which is a massive cave, 150 yards long and 40 yards deep in places and covered with hundreds of figures on its wall, including deer, cougar, birds, and shamans.

[24] *See* Milo Colton, "Texas Indian Holocaust and Survival: McAllen Grace Brethren Church v. Salazar," *The Scholar: St. Mary's Law Review on Race and Social Justice* Vol. 21, No. 1 (2019): 51-146.

[25] J.W. Powell, *7TH Annual Report of the Bureau of Ethnology* 1885-1886 (GPO. 1891): 68.

[26] Frederick Henry Ruecking, "The Coahuiltecan Indians."

[27] Now called the Rock Art Foundation White Shaman Preserve of the Witte Museum of San Antonio.



A group of St. Mary's Indian students, along with St. Mary's librarian Pat Somach and Prof. Milo Colton, visit the White Shaman Center in 2006.

The Park Guide was full of information about the cave paintings and the Paleo-Indians who inhabited the area between 14,000 to 600 years ago. But he dropped a bombshell when he mentioned the excavation of the cave and the removal of human remains in the early twentieth century.[28] The students peppered him with questions: How many Indian graves were dug up? He could not say for sure, maybe six or more.[29] Where are the remains now? They are part of the "Indian Collection" at the Witte Museum in San Antonio. The what? "Indian Collection," all the great museums have them.

---

[28] There has been at least one published study of human remains from the Fate Bell Shelter. *See* "Christine Jones, Brucellosis in an adult female from Fate Bell Rock Shelter, Lower Pecos (4000-1300BP)," *International Journal of Paleopathology* Vol. 24, (March 2019): 252-264.

[29] *See* Greg Harman, "Battle of the Bones," *San Antonio Current* 14, (June 4-10, 2008), where he states CEO McDermott and Collections Manager Amy Fulkerson admitted that they had the remains of eight individuals.

Back in San Antonio, the students contacted Marise McDermott, President and CEO at the Witte Museum. They asked her to return their ancestors' remains for reburial. Her response was, "No way! They are not your ancestors. They are the remains of a hunter-gatherer race that has long been extinct." Moreover, she believed that the museum had the law on its side. That law was the Native American Graves Protection and Repatriation Act of 1990 (NAGPRA) which provides a process for federal agencies and museums that receive federal funds to repatriate or transfer from their collections certain Native American cultural items—human remains, funerary objects, sacred objects and objects of cultural patrimony—to lineal descendants, and to Indian tribes, Alaska Native Corporations, and Native Hawaiian organizations.[30]


Marise McDermott

What that means is (1) only members of federally recognized tribes (2) that are lineal descendants of the deceased have standing to claim the remains, and (3) claimants must show that the remains were removed from a location that was a national park, Indian Reservation, or military base to succeed with the claim. This narrow interpretation of the law has worked in the majority of the cases in which remains have been returned, but it has been the subject of broader interpretations, as well.


Juan Mancias

The St. Mary's Indian students, refusing to accept the Witte Museum's position, met with Juan Mancias, Tribal Chairman of the Carrizo/Comecrudo Tribe of Texas,[31] whose Coahuiltecan ancestors occupied a territory that included Seminole Canyon State Park, and members of the American Indian Movement of Texas to organize a protest outside the museum, demanding the return of the museum's remains for reburial and hoping that public pressure would force the museum to relent. The protests went on for weeks, but the museum refused to budge, resulting in a stalemate that persists today.[32]

But not all was lost. The students discovered there were other ongoing efforts in Texas to reclaim and rebury Indian remains, with varying degrees of success. Moreover, they found two more groups of living descendants of the hunter-gatherer Indians of Texas. They called themselves The Tap Pilam Coahuiltecan Nation and Miakan-Garza Band of Coahuiltecans.

---

[30] Pub. L. 101-601, 25 U.S.C. 3001 et seq., 104 Stat. 3048.

[31] The Carrizo/Comecrudo Tribe of Texas is not a federally recognized Tribe. In fact, none of the Coahuiltecans have federal recognition. However, all are incorporated under the laws of Texas and established as 501(c)3 organizations.

[32] *See* Greg Harman, "Battle of the Bones," *San Antonio Current,* 11, 13-14.

III. COAHUILTECAN RENAISSANCE AND RESISTANCE

A. The Tap Pilam Coahuiltecan Nation (TPCN)

In 1960s, the Archdiocese of the Catholic Church in San Antonio granted permission to University of Texas archaeologists to conduct a protracted study of Indian remains at the cemetery at Mission San Juan Capistrano. More than 100 individuals, presumed to be missionized-Coahuiltecans,[33] along with funerary objects, were removed from their graves.[34]

Logo of the Tap Pilam Coahuiltecan Nation

Descendants of the missionized-Coahuiltecans, many of whom were parishioners of the archdiocese and still residing near the mission, were outraged. This was the moment the Tap Pilam ("People of the Earth") Coahuiltecan Nation (TPCN)[35] launched the first of many protests and legal battles to repatriate and rebury their ancestors' remains at Mission San Juan. The TPCN also vowed to protect their dead still buried in the cemeteries of the other four missions of San Antonio.

In 1986, the Catholic Church admitted that it was a mistake to disturb the graves of the missionized-Coahuiltecans, and they began to work with TPCN and other local Indian groups to recover and rebury the remains.[36] When the Church requested the remains be returned, the State Archaeologist (an office within the Texas Historical Commission) and University of Texas officials demurred, arguing the scientific importance of the remains should take precedence over the concerns of the Church and its native parishioners.[37]

In 1990, the TPCN asserted that it had a right to its ancestors' remains as lineal descendants under the recently passed federal Native American Graves Protection and Repatriation Act (NAGPRA). It was quickly shot down by the state and the university on the grounds that the TPCN was not listed among the federally recognized tribes, and even if the Indians could show that their ancestors were buried at the mission, nothing in the Church records would specifically declare that they were Coahuiltecan Indians. Further, the remains were taken from a site that was not under federal management or control at the time of their removal.[38]

---

[33] Coahuiltecans who had converted to Catholicism.

[34] The excavation was led by Mardith Schuetz. *See* Mardith Schuetz, "The Indians of the San Antonio Missions, 1718-1821." Unpublished Doctoral Dissertation, University of Texas-Austin, 1980. Also *see* Alston V. Thomas, et al., "Reassessing Cultural Extinction: Change and Survival at Mission San Juan Capistrano, Texas," Center for Ecological Archaelogy at Texas A&M- College Station, Tx (Reports of Investigation No. 4 and San Antonio Mission National Historical Park, Texas, National Park Service, Contract #1443 cx760098001, 2001)

[35] The Tap Pilam Coahuiltecan Nation describes itself as a tribal community of affiliated Bands and Clans of the Payaya, Pacoa, Pakawan, Paguame, Papanac, Hierbipiame, Xarame, Jajalot, and Tilijae of Texas and northeastern Mexico. https://www.facebook.com/tappilam/. Also, https://tappilam.org/tribal-documents/

[36] See Alston V. Thomas, "Reassessing Cultural Extinction." These included the Pamaque Band of Mission Indians and American Indians in Texas-Spanish Colonial Missions.

[37] *Ibid*., p. xxii.

[38] *Ibid.*

By the mid-1990s, the State Historical Commission caved, recognizing that the Catholic Church had standing,[39] even if the TPCN did not, and agreed that the remains should be returned, which by then were housed at the University of Texas at San Antonio. In 1999, the remains of 150 Coahuiltecans were returned for reburial at Mission San Juan. [40]

Prior to reburial, Archbishop Patrick Flores conducted a funeral mass and apologized to the Coahuiltecans. Coahuiltecan members of the Native American Church also held a Tipi Ceremony on the mission's grounds the night before to purify and to prepare themselves for re-interment of their relations. Thus, ended one decades-long struggle, but others loomed on the horizon.

A second big battle for the Coahuiltecans began to take shape in the mid-1990s. San Antonio political and business leaders were seriously promoting the renovation of the Alamo, which is state-owned, and Alamo Plaza, which is owned by the City of San Antonio, as one way to raise the profile of the city, increase tourism and have a positive impact on the local economy.

Anticipating upcoming battles, the TPCN took steps to enhance its status among the non-Indians. In 2001, it was able to get the 77th Texas State Legislature to recognize the TPCN as "The Aboriginal Tribal families of Texas," the City of San Antonio to recognize it as "The first Tribal families of San Antonio," and the Archdiocese of San Antonio to recognize it as "The Indigenous Tribal families of the five Indian Missions of San Antonio."[41]

As the talks moved forward between the city and the state on Alamo renovation, the major bone of contention between the two entities was over the primary focus of the renovation. Should it be the Battle of 1836 and the John Wayne version of Texas history, or should it cover all three centuries of its existence—its time as a Catholic Mission among the natives, a military garrison of the Spanish to protect the colonists, and a shrine of liberty? Should it even mention that the Alamo martyrs were fighting not only for self-governance, but also for a slave-based economy that had already been abandoned by Europe and Mexico?

In 2014, City of San Antonio political leaders, believing the kinks could be worked out, established a 21-member committee to "create a vision and guiding principles for the redevelopment of Alamo Plaza and the surrounding area."[42] One of the members of the committee was Ramon Vasquez, a leader of the TPCN and the American Indians of Texas, both organizations headquartered in San Antonio.[43]

In the committee's meetings, Mr. Vasquez raised concerns about the existence of a cemetery on the Alamo grounds, containing the remains of over 1,300 individuals,[44] most of whom were

[39] *Ibid*., The Catholic Church claimed that the reburial issue was not NAGPRA-related, and that it had not relinquished its possession and control of the remains.

[40] *Ibid.*, p. xvi.

[41] The resolutions and proclamations are available on the Tap Pilam Coahuiltecan Nation homepage. https://tappilam.org/tribal-documents/

[42] Tap Pilam Coahuiltecan Nation, et al., v. Alamo Trust Inc., et al., Case 5:19-cv-01084 (W.D. Tex. Sep. 10, 2019) Document 1, Filed 09/10/19, p. 7.

[43] *Ibid.*, 8.

[44] Tap Pilam Coahuiltecan Nation, et al., v. Alamo Trust Inc., et al., Case 5:19-cv-01084 (W.D. Tex. Sep. 10, 2019) Document 1, Filed 09/10/19, p. 3.

Ramon Vasquez

ancestors of the TPCN. In the summer of 2016, human remains were discovered in an archeological dig on the Alamo Complex. They were turned over to the TPCN and reburied where they were discovered.

In April 2017, Mr. Vasquez recommended human remains protocols for the parties involved in the Alamo redevelopment. Soon thereafter, representatives of the state began taking actions ignoring the protocols, including banning access to the Alamo chapel for Coahuiltecan ceremonies that had been practiced for decades to honor their ancestors who had lived, died and been buried at the mission. When challenged, the state's agents said: We believe "there is no Historic Cemetery on the Alamo property."[45] Moreover, we don't believe the TPCN are Indians.[46]

State officials wanted to use the federal Native American Graves Protection and Reburial Act (NAGPRA)"[47] to resolve Indian issues related to Alamo redevelopment, whereas the city had adopted its own version of NAGPRA, recognizing that the Coahuiltecans were indeed Indians and lineal descendants of the deceased buried at the Alamo, just as the Archdiocese of the Catholic Church had done in 1986.[48]

By 2021, three lawsuits had been filed against the $450 million Alamo redevelopment project by the Coahuiltecans, one in the 8th Court of Appeals in El Paso, a second on appeal in the U.S. 5th Circuit Court of Appeals in New Orleans, and a third in a state district court. In the first two, the Coahuiltecans claimed their civil rights had been violated by being denied access to the Alamo chapel for ceremonies honoring their ancestors who were buried on the Alamo grounds. In the third, Judge Dustin Howell, of the 455th District Court in Travis County, heard arguments on April 26, 2021, whether it had jurisdiction in a case where the Coahuiltecans are claiming they have been discriminated against under Texas Religious Freedom Restoration Act. The state claimed sovereign immunity and that the Coahuiltecans were not Indians because they lack federal recognition.[49]

The issue of federal recognition has been addressed in two cases involving the Lipan Apache Tribe of Texas, a tribe that does not have federal recognition. Both cases wound up being appealed to the U.S. 5th Circuit Court of Appeals in New Orleans, and in both cases the Court held that a person may qualify as an American Indian without being a member of a federally recognized

---

[45] *Ibid.*, 12. In 2019, After reviewing numerous records, The Texas Historical Commission declared that there was indeed a Historic Cemetery on the grounds of the Mission San Antonio de Valero.

[46] Elaine Ayala, "Alamo lawsuit puts city in awkward position," San Antonio Express-News, April 29, 2021, A2. Tap Pilam Coahuiltecan Nation, et al., v. Alamo Trust Inc., et al., *loc. cit.*

[47] *Ibid.,* 2.

[48] Elaine Ayala, "Alamo Lawsuits."

[49] *Ibid.*

tribe.[50] For example, several states have state-recognized tribes, including Texas.[51] Moreover, the federal government itself has several other ways of identifying American Indians, for example self-declaration on the U.S. Decennial Census.[52]

B. Miakan-Garza Band of Coahuiltecans

While the TPCN was waging its war in San Antonio, the Miakan-Garza Band of Coahuiltecans, headquartered in San Marcos, had its own battles and victories. Since 1991, Dr. Mario Garza, Cultural Preservation Officer of the Miakan-Garza Band, and his wife Maria Rocha, had participated in the repatriation and reburial of "more than 200 of their ancestral remains that ended up in the hands of universities and the Catholic Church."[53] Two of the more recent cases are discussed below.


Dr. Mario Garza

In 2011, construction workers in San Marcos unearthed the remains of a young man who died about 1,200 years ago. Construction halted for five days, while Texas State University archaeologists removed the remains from the ground. Dr. Garza asked the lead archaeologist Jon Lohse, "Can I stay during the exhumation and pray?" "Of course," was the answer.[54] Garza remembers:

> Archaeologists wrapped each bone and fragment in household aluminum foil. They put the foil in plastic bags and the plastic-bags in an acid-free cardboard box. They sealed it and on the side of the box wrote "41HY160" in black Sharpie, denoting the specific archaeological site where the bones were discovered.[55]

The box was taken back to the university where it was stored with the remains of 120 others, becoming part of the more than 4,000 in research labs across Texas.[56]

Jon Lohse, the lead archaeologist, watching Garza pray at the gravesite was moved. He told

---

[50] McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 469 (5th Cir. 2014) (ISSUE: Can an Indian who is not enrolled in a federally recognized tribe use eagle feathers in American Indian religious ceremonies?) and A.A. Ex Rel. Betenbaugh v. Needville Indep. School, 611 F.3d 248 (5th Cir. 2010) (ISSUE: Can an American Indian boy in a Texas public school wear his hair long?)

[51] California has dozens of state-recognized tribes. Texas has at least three (Lipan Apache Tribe of Texas, Miakan-Garza Coahuiltecan Band, and Yaqui Tribe of Texas). https://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx#State.

[52] *See* Milo Colton, "Texas Indian Holocaust and Survival," 79-82 and 121-130.

[53] Mary Huber, "The Fight to Rebury the Ticket Booth Remains," *Latterly* (June 11, 2016).

[54] *Ibid.*

[55] *Ibid.*

[56] *Ibid.*

Garza, "After these (remains) are all studied, maybe we can give them to you to repatriate … Why don't I send a letter inviting you into the process?"[57]

In 2015, Dr. Garza and Texas State University Attorney Todd Ahlman appeared before the NAGPRA review committee to request authorization to transfer the remains of the 25-year-old hunter gatherer to the Miakan-Garza Band for reburial near the Sacred Springs in San Marcos. The committee voted unanimously for the repatriation and reburial. It was the first time a non-federally recognized group in Texas had received such action.[58]

In 2016, the Miakan-Garza Band entered into an agreement to establish the first city repatriation site near the Sacred Springs. Over the next three years, seven were buried at the site.[59]

Meanwhile, the Miakan-Garza Band had set its sights on remains held by the Texas Archaeological Research Lab (TARL) at the University of Texas in Austin. The Lab held more than 2,400 remains of indigenous people who inhabited Texas millennia ago.[60] On March 7, 2016, the Miakan-Garza Band requested from TARL three remains estimated to be more than 1,000-years-old dug up over sixty years ago in Hays County.[61] On July 7, 2020, after years of letters, emails, and meetings, the request was denied on the grounds that TARL "could not find evidence of a shared group identity between the tribe and the remains."[62] Thus, began a struggle that would end on September 30, 2020, when UT-Austin President Jay Hartzell announced in a letter to Dr. Garza that UT would commence the legal process of repatriation.[63]

Commenting on this last battle, Dr. Garza said,

> We believe that when a person is buried, they depart on their spiritual journey. When they are unearthed, their spiritual journey is interrupted and they are suspended in agony. It is our obligation as indigenous people to return our ancestors to Mother Earth so they can proceed to the Great Mystery of the Cosmos. It is extreme arrogance for an institution to own the remains of a people and deny their descendants' religious right to bury their dead. We are now sending a plea to all people of good conscience: Help us to rebury our ancestors.[64]

---

[57] *Ibid.*

[58] *Ibid.*, Since NAGPRA was enacted, the committee recommended eleven previous times to confer remains from a museum or university trust directly to a non-federally recognized group.

[59] Nick Castillo, "UT Tells Miakan-Garza Band It Will Look Into Legal Repatriation Process," *San Marcos Record,* Sep. 30, 2020.

[60] Ryan Chandler, "Indigenous Group Petitions."

[61] David Tarler, J.D., Email *Request for NAGPRA Support*, Nov. 20, 2019.

[62] *See* News Release: Miakan-Garza Band, "Miakan-Garza Tribe requests ancestors' remains from the University of Texas at Austin," *Indian Country Today*, Aug. 20, 2020. Also *See* Presley Glotfelty, "Miakan-Garza Band hosts teach-in, ceremony urging UT-Austin to return Indigenous remains," *Daily Texas,* Sep. 10, 2020.

[63] Somaya Jimenez-Haham, "Ancestral Remains Returned to the Miakan-Garza Band," *Liberator,* Nov. 15, 2020. https://lasaliberator.com/2335/news/ancestral-remains-returned-to-the-miakan-garza-band/

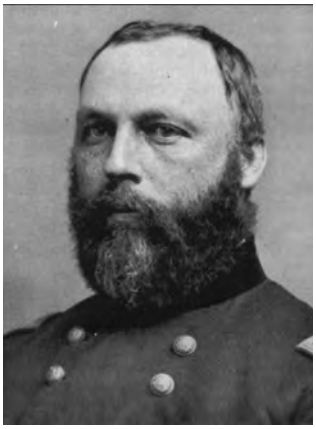
[64] News Release: Miakan-Garza Band, "Miakan Garza Tribe requests ancestors' remains."

PART TWO:
THE RISE OF NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATIONS ACT AND A PROPOSAL FOR TEXAS

I. THE FEDERAL NATIVE AMERICAN GRAVES AND PROTECTION ACT (NAGPRA)

A. The History of the Federal Act

Museums in the United States began collecting American Indian remains early in the nation's history. The Surgeon General William A. Hammond institutionalized the practice of collecting Indian skulls for research in 1862 when he established the Army Medical Museum. He ordered medical officers to collect Indian skulls and deliver them to the office of the Surgeon General. In 1864, after the Cheyenne Indian massacre at Sand Creek, Colorado, troops removed the Native American's heads and shipped them to Washington D.C.


William A. Hammond

The Cheyenne people were one of the first to successfully repatriate remains, including five victims of the Sand Creek Massacre. One of the five was a young girl around ten years old. Because the bodies were collected after the massacre, they had never been buried. The tribe arranged an emotional ceremony to bury the remains. In the 1900s, some burial sites fell into the hands of promoters. In Kansas, people could view open burials sites for $3.50. Attitudes, however, began to shift in the 1980s.[65]

Several events generated interest in NAGPRA legislation. Prior to the enactment of the Federal Act, Northern Cheyenne leaders discovered that the Smithsonian had almost 18,500 human remains in its possession, sparking a social movement for repatriation.[66] In 1988, one hundred and sixty-three museums held an estimated 43,306 Native American skeletal remains.[67] In 1989, the Army Medical Museum donated 2,000 crania and most of the skulls and skeletons that remained in storage to the Smithsonian.[68] Also in 1989, the National Museum of the American Indian Act (Museum Act) was enacted concerning the human remains and funerary objects in the Smithsonian's collection. The Museum Act required the Smithsonian to identify cultural objects and remains in the museum's possession and notify the Indian tribe of origin. Lineal descendants and culturally affiliated tribes could request return of the object or remains. Around that time, a panel, hosted by the American Association of Museums, encouraged dialogue on Museum-American Indian relations. Subsequently, states began enacting their own repatriation legislation.[69] Ultimately this social movement produced the federal Native American Graves Protections and Repatriation Act, which President George H. W. Bush signed into law in 1990.[70]

---

[65] *See* Andrew Gulliford, *Sacred Objects and Sacred Remains: Preserving Tribal Traditions* (Boulder: University Press of Colorado, 2000), 13.

[66] Thrope and Echo-Hawk, "An Unraveling Rope," 16-34.

[67] Gulliford, *Sacred Objects*, 13.

[68] *Ibid*., 18.

[69] Thrope & Echo-Hawk, "An Unraveling Rope."

[70] James Riding In, "The Native American Graves Protection and Repatriation Act and American Indian Relgious Freedom," *Native Americans,* ed. Donald A. Grinde (Washington, D.C: CQ Press, 2002), 107-16.

To some, the Federal Act was landmark legislation for American Indians, representing a shift in social attitudes.[71] The legislation was a combination of legislation proposed by Senators McCain and Inouye, and Representatives Udall and Bennett. At its core, the Federal Act is human rights legislation enacted to redress the civil rights violations of Indian people.[72] During debate on the Act, Senator Inouye of Hawaii stated, "[T]he bill before us is not about the validity of museums or the value of scientific inquiry. Rather, it is about human rights."[73] He further noted:

> When human remains are displayed in museums or historical societies, it is never the bones of white soldiers or the first European settlers that came to this continent that are lying in glass cases. It is Indian remains. The message that this sends to rest of the world is that Indians are culturally and physically different from and inferior to non-Indians. This is racism.[74]

B. Provision and Definitions of the Federal Act[75]

The Federal Act provides for repatriation of funerary objects, objects of cultural patrimony, sacred objects, and human remains to federally recognized American Indian, Alaskan, or Hawaiian Tribes. Like the Museum Act, it requires museums and agencies to inventory items and remains in their control, identify the cultural affiliation of items and remains, and then notify the appropriate tribes. If the museum cannot identify an item, a tribe may still prove its affiliation. The Federal Act also provides grants to tribes, Native Hawaiian organizations, and museums to assist with the documentation and repatriation of American Indian associated funerary objects, objects of cultural patrimony, sacred objects, and remains. In the 2008 fiscal year, the Federal NAGPRA awarded 1.6 million dollars in grants responding to requests totaling 2.9 million dollars.[76]

Further, the Federal Act prevents trafficking remains and cultural objects through a punishment of a $100,000 fine and up to one year in prison for the first offense. The Federal Act also imposes civil penalties for failing to inventory or repatriate items or consult with tribes. From 2006-2008, the review committee found seventeen substantiated violations, twleve of which were against museums who failed to inventory or repatriate items.[77]

The Federal Act applies to all federal agencies and museums that receive federal funding. Any federally recognized tribe may seek repatriation of remains or items under the Federal Act.

Under the Federal Act, a sacred object is an object that is used in a traditional religious

---

[71] *Ibid*., 123.

[72] *Ibid.*, 139.

[73] *Ibid.*, 140 (quoting Senator Daniel Inouye).

[74] Jack Trope and Walter Echo-Hawk, "The Native American Graves Protection and Reparation Act: Background and Legislative History," *The Future of the Past: Archaeologists, Native Americans, and Repatriation*, ed. Tamara Bay (New York/London: Garland Pub., 2001).

[75] Pub. L. 101-601, 25 U.S.C. Sec. 3001 et seq., 104 Stat. 3048.

[76] Department of Interior, National Park Services, National NAGPRA, Frequently Asked Questions, Fiscal Year 2008.

[77] *Ibid*.

practice by current members. An object of cultural patrimony has ongoing historical, cultural, or traditional significance to the native group itself. Funerary objects are used as a part of a burial ceremony or rite and have been placed with the remains at the time of death or later. Whether the funerary object is associated depends upon whether it is presently in control of a federal agency or museum.

The Federal Act allows lineal descendants to request the return of human remains. If there are not any lineal descendants, the tribe of the deceased may request the return of the remains. Finally, if neither is available the tribe on whose land the remains were found can request return. For unassociated funerary objects, cultural objects, and objects of cultural patrimony, the tribe whose tribal land the item was discovered or the tribe who has the closest cultural affiliation may request return. The Federal Act also provides tribes the option to be consulted on archeological digs.

Data from two years ago show that NAGPRA has returned the remains of 31,995 individuals, 669,554 association funerary objects, 118,227 unassociated funerary objects, 3,584 sacred objects, 281 objects of cultural patrimony, and 764 objects that are both sacred and patrimonial. The federal government also offers training to individuals about the Federal Act and following its procedures. In 2008, National NAGPRA trained 1188 individuals at 27 different events.[78]

C. NAGPRA's Limited Applicability in Texas

The Federal Act has limited applicability in the State of Texas. Since the Federal Act only applies to the three small federally recognized tribes (about 5,000 people).[79] According to the 2010 Decennial Census, there are at least 315,264 American Indians living in Texas. Many of them are descendants of the original, unrecognized tribes mentioned earlier. Under the Federal Act, these American Indians cannot request the return of items or remains since they are not members of federally recognized tribes, with a few exceptions. The Federal Act is also limited in the amount of land it protects in Texas. The Federal Act only covers 5,372 of the 268,608 square miles of land (less than two percent) in Texas. Therefore, the Federal Act only applies to the three federally recognized reservations and the small amount of federal land within the state. If an Indian were to object, or if human remains are found on the other ninety-eight percent of land, they are most likely not covered. With so many tribes historically located throughout Texas, the likelihood of discovering Indian graves on unprotected land is great.

Though optimistic about the passage of the Federal Act, American Indian tribes still face many obstacles in successfully repatriating remains and cultural objects. Many tribes lack the resources to handle the amount of paperwork they receive from museums. Additionally, the repatriation process itself is very emotional for tribe members.

> Our children must learn that we honor those who have returned to Mother Earth. We must put our ancestors to rest. We must let them go on their journey. Should we dig up Custer to see what he ate? No,

[78] *Ibid.*

[79] *See* Milo Colton, "Texas Indian Holocaust and Survival," 140-146.

> we would be put in jail. Now my religious leaders are afraid to put their things out in the mountains. Nonnatives need to leave these things alone because they are placed there for their good, too. We don't want to be studied any more. We have been studied enough.[80]

There seems to be little a statute could do, however, to address the emotional aspects of repatriation other than prevent the need for it altogether by eliminating the destruction of gravesites.

On a national level, however, the Federal Act does have positive aspects within its provisions. The most beneficial aspect of the Federal Act is that it provides grant money for museums, agencies, and tribes that encounter expense while repatriating or seeking repatriation. Even if lawmakers enacted legislation, it would not likely reach its full potential without grant funding, because many museums cannot afford to document and identify items in their collections and many tribes cannot afford to handle the paperwork and expenses associated with seeking repatriation under NAGPRAs.

PART III:
STATE NAGPRAS

A. Iowa[81]

Iowa has the granddaddy of all NAGPRAs because of Maria (Running Moccasins) Pearson.[82] In the American Indian world, she is considered the Founding Mother of the modern Indian repatriation movement. Her efforts eventually led to the federal NAGPRA of 1990.

Maria Pearson

She was an enrolled member of the Yankton Sioux Tribe, and she was married to a white man named John Pearson. In early 1971, her husband John, a district engineer with the Iowa Highway Commission (now the Iowa Department of Transportation) was working on a highway construction project south of Council bluffs, when his crew unearthed the remains of twenty-six white pioneers and an Indian woman and her baby. He relayed to his wife that the whites had been moved to a nearby cemetery, but the remains of the Indian woman and her baby, along with funerary artifacts, had been sent to the office of the State Archaeologist for study.[83]

Appalled with the discriminatory treatment of the Indian remains, Maria immediately contacted Governor Robert Ray and

[80] Gulliford, *Sacred Objects and Sacred Remains*, 29 (quoting Rex Salvador, second lieutenant governor of the Acoma Pueblo).

[81] Iowa Code, Ch. 263B.7-9 & 716.5.

[82] Milo Colton worked with her on several Indian issues during his time in the Iowa Senate (1983-1987).

[83] Ames History Museum, *Maria Pearson*, https://www.ameshistory.org/content/maria-pearson (downloaded: May 19, 2021).

State Archaeologist Marshall McKusick about her concerns. She then began to lobby legislators, the press, and anyone who would listen.

In 1976, the Iowa General Assembly passed landmark legislation to protect American Indian graves and repatriate their remains for reburial in one of four cemeteries established for them in western, eastern, northcentral, and southern Iowa.

B. Utah[84]

Several states have passed repatriation statutes since 1989. For example, Utah has enacted a state Native American Graves Protections and Repatriation Act (the Utah Act) that is similar to the Federal Act. The Utah Act supplements the Federal Act by extending protection to all nonfederal lands in Utah. Nonfederal lands include all land owned by the state, local governments, an Indian tribe, school and institutional trust lands, and a person other than the federal government. The Utah Act does not require that the state or federal government recognize the Native American tribe before the tribe can seek repatriation; rather, it simply defines "Native American" as "of or relating to a tribe, people, or culture that is indigenous to the United States."

Any remains that are found must be identified and turned over to the lineal descendants of the appropriate tribe. "Remains" includes "all or part of a physical individual and objects with the individual that are placed there as part of the death rite or ceremony of a culture." Ownership of the remains is determined in a similar manner as the Federal Act if a lineal descendant cannot be determined. Upon learning ownership, the museum or agency must return any remains within ninety days. Scientific study of the remains can only occur with permission from the owner of the remains. If multiple parties seek return of remains, the agency or museum may hold the remains until the parties reach an agreement as to proper disposal of the remains or the dispute is resolved through an administrative process. The Utah Act notes that the statute does not change the property rights of the person who owns the land, only the ownership of the remains.

Remains discovered during construction, agriculture, and mining are turned over to state authorities for identification and the activity temporarily ceases. Remains found on both private and state lands must be reported to the Division of State History. Additionally, a person may not knowingly sell, or purchase remains of American Indians found on state lands without ownership, with a second conviction even resulting in a third-degree felony. Similarly, a person may not knowingly sell or purchase remains for profit if the remains are obtained in violation of the Utah Act.

Finally, like the Federal Act, the Utah Act sets up a review committee in charge of overseeing the identification and repatriation process. A director selects the review committee, with four positions selected from nominations taken from Indian tribes.

C. Nevada[85]

Like Utah, Nevada has a statute to specifically protect Native American burial sites. The

[84] UTAH CODE ANN. § 9-9-401 to § 9-9-408.

[85] NEV. REV. STAT. § 383.150 to § 383.190.

Historic Preservation Protection of Indian Burial Sites (the Nevada Act) applies to tribes recognized by the federal government. The Nevada Act covers private and state lands. The Nevada Act provides that when a person discovers an American Indian grave, that person should notify the Nevada Office of Historic Preservation. The office will notify the Nevada Indian Commission, who notifies the appropriate tribe. The Nevada Act even allows the tribe to request that the landowner allow them to inspect the site. The tribe can make a recommendation of how to treat and dispose of the site. If the landowner rejects the recommendation, he must reinter the remains at his own expense. If the land is public, the Office of Historic Preservation may appoint a professional archeologist to excavate the site. Further, the excavation of an Indian burial site can only happen if conducted by a professional archeologist, the person received permission from the appropriate tribe, or after receiving written notification from commission. The Nevada Act also provides penalties for willfully damaging the grave or cairn of an American Indian. A violator will receive a $500 fine for the first offense and up to a $3,000 fine and a possible jail sentence for the second offense. Additionally, a person who is convicted of failing to notify the appropriate division of an Indian burial site will receive a fine of $500 for the first offense and $1,500 and a possible jail sentence for the second offense. A person who possesses, displays, or sells an artifact or remains removed from an Indian grave in an unauthorized manner will face category D felony charges.

Unique to the Nevada statute, an Indian tribe or member of a tribe may sue any person who violates the statute. The plaintiff may seek an injunction, damages, or other relief. The violator will receive a civil penalty in addition to a criminal penalty. If the plaintiff prevails, he or she may also seek attorney fees.

D. Strengths and Deficiencies of the Utah and Nevada Acts

The provisions included in the Utah Act are helpful in supplementing the Federal Act's protection for Indian graves within the state. As previously mentioned, the Utah Act applies to nonfederal lands, extending protection to areas the Federal Act does not apply. The Utah Act is also more inclusive because it does not require that a tribe be state or federally recognized like some state and the federal acts do. Any native tribe indigenous to the United States may seek repatriation eliminating a step in the often-complex repatriation process. The Utah Act is attentive to the Indian population and their traditions. Prohibiting the scientific study of remains without the permission of the owner is a preventive measure that ensures Indian remains will not be treated contrary to tribal beliefs. The Utah Act also includes the Indian population in the repatriation process by selecting members that make up the review committee, which oversees the process, from nominations from members of the Indian tribes. The Utah Act is a balance between the property rights of landowners and the religious rights of indigenous tribes. The proper tribes have a right to the remains and the property owners retain their land.

Further, by penalizing the sale of Indian remains or artifacts, the statute helps to eliminate the profitability of site-looting, making it a crime to both profit from destructive looting and sell remains without ownership rights. More importantly, the crime carries a serious punishment to deter individuals from engaging in grave desecration. The Utah Act originally lacked a provision allocating money for grant money for repatriation but now has a provision establishing funding through a "Native American Repatriation Restricted Account."

The Nevada Act has its advantages as well as its disadvantages. The Nevada Act appears to provide federally recognized tribes with eligibility for "special programs and services." Unlike the Utah Act, which only requires the tribe be indigenous to the United States, requiring government recognition may be another unnecessary barrier to a tribe seeking repatriation. A positive aspect of the Nevada Act is that it extends protection to items found on nonfederal lands.

What sets the Nevada Act apart from other statutes is that it allows an Indian tribe or member of a tribe to sue any person who violates the statute. The availability of seeking an injunction provides tribes a remedy should they need to take immediate action. Another positive aspect of the Nevada Act is that it includes the Indian population in the excavation of sites. By including the Native population in the excavation, the statute provides Indians with what many of them desire, a voice to ensure the proper care for items likely belonging to them. Like the Utah Act's provision requiring permission from the owner before scientific study, tribal consultation is another way to ensure those who know how to care for burial items and remains are the ones doing so.

Again, like the Utah Act, the Nevada Act punishes selling Indian remains and artifacts. The Nevada Act also ensures that the proper state authorities and tribal authorities will learn about Indian burial sites by also punishing those who fail to notify them. An inadequacy in the Nevada Act is that it does not provide for grant funding as the Federal Act does. Museums may want to inventory and repatriate items, yet they may not have the funding. Similarly, Indian tribes seeking civil action against individuals may lack adequate funding. Even though tribes may seek attorney's fees if they win in a civil action, they may need money to pay fees initially. Learning from deficiencies and combining the successful provisions of the three acts would result in ideal legislation for Texas.

III. PROPOSED TEXAS NAGPRA

A. Texas Laws Governing Graves Protection and Repatriation

Texas does not have specific repatriation legislation.[86] Two different sections address historic sites and human remains.[87] The Texas Natural Resource Code § 191 protects all prehistoric and historic sites and the Texas Health and Safety Code § 711.004 protects human remains.[88] The Natural Resource Code provides that the Texas Historical Commission (the Commission) must issue permits for excavations and protects sites from vandalism.[89] The Commission is made up of fifteen citizen members appointed by the governor. Each member serves a six-year term and the terms of the members are staggered. The Commission is the custodian of all recovered items and is responsible for maintaining an inventory of recovered items. The Commission may choose to designate private land as a landmark by a majority vote. Once land is designated as a landmark, it may not be damaged and excavation requires a permit from the Commission.[90] According to

---

[86] *See* TEX. HEALTH & SAFETY CODE ANN. § 711.004 (Vernon Supp. 2008), TEX. NAT. RES. CODE § 191.

[87] TEX. HEALTH & SAFETY CODE ANN. § 711.004; TEX. NAT. RES. CODE § 191. Also, the Texas Penal Code punishes abusing a corpse as a Class A misdemeanor. TEX PENAL CODE ANN. § 42.08.

[88] TEX. HEALTH & SAFETY CODE ANN. § 711.004; TEX. NAT. RES. CODE § 191.

[89] TEX. NAT. RES. CODE § 191.

[90] *Ibid.*

the Commission, ninety percent of recorded archeological sites in Texas have been destroyed.[91] Violation of the Natural Resource Code results in a misdemeanor punishable by a maximum fine of $1,000 and maximum sentence of thirty days in prison, or both. Each day of continued violation results in a separate offense.[92]

The Health and Safety Code prohibits removing remains from a plot in a cemetery without the plot owners and cemeteries consent or permission from the court.[93] If a property owner discovers an unmarked cemetery, the owner must not disturb the property until the state registrar can properly remove the remains. The most notable difference between these laws and the Federal Act or other state NAGPRAs is they do not provide for repatriation or grants.

As the discussion in Part One of this article indicates, there is an ongoing conflict in Texas and nationwide between the scientific and indigenous communities over the remains of their dead. To the archeologists who study these bones, they are essential to understanding humanity and history. To Indians, these bones represent an essential part of their culture. One Indian student at the St. Mary's protest outside the Witte Museum described in Part One appealed to the president and CEO of the museum in a letter. He stated:

> (W)e Indians are not an ignorant and superstitious people. Many of us are going to college or have completed a degree program. We also recognize that the remains of our Indian people are going to be inadvertently uncovered as a result of road and dam constructions and new housing developments. We further recognize the need for scholars and scientists to help us unravel and understand our past and to rebury our dead. We just want to be part of that process.[94]

Further, many Indians are not in opposition to scientific study, rather they oppose damaging or altering remains and keeping the remains longer than necessary. Another Indian student involved in the St. Mary's protest said, "You feel a connection to those bodies that are there . . . And you feel that there is something wrong because (they're at the Witte) and they're not where they're supposed to be, which is in the ground."[95] At the time of the protest (2008), the bones from Seminole Canyon had been stored at the museum for more than seventy years with no evidence of scientific study on any of them.

Indians are not only battling museums for the return of artifacts and remains. Site-looting is a destructive phenomenon that is widespread in Texas. The term "looters" refers to people who obtain artifacts from unregulated and unscientific digs. Looters damage thousands of sites in Texas each year. Looters raid private and publicly owned land either by obtaining permission of the landowner through misrepresentation or by using the cover of the night. Despite the passage

[91] "About the Commissioners," *The Texas Historical Commission*, https://www.thc.texas.gov/about (last visited April 6, 2021).

[92] TEX. HEALTH & SAFETY CODE ANN. § 711.004(a)-(c) (Vernon Supp. 2008).

[93] *Ibid.*, § 711.010(a).

[94] Letter from Dallas W. Colton, Cherokee and Vice President of the Native American Student Association at St. Mary's University, to Marise McDermott, President and CEO, Witte Museum, Jun. 17, 2008 (on file with authors).

[95] Marie Crabb, Apache and President of the Native American Student Association at St. Mary's University. *See* Greg Harman, "Battle of the Bones," *San Antonio Current,* 11.

of the Federal NAGPRA in 1990, looters continue to raid many Native cemeteries.

There are two main inadequacies in the Texas statutes. First, the Texas statutes do not provide Native Americans with an avenue for repatriation. Second, Texas also does not provide funding for tribes and museums to conduct repatriation or consultation projects. Without a legal mandate, Texas museums are not required to repatriate items not under the Federal Act. Even if they wish to return the items, absent funding, many of them likely cannot afford to, or they do not believe they can afford to, repatriate to a tribe unless the tribe is federally recognized. Furthermore, although the Texas statutes protect human remains, the Texas statutes also need to be forceful enough to deter conduct leading to the need for repatriation, including grave desecration and trafficking.

B. A State NAGPRA Tailored for Texas

Texas should enact a state Native American Graves Protection and Repatriation Act (NAGPRA). An ideal statute would be the combination of the beneficial aspects of the Nevada, Utah, and Federal Acts. There are several necessary and noteworthy provisions. The ideal statute would extend protection to nonfederal lands, like the Utah and Nevada Acts. A statute that facilitates state recognition of the native tribe would also be best to extend protection to the greatest number of native tribes.

In 2020, the California Legislature passed a bill that expands the right of non-federally recognized tribes to repatriate Indian remains in the state. It provided for dozens of tribes to qualify for state recognition through the Native American Heritage Commission (and dozens have qualified). The state law took into account that many state tribes had lost their federal recognition when the federal government terminated its relationship with them during the 1950s and 1960s. Others had never been able to receive federal recognition. Today, California has dozens of state recognized tribes.[96] It is time for Texas to take similar action.

The ideal Texas Act also would criminalize Indian grave desecration and profiting from site-looting. Additionally, the punishment should be severe enough to deter the prohibited conduct. The Texas statute should provide a process for repatriation and how to declare ownership. A provision that specifically stated the proposed act would not affect the ownership rights of landowners, only as to the remains, could help to ease the minds of skeptics fearing infringement upon land-ownership rights. Importantly, like the Federal Act, the state act should include a provision for grant money for museums and tribes engaged in repatriation. Finally, similar to the Nevada Act, including a civil remedy for tribes and individuals could heighten the amount of grave protection and repatriation by expanding the remedies available to American Indian tribes.

CONCLUSION

Because of the Federal Act, the Yselta del Sur tribe successfully sought the return of items essential to its culture. Not all tribes are as lucky. The Federal Act was a giant step towards righting

[96] *See* Amal Ahmed, "Bringing the Dead Home," *Observer*, Nov. 16, 2020.

a wrong that has occurred for centuries. The Federal Act's deficiencies in the state of Texas creates a need for state legislation. Therefore, Texas should enact a state Native American grave protection and repatriation act to protect and return items and remains to all Native American tribes in Texas. Ideal legislation for the State of Texas results from combining the successful provisions of state NAGPRAs already in effect. Such legislation, once enacted, would prove to the world and our Indian people that the citizens of Texas are indeed a sympathetic and respectful population.

MILO COLTON *received B.A., M.P.A., M.A., and Ph.D. degrees from the University of Colorado at Boulder and a J.D. degree from the University of Iowa. He is of Cherokee heritage and served as Chief Administrative Officer of the Winnebago Tribe of Nebraska. He taught college classes at the Winnebago and Omaha Indian Reservations. He also has taught American Indian law at St. Mary's University, where he serves as faculty advisor for the Native American Student Association.*

ALYSIA CÓRDOVA *received a B.A. degree from St. Mary's University at San Antonio and a J.D. degree from Texas Tech University. She was one of Colton's best and brightest students. She wrote PART TWO of this article. She is a partner with Mullin, Hoard & Brown, LLP in Amarillo, Texas.*

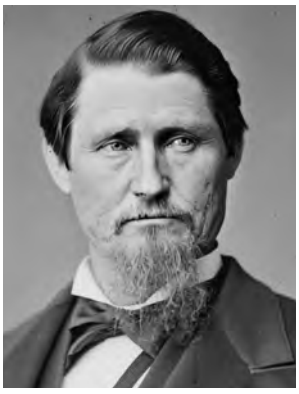
Return to Journal Index

Their Day in Court:
The Rule of Law and the War on the Plains

By Hon. Ken Wise

Violent conflict on the western frontier presented a unique challenge to United States expansion. The Plains Indians wouldn't give up the only way of life they knew, and the United States wouldn't tolerate what it viewed as lawlessness on the frontier. The Peace Policy of President Ulysses Grant, strongly favored by Easterners far removed from the frontier, finally collided with the terror Texans were experiencing. The turning point came in the form of a deadly Indian attack on a merchant wagon train. Strong personalities and an almost desperate desire to impose the rule of law upon a rugged land called into question whether peace was even possible. Could the rule of law resolve a clash of cultures, or are some conflicts destined to resolve only by war?

The Threat


J.W. Throckmorton

In post-civil war Texas, the counties west of Fort Worth were very dangerous places. Indian raids were a constant threat. During the war, the Texas frontier had receded steadily eastward due to frequent Indian attacks.[1] In 1867, Texas Governor J.W. Throckmorton reported that since the end of the war two years before, 162 people had been killed by Indians on the frontier, forty-three captured, and twenty-four wounded. The governor also reported over 30,000 head of cattle, 3,000 head of horses, and 2,000 head of sheep and goats had been stolen or destroyed.[2] Despite both state and federal attempts to protect the residents, Indian raids were a weekly experience.[3]

Shortly after becoming President in 1869, Ulysses Grant instituted what became known as his Peace Policy. The Society of Friends, commonly known as the Quakers, had approached Grant and suggested Quaker Indian agents could calm things on the frontier and encourage assimilation among the most violent tribes by modeling pacifism, kindness, and justice.[4] The government

[1] Journal of Inspector General Randolph Marcy, reprinted in H. Smythe, *Historical Sketch of Parker County and Weatherford, Texas*, facsimile edition (W.M. Morrison 1973), 254.

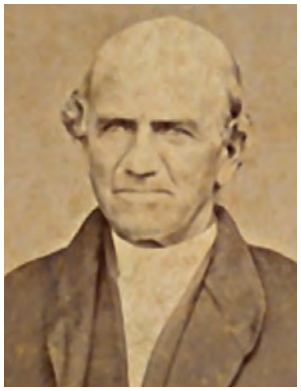
[2] J.W. Throckmorton to E.M. Stanton, August 5, 1867, in Dorman Winfrey and James Day, *The Indian Papers of Texas and the Southwest* (Austin: Pemberton Press 1966), 235.

[3] Ida Lasater Huckabay, *Ninety-Four Years in Jack County 1854-1948* (Laura Peacock: 1979), 105.

[4] W.S. Nye, *Carbine & Lance, The Story of Old Fort Sill*, Fort Sill Edition (Norman: University of Oklahoma Press 1942), 99. Nye's book is one of the most important on the subject because Nye had access to firsthand accounts of the raid. Nye obtained his account of the Warren raid from Yellow Wolf, a surviving participant in the attack. He also interviewed Hunting Horse, who was alive at the time of the raid but did not participate, and Ay-tah, whose husband participated in the raid. Nye also interviewed George Hunt. Hunt, whose Kiowa name was "Bear Claw,"

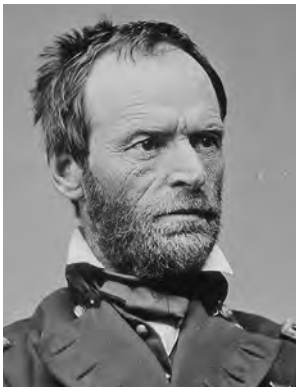
wanted to keep the Indians on the reservations (and away from the citizens) to avoid what the Secretary of the Interior described as "frequent outrages, wrongs, and disturbances of the public peace."[5] The Peace Policy also included a government welfare program. The Indians promised to stay on the reservation, and the government promised to supply food, farming implements, and other goods regularly.[6] All of this was managed by government Indian Agents assigned to the various tribes.

Typical of such extensive government programs, however, there was waste, inefficiency, and outright fraud. Rations often didn't arrive on time. The goods were frequently pillaged or sold off before reaching the reservation. When the Indians didn't get what they expected, they attacked Texas, killing citizens, stealing their livestock, and looting their homesteads. Standing between an inefficient government in Washington, D.C., and violent raids on the western frontier, the Indian Agents soon discovered that theirs was an almost impossible task.


Lawrie Tatum

Lawrie Tatum was the Agent for the Kiowas and Comanches, the two most feared tribes on the plains. The agency was located at Fort Sill, near present-day Lawton, Oklahoma. Tatum was an enthusiastic advocate for the Peace Policy, recalling how well it had worked in Pennsylvania and New Jersey.[7] He soon learned that the Plains Indians were not like the tribes of the northeast. The Plains Indian culture was hard and violent, borne of a near-constant fight against nature and each other.

The Warren Wagon Train Raid


William T. Sherman

Texans demanded protection from the terror and destruction of the frequent raids. Citizens of Jacksboro, Texas, petitioned General of the Army William T. Sherman to investigate the "many cruel murders and outrages" so that the citizens could "...feel a comparative safety in our lives and some protection and security in the possession of our property..."[8] General Sherman doubted conditions were as bad as declared and decided to tour the area personally. He landed in Galveston on April 24, 1871, and by May 17 was camped near Fort Richardson, near Jacksboro.[9] Area citizens wanted an Indian attack to happen "while Sherman was in the country, and close to the scene of destruction..." so he might better sense the urgency of military action.[10] Sherman couldn't have imagined how close he would

was a Kiowa interpreter who later became a Kiowa scholar. He knew the participants and gathered information about the raid from, among others, Big Tree himself. Hunt also married the daughter of Satank, one of the three chiefs arrested and who was killed while attempting to escape.

5 Report of the Secretary of the Interior, H.R. Exec. Doc. No. 1., 42nd Cong., 2nd Sess. (1871). https://digitalcommons.law.ou.edu/cgi/viewcontent.cgi?article=6634&context=indianserialset. Accessed August 10, 2021.

6 These items are referred to in various sources as "rations" or "annuity goods."

7 Lawrie Tatum, *Our Red Brothers,* reprint (Lincoln: University of Nebraska Press 1970), 21.

8 Charles Robinson, *The Indian Trial* (Norman: University of Oklahoma Press 1997), 58.

9 Journal of Inspector General Randolph Marcy quoted in Smythe, *Historical Sketch of Parker County*, 250.

10 *Army and Navy Journal* 7, no. 35, June 10, 1871, 679.

come to granting the Texans' wish. He would soon find himself at the apogee of a clash of cultures, tasked with deciding whether the dying ways of an ancient people demanded diplomacy or war.

On May 18, 1871, General Sherman and Inspector General Randolph B. Marcy bounced across the prairie in an army ambulance bound for Fort Richardson.[11] Sherman took only a small guard, unconcerned with the Indian threat. Marcy knew better, however, having laid out the Butterfield trail upon which the party traveled.[12] Marcy wrote, "The remains of several ranches were observed the occupants of which have either been killed or driven off to the denser settlements by the Indians. Indeed, this rich and beautiful section does not contain today as many white people as it did when I visited it eighteen years ago, and if the Indian marauders are not punished, the whole country seems to be in a fair way of becoming totally depopulated."[13]


Randolph B. Marcy

As Sherman rolled toward Fort Richardson, a war party of 150 Kiowas, with a few Comanches, assembled on top of a small hill overlooking the Salt Creek Prairie northeast of present-day Graham, Texas. Kiowa medicine man Maman-ti had a vision that predicted two parties of "Tehannas" (Texans) would pass this way.[14] The first party would be small and insignificant. The second party would be larger and worthy of attack. The Indian scouts, or perhaps the entire war party, watched Sherman and his escort travel right below them. This was Maman-ti's smaller party, and the Kiowas let Sherman pass. The next travelers would not be so fortunate.


Big Tree as a young chief

A 12-wagon train owned by merchant Henry Warren soon came down the trail, driven by 12 teamsters.[15] Chiefs Yellow Wolf and Big Tree led the attack.[16] The teamsters saw the Indians coming and quickly circled their wagons but couldn't complete the circle before the Indians struck. One Comanche fell in the initial assault. In the melee that ensued, one Kiowa was killed as he plundered a wagon.

[11] Marcy's journal says the party passed through the Salt Creek prairie on May 17. The Indians who participated, however, recalled Sherman's party passing the Indian raiding party on the same day as the Warren wagon train. See Nye, *Carbine and Lance*, 128. Sherman wrote to Col. Ranald Mackenzie on May 19, referring to, "the Indians who yesterday attacked the corn train…" Sherman to Mackenzie, May 19, 1871.

[12] Nye, *Carbine & Lance*, 124.

[13] Marcy's journal quoted in H. Smythe, *Historical Sketch of Parker County*, 254.

[14] Nye, *Carbine & Lance,* 128.

[15] Gen. W.T. Sherman to Col. William Wood, May 19, 1871, C. C. Rister papers at the Southwestern Collection/Special Collections Library, Texas Tech University.

[16] Big Tree's given name in the Kiowa language is "A´do-ee´tte"

Present-day Cox Mountain, to which escapees fled

Seven teamsters broke through the Indian lines and ran toward some timber in the direction of a brushy hill called Cox Mountain.[17] One was killed immediately, the next killed a little further away, but five escaped to the timber.[18]

Yellow Wolf didn't describe the end of the massacre to Nye, and no teamster lived to tell the tale. Sometime after midnight, a wounded Thomas Brazeal straggled into Fort Richardson and informed General Sherman of the attack.[19] Sherman sent General Ranald McKenzie to inspect the massacre site and, if indicated, pursue the Indians onto the reservation.[20] Mackenzie's surgeon described the scene of the attack:

> "...I examined on May 19, 1871, the bodies of five citizens killed near Salt Creek....All the bodies were riddled with bullets, covered with gashes, and the skulls crushed, evidently with an axe found bloody on the place; some of the bodies exhibited also signs of having been stabbed with arrows. One of the bodies was even more mutilated than the others, it having been found fastened with a chain to the pole of a wagon lying over a fire with the face to the ground, the tongue having been cut out... The scalps of all but one were taken."[21]

If the Kiowas followed their custom, the teamster was certainly tortured and burned alive.

---

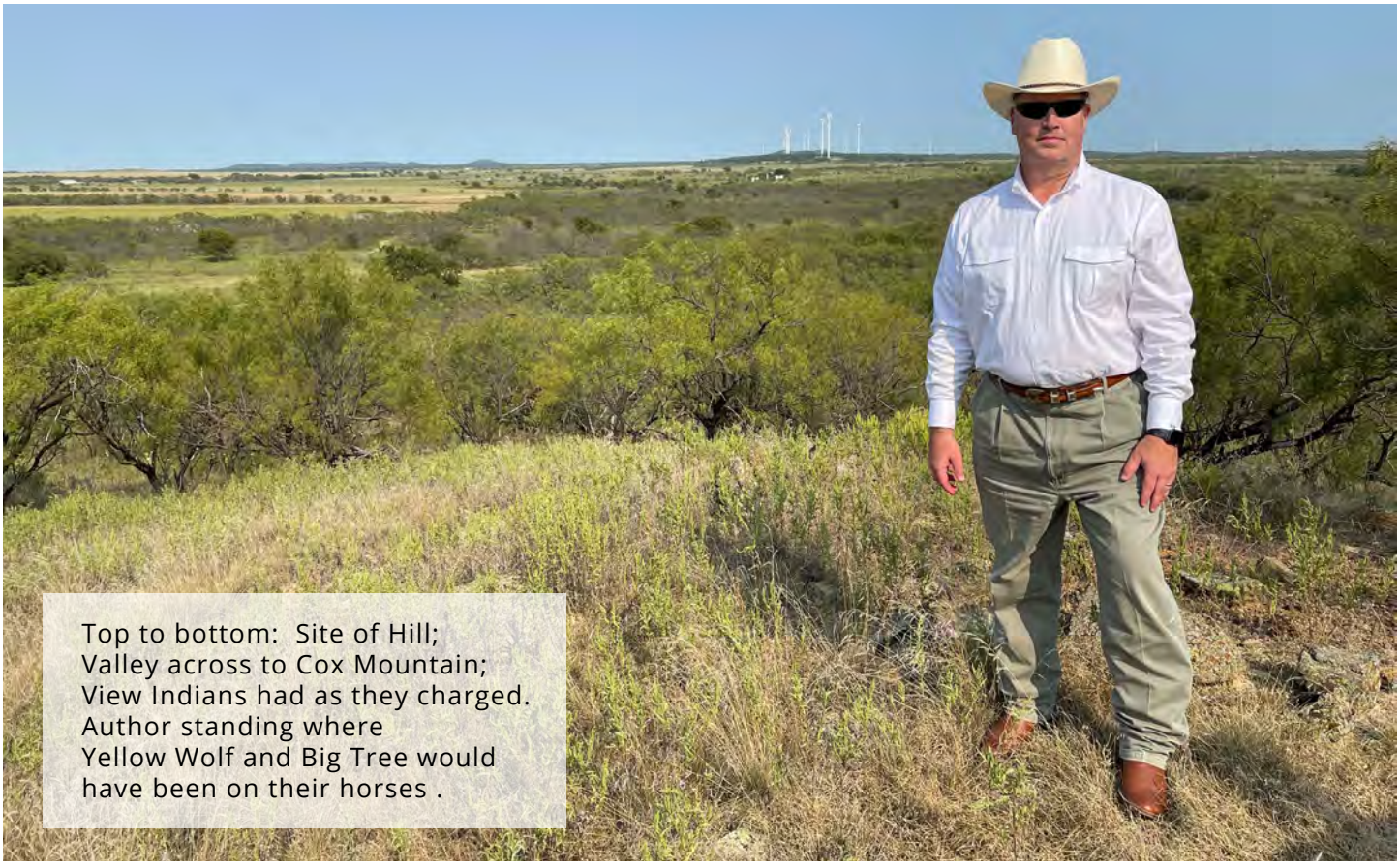
[17] Nye, *Carbine and Lance*, 130.

[18] *Ibid*.

[19] Huckabay, *Ninety-Four Years in Jack County*, 168. Ms. Huckabay's book contains information obtained from two members of the 4th cavalry under Mackenzie's command.

[20] Sherman to Mackenzie, May 19, 1871, C. C. Rister papers at the Southwestern Collection/Special Collections Library, Texas Tech University.

[21] Report of J.H. Patzki, Asst. Surgeon, reproduced in Nye, *Carbine & Lance*, 131.



Top to bottom: Site of Hill;
Valley across to Cox Mountain;
View Indians had as they charged.
Author standing where
Yellow Wolf and Big Tree would
have been on their horses .

Marker at the site of the raid and the site where the teamsters were buried

Sherman had now seen the terror in Texas firsthand. Grant's Peace Policy was failing, and Henry Warren's teamsters were merely the latest of hundreds of victims. Sherman was determined to find and punish the raiders. Along with Mackenzie, Sherman ordered Col. William Wood, commander at Fort Griffin, to scout Northeast toward the Little Wichita River and attack any Indians he found.[22]

The Arrest

Sherman arrived at Fort Sill on May 23.[23] He quickly "became satisfied" that the Indians from the reservation were doing much of the raiding, probably due to a discussion with Lawrie Tatum.[24] Tatum knew the Kiowa chiefs better than anyone and had become increasingly frustrated with his charges. He had even warned his superiors that the Kiowas were preparing for war in March 1871, two months before the Warren wagon train attack.[25] Tatum took the bold step of recommending that the Indians be subject to regular criminal prosecution for raiding activities. Tatum wrote to his superiors on May 22, 1871, before he learned of the Warren raid, that "...from their actions and sayings [the Kiowas] intend to continue their atrocities in Texas. I believe affairs will continue to get worse until there is a different course pursued with the Indians. I know of no reason why they should not be treated the same as white people for the same offence [sic]. It is not right to be feeding and clothing them and let them raid with impunity in Texas. Will the committee sustain me in having Indians arrested for murder, and turned over to the proper authorities for trial?"[26]

Tatum learned of the Warren raid the day after he sent his letter.[27] He immediately summoned several Kiowa chiefs, including the principal war chief Satanta, into his office and before issuing rations asked what they knew about the attack.[28] To Tatum's surprise, Satanta pounded his chest and bragged about leading the raid. Tatum recalled Satanta's speech as follows:

> "Yes, I led in that raid. I have repeatedly asked for arms and ammunition which have not been furnished. I have made many other requests which have not been granted. You do not listen to my talk. The white people are preparing to build a railroad through our country, which will not be permitted. Some years ago they took us by the hair and pulled us here close to Texas where we have to fight them. More recently I was arrested by the soldiers and kept in confinement several days.[29] But that is played out now. There is never to be any more Kiowa Indians arrested. I want you to remember that. On account of these grievances, a short time ago I took about

[22] Sherman to Col. William Wood, May 19. 1871, C. C. Rister papers at the Southwestern Collection/Special Collections Library, Texas Tech University.

[23] Sherman to Gen. John Pope, May 24, 1871, C. C. Rister papers at the Southwestern Collection/Special Collections Library, Texas Tech University.

[24] *Ibid.*

[25] Tatum, *Our Red Brothers*, 107.

[26] Tatum, *Our Red Brothers*, 115-116.

[27] *Ibid*., 116.

[28] Satanta's given name in the Kiowa language is "Set-t´aiñte," which translates to "White Bear."

[29] Satanta was referring to his 1868 arrest by General Phillip Sheridan. See Robert G. Carter, *On the Border with Mackenzie* (Austin: Texas State Historical Association 2017), 85.

a hundred of my warriors to Texas, whom I wished to teach how to fight. I also took the chief Satank, Eagle Heart, Big Bow, Big Tree and Fast Bear.[30] We found a mule train, which we captured, and killed seven of the men. Three of our men were [sic] got killed, but we are willing to call it even. It is all over now, and it is not necessary to say much more about it. We don't expect to do any raiding around here this summer; but we expect to raid in Texas. If any other Indian claims the honor of leading that party he will be lying to you. I led it myself."[31]

After Satanta finished, the other chiefs present, including Satank, Big Tree, and Eagle Heart, confirmed that Satanta had led the raid.[32] Satanta had spent a lifetime waging war against the whites. Often, he brought white captives to sell, the captives themselves evidence that Satanta had murdered their relatives. The government paid Satanta for the captives rather than punish him for the raiding. Why should this time be any different?[33]

Tatum immediately contacted Fort Sill post commander Colonel Benjamin Grierson, asking that he arrest the chiefs. General Sherman agreed to the plan and called for a council with the Indians to take place on the front porch of Colonel Grierson's quarters.[34] Indians who were present recalled Satanta thumping his chest and "mak[ing] a loud talk, saying 'I'm the man.'"[35]


Benjamin Grierson

Upon learning that he was facing arrest, however, Satanta claimed he didn't kill anyone and had only led the raid to teach his young warriors to fight. At one point Satanta reached for a pistol but stopped when met by the barrels of several rifles.[36] Sherman also took Satank and Big Tree into custody, Big Tree after being chased down trying to escape. Realizing there was no escape, the chiefs "begged hard" to be shot on the spot rather than face captivity.[37]

The Defendants

Sherman had in custody three Kiowa chiefs who represented the past, present, and future of the Kiowa nation. Satank represented the old guard. He had come of age in a world free of white influence. A great war chief in his time, Satank was the leader of the *Koiet-senko*, a society comprised of the ten most elite warriors of the Kiowas.[38] But he also fought for vengeance. Satank's

---

30 Satank's given name in the Kiowa language is "Setängya," which translates to "Sitting Bear."

31 Tatum, *Our Red Brothers*, 116-117.

32 *Ibid*., 117; Nye, *Carbine & Lance*, 135.

33 Nye, *Carbine & Lance*, 135.

34 *Ibid*., 136.

35 *Ibid*., 138.

36 *Ibid*.

37 Sherman to Gen. P.H. Sheridan, May 29, 1871, C. C. Rister papers at the Southwestern Collection/Special Collections Library, Texas Tech University.

38 James Mooney, "Calendar History of the Kiowa Indians," *Report of the Bureau of American Ethnology*, Part 1 (Washington D.C. 1898); Charles Robinson, *Satanta* (Austin: State House Press 1997).

eldest son had been killed during a raid in Texas.[39] Satank had gathered his son's bones and carried them with him wherever he went. When traveling, he had an additional horse to carry them. When camped, Satank erected an additional tipi where he placed his son's skeleton along with food and water. [40] As the situation around Grierson's porch escalated, Satank sat calmly, smoking his pipe. He said, "I am an old man, surrounded by soldiers. But if any soldier lays a hand on me I am going to die, here and now."[41]

Satanta represented the present. He was the most important war chief of the Kiowas. Imposing in stature and speech, Satanta was a natural showman. He had acquired a cavalry bugle in one of his many raids that he delighted in blowing frequently. He was also one of the fiercest warriors on the plains. Satanta was very concerned with his status among not only the Kiowas but also the Americans. One writer described him as the "Orator of the Plains" for his propensity to make long, eloquent, but self-aggrandizing speeches, much like his bragging to Tatum about leading the Warren raid.[42] Satanta enjoyed his status among his people and wanted to protect it.

Big Tree represented the future. He was undoubtedly on the path toward becoming a war chief. He had the ferocity and brutality to earn status and honor in Kiowa culture. He was proving himself again and again as the Kiowas raided into Texas. But he was also young. Big Tree had the potential to lead the Kiowas away from war and down what the Indian Agents referred to as the "good road."

A Fort Sill school teacher named Josiah Butler took the chiefs' measure. He recorded this assessment in his diary, "Big Tree (twenty-two years old) is anxious to live; Satanta (fifty years old) is indifferent as to life and Satank (seventy years old) is determined to die in preference to going to Texas."[43]

Top: Satanta wearing a peace medal. Bottom: Satank 1857 (Oklahoma Historical Society Collection)

---

[39] Nye, *Carbine & Lance*, 113.

[40] *Ibid*., 114.

[41] Nye, *Carbine & Lance*, 141.

[42] Generally, Charles Robinson, *Satanta* (Austin: State House Press 1997).

[43] Josiah Butler, "Pioneer School Teaching at the Comanche-Kiowa Agency School 1870-3," *Chronicles of Oklahoma* 6, no. 4 (1928), 505-506, cited in Robinson, *Satanta*, 139.

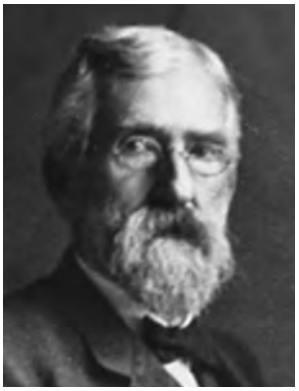
The Trial

Texas Governor E.J. Davis, the federally appointed governor, did not interfere with the prospect of trying the Kiowas in a Texas court. Davis was not popular and would soon face an election when reconstruction came to an end. Putting the Kiowas to trial in a Texas court might help his prospects, especially in northern Texas. Jack County was about to host the trial of the century and the first of its kind in the United States.


Horace Jones

The chiefs set out for Texas on June 8 in two wagons. Satank rode in the first, guarded by two soldiers. Satanta and Big Tree followed, guarded by Corporal John Charlton and a private.[44] When Satank got in the front wagon, he pulled his blanket over his head and began chanting. As they departed, Horace Jones, an agency interpreter, walked up to Charlton in the second wagon and said, "Corporal, you had better watch that Indian in the front wagon for he intends to give you trouble…Because he is chanting his death song."[45]

As Satank sang, he withdrew a knife that he had secreted before departing. He slipped his hands out of his shackles, taking skin and flesh with it.[46] Satank let out a yell and lunged at the wagon driver, stabbing him but not seriously.[47] Both guards leaped from the wagon as Satank grabbed a rifle and tried to chamber a round.[48] From the second wagon, Charlton snapped off a shot, hitting Satank. The chief managed to rise, and Charlton fired again, giving Satank the warrior's death he craved.


Charles Soward

Soldiers placed Satank's body by the side of the road for burial. Nye's sources recall Satank had told one of the Tonkawa scouts that accompanied the group, "You may have my scalp. The hair is poor. It isn't worth much, but you may have it."[49] One of the Tonkawa scouts traveling with the party did indeed scalp the old chief and claimed a significant trophy, good hair or not.[50]

The soldiers delivered Satanta and Big Tree to the guardhouse at Fort Richardson.[51] Judge Charles Soward of the 13th District Court would try the case.[52] Upon learning of the plan to try the Kiowas in court, eight local

[44] Carter, *On the Border*, 91.

[45] *Ibid*.

[46] Carter, *On the Border*, 90.

[47] *Ibid*.

[48] Charlton to Carter, January 12, 1921, in Carter, *On the Border*, 93.

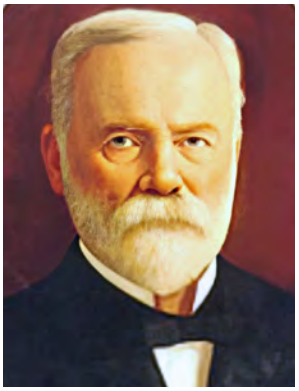
[49] Nye, *Carbine & Lance*, 145.

[50] Carter, *On the Border with Mackenzie*, 95. Satank became the first Indian buried on Chief's Hill at the Fort Sill Post Cemetery. See https://armycemeteries.army.mil/Cemeteries/Fort-Sill-Post-Cemetery. Accessed August 10, 2021.

[51] Huckabay, *Ninety-Four Years in Jack County*, 178.

[52] The 13th Judicial District consisted of Parker, Jack, Palo Pinto, Johnson, and Hood Counties. Smythe, *Historical Sketch of Parker County*, 246.

lawyers filed a petition with Judge Soward requesting he not hold the trial in "Jacksborough."[53] The lawyers alleged that "...the whole country between this place and Jacksborough [sic] is to an unusual and very dangerous extent infested with large bands of hostile Indians..."[54] The lawyers went on to opine that "we do not think it be humane and just to force litigants and jurors of Jack County to leave their families and attend court..."[55] Soward was unmoved, and the trial would proceed in Jacksboro.


S.W.T. Lanham

Lawrie Tatum knew that things would not go well for the chiefs, especially with Satanta's boastful confession. Tatum also knew the probable spirit of a Jacksboro community that had seen so many family and friends murdered or captured by the Kiowas over the years. Ever the pacifist, however, Tatum wrote to District Attorney S.W.T. Lanham before the trial recommending that Satanta and Big Tree receive, at most, life in prison.[56] As a Quaker, Tatum was against capital punishment, but he also thought that putting the chiefs in prison would have a calming effect on the Indians. Even though raiding had continued after the arrests, Tatum was hopeful that the imposition of the legal process would impress upon the Kiowas the need to assimilate into American society.

On July 4, a grand jury indicted Satanta and Big Tree for the murder of the seven teamsters.[57] Judge Soward appointed Thomas Ball to represent Satanta and J.A. Wolfork to represent Big Tree.[58] Wolfork moved for separate trials, which Soward granted. Soward then impaneled a jury and began Big Tree's trial on July 5.

A huge crowd, heavily armed, crowded into the courtroom to watch the trial.[59] The jurors, also wearing their guns, sat on two long wooden benches.[60] The prosecution's primary witnesses were Horace P. Jones, General Ranald Mackenzie, and Thomas Brazeal.[61] For Satanta's trial, in addition to the witnesses, the Court had his confession.

Unfortunately, the trial transcript is missing. However, one of Mackenzie's officers recorded

---

[53] Petition to 13th District Court, June 22, 1871, copied in Huckabay, *Ninety-Four Years in Jack County*, 179.

[54] *Ibid*.

[55] *Ibid*.

[56] Tatum, *Our Red Brothers*, 122; Lawrie Tatum to S.W.T. Lanham, June 29, 1871, copied in Huckabay, *Ninety-Four Years*, 187.

[57] *State of Texas v. Satanta & Big Tree*, No. 224, 13th District Court, Jack County, copied in Huckabay, *Ninety-Four Years*, 180-181. Most of the original court records are missing. Partial copies exist in the C. C. Rister papers at the Southwestern Collection/Special Collections Library, Texas Tech University. The entries in the Court Minutes survive in Jack County Minute Book A.

[58] Ball was elected to Congress in 1896 and secured the first federal funding for the Houston Ship Channel. The town of Peck, northwest of Houston, was renamed Tomball in his honor.

[59] Carter, *On the Border*, 100. Resident Ida Huckabay describes the courtroom as 30 feet by 30 feet consisting of the second floor of the "red sandstone courthouse." Huckabay, *Ninety-Four Years*, 128.

[60] *Ibid*.

[61] *Ibid*., 101. Jones was the Fort Sill post interpreter. Mackenzie had been the first officer on the scene of the massacre. Brazeal was wounded in the raid and was the one who had made it to Fort Richardson with news of the attack.

some of the lawyers' arguments. Attorney Ball was said to have given a "spread eagle" but eloquent opening statement.[62] He argued that the Indians, whom he referred to as "my brother[s]," had been cheated and driven off the land repeatedly and steadily.[63] He then threw off his coat and began a lecture on the history of the Spanish conquest of the Aztecs. The jury tuned out, whittling on the courtroom benches, and spitting tobacco juice at cracks in the floor or walls.[64] But when Ball invoked the image of an eagle and urged the jury to allow the chiefs to "fly away as free and unhampered," the jury adjusted their pistols to their fronts and paid strict, but far from sympathetic, attention.[65]

Several primary and secondary sources contain a partial record of the prosecution's closing argument.[66] District Attorney Lanham recognized the importance of the trial. It was the first time in United States history that Indian raiders had been tried in a civilian court. Not only were Satanta and Big Tree on trial, so was the entire idea that the rule of law could cause a change in the Indians' violent behavior toward the Texans. There seemed to be a belief that the due process afforded the defendants, along with just punishment if found guilty, would be recognized by the Indians as a better way of life. Perhaps, many thought, a more "civilized" process would suddenly change generations of plains culture.

Lanham argued accordingly. He reminded the jury that "[this] is a novel and important trial, and has, perhaps, no precedent in the history of American criminal jurisprudence."[67] He described the horrible scene of the attack. He went on to remind the jurors that they, their friends, family, and neighbors had all heard of or witnessed similar atrocities, attempting to hold Satanta and Big Tree accountable for every Indian attack any juror could remember.[68]

Lanham then described Satanta as the "orator," "diplomat," and "counselor" of his tribe. He described Big Tree as a "mighty warrior athlete, with the speed of the deer."[69] But Lanham was cleverly invoking the anti-government sentiments of reconstruction Texas. The fawning descriptions of the two chiefs, he argued, would only appeal to, "[i]ndian admirers, who live in more secure and favored lands, remote from the frontier…where the story of Pocahontas…is read, and the dread sound of the war whoop is not heard."[70] He reminded the jurors that not only were the defendants being granted the benefit of due process to appease the "carpetbaggers" still ruling Texas, but those same people had no idea what it was like to live on the frontier. Lanham had a point. General Sherman himself had doubted the problems were as bad as represented until he experienced them firsthand.

---

62 Carter, *On the Border*, 100.

63 *Ibid*.

64 *Ibid*., 101.

65 *Ibid*.

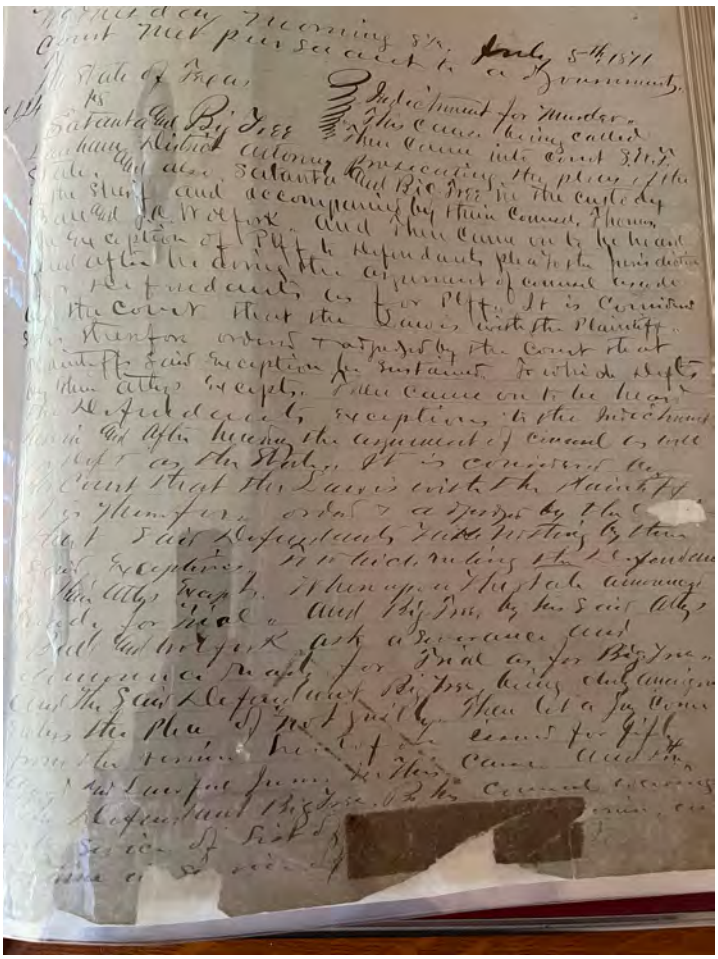
66 Huckabay, *Ninety-Four Years*, 182-186; H.H. McConnell*, Five Years a Cavalryman or, Sketches of Regular Army Life on the Texas Frontier 1866-1871*, reprint (Norman: University of Oklahoma Press 1996), 282-284; Josiah Wilbarger, *Indian Depredations in Texas*, facsimile edition (Austin: Eakin Press 1985), 562-566.

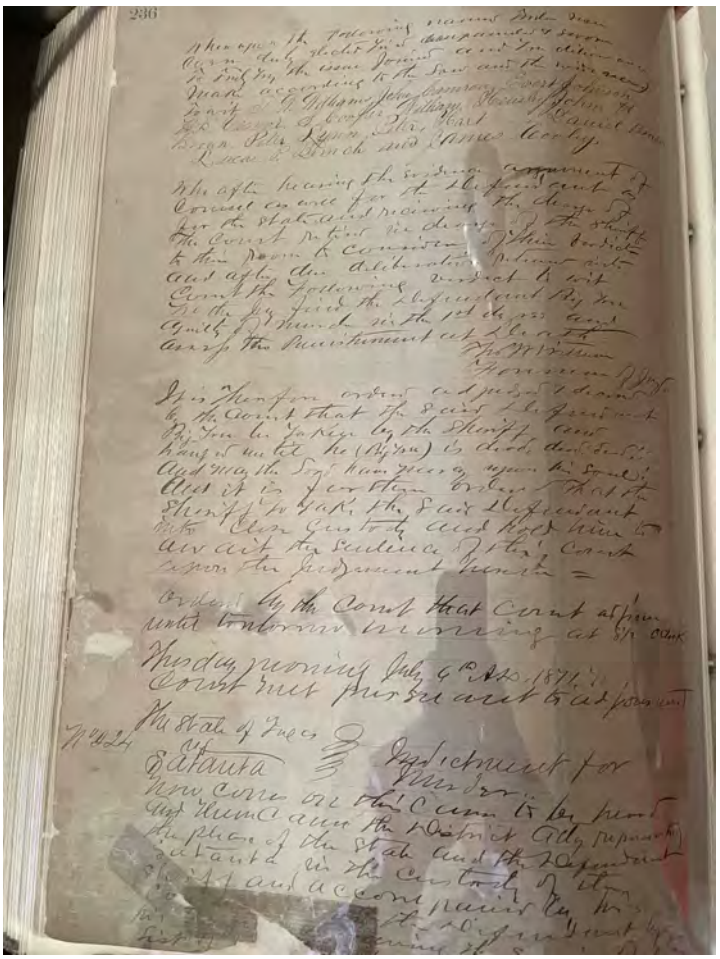
67 Wilbarger, *Indian Depredations*, 562.

68 *Ibid*., 563.

69 *Ibid*.

70 *Ibid*.





Top: The author and Hon. Tracie Pippin, Jack County District Clerk, display court minutes of the trial.
Bottom: Minute book restored by the Court Records Presidential Task Force of the
Texas Supreme Court. This is the only thing surviving from the trial.

Lanham then described Satanta as the "arch fiend of treachery and blood…the promoter of strife, the breaker of treaties…the inciter of his fellows to rapine and murder…the most artful dealer in bravado while in the pow-wow,…and the most canting and double-tongued hypocrite when detected and overcome."[71] Again, Lanham had a point, at least from the Texan perspective. Satanta was all those things, even to Tatum. From the Kiowa perspective, to the extent those words could even translate in Kiowa culture, such actions would have brought Satanta honor and status.

Lanham also made a more condescending moral appeal. He told the jury how "[it] speaks well for the humanity of our laws and the tolerance of this people, that the prisoners are permitted to be tried in this Christian land, and by this Christian tribunal. The learned Court has…required… the same judicial methods…that are enforced in the trial of a white man."[72] Lanham essentially told the jurors they would not just be doing their duty but actually doing the Indians a favor by convicting them on such overwhelming evidence. The jury convened in the corner of the courtroom to deliberate for the few minutes it took to return a verdict of guilty against Big Tree.[73]

Satanta was tried the following day before the same jury. Unlike Big Tree, the "orator of the plains" decided to speak on his own behalf. Speaking Comanche (and translated by Horace Jones), he told the jury that he had never raided in Texas. He also threatened that if he were imprisoned or killed, it would be like "a match put to the prairie."[74] If released, he promised never to raid in Texas and to kill the chiefs responsible for the Warren raid personally.[75]

Satanta likely viewed the trial more like his negotiations with the agents. The things he said were patently untrue, but not everyone in the room may have known that. One can only wonder what Satanta thought this speech would accomplish. The same jury that convicted Big Tree likewise convicted Satanta of murder. Judge Soward sentenced each of the chiefs to "hang by the neck until he is dead, dead, dead, and may God have mercy on his soul. Amen!"[76] Under military guard, the chiefs were taken to the State penitentiary in Huntsville to be held until their execution day.

Almost immediately, calls came to spare Satanta and Big Tree the death penalty. Lawrie Tatum wrote General Sherman that as long as Satanta and Big Tree remained in prison, "…the Indians will hope to have them released and thus [imprisonment would] have a restraining influence in their actions."[77] Tatum understood that the Indians feared imprisonment as much as they enjoyed seeking revenge.[78]

---

[71] *Ibid*.

[72] *Ibid*., 565.

[73] Carter, *On the Border*, 101-102.

[74] Robinson, *The Indian Trial*, 110 quoting the *Austin State Journal*, July 18, 1871.

[75] *Ibid*.

[76] District Court Minutes, Jack County Minute Book A, 238, copy in the C. C. Rister papers at the Southwestern Collection/Special Collections Library, Texas Tech University.

[77] Tatum to Sherman, May 29, 1871, quoted in Wilbarger, *Indian Depredations in Texas*, 569.

[78] Tatum to S.W.T. Latham, June 29, 1871, quoted in Wilbarger, *Indian Depredations in Texas*, 569.

Judge Soward agreed with Tatum. On July 10, he wrote to Governor E.J. Davis advocating for a commutation of the sentence to life imprisonment. Soward pointed out that the "current policy of the United States toward these wild tribes, is founded on supreme folly…"[79] To the citizens of Judge Soward's district, the diplomatic Peace Policy and its welfare program was a distinct and deadly failure.

Davis was caught between popular sentiment and a long-term solution to the terror on the frontier. The people of North Texas understandably wanted Satanta and Big Tree executed, but Davis agreed with Tatum and Soward. On August 2, Davis commuted the chiefs' sentences to life imprisonment.[80] Davis attempted to preempt the backlash that would surely come from area residents by declaring that Satanta and Big Tree's actions didn't constitute murder under Texas law but rather an act of "Savage Warfare."[81] By doing so, perhaps Texans would blame the federal government rather than his administration.

Sherman was a different story. He was willing to go along with the idea of trying the Indians in civilian courts because if they were to remain free, "no life would be safe from Kansas to the Rio Grande; and no soldier will ever again take an Indian prisoner alive…"[82] But his experiences in Texas and Fort Sill had given him a better understanding of the Kiowas. Upon learning of Davis' commutation, Sherman opined, "Satanta ought to have been hung and that would have ended the trouble…He ought never to be released…As to Big Tree, I do not deem his imprisonment so essential though he ought to keep Satanta company."[83]

Satanta and Big Tree were checked into the penitentiary in Huntsville on November 2, 1871, as prisoners 2107 and 2108, respectively.[84] Big Tree seemed to adjust, working in the prison shop.[85] Satanta, maintaining his status as a chief, did not work.[86] He once welcomed a northern writer for *Scribner's Monthly*, "with as much dignity and grace as if he were a monarch receiving a foreign ambassador."[87]

The Effect of the Trial

During the fall and winter after the trial, the Comanches continued to raid but the Kiowas were quiet. Hunting Horse put it this way, "[The Kiowa] slowed down on the raids, but their minds were on it."[88] Knowing the Comanches remained on the warpath, the Kiowas could stand it no

[79] *Ibid*., 570.

[80] Commutation, August 2, 1871, District Court Minutes, Jack County Book A, 243, copy in the C. C. Rister papers at the Southwestern Collection/Special Collections Library, Texas Tech University.

[81] *Ibid*.

[82] Sherman to Adjt. Gen. E.D. Townsend, May 28, 1871, copy in the C. C. Rister papers at the Southwestern Collection/ Special Collections Library, Texas Tech University.

[83] Nye, *Carbine & Lance*, 147.

[84] Huckabay, *Ninety-Four Years*, 190.

[85] Edward King. "Glimpses of Texas," *Scribner's Monthly*, Vol. 7 (1874), 415. https://babel.hathitrust.org/cgi/pt?id=coo.31924079633206&view=1up&seq=421&skin=2021. Accessed August 15, 2021.

[86] *Ibid*.

[87] *Ibid*.

[88] Nye, *Carbine & Lance*, 152.

longer and resumed raiding in the Spring of 1872. Kiowa chief Big Bow led an attack on a wagon train in April 1872, killing seventeen people.[89] Two U.S. cavalrymen were killed in the subsequent pursuit. Later, two Kiowa boys were killed after joining some Comanches on a horse-stealing expedition.

Kiowa chief White Horse organized a raid deep into Texas along the Brazos. Sixteen miles from Fort Griffin, the Kiowas shot Mr. Abel Lee out of a chair on his porch and stormed the house. They wounded Mrs. Lee in the back with an arrow, scalped her, then cut off her ears and one of her arms.[90] An arrow killed fourteen-year-old Frances. Nine-year-old Millie tried to help her sister but was captured. The Kiowas seized seventeen-year-old Susanna and six-year-old John who were hiding in some brush. The kids were made to watch the Indians plunder the house while their mother, still breathing, lay mutilated on the floor. White Horse gave the Lee children as slaves to warriors who had participated in the raid.[91]


Cyrus Beede


Phillip Sheridan

Tatum was beside himself. He urged the military to arrest the raiders but was unsuccessful. Instead, the agency convened a diplomatic council hoping that representatives from the "Five Civilized Nations" could convince the Kiowas that peace was the better option.[92] The Kiowas were arrogant, demanding the removal of Fort Sill and all U.S. troops from "the Indian country."[93] They also demanded that the government extend their reservation from the Missouri River on the north to the Rio Grande River on the south.[94] The Kiowas would make peace only after Satanta and Big Tree were released back to the tribe.[95]

Unbelievably, U.S. Indian Department personnel actually thought the discussions indicated the Peace Policy was working. Agent Cyrus Beede wrote to Tatum's superior Enoch Hoag, "[e]verything indicates the best feeling toward the government on the part of the Indians."[96] General Phillip Sheridan got a copy of the letter, on which he indorsed, "The writer of the within communication is a little too simple for this earth."[97]

Despite the conditions in Texas, discussions began in Washington over whether to free Satanta and Big Tree and return them to their tribe. Satanta had boasted that, if released, he could keep all the tribes from raiding. The Friends' Indian Committee in Washington somehow believed

---

89 Nye, *Carbine & Lance*, 152.

90 *Ibid*, 153.

91 *Ibid*.

92 The "Five Civilized Nations" consisted of the Cheyennes, Arapahoes, Caddoes, Wichitas, and Delawares.

93 Nye, *Carbine & Lance*, 156-157.

94 *Ibid*., 157

95 Tatum, *Our Red Brothers*, 126; Nye, *Carbine & Lance*, 157.

96 Cyrus Beede to Enoch Hoag, June 21, 1872, quoted in Nye, *Carbine & Lance*, 157.

97 *Ibid*.

him.[98] Tatum knew that Satanta couldn't keep others from raiding and wouldn't even if he could.[99] As the one Indian Agent with the most direct experience, Tatum got fed up with the refusal of his superiors to understand the Kiowas and eventually resigned.[100]

Parole

In 1872, the Indian Department thought that a tour of Washington D.C. would so impress the hostile tribes that they would be interested in final peace. The Kiowa wouldn't attend unless Satanta and Big Tree were there, even if temporarily.[101] Doubtless against his better judgment, Governor Davis agreed to allow the Kiowa delegation to see that Satanta and Big Tree were alive and unharmed, as long as the federal government promptly returned them to the state penitentiary. After considerable difficulty, Lieutenant R. G. Carter managed to take Satanta and Big Tree to meet the Washington-bound Indian delegation in eastern Indian Territory. Seeing the chiefs had the hoped-for impressive effect on the Kiowa delegation, and Satanta and Big Tree were returned to Huntsville without incident.[102]


R. G. Carter

Unbeknownst to Governor Davis, the federal government had already promised the Kiowa that Satanta and Big Tree would be released. Of course, they had no authority to do so since the Kiowas were prisoners of the State of Texas. Sherman was incensed. Having personally taken the measure of Satanta and the other Kiowas, he wrote to Secretary of the Interior Delano that when Satanta boasted about leading the Warren raid, "I ought to have shot him on the spot, but out of great respect for the law I caused his arrest…"[103] Sherman went on to counsel Delano that releasing Satanta to kill more citizens would be "worse than murder."[104] Sherman summed up Satanta as no doubt many would have, "I know the man well; with irons on his hands he is humble and harmless enough, but on a horse he is the devil incarnate." [emphasis in original].[105]

When approached on the matter, Governor Davis made additional demands of the Indians beyond what the federal government had negotiated. Davis was once again caught between the citizens of Texas and his status as a federal appointee. Hoag knew it and encouraged the Interior Secretary to join with President Grant and pressure Davis to release the Kiowas.[106]

---

[98] Tatum, *Our Red Brothers*, 131.

[99] *Ibid*., 132.

[100] *Ibid*., 133.

[101] Nye, *Carbine & Lance*, 158.

[102] *Ibid*.

[103] Sherman to Sec. C. Delano, April 16, 1873, William T. Sherman Papers: Letterbooks, 1891 "Semi-official letters sent"; 1866, Feb. 11-1878, July 8. 1866. Manuscript/Mixed Material. https://www.loc.gov/resource/mss39800.045_0007_0307/?sp=2&st=slideshow#slide-42. Accessed August 16, 2021.

[104] *Ibid*.

[105] *Ibid*.

[106] Enoch Hoag to Sec. C. Delano, May 19, 1873, reprinted in Dorman Winfrey & James Day, eds., *Te Indian Papers of Texas and the Southwest* (Austin: Pemberton Press 1966), 336-337.

Davis gave in. He agreed to release Satanta and Big Tree during a council at Fort Sill in October 1873. Tatum had already resigned but knew the release, promised by his superiors before his resignation, would lead to a bad result. In his memoir, Tatum wrote, "[T]o give [the Kiowas] cause to believe that their raiding had compelled the white people to release their chiefs would only be a stimulus to them to continue hostilities…"[107] Tatum understood that releasing the chiefs would communicate weakness, not strength.

The federal government wanted to parole Satanta and Big Tree as an act of good faith, receiving only promises in return. Once again, the government led with diplomacy while failing to appreciate the Kiowa culture despite years of experience. The Kiowas were prepared to go to war for the return of Satanta and Big Tree. The U.S. should have learned, from Satanta in fact, that negotiations didn't result in binding agreements but were merely another type of battle.

The chiefs arrived at Ft. Sill on September 4. Governor Davis came a month later, as well as the Commissioner of Indian Affairs E. P. Smith and the superintendent of the plains tribes, Enoch Hoag.[108] The council convened on October 6.[109]

Davis explained federalism by referring to Texans as "children of the Great Father." Despite being victimized by the Kiowas and Comanches, the Texans hadn't gone onto the reservation for revenge. He demanded that the Indians remain on the reservation and take up farming and stock raising.[110] Davis explained that though Satanta and Big Tree were being released, they were paroled rather than pardoned. They would be rearrested if the Indians didn't comply with the agreement. Davis closed by saying that if the deal failed, "…it will be better for the people of Texas…to have open war and settle this matter at once. I have nothing more to say."[111]

As was common during such proceedings, many of the Indians spoke. The comments were mostly similar. Kiowa chief Lone Wolf told the council, "[w]e intend to do what you say." One of the more moderate Kiowa chiefs, Kicking Bird, said, "[t]urn over the chiefs and we will quit raiding in Texas."[112]

In the presence of the Indians, Hoag told Davis that he believed the Kiowas had not been raiding in Texas since the Washington trip. Davis took umbrage at such a ludicrous statement and insisted on the terms he had laid out, which would require Kiowa compliance before Satanta and Big Tree could return to the tribe. Davis told the entire council, "Texas has control of this matter entirely, and as to the conditions I exact, I am governed by a desire to have peace and protect the people of Texas."[113] After a tense exchange, Davis agreed to leave the chiefs with the new post commander J.W. Davidson. Hoag then spoke to Davis personally, without interpretation for the Indians, and

---

[107] Tatum, *Our Red Brothers*, 133.

[108] Nye, *Carbine & Lance*, 168.

[109] Satanta's son, Tsa'l-au-te, arrived at Fort Sill riding a horse belonging to one of Davis' aides. The aide was instructed to keep his mouth shut. Nye, *Carbine & Lance*, 169.

[110] Negotiations Concerning Big Tree and Satanta, October 6, 1873, printed in Winfrey & Day, *Indian Papers*, 352.

[111] *Ibid*., 353.

[112] *Ibid*.

[113] Winfrey & Day, *Indian Papers*, 360.

Lone Wolf

Kicking Bird

informed him that they could put agents with the various bands to control them if Satanta and Big Tree were released, at least to Davidson, but not if they weren't. Davis replied, "If they are so warlike as that, we had better settle the matter at once."[114] However, the next morning Davis merely complimented the Kiowas on their good behavior and handed over Satanta and Big Tree, trusting the Kiowa promise not to raid and the federal government's promise to secure Texas.[115]

Diplomacy Fails

One week after the chiefs were released a large party of Indians attacked three men in Wichita County but were repulsed.[116] On October 16th, Indians attacked another ranch in the area and killed a man named Ellison.[117] On the 18th, a scouting party ran into two parties of Indians but escaped.[118] On October 30th, E.B. Baines wrote to Governor Davis informing him that Indians had been "depredating on the people of [Palo Pinto] county for the past ten days."[119]

The raids caused an uproar on the reservation. The Indian Department ordered the agents not to distribute rations until further notice, which angered both the Kiowas and the Comanches.

[114] *Ibid*.

[115] Nye, *Carbine & Lance*, 175.

[116] F.A. Blake to Gov. E.J. Davis, October 23, 1873, printed in Winfrey & Day, *Indian Papers*, 364.

[117] *Ibid*.

[118] *Ibid*.

[119] E.B. Baines to Gov. E.J. Davis, October 30, 1873, printed in Winfrey & Day, *Indian Papers*, 365.

The Comanches claimed the Kiowas participated in the raids, which the Kiowas denied. Kiowa chief Lone Wolf suggested that the Comanches had, imprudently, taken their chances in Texas and were dead. A few days later, however, his own son would be killed on a raid in Texas. Kiowa chief Kicking Bird claimed the government had broken the agreement, even though Comanche raids had started the trouble.[120] A common claim by the Indians was a difference between a "land of peace," meaning the reservation, and Texas. The Indians viewed raids into Texas as a foray into a foreign land that the U.S. government ought to tolerate to some degree. They didn't see the connection between rations on the reservation and murder in Texas.

Sherman had predicted this outcome. When testifying before Congress about the situation in Texas, Sherman reiterated his view that Satanta should have been executed and that Davis had made a mistake by releasing the chiefs.[121] Davis defended himself in a letter to Sherman on February 7, 1874, claiming Sherman should have assumed jurisdiction over Satanta (and the other chiefs) because the military had arrested them in Indian Territory as military combatants rather than common criminals.[122] Sherman shot back,

> "You are in error in supposing that I had any authority whatever to execute [the Kiowa chiefs] at Fort Sill; or to order their trial by a military court or commission. I had authority to do exactly what I did, viz: with the assent and approval of the Agent, Tatum, on the spot, to send them to the jurisdiction of the Court with the authority to try and punish.
>
> …I believe that Satanta and Big Tree shall have their revenge, if they have not already had it, and that if they are to have scalps, that yours is the first that should be taken."[123]

Sherman had made his point. The Texans wanted justice from their local courts, but Governor Davis had betrayed them. Davis wanted to blame the federal authorities. Sherman knew it had all been a mistake from the outset.

Governor Davis encouraged federal action. He notified Commissioner Smith that large parties of Indians were seen in Denton, Wise, Jack, and Wichita counties.[124] Davis suggested raising a Texas regiment to defend the borders, but General Sheridan disagreed. Sheridan suggested an offensive campaign, which Sherman endorsed. Sherman had finally realized that the Peace Policy was a total failure, as was the concept of civilian trials for the Indian raiders. He wrote, "If the Indian Bureau will confess their inability to restrain these Indians and turn them over to the military we will find troops enough without asking any from Texas."[125]

---

[120] Thomas C. Battey, *The Life and Adventures of a Quaker Among the Indians*, facsimile edition (Williamstown: Corner House 1972), 224.

[121] Robinson, *The Indian Trial*, 163.

[122] *Ibid*., 164.

[123] Sherman to Gov. E.J. Davis, February 16, 1874, William T. Sherman Papers: Letterbooks, 1891 "Semi-official letters sent"; 1866, Feb. 11-1878, July 8. 1866. Manuscript/Mixed Material. https://www.loc.gov/resource/mss39800.045_0007_0307/?sp=2&st=slideshow#slide-56. Accessed August 16, 2021.

[124] Nye, *Carbine & Lance*, 181.

[125] Sherman quoted in Nye, *Carbine & Lance*, 181.

The raids continued into 1874.[126] A Comanche medicine man named Isa-Tai convinced a large party to raid into the Texas panhandle and attack a trading post known as Adobe Walls, resulting in defeat. Soon after, the Kiowas held their sun dance, at which Satanta resigned as a war chief. Lone Wolf suggested a raid to avenge the death of his son. Kicking Bird wanted none of it and led part of the Kiowas back to Fort Sill to steer clear of the trouble. [127]


Isa-Tai

Maman-ti appeared and volunteered to lead the raid. He predicted that the attack would be a success and none of the warriors would die. They soon made their way onto the very same plain where the Warren wagon train had been attacked. The war party even visited the grave of the Comanche killed in the Warren raid. [128] Soon they encountered a group of men in the valley below that appeared to be tracking the Indians. Maman-ti took one brave and rode down to act as bait, hoping to draw the party to them so the rest of the party could attack from the flank, a typical plains Indian maneuver.


John B. Jones

The men the Indians saw were from the Frontier Battalion of the Texas Rangers under the command of Major John B. Jones. Major Jones was new to the plains and rode into the ambush. He kept his Rangers organized, however, and they fought bravely.[129] In the melee, Ranger David Bailey was knocked off his horse by an Indian lance.[130] Lone Wolf finally got his revenge when he split Bailey's head into pieces.[131]

Lone Wolf crossed the Red River to discover that soldiers had been looking for him. A messenger from Kicking Bird told him to return to Fort Sill immediately. The message itself was actually from Enoch Hoag and Tatum's replacement, James Haworth. The Agents were trying to sneak the war party back onto the reservation before the soldiers could identify the raiders. [132] After all the trouble and the failure of the Peace Policy, the Agents had decided to work against the military.

---

[126] Davis was defeated in the 1873 election, leading to the famous "Semi-Colon Case" in the Texas Supreme Court. Richard Coke became Governor in 1874.

[127] Nye, *Carbine & Lance*, 192. The Sun Dance was an elaborate set of rituals in which the entire tribe participated. It served as a patriotic reunion of sorts, where the various bands could come together. Mildred Mayhall, *The Kiowas* (Norman: University of Oklahoma Press 1962), 133.

[128] *Ibid*., 193.

[129] Utley, Robert, *Lone Star Justice: The First Century of the Texas Rangers*. (New York: Berkley Books 2002), 150.

[130] *Ibid*.

[131] Nye, *Carbine & Lance*, 200.

[132] *Ibid*.

Meanwhile, the raiding continued. It is not clear the degree to which Satanta participated, but members of his band were involved. The Army was doing a much better job keeping track of the Indians on the reservation and knew Satanta was absent in August 1874, when some fighting occurred near the Wichita agency. [133] Satanta later admitted being present during a fight but again denied being involved. Later in the summer, Satanta and Big Tree are believed to have been present at an attack on another wagon train.

Finally, in October 1874, Satanta and Big Tree appeared at the Cheyenne Agency in Darlington, avoiding the authorities at Fort Sill.[134] They were immediately arrested and incarcerated at Fort Sill. General Sheridan telegraphed Washington, recommending Satanta be sent back to prison immediately. President Grant agreed, and Satanta was on his way to Huntsville by November 5. [135] In the meantime, Hoag and Haworth still scrambled to rescue Satanta, to no avail.

Satanta didn't do well in prison. He lost his pride, his arrogance, and his health. He was often found staring north, toward the Red River.[136] On October 10, 1878, he asked a prison official if there were any chance he would be released again.[137] The answer was no. The next day, Satanta threw himself off a second-floor balcony, dying a few hours later. Officials buried Satanta in the prison cemetery, alongside others that nobody claimed.

Big Tree after becoming a Baptist missionary
(Oklahoma Historical Society Collection)

The entire affair marked the turning point in government relations with the Plains Indians. As the Peace Policy collapsed, Sherman realized it was time for a military solution. He developed a plan that would separate the Indians into friendly and hostile, and what would become known as the Red River War put an effective end to the Indian wars.

Satank had chosen death rather than the ignominy of being tried and imprisoned. Nye

---

[133] Nye, *Carbine & Lance*, 205.

[134] Nye, *Carbine & Lance*, 219.

[135] *Ibid*.

[136] Nye, *Carbine & Lance*, 255.

[137] *Ibid*; Huckabay, *Ninety-Four Years*, 202.

describes him as "a true product of the stone age."[138] His descendants, however, would move beyond the plains culture. His son became an Episcopal minister, and his granddaughter would become the first Kiowa girl to receive a college degree.

It turned out Big Tree's youth did indeed work in his favor. He was released from prison as the conflicts on the plains died down. He became interested in Christianity and joined the Baptist Church, becoming a deacon.[139] At one point, a Kiowa medicine man tried to convince the tribe to renounce all relations with whites and return to the warpath. Big Tree, along with Satank's son Joshua Givens, led the way in squelching this effort. Big Tree often spoke of forgiveness, telling the story of the time he snatched a baby from its mother's arms and dashed its skull against a tree. But now, he would say, "God has forgiven me, and I did that hideous thing."[140] Big Tree prospered and was well-liked in both the Indian and white communities. He died in 1929.[141]

The trials of Satanta and Big Tree were failed experiments with the rule of law on the western frontier. Grant's Peace Policy contemplated assimilation of the Plains Indians into the American economy (through farming and ranching) and the legal system (through the deterrent effect of the criminal justice system). Advocates for the policy in Washington, D.C. thought leading with diplomacy would encourage the Kiowas to stop raiding. What they failed to appreciate was the nature of plains culture and the traditions of war. The Kiowas lived in a state of war, even if the U.S. did not. To the Kiowas, peace meant only that they weren't fighting at that moment. To effect lasting change required time, which the victims of the raids did not have.

History is never far from us, as similar disconnects exist even today.[142] The Warren wagon train affair instructs us that, despite a preference for peace, cultural conflicts sometimes exist where violence is an inevitable result.

---

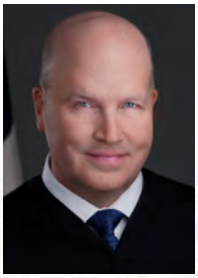
[138] Nye, *Carbine & Lance*, 147.

[139] Huckabay, *Ninety-Four Years*, 206.

[140] *Ibid*.

[141] *Ibid*., 205.

[142] E.g., Michael Mukasey, "Civilian Courts are No Place to Try Terrorists," *The Wall Street Journal*, October 19, 2009. https://www.wsj.com/articles/SB10001424052748704107204574475300052267212. Accessed August 17, 2021. Josh Lederman, "How the U.S. Plans to Run Diplomacy in Afghanistan From Afar," *NBCnews.com*, September 1, 2021. https://www.nbcnews.com/politics/national-security/how-u-s-plans-run-diplomacy-afghanistan-afar-n1278191. Accessed September 2, 2021.



Justice Ken Wise *is a Justice on the 14th Court of Appeals. He is the President-elect of the Texas Supreme Court Historical Society as well as a director of the Texas State Historical Association and the Texas Historical Foundation. He is the creator and host of* Wise About Texas*, a Texas history podcast heard in 150 countries worldwide.* *He wishes to thank Texas State Historian Dr. Monte Monroe for his invaluable assistance in obtaining copies of original court documents and letters from the C.C. Rister collection at Texas Tech University. He also thanks the Honorable Tracie Pippen, District Clerk of Jack County for access to the original court minutes from 1871. He also thanks Ms. Shannon Potts for facilitating photography at some of the sites mentioned in the article.*

Return to Journal Index

Texas' First Native American Federal Judge: Ada E. Brown

By Hon. John G. Browning

Judge Ada Brown is sworn in as United States District Court Judge for the Northern District of Texas as her parents look on. Photo from choctawnation.com

On September 13, 2019, history was made when the United States Senate voted 80–13 to confirm the Honorable Ada E. Brown as a judge on the United States District Court for the Northern District of Texas. Nominated by President Trump on March 15 of that year, Judge Brown became the first Article III federal judge in Texas of Native American ancestry (she is also the first female federal judge of African American ancestry to serve in the Northern District). The nomination, and subsequent confirmation, marked not only the capstone of a distinguished career of "firsts" for the jurist herself (an enrolled member of the Choctaw Nation), but also heralded a milestone in federal judicial history. Judge Brown is one of only three Native Americans currently serving in the federal judiciary (in October 2021, the Senate confirmed a third, Muscogee Creek Nation member Lauren King of Washington state to fill a vacancy on the U.S. District Court for the Western District of Washington).

Let that sink in for a moment. Besides being a first for Texas, Judge Brown is one of only three Native American federal judges out of the 890 authorized federal judgeships in the United States. The others are Judge Diane Humetewa, a Hopi Nation member appointed by President Obama to the U.S. District Court for the District of Arizona in 2014 and Muscogee Creek Nation member Lauren King of Washington state who was recently appointed to the federal district bench,

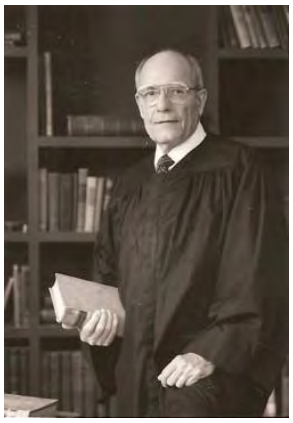
making her not only the 3rd actively serving Native American judge, but also the fifth Article III judge overall of Native American ancestry. In fact, only two other Native Americans have served as Article III federal judges since the federal court system was established in 1789. Those were Judge Frank Howell Seay of Oklahoma's Eastern District, appointed by President Carter in 1979, and Judge Billy Michael Burrage (also of Oklahoma), appointed by President Clinton in 1994. But Judge Burrage resigned in 2001, and Judge Seay took senior status in 2003. Consider this: if the federal judiciary actually reflected national demographics, there would be fourteen Native American federal judges. Native Americans are among the most underrepresented communities in the federal judiciary.

ADA BROWN—A CAREER OF FIRSTS

Judge Ada Brown was born November 8, 1974, to parents of both African American and Native American ancestry. She is the great-granddaughter of original Dawes Rolls enrollee Edward P. Snead, making her an enrolled member of the Choctaw Nation. Judge Brown can also proudly claim Muscogee (Creek) lineage on her father's side of the family, and a number of her ancestors on that side appear on the Dawes Rolls of Creek Freedmen. Judge Brown grew up in Midwest City, Oklahoma, not far from Oklahoma City. In some ways, one might say that the administration of justice runs in Judge Brown's family. Her great-grandfather's uncle was a Choctaw Lighthorseman, a roving law enforcement unit that patrolled Choctaw land and enforced the nation's laws against not only tribal members but non-Native Americans as well [see sidebar]. Brown's ancestor Edward Snead was a court reporter for a district court judge. One of Snead's children, Paul Snead, went on to become a district court judge in New Mexico. When she became a judge, Brown says, "I felt like I was part of that family history."


Hon. Ada E. Brown


Edward Snead


Judge Paul Snead

Given such rich family tradition, Judge Brown's meteoric rise is hardly surprising. But she is quick to credit her parents for instilling in her pride in her ancestry (she attended powwows and other Choctaw events growing up), as well as a strong work ethic and "can do" attitude. Recalling a favorite childhood memory, Judge Brown says "I remember I got a book about careers, which listed jobs for boys and jobs for girls. My mom took a marker, scratched out 'boys' and 'girls' and told me, 'You can be anything.'" With such inspiration, Judge Brown excelled at an early age. She graduated as valedictorian of her high school class, and was elected as president of both her sophomore and junior classes. Intending at first to major in biology and pursue a career as an orthodontist, Brown headed off to historically Black Spelman College in Atlanta.

At Spelman, Brown's intended career path took a sharp turn thanks to a "Women in the Law" class taught by Professor Marilyn Davis. Years later, after her confirmation to the Northern District bench, Judge Brown sent an open letter of thanks to this influential professor, crediting her with "changing the course of my career." The letter said in part:

After taking your class, I knew that law was my destiny. You brought the law to life and made it exciting and relevant. I quickly learned that lawyers could write laws, argue about them, change laws, and, in the cases of judges, decide the law. Where I am in my career today all began with learning to love the law because you taught it so well and because of the scholarship you helped me obtain . . . You changed my life for the better and I still think of you today . . .


Marilyn Davis

Judge Brown received her Bachelor of Arts degree, magna cum laude, from Spelman in 1996. She received a presidential scholarship to attend Emory University School of Law in Atlanta, graduating from there in 1999. Brown embarked upon a career in criminal law, joining the Dallas County District Attorney's Office as a prosecutor in 2000. There she tried more than a hundred jury trials to verdict as a lead prosecutor. As a felony prosecutor, she tried murders, rapes, kidnappings, and other serious crimes. Brown later began specializing in prosecuting crimes against children, including cases involving online predators.

Her career as a prosecutor was short lived, thanks to her appointment as a criminal court judge. At thirty, Brown became the youngest sitting judge in Texas when she was appointed to serve as judge of the Dallas County Criminal Court No. 1 in 2005. But partisan politics in judicial elections claimed yet another casualty when Judge Brown lost her 2006 bid for election, and by 2007, she had transitioned to private practice. Brown pivoted to civil litigation and joined the high-profile litigation boutique McKool Smith in Dallas.

At McKool Smith, Brown focused on large commercial litigation matters and complex patent infringement cases. Several of the cases she tried resulted in some of the largest jury verdicts in the country, such as the *Medtronic v. Boston Scientific* case. There, the $250 million verdict Brown and her colleagues obtained was ranked the twelfth largest jury verdict of 2008 in the United States. In a 2011 patent infringement trial against SAP America, Brown was successful in getting a $345 million verdict for her client (increased to $391 million on final judgement). It was the tenth largest jury verdict in the country that year.

Even in the midst of a demanding private practice, Judge Brown remained committed to public service. She was appointed by then-Governor Rick Perry to the Texas Commission on Law Enforcement Officer Standards and Education (the regulatory agency that oversees licensing for Texas police officers). Later, Gov. Perry appointed Brown as a Commissioner for the Texas Department of Public Safety, the board that oversees not only all Texas state troopers but also the Texas Rangers. When her service as a commissioner ended, Brown was named an Honorary Captain of the Texas Rangers. Judge Brown is also a member of Mensa, the Mayflower Society, and the Daughters of the American Revolution.

On September 13, 2013, Ada Brown returned to public service full time when Gov. Perry appointed her as a justice on the Fifth Court of Appeals in Dallas, Texas' largest and busiest intermediate appellate court. At age thirty-eight, she became the youngest sitting appellate judge in the state, and one of only two African American women in the appellate judiciary. Over the course of her six years on the court, Justice Brown heard more than 1,500 civil and criminal appeals and authored more than six hundred opinions. By her last year on the court, she received the

highest rating of any of the justices in the Dallas Bar Association's nonpartisan judicial evaluation poll—earning the highest marks in such areas as judicial temperament, proper application of the law, and being open-minded and fair. It was a reflection of the high regard in which Brown was held by lawyers and a harbinger of the ABA's unanimous "well qualified" rating that she would later receive upon her nomination to the federal bench.

Judge Brown's approach to her responsibilities as a federal judge mirrors her philosophy as a state court trial and then appellate judge. "A judge fails the legal system if the jury knows what the judge thinks about the case or of the lawyers trying it," she says. "I want the parties and witnesses to feel respected. I try to create a non-intimidating environment for lawyers, parties, and witnesses. Whatever the outcome of the case, it is important to me that both sides feel they had a fair hearing, and that their stories were heard." Presiding over everything from complex business disputes to air crash cases to high-level narcotics distribution cases, Judge Brown takes particular care in the criminal sentencing hearings on her docket. "I spend a lot of time reading through people's life stories and focusing on the facts of the cases before me," she notes. "I try very hard to craft individual sentences. I do not want to sentence anyone to more time than they deserve, but justice must be served."

Despite the heights to which she has ascended, Judge Brown remains keenly aware of how certain people may perceive her simply on the basis of her racial identity. In a *Dallas Morning News* editorial in 2011, she related some of her brushes with racism, including a conversation with an elderly white judge from New Mexico who casually dropped the n-word in front of the light-complexioned Judge Brown, never suspecting her African American and Native American heritage. A more disturbing encounter occurred years ago, when Judge Brown (then a young prosecutor) was in a Dallas bookstore. The store manager confronted her, yelled "I'm sick of you people," and threatened to call the police and have her charged with criminal trespass.

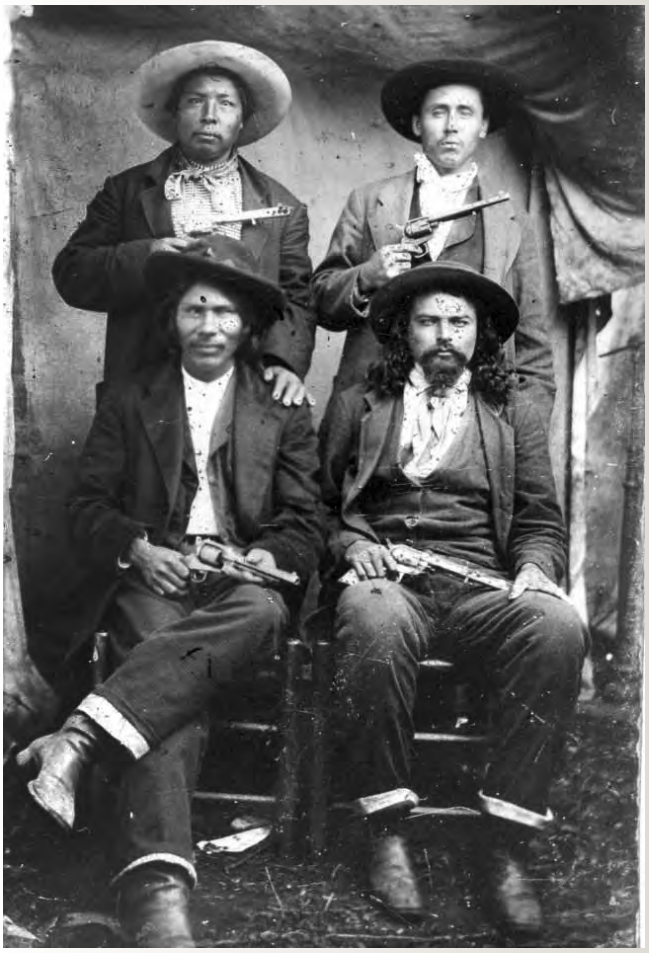
Brown didn't back down, and when the police officer arrived and realized she was an assistant district attorney, he refused to take Brown into custody. "If not for that [ADA] badge," Judge Brown observed, "I'm pretty sure I would have been arrested for Shopping While Brown." Brown later filed a civil rights lawsuit against the store, and said "I settled for peanuts, but it wasn't about money. I wanted to document what happened and establish the precedent for the next victim." Realizing that simply because of the color of her skin, she like others "can be arrested for merely being at the wrong place at the wrong time. That day, in that bookstore, I saw a tiny flash of what my dad faced every day growing up in the segregated South."

Knowing that her status as one of the few African American and Native American judges makes her a role model, Judge Brown advises young men and women of color to "Learn to become a leader. It's a learned skill, like anything else . . . great leadership takes great practice. Regardless of what you're meant to do," she says, "do that with excellence and make your tribe proud." And while she is cognizant of her responsibilities as a role model, Judge Ada Brown remains humble. "I'm not a trailblazer but a lucky beneficiary of all the amazing women who came before me," she insists. "I stand on the shoulders of those women, and I benefit from the barriers they broke. Now it's up to me to do the absolute best job I can do so young people of all colors and backgrounds can see clearly that they can do this, too."

THE CHOCTAW LIGHTHORSEMEN

As Judge Brown noted, the administration of justice runs in her family, traced all the way back to her great-grandfather's brother, a member of the Choctaw Lighthorsemen. But who were these mounted enforcers of the law?

In the beginning of the 19th century, the federal government began to formalize efforts to permit Native American tribes to police their borders. This was especially true among tribes in the Southeast, which began to create law enforcement units known as the "lighthorse regulars," or "lighthorse guards." During the 19th century, the lighthorse guards exercised their authority over not just tribal citizens but also over non-Indian citizens, whether for the purpose of investigating crimes or removing them from Indian country. The activities of the lighthorse guards were known to federal officials who not only often requested their help but also funded their efforts.[1]



Four members of the Choctaw Lighthorsemen, c. 1928. Seated, left to right: Ellis Austin and Stanley Benton. Standing on the left is Peter Conser.

The Choctaw Nation established its Lighthorsemen in 1824, prior to the forced removal to the Indian Territory in what is now Oklahoma.[2] While their Cherokee counterparts were primarily concerned with horse theft, the Choctaw's main priorities included combating the continued illegal importation and sale of liquor into their territory. The Choctaw Lighthorsemen were authorized to confiscate and sell the property of any person who brought liquor into the Nation and did not pay the assessed fine and could search the dwelling or bags of any suspicious person for liquor; this included non-Indians. Another top priority for the Choctaw were the numbers of non-Indians squatting on their lands. Federal authorities recognized this problem, and in the 1820 Treaty of Doak's Stand promised the Choctaw that the United States would provide

[1] *See, e.g.*, William G. McLoughlin, Cherokee Renascence in the New Republic 45 (1986); Bob Blackburn, *From Blood Revenge to the Lighthorsemen: Evolution of Law Enforcement Institution Among the Five Civilized Tribes to 1861*, 8:1 Am Indian L. Rev. 49–63 (1980).

[2] Devon A. Mihesuah, Choctaw Crime and Punishment, 1884–1907, 24–25 (2009).

Lighthorsemen. (OU Western History Collections)

funding for the Lighthorsemen to "maintain good order and compel bad men to remove from the nation who are not authorized to live in it by a regular permit."[3]

Choctaw Lighthorsemen were selected on the basis of their respect and involvement in their community. After the forced removal of the Choctaw Nation to Indian Territory, the number of Lighthorsemen was established as eighteen—six elected for each of the three districts. During the Civil War, with the problem of renegades and deserters fleeing to Indian Territory, the Lighthorsemen functioned as a kind of home guard for the community. They were known for traveling light, riding sturdy Choctaw ponies that were well-suited to crossing rough terrain, and carrying traditional Native American weapons in addition to firearms. At first, a distinctive red ribbon attached to their hats signified their status as Lighthorsemen, but later they wore badges similar to those of U.S. Marshals. Since U.S. Marshals were the only law enforcement agents permitted onto Choctaw land to pursue outlaws after the Treaty of 1866, it was fairly common for the Choctaw Lighthorsemen to work closely with U.S. Marshals in the apprehension of non-Indian fugitives.[4]

---

[3] United States–Choctaw Treaty, Art. 13, Oct. 18, 1820, 7 Stat. 210.

[4] "Issuba Vmbinili Tvshka: Choctaw Lighthorsemen," in *Iti Fabussa* (monthly column in the Choctaw Nation newspaper), Oct. 2016; https://www.choctawnation.com/sites/default/files/import/Iti_Fab%CF%85ssa_Issuba_Vmbinili_Tvshka-_Choctaw_Lighthorsemen.pdf.

Return to Journal Index

The Forgotten Federal Courts of Indian Country

By Hon. John G. Browning

The evolving relationship between the United States and sovereign Native American nations bore witness to the creation of a number of specialized Indian courts within the federal court system. Some were created for very narrow purposes and limited duration, and consequently no longer exist. Others have persisted to the current day and are courts that are both federal and tribal in nature—functioning as a unique hybrid, distinct from any other federal court in the country. This article offers a brief glimpse of these forgotten courts.

THE CHOCTAW AND CHICKASAW CITIZENSHIP COURT (1902–1904)

Beginning with the Dawes Act of 1887 (and subsequent legislation creating a "Commission to the Five Civilized Tribes"), Congress passed laws designed to allocate land among members of the Cherokee, Chickasaw, Creek, Choctaw, and Seminole tribes in Indian Territory (present day Oklahoma). Because of the value of land allotments (particularly after valuable mineral rights, like oil, were discovered), there was the potential for individuals falsely claiming Native American citizenship. After several individuals who'd been rejected were successful in appealing the citizenship determination to the United States Court for the Indian Territory, the Choctaw and Chickasaw nations cried foul. In response, Congress enacted legislation on July 1, 1901, creating a new court, the Choctaw and Chickasaw Citizenship Court. This statute gave this new court appellate jurisdiction over the U.S. Court for the Indian Territory for purposes of the disputed citizenship determinations. The court had a Chief Judge and two associate judges, each of whom were appointed by the President of the United States. But its existence came with an expiration date: December 31, 1903 (later extended to December 31, 1904). After reaching a final judgement in its only case (a test case that applied to all the contested citizenship decisions) on January 15, 1903, the court was done. It had no further power to act, and so it is unique in federal court history: a court created to decide a single case, and which was in operation for less than seven months.

U.S. COURT FOR THE INDIAN TERRITORY (1889–1907)

This court was created in 1889 to preside over Indian Territory (mostly what is now Oklahoma, although a portion of Oklahoma was included as a division of the Eastern District of Texas). The court could not hear cases "between persons of Indian blood only"; instead, it heard civil and non-capital criminal matters in which at least one party was a citizen of the United States. The court originally had one judge appointed by the President of the United States. In 1895, it was expanded to three judges, and the area of its jurisdiction was divided into three districts. When Oklahoma attained statehood in 1907, the courts were abolished.

THE COURT OF INDIAN OFFENSES

The original Court of Indian Offenses was created in 1886 in Indian Territory. It was originally designed as a court to hear cases from the Kiowa, Comanche, and Apache reservations; indeed, several prominent tribal leaders such as Quanah Parker served as judges. It predated by decades the Oklahoma state courts that came along after statehood, but after statehood, the Court fell into disuse. Following a series of federal court decisions holding that tribal nations still had tribal and judicial sovereignty over tribal lands in Indian Country, Courts of Indian Offenses authorized under the Code of Federal Regulation (hence being referred to as "CFR Courts") were re-established in the 1970s. With this re-affirmation of tribal sovereignty, and the fact that few tribes had operating judicial systems in place in the 1970s, these CFR Courts became more necessary than ever. One of these, the Court of Indian Offenses for the Anadarko Area Tribes (now the Southern Plains Region Tribes), encompasses part of Texas. These CFR Courts functioned as a tribe's judicial system until such time as that tribe established its own tribal court. The CFR Court is a trial court, with a single magistrate hearing a variety of civil matters (including divorce, custody, and tort cases) as well as misdemeanors and some felony cases.

As tribal justice systems were gradually re-established, the need for CFR Courts diminished. Today, there are more than 500 Native American tribes, and between 250 and 300 tribal trial courts (as well as 150 tribal appellate courts). Only nineteen Native American tribes use CFR Courts, and that number is likely to continue to diminish over time.

Operating as a branch of the Department of the Interior's Court of Indian Offenses, and because trial court's appeals must go somewhere, is the Court of Indian Appeals. This quasi-federal appellate court handles tribal appellate matters for multiple tribal nations. Judges on the Court of Indian Appeals are officially called "appellate magistrates," and they serve on a part-time basis for four-year terms, subject to re-appointment. Matters are usually heard before three-judge panels.[1]

---

[1] Chief Judge Gregory D. Smith & Bailee L. Plemmons, "The Court of Indian Appeals: America's Forgotten Federal Appellate Court," 44 *American Indian Law Review* 211 (2020).

Return to Journal Index

History of the Native American Law Section of the State Bar of Texas

On January 21, 1994, the Board of Directors of the State Bar of Texas approved the creation of the American Indian Law Section, now known as the Native American Law Section of the State Bar of Texas.

Recognizing that there existed a gap between major Indian law issues, like the Indian Child Welfare Act, and educational resources for lawyers, founder Tricia Tingle gathered a group of Native American lawyers and began the "Texas Indian Bar Association." Those that joined the Texas Indian Bar Association became the core group of individuals whose vision and hard work ultimately resulted in the fifty signatures needed to become an official section of the State Bar (originally the "American Indian Law Section"). Needless to say, the creation of the section was driven by the collective effort of a handful of individuals who were passionate about designing an organization that could serve the dual purpose of a community for Native legal practitioners and an educational arm for the rest of the state.

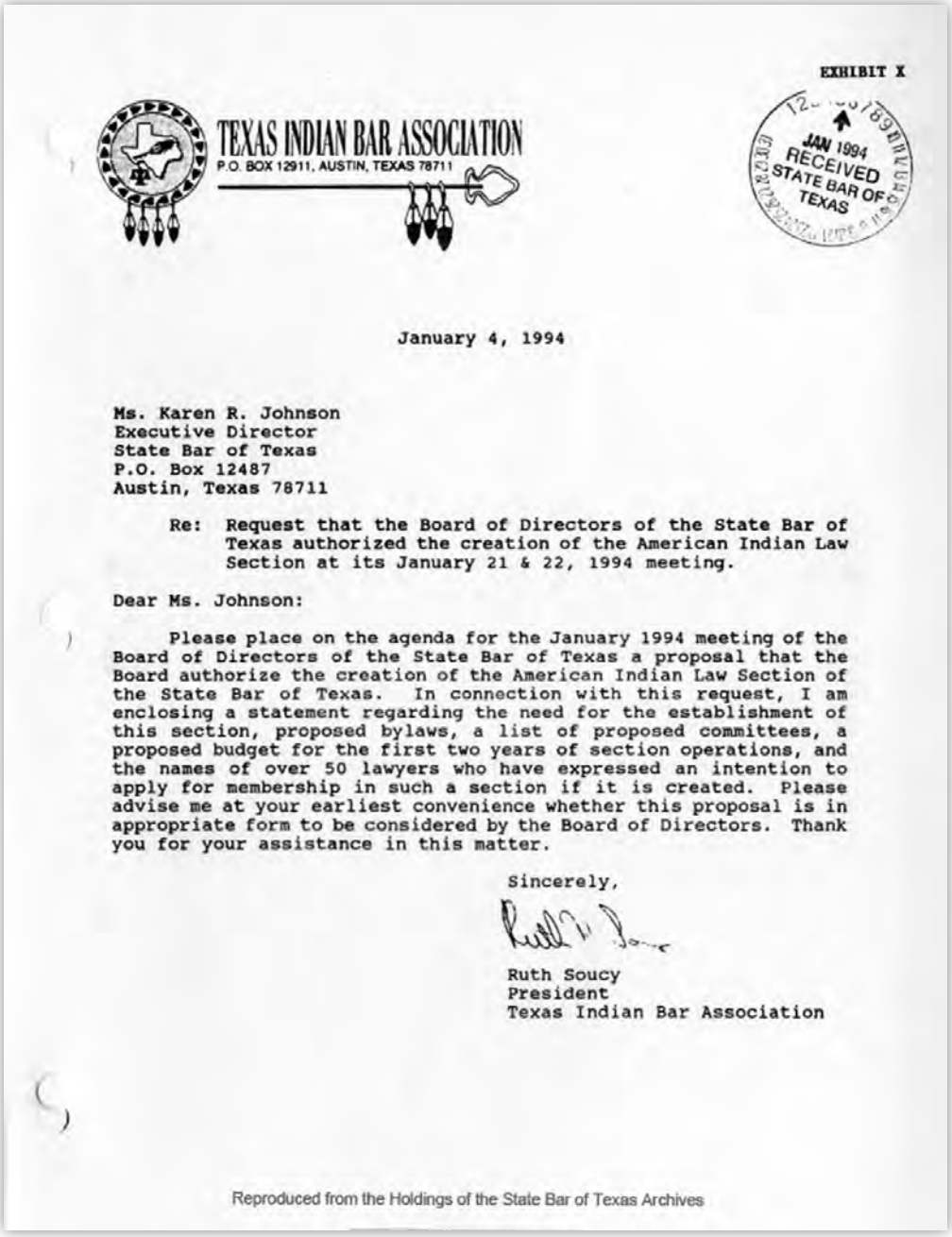


EXHIBIT X

TEXAS INDIAN BAR ASSOCIATION
P.O. BOX 12911, AUSTIN, TEXAS 78711

JAN 1994 RECEIVED STATE BAR OF TEXAS

January 4, 1994

Ms. Karen R. Johnson
Executive Director
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711

Re: Request that the Board of Directors of the State Bar of Texas authorized the creation of the American Indian Law Section at its January 21 & 22, 1994 meeting.

Dear Ms. Johnson:

Please place on the agenda for the January 1994 meeting of the Board of Directors of the State Bar of Texas a proposal that the Board authorize the creation of the American Indian Law Section of the State Bar of Texas. In connection with this request, I am enclosing a statement regarding the need for the establishment of this section, proposed bylaws, a list of proposed committees, a proposed budget for the first two years of section operations, and the names of over 50 lawyers who have expressed an intention to apply for membership in such a section if it is created. Please advise me at your earliest convenience whether this proposal is in appropriate form to be considered by the Board of Directors. Thank you for your assistance in this matter.

Sincerely,

Ruth Soucy
President
Texas Indian Bar Association

Reproduced from the Holdings of the State Bar of Texas Archives

The Early Years

Ruth H. Soucy, current Secretary of the Section, retold the story of the early meetings of this organization that eventually became Native American Law Section ("NALS"), "I was recruited into the association by Tricia in 1992. I met Paul Shunatona and John King over pizza at one of the meetings. Tricia never really said how many members we had, since not everyone could pay dues, but my understanding is that we had at least ten the first year." Although the group was few in number, they worked together to help draft legislation, organize meetings, and assist in educational programs. Ms. Soucy spoke of Ms. Tingle's uncanny ability to move people to action. "It was hard to turn Tricia down, which I knew from getting my own set of unexpected assignments," Ms. Soucy recounted. Other members in the early 1990s included Clark Chamberlain, Professor Roy Mersky, Larry Kurth, Mike Gentry, Michael VanderBurg, Gaines West, Michael Boling, Jonathan Vickery, Alan Hart, Wade Wilson, Judges Steve Russell, David Phillips, Angelita Mendoza-Waterhouse, and Jay Hurst. Many of these individuals have remained involved in NALS throughout the course of their careers (and for some—long after retirement).

American Indian Law Section Leaders (left to right):
Ray Torgerson, Gaines West, Ruth Soucy, Jay Hurst, Arnold Battise, Ron Jackson

Jay W. Hurst, pictured below with Governor Greg Abbott, added that NALS remains the one visible, discoverable, reachable, statewide organization in Texas for education, outreach, community service, and legislation on Indian law. NALS honored Mr. Hurst in 2013 with the Lifetime Achievement Award for his work and dedication to the section and issues facing Indian Country. Other past recipients of this honor include Arnold Battise, former federal administrative law judge and dedicated member of NALS.

FROM THE DESK OF GREG ABBOTT

Our history and our heritage inform who we are. That is true for us as a nation and as a state, and it is also true for us as a people and for our individual families. Jay Hurst lives by this principle. An AAG in our Bankruptcy and Collections Division, Jay is also a member of the Chickasaw Nation of Oklahoma. He traces his family history to 1780, when the tribe was settled in Mississippi. His family walked the Trail of Tears from Mississippi to Indian Territory during the removal years of 1830-1850.

About 20 years ago, Jay's pride in his heritage led him to help found the American Indian Law Section of the State Bar of Texas.

He also created the first Texas American Indian Law Conference, and has continued to be active in the conference since that time.

Jay's work has made a big impact, and recently the American Indian Law Section recognized him for it. The section gave Jay its Lifetime Achievement Award for his dedication to promoting Native American culture, history, and legal issues, and for his work assisting Native students educationally and personally.

Jay has helped countless others understand not only his heritage, but our common heritage. Congratulations to Jay, and thanks to him for enriching us all.

Sincerely,

Greg Abbott

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

Community Service & Outreach

True to its roots, NALS strives to be an accessible resource whose members can help answer questions about Indian law and provide referrals when necessary. Prior to its abolishment on September 1, 1989, the Texas Indian Commission acted as a liaison between the state of Texas and the three recognized tribes in the state. After the state disbanded the commission, the Texas Indian Bar Association, and later, NALS, began serving as the unofficial liaison by helping connect tribes to various government personnel and vice versa.

In 1997, NALS commissioned a study, "The Texas Indian Legal Needs Assessment," in an effort to identify the pressing legal needs of the three federally recognized tribal nations in Texas. In 2002, the Texas Senate Sub-Committee on Native American Affairs quoted NALS's assessment in its legislative report:

> In order to grasp the diverse Indian culture in the State, one must first have a brief history of all the tribes that have, at one time or another, inhabited parts of Texas. [The Texas Indian Legal Needs Assessment] gives a brief history of Indian culture that has had a presence in Texas from the arrival of the Europeans to the present

Education

The Section also serves as an educational resource in Texas for Indian law and issues facing Native American communities. To receive approval to become a section, the group was first required to demonstrate a need for the section and how that need related to a substantive area of the law; the group stated in its application:

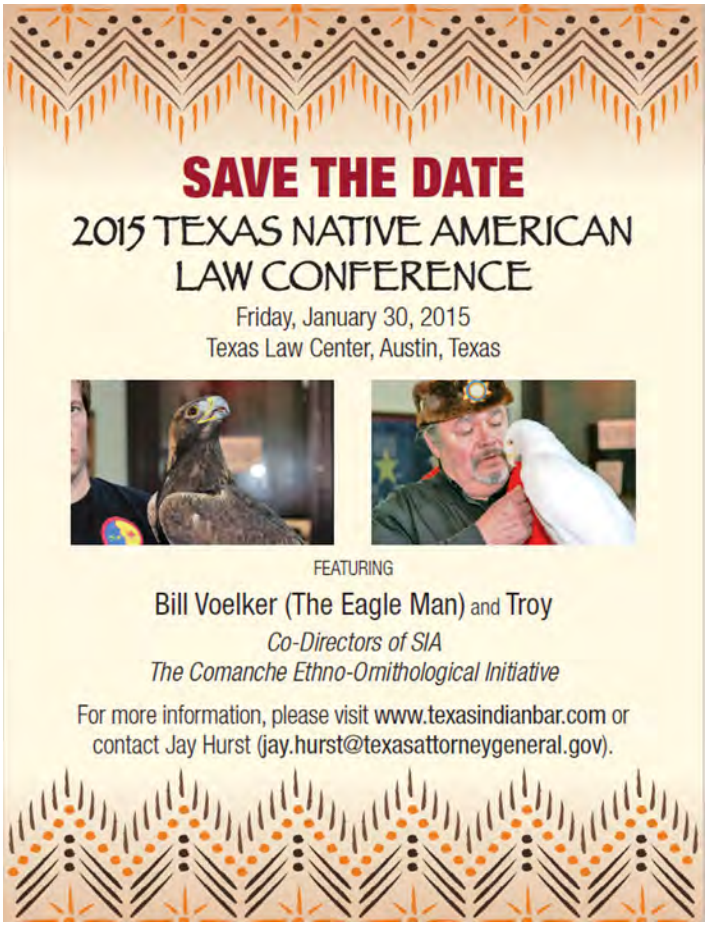
> Indian law is a well-established area of law to which many lawyers devote their entire careers and to which many law schools devote significant research, library, and teaching resources. Indian law is composed of the numerous treaties between the United States of America and the various Indian Nations recognized by the United State, extensive case law, federal statutory codified law, and the tribal laws established by the Indian Nations to govern the actions of their citizens.

The Honorable Stephen J. Moss, long-time member and current Vice Chair of NALS, appearing as a guest in the Powell Law Group, LLP Podcast, "The School Zone," to discuss ICWA in 2018.

NALS has continued to educate the Texas legal community about this substantive area of the law. Since its conception, NALS has held annual CLE conferences at the Texas Law Center in Austin. The topics vary from year to year, but typically include a session entitled "Federal Case Law Update" and presentations by various practitioners on timely Indian law topics. Through the years, some of these topics have included gaming, the Indian Child Welfare Act, reburial and repatriation, eagle and migratory bird laws, tribal sovereignty, ethical and tribal justice, and tribal finance and economic development. NALS strives to educate attendees on these topics and provide a forum for discussion around relevant legal issues.

Employees of the State Bar of Texas, including Tracy Nuckols, Sandra Carlson, Donna Rene Johnston, Kathy Casarez, Karen Johnson, and many others have contributed their time and energy to making these conferences—and the existence of the Section—possible.

The 2015 Conference was designated a special "Homecoming Conference" and was one of the Section's most attended conferences to date. All fifty of the original signatories were in attendance, along with several former council members and officers of the Section. Topics that year included "Eagles, Feathers and Spiritual Birds: Native American Spirituality and the Law," co-presented by Mr. Hurst and William Voelker, co-director of SIA the Comanche Nation Ethno-Ornithological Initiative, remarks by former State Bar of Texas President Lisa Tatum, and featured special presentations by the Chickasaw Nation Stomp Dance Troupe, Chickasaw flutist Jesse Lindsey, and the Eagle Point Singers.



The leadership in 2015 worked very hard on the 2015 Conference and it paid off—literally. Following the 2015 Conference, membership rose, and the Section's budget benefited from the increased dues revenue. Indeed, 2015 was the largest one-year budget in the Section's history and marked the Section's turn from near-bankruptcy to self-sufficiency. Income created by dues has remained stable since 2015, providing economic stability for the Section. Section leaders attribute the increased membership and financial stability to the CLE conferences which continue to increase awareness and membership year after year.

The conferences not only serve as an educational opportunity for lawyers in Texas and an opportunity for financial stability for the section, but importantly, the conference also serves as a meeting space for leaders of the three recognized tribes in Texas to get together, providing an opportunity for tribes, stakeholders, state government officials, and Indian and non-Indian lawyers to have roundtable discussions about issues facing Indian Country.

Today & Tomorrow

Despite the pandemic, NALS has remained connected, holding its new board elections virtually in 2020,[1] and electing current Chair of the Section, Lisa Tatum, to serve as the NALS representative on the Diversity Equity and Inclusion Task Force. NALS also celebrated the life of one of its founding members, Mr. Paul Shunatona, who passed away September 6, 2020. NALS has also continued to serve as a resource during these unprecedented times. For example, Ray Torgerson, former Chair of the Section, worked with the State Bar of Texas to present an online CLE program on the Indian Child Welfare Act following activity in the case *Brackeen v. Haaland* (formerly *Brackeen v. Bernhardt*).

The Section's current goal is to continue to increase membership and recruit the next generation of leaders so that it can continue its important work. Passing down the history and the institutional knowledge of the Section will be a crucial part of ensuring the Section honors the work of past leaders, members, and volunteers.

---

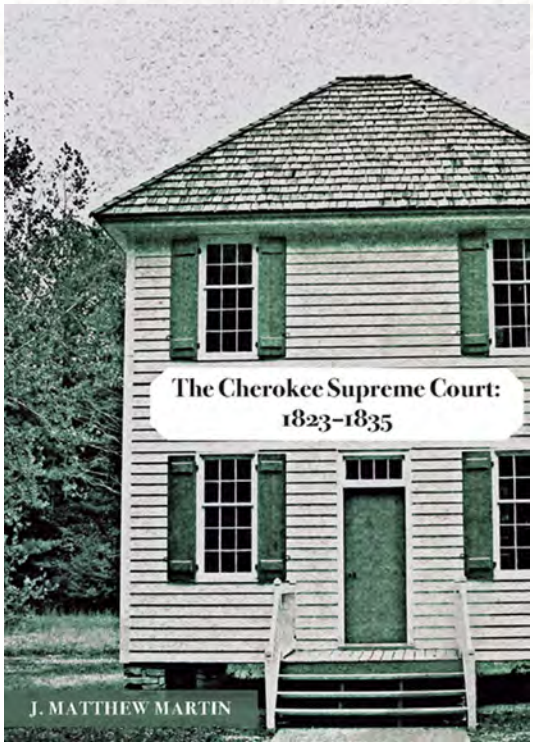
[1] The 2020-2021 elected officers are Lisa Tatum, Chair; Stephen Jon Moss, Vice Chair; Ruth H. Soucy, Secretary; and Sandy McCorquodale, Treasurer.

Return to Journal Index

Book Review—*The Cherokee Supreme Court: 1823-1835* by J. Matthew Martin

Review by Hon. John G. Browning

Earlier this year, Americans unfamiliar with the important role played by tribal courts were probably surprised to see the Cherokee Nation Supreme Court make national headlines. In February 2021, at the height of national discussion about racial justice and equity, the court issued a decision striking the language "by blood" from the Cherokee Nation's Constitution and tribal laws. As a result, the descendants of Cherokee Freedmen—people of mixed African American and Native American ancestry, many of whom accompanied the Cherokee on the Trail of Tears—now have full rights as Cherokee citizens. The decision, which impacts at least 8,500 Cherokee Nation members of Freedmen descent, ended decades of controversy and a battle that had spread to federal court. The spotlight on the Cherokee Supreme Court also reminded Americans of the long and important history of the tribal court system, and particularly this court.



The Cherokee Supreme Court: 1823–1835 by J. Matthew Martin (Carolina Academic Press, 2021), 228 pages

In this book, Judge J. Matthew Martin (a retired judge of the Cherokee Court) provides a fascinating legal history of the first tribal court while shattering long-held misconceptions about the origins of Westernized tribal jurisprudence. As Martin points out, before the early 1800s, the Cherokee had a legal system in which clans adjudicated disputes—deciding on causation, dispensing compensation, etc. But faced with the challenge of the young United States government and its policies, the Cherokee adopted a formal court system modelled on the American framework, as well as a constitution in 1827. This was done in an effort to avoid the loss of their ancestral lands and forced removal by reassuring Americans of the Cherokee's degree of assimilation.

The first Cherokee tribal court was established on October 20, 1820, to convene "councils to administer justice in all causes and complaints that may be brought forward for trial." According to Martin, the Cherokee Supreme Court heard 237 cases from 1823 to 1835 (213 civil cases and 24 criminal matters). During this time, the court was "a symbol of idealism, relevance, and defiance." While certain states took a hostile view of the Cherokee court system, many white citizens and even U.S. government agents accepted it. In 1829, the United States even appeared before the

tribal courts, accepting the Cherokee Nation's jurisdiction. As one scholar, John Phillip Reid, has observed, the Cherokee legal system was a remarkable success.

> [T]he Cherokee seem to have possessed to a larger degree than any other important Indian nation—an ability to accept new law and forget old ways. During the early decades of the nineteenth century, they would discard all their primitive customs, turn their back on their legal past, create a new judicial system borrowed almost entirely from their American neighbors, and to do so with a success that would make them both the leaders and the envy of their fellow Indians.[1]

Martin's work—the first legal history of the first tribal court—is painstakingly researched, using actual cases to demonstrate that even as it operated as a modern court with complete jurisdiction, the Cherokee Supreme Court nevertheless operated in such a way as to preserve certain tribal traditions, including the existence of the clan structure, the role of women, and the nature of property (which included slavery). As Martin's narrative shows, the Cherokee Supreme Court was "far more than a footnote," but in fact "a storehouse of written law, both legislative and judge-made, and also of valuable components of tribal custom and tradition. With all that was lost in the genocide, doubtless far more would have disappeared but for that repository and norms."

Sadly, embracing "civilized" legal values did not prevent or even slow down the existential crisis for the Cherokee. The political realities and white settlers' insatiable lust for land led to the Treaty of New Echota and the forced removal of the Cherokee on the Trail of Tears to what is now Oklahoma. Despite being highly regarded as honorable and trustworthy, the Cherokee tribal court system would lie dormant for the next 165 years. But thanks to the important work of Judge Martin, the story of the Cherokee Supreme Court, and its importance as a court that guarded Indigenous traditions and sovereignty while exercising criminal jurisdiction over white Americans, is not lost.

---

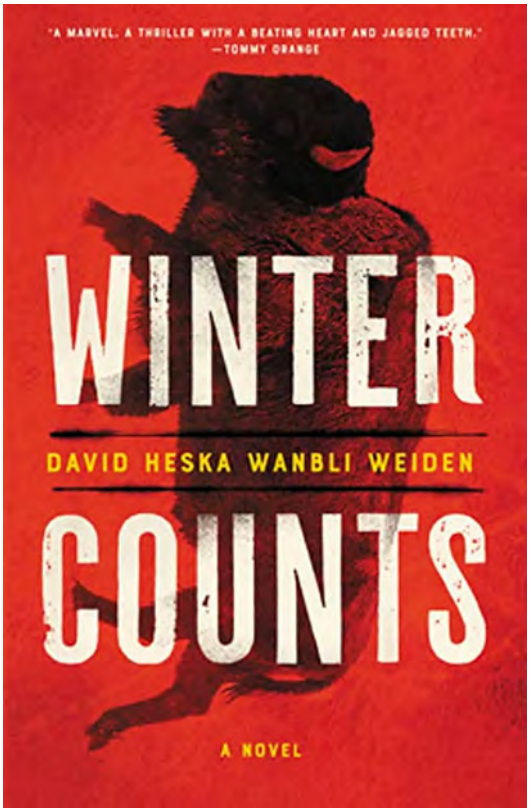
[1] John Phillip Reid, *A Law of Blood: The Primitive Law of the Cherokee Nation* (New York: New York University Press, 2006), 272.

Return to Journal Index

Book Review—*Winter Counts* by David Heska Wanbli Weiden

Review by Hon. John G. Browning

It's an exception to the rule for us to review a work of fiction like *Winter Counts*, rather than a nonfiction book about history, in this Journal. But in many ways, *Winter Counts*, written by Native American lawyer, novelist, and Metropolitan State University of Denver Native American Studies professor David Heska Wanbli Weiden, is infused with history. Even its title is derived from the term for pictorial calendars or histories, usually inscribed on buffalo hides, in which Plains tribes like the Lakota, Kiowa, and Blackfeet would record memorable events over a period of many years. Usually maintained by a single elder entrusted with the task, the winter count's pictographs served as a written history used to supplement and provide guideposts for more detailed oral histories that were also passed down.



Winter Counts by David Heska Wanbli Weiden (Ecco Publishing, 2020), 336 pages

The narrator and protagonist of *Winter Counts* is Virgil Wounded Horse, a private enforcer/vigilante for hire on the Lakota Rosebud reservation in South Dakota. Such a job wouldn't exist, the novel makes clear, if not for the ineffectual tribal court system and the indifference of its federal counterpart. Native American victims and their families turn to Virgil for some measure of justice when felony criminal cases "on the rez" are ignored or declined by federal authorities. It's a violent job, but one which suits the troubled Virgil well as he serves as sole guardian of his orphaned teenage nephew Nathan. But when Nathan is framed for drug dealing after pills are planted in his school locker, and later manipulated by narcotics agents into wearing a wire and making drug buys, Virgil's work becomes personal. He soon finds himself on a one-man mission to save Nathan and help combat the Mexican cartels, Denver street gangs, and a Native American drug dealer (with whom Virgil has history) behind the drug trade on the reservation.

Winter Counts is part crime thriller, part social commentary, and imbued throughout with history. Observing white tourists in the Black Hills, Virgil muses:

> few of these people know they were traveling on sacred ground, lands that had been promised by treaty to the Lakota people forever but were stolen after gold was discovered in the 1860s. Adding insult to injury, Mount Rushmore had been carved

out of the holy mountain previously known as Six Grandfathers as a giant screw-you to the Lakotas.

The betrayal of Native Americans is a recurring theme. Serving as the backdrop of the novel is the Major Crimes Act,[1] a law passed in 1885 that takes away tribal jurisdiction for 15 major felonies and places them under federal authority—as long as they are committed by Native American offenders against Native American victims on tribal land.

The Act, which diminished Native American sovereignty by taking away tribal ability to try and convict serious offenders, was passed in response to an 1883 U.S. Supreme Court decision, *Ex parte Crow Dog*.[2] In that case, the Court overturned the federal court conviction of Lakota chief Crow Dog for the murder of rival tribal leader Spotted Tail on the Rosebud reservation. The Court reasoned that tribal sovereignty gave Native Americans the ability to deal with such crimes on their own land; Congress acted to abrogate such authority.

As Weiden reminds us, the Major Crimes Act and its effects remain controversial. For example, sexual assaults of Native American women have long been under prosecuted, yet last year, federal authorities executed Navajo citizen Lezmond Mitchell after he was convicted of murder over the objections of the Navajo Nation, which opposes the death penalty. And Weiden is uniquely well-qualified to address these issues. In addition to being an enrolled member of the Sicanju Lakota Nation, Weiden has a Ph.D. from the University of Texas at Austin, a J.D. from the University of Denver Sturm College of Law and is admitted to practice in Colorado.

In short, *Winter Counts* works not only as a crime thriller but also as a meditation on an embattled criminal justice system and Native identity.

---

1 18 U.S.C. § 1153.

2 109 U.S. 556 (1883).

Return to Journal Index

Society Trustee Appointed to Supreme Court

Texas Supreme Court Historical Society Trustee and Baker Botts partner Evan Young of Austin has been appointed by Gov. Greg Abbott to replace Justice Eva Guzman on the Supreme Court of Texas. Young, a former clerk for the late U.S. Supreme Court Justice Antonin Scalia, chairs Baker Botts' Supreme Court and Constitutional Law Practice. He will serve the rest of Justice Guzman's term, which goes through the end of 2022 and will be on next year's ballot.

"Evan Young is a proven legal scholar and public servant, making him an ideal pick for the Supreme Court of Texas," Abbott said in a statement. "Evan's extensive background in private practice and public service will be a fantastic addition to the bench, and I am confident that he will faithfully defend the Constitution and uphold the rule of law for the people of Texas."

"Evan Young has already made outstanding contributions to the Texas justice system," Chief Justice Nathan L. Hecht added. "As a member of the Judicial Council, the judiciary's policy-making body, and the Supreme Court Rules Advisory Committee, which advises the Court on procedural and administrative matters for all Texas courts[...,Young] will continue to serve the people of Texas with distinction, and the Court is proud to have him join us."

Evan Young

Young earned his bachelor's degree in History from Duke University, graduating summa cum laude and as a Duke Memorial Scholar and a member of Phi Beta Kappa. Designated a British Marshall Scholar, he went on to earn a B.A. in Modern History from Oxford University. Young received his law degree from Yale Law School in 2004. After clerking for Justice Scalia, Young served in the U.S. Department of Justice as Counsel to the Attorney General, serving under Attorneys General Alberto R. Gonzales and Michael B. Mukasey. He later worked with the U.S. Embassy in Baghdad, serving as Deputy Rule of Law Coordinator and assisting the Iraqi government in strengthening its legal system.

Young has served as Chair of the State Bar of Texas Business Law Section, as a member of the Supreme Court Advisory Committee, and as an adjunct professor at the University of Texas School of Law. Prior to this appointment, he was appointed by Gov. Abbott to the Texas Judicial Council. Young is also an elected member of the American Law Institute.

Young's scholarly nature and love of history is evident in his role as a Trustee of the Society.

However, he also worked as a co-executive producer on the documentary “John Marshall: The Man Who Made the Supreme Court” (available to stream on Amazon Video). The Texas Supreme Court Historical Society congratulates Trustee Evan Young on his appointment to the Supreme Court of Texas.

Return to Journal Index

Journal Contributor Wins "Genius" Grant

When the John D. and Catherine T. MacArthur Foundation makes its annual announcement of the prestigious "genius" grants – a $625,000, no strings attached award for standout scholars – the world takes notice. One of this year's winners (and the only honoree from Texas) is of particular interest for Texas Supreme Court Historical Society members, however. Dr. Monica Muñoz Martinez, a history professor at the University of Texas at Austin, was honored for her groundbreaking work on the history of racial violence against Mexican Americans in Texas. Some of that work is reflected in her book, *"The Injustice Never Leaves You: Anti-Mexican Violence in Texas"* (2018) (reviewed in the Journal's Winter 2021 issue), and some is reflected in her article in the same issue. In both, Dr. Martinez delves deeply into several specific instances of extralegal killings committed in early twentieth century Texas. Martinez' writings demonstrate how official legal records and newspaper comments demonized ethnic Mexican victims as "bandits" while glorifying Texas Rangers as protectors of Anglo settlers. Her work also examines the aftermath of these tragedies and how descendants of the lynching victims are still pursuing the truth generations later.

Dr. Monica Muñoz Martinez

As Prof. Martinez puts it, "Historians have a responsibility to the profession to contribute new findings and advance knowledge. But historians also have a responsibility to society more broadly to make sure that people have access to that knowledge. People have a right to learn truthful accounts of history in schools, museums, the news, and popular culture, even when those histories are troubling." In addition to her book, her scholarly works in our Journal and others, Dr. Martinez cofounded the non-profit *Refusing to Forget*, and is working on a digital archive project, *Mapping Violence*, that will enable scholars and the general public to learn about the various forms of racial violence in Texas in the early 20th century.

The Texas Supreme Court Historical Society congratulates Dr. Monica Muñoz Martinez for being named a MacArthur "Genius" fellowship recipient, one of the richest prizes in academia. And like the Jon D. and Catherine T. MacArthur Foundation, we have a pretty keen eye for talent, too.

Return to Journal Index

A Phoenix Rises from the Ashes

By David A. Furlow

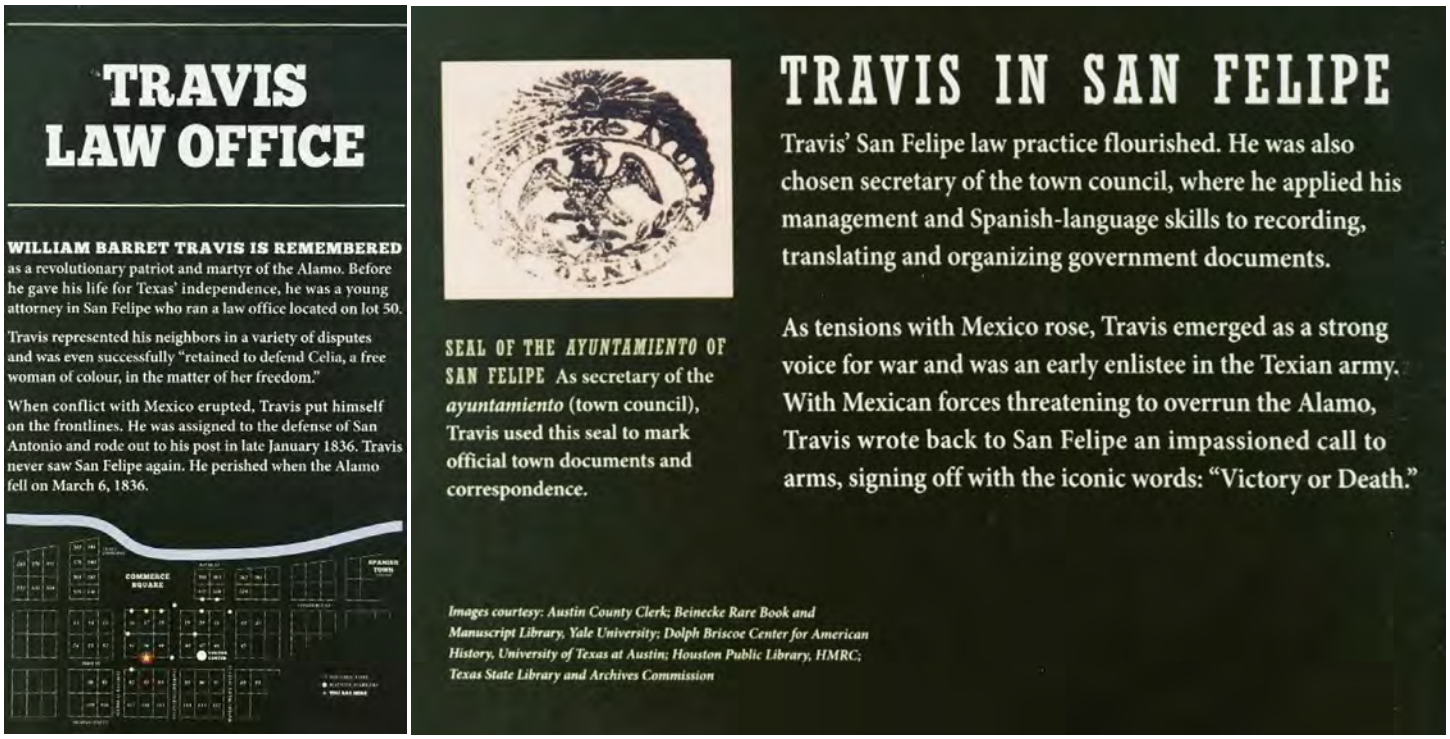
The myth of the phoenix that rises from the ashes of its own destruction resonates across time because fire makes steel stronger, purifies gold, and lays a foundation for rebuilding cities and settlements. The strongest and best things emerge from fire transformed. The same thing is true about the "Courthouse," an important new part of the Villa de Austin exhibition at the Texas Historical Commission's San Felipe de Austin Historic Site. The Commission built the Courthouse to show how justice was administered in San Felipe de Austin between the town's founding and its burning on March 30, 1836, during the Texas Revolution. But on the night of April 9, 2021, fire engulfed the recently reconstructed Courthouse, reducing it to blackened ashes.

Left: The Courthouse close to completion in December 2020.
Right: The Courthouse after the April 9. 2021 fire. Photos courtesy of the Texas Historical Commission.

The Texas Historical Commission, owner of the San Felipe de Austin Historic Site, planned for the Courthouse to play a central role in explaining the history of early Texas to visitors from throughout the world. The development of Anglo-Mexican alcalde law in Stephen F. Austin's Anglo-American colony occurred in San Felipe,[1] as the Hon. Jason Boatright, Justice of the Fifth Court of Appeals in Dallas and a Society trustee, explained in "Alcaldes and Advocates in Stephen F. Austin's Colony, 1822 through 1835," his panel presentation at the Texas State Historical Association's 2018 Annual Meeting in San Marcos.[2] The Conventions of 1832 and 1833, David G. Burnet's Primary Court of 1834, and the Consultation of 1835 all occurred in the original alcalde courthouse in

[1] *See, e.g.,* Jason Boatright, "Alcaldes in Austin's Colony, 1821-1835," *Journal of the Texas Supreme Court Historical Society*, vol. 7, no. 3 (Spring 2018): 26-50, https://www.texascourthistory.org/Content/Newsletters//TSCHS%20Journal%20Spring%202018.pdf; David A. Furlow, "Texas Law and Courts in the Victorian Age," *ibid*., 9-25 at 9-14.

[2] David A. Furlow, "Laying Down the Law at the 2018 TSHA Annual Meeting," *ibid*., 116-118.



Signboards on the grounds of the San Felipe de Austin site identify the places where the original courthouse's attorneys practiced law. Photos by David A. Furlow.

San Felipe.[3] Those representative gatherings marked the rise of a distinctive Texian identity in Stephen F. Austin's colony and contributed to the development of an independence-minded Tejano movement in San Antonio de Bexar; they also led directly to the Texas Revolution of 1835-36.

Because of the site's importance to the history of Texas courts, law, and justice, this Society conducted its Spring 2018 Board and Members Meeting at San Felipe. The Society works closely with the THC's representatives at the San Felipe de Austin site to research and present Texas legal history.[4]

The Society's Liaison to the Texas Supreme Court, Justice Paul W. Greene, and Society President Tom Leatherbury toured the San Felipe Museum during the Spring 2018 Board and Members Meeting. Photo by David A. Furlow.

The site's museum, just three years old, offers historians, attorneys, judges, teachers, and students an opportunity to view historic artifacts from some of the first law offices, businesses,

[3] Charles Christopher Jackson, "San Felipe de Austin, TX," *Handbook of Texas Online*, https://www.tshaonline.org/handbook/entries/san-felipe-de-austin-tx; David A. Furlow, "New England Roots Run Deep in Texas: A 400th Anniversary Salute, Part 2," vol. 9, no. 3 (Spring 2020): 27-57, https://www.texascourthistory.org/Content/Newsletters//TSCHS_Spring_2020.pdf.

[4] Ken Wise, "New San Felipe de Austin Museum is a State Treasure," *Journal of the Texas Supreme Court Historical Society*, vol. 7, no. 3 (Spring 2018): 119-23, https://www.texascourthistory.org/Content/Newsletters//TSCHS%20Journal%20Spring%202018.pdf.

and printing presses in Mexican Texas. Alamo defender William B. Travis practiced in a law office nearby and tried cases in the original courtroom, including the case of Cecelia, a wrongfully-enslaved African American woman Travis sought to free through judicial manumission.[5]

The Texas Historical Commission and a private, non-profit group, Friends of the Texas Historical Commission, are completing their construction of the Courthouse that burned twice—first in 1836, and then in its reconstructed form on April 9, 2021. Insurance proceeds are providing most of the funds needed to rebuild the wooden building's frame and planking, as supplemented by another $23,000 in voluntary contributions received by early October 2021.

Off-site construction of the post-fire reconstructed Courthouse began in June with trees being sawn for the hardwood frame, siding and flooring. In mid-September, the timber frame structure arrived, and on-site construction begun. Substantial completion of the building is scheduled to occur by early November.[6]

Assembling the reconstructed Courthouse's timber frame, September 2021.
Photo courtesy of the Texas Historical Commission.

[5] Michael Rugley Moore, "Celia's Manumission and the Alcalde Court of San Felipe de Austin," *Journal of the Texas Supreme Court Historical Society*, vol. 5, no. 1 (Fall 2015): 36-48, https://www.texascourthistory.org/Content/Newsletters//TSCHS%20Journal%20Fall%202015.pdf.

[6] Emails, Michael Rugley Moore to the author, August 18, 2021 and September 16, 2021.

The Commission has organized the creation of period-appropriate furnishings for the Courthouse based on archival and archeological research. THC Historian and Construction Manager Michael Rugley Moore and Bryan McAuley, THC Site Superintendent for the San Felipe de Austin and Fannin Battlefield State Historic Sites, conducted the research necessary to create exacting, new-made reproductions of original courthouse items in 2018. Those items are capable of being handled by visitors and sturdy enough to be used by re-enactors in demonstrations and programs. The Commission's Villa de Austin Capital Campaign has funded the crafting of some items, but other important aspects of alcalde courthouse operations remain in need of sponsorship in the amount of some $10,000. Among the furnishings items to be reproduced for the Courthouse are items such as those below:

Sam Houston's cedar desk box. Original from Sam Houston Museum (left) and reproduction made by Larry Johnson for the Villa de Austin Courthouse (right).

Document chest of Sheriff Thomas Barnett to be reproduced from the collection of the Fort Bend History Association (left) and an 1821 Ohio Ballot Box of the kind used to count votes in San Felipe de Austin (right).

THE TEXAS GAZETTE.

Administrator's Sale.

WILL be sold at pubic sale, on MONDAY the 6th September next,

A LAW LIBRARY,

Consisting of the following

BOOKS,

Belonging to the estate of A. B. CLARK, deceased, subject to a lien of $120, in favor of R. M. Williamson, Esq.

Vesey's Chancery Reports,	22	Volumes.
Jacob & Walker's Do.	1	Do.
Morgan's Essays,	3	Do.
Robertson, Fraudulent Conveyance,	1	Do.
Digest of Chancery Reports,	1	Do.
Kyd on Awards,	1	Do.
Bayard's Evidence,	1	Do.
Bagley on Bills,	1	Do.
Buller's Nisi Prius,	1	Do.
Coke's Reports,	1	Do.
Cooper's Pleading,	1	Do.
Highmon on Lunacy,	1	Do.
Montagu's Law of Lien,	1	Do.
Wyche's Practice,	1	Do.
Starkie's Criminal Pleading,	1	Do.
Starkie on Slander,	1	Do.
Beme's Ne Exeat,	1	Do.
Ballantine Treatise,	1	Do.
Law of Security,	1	Do.
Martin on Execution,	1	Do.
Saunders' Reports,	3	Do.
Cowper's Reports,	2	Do.
Tidds' Practice,	2	Do.
New-York Cases in Error,	2 vols. in 1	Do.
Hardress' Reports,	1	Do.
Gilbert's Evidence,	1	Do.
Sergeant on Attachments,	1	Do.
Midford's Pleadings,	1	Do.
Commercial Digest,	1	Do.
Law Selections,	2	Do.
Perkins on Conveyancing	1	Do.
Hammond's Nisi Prius,	1	Do.
Wharton's Digest,	1	Do.
Adams on Ejectment,	1	Do.
Caines Practice,	1	Do.
Durnford's Reports, (broken)	7	Do.
Ridgeways Reports,	3	Do.
Kyrby's Reports,	1	Do.
Baron and Feme,	1	Do.
Conductor Generalis,	1	Do.
Spirit of Laws,	2	Do.
Caines Reports,	3	Do.
Chitty on Bills	1	Do.
Chitty's Pleading, (broken)	2	Do.
Termain's Crown Law,	2	Do.
Laws on Pleading,	1	Do.
Comyn's Reports,	1	Do.
Comyn on Contracts,	2	Do.
Washington's Reports,	2	Do.
Cranches Reports,	6	Do.
Swift's Evidence,	1	Do.
Espinasse on Evidence,	1	Do.
Park on Insurances,	1	Do.
Modern Conveyancer,	3	Do.
Chitty's Criminal Law,	4	Do.
Espinasse, Nisi Prius,	2	Do.
Bigelow's Digest,	1	Do.
Toller on Executions,	1	Do.
Graydon's Justice,	1	Do.
Stubb's Crown Circuit,	1	Do.
Read's Declaration,	1	Do.
Instructor Clericales,	6	Do.
Graydon's Abridgement,	2	Do.
Precedents in Clerkship,	1	Do.
East's Crown Law,	4	Do.
Jones on Bailment,	1	Do.

Sale to take place in the town of Austin at the office of said R. M. Williamson. Terms—CASH

EDWARD ROBERTSON,

Aug. 21, 1830. Administrator

A bookcase filled with reprints of law books used in San Felipe de Austin.

Once the Courtroom is completed, equipped, and furnished, it can serve as a setting for re-enactments of alcalde trials in Austin's Colony, the filming of documentaries, and conference presentations. The Friends of the Texas Historical Commission are now raising funds through tax-deductible donations to fill the Courthouse with era-appropriate reproduction furnishings and special features. The Commission is dedicating one hundred percent of all donations for the sole purpose of rebuilding and refurnishing the Courthouse building. Online donations can be made to Friends of the Texas Historical Commission through the Friends' online link: https://www.thcfriends.org/villa-de-austin-fire-recovery-campaign. Donors can also make dedicated gifts by writing checks payable to the Friends of the Texas Historical Commission by attaching a memo or Post-It pad reading "Villa de Austin." The mailing address is: Friends of the Texas Historical Commission P.O. Box 13497 Austin, Texas 78711-3497. Commission employees are available to answer questions, including Anjali Kaul Zutshi, Executive Director, Friends of the Texas Historical Commission at (512) 936-2241 or at Anjali.Zutshi@thc.texas.gov. A specific request to the Texas Supreme Court Historical Society and its members is to sponsor the reproduction furnishings to outfit the Courthouse and interpret its functions as a convention hall and alcalde courtroom.

The Commission's reconstruction of the Courthouse at San Felipe can play an important role in bringing the judicial and legal history of Coahuila y Tejas, the Lone Star Republic, and the Lone Star State to life. Re-enactors frequently volunteer to participate in events at San Felipe. One

Historical re-enactors stand ready to portray parties seeking justice in San Felipe de Austin's reconstructed Courthouse. Photo by David A. Furlow.

can easily imagine Society members presenting research there or re-enacting important trials. When Michael Rugley Moore sent me an email that revealed what even modest donations could fund, I wrote a check to help the Friends purchase era-appropriate law books for the Courtroom. It was a modest but effective way of helping the history of Texas law, courts, and justice arise phoenix-like from the ashes of an April 9, 2021 fire.

The work of rebuilding is close to complete. The Texas Historical Commission and the Friends of the Texas Historical Commission are hosting a much-anticipated Grand Opening of the Villa de Austin Townsite Exhibit at 1:00 p.m. on Friday, November 12, 2021 in San Felipe.

Return to Journal Index

Osler McCarthy's Legacy Endures

By David A. Furlow

"There is no jewel in the world comparable to learning; no learning so excellent both for prince and subject as knowledge of laws; as knowledge of laws..."

— Sir Edward Coke, *Les Reports de Sir Edward Coke* (London: In folio [A. Islip], ed., T. Wight, 1602), vi.

Long before he retired on August 31, 2021, William Osler McCarthy exemplified the best in public service. Mr. McCarthy—the Texas Supreme Court's first and only Staff Attorney for Public Information—earned the gratitude of lawyers, judges, journalists, historians and ordinary members of the public throughout Texas as a reliable source of plain-speaking information about the Texas Supreme Court and the Texas judiciary.

Born in Plainview, between Lubbock and Amarillo, he graduated from Plainview High School. He earned a Bachelor's Degree in Political Science, Cum Laude, at Austin College in Sherman in 1973. He then studied journalism studies at the University of Missouri School of Journalism. He spent more than two years working as a newspaperman writing, fact-checking, and editing stories at the *Sherman Democrat*, exercised managerial discretion as City Editor at the *Temple Daily Telegram*, and worked at the *Kansas City Star*, *San Bernardino Country Sun*, and the *Austin American-Statesman.*[1] McCarthy published articles about defamation law in *Journalism Quarterly,* reflecting his early interest in the practice of law.[2] The newspaper business taught McCarthy what the public wanted to learn, how to summarize the news, and how to capture a reader's attention.

Although he earned accolades as a journalist, McCarthy wanted to study law.[3] He earned his J.D. degree from Gonzaga University in Spokane, Washington, where he previously worked for a newspaper. He clerked for the Chief Justice of the Washington State Supreme Court, in the Temple of Justice, in Olympia, Washington. The Washington State Bar admitted him in 1991. He published an article about constitutional aspects of defamation law as applied to the press in the *Gonzaga*

---

1 "Back in Time 02-23-09," *My Plainview*, Plainview Daily Herald, https://www.myplainview.com/news/article/Back-in-Time-02-23-09-8429290.php.; Vickie S. Kirby, Senior Director of Editorial Communication—Austin College, "Distinguished Alumni Awards: Austin College to honor five at Alumni Awards Gala March 7," *NTXE-News* (March 2, 2008), http://www.ntxe-news.com/cgi-bin/artman/exec/view.cgi?archive=26&num=44250.

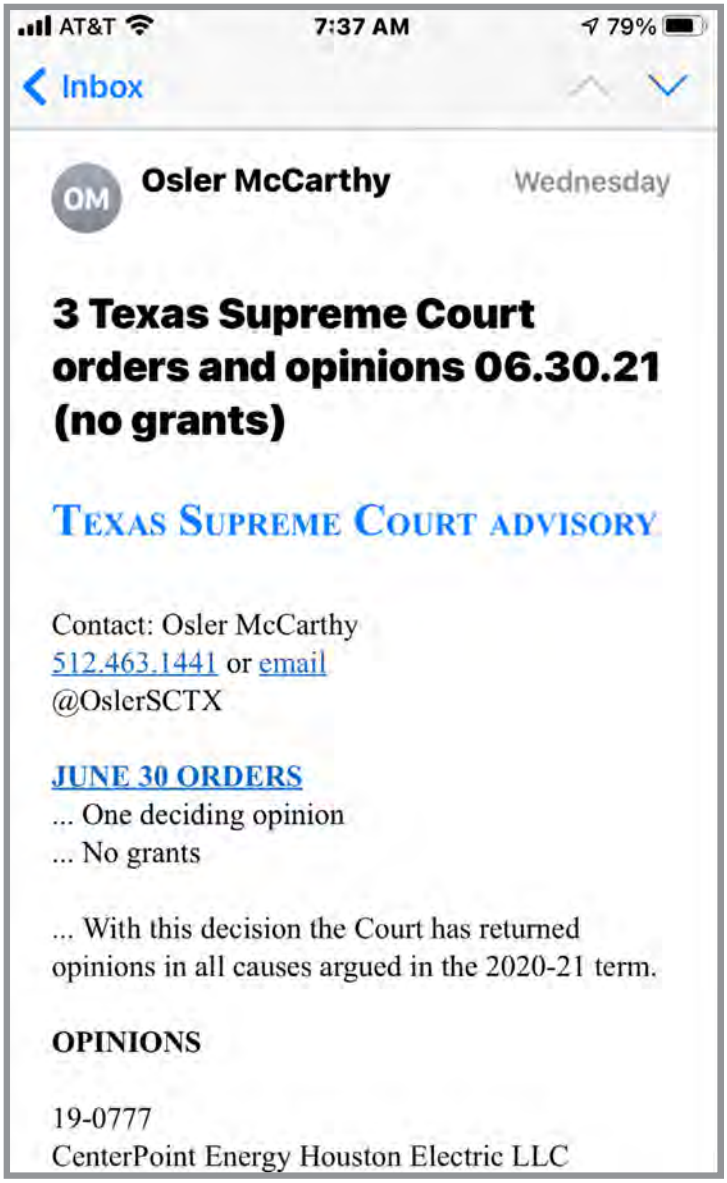
2 William Osler McCarthy, "How State Courts Have Responded to *Gertz* in Setting Standards of Fault," *Journalism & Mass Communication Quarterly* (1979).

3 D. Todd Smith, "Handling the Texas Supreme Court's Public Information | Osler McCarthy." Butler Snow law firm website (July 29, 2021), https://www.butlersnow.com/2021/07/handling-the-texas-supreme-courts-public-information-osler-mccarthy/ (interview with William Osler McCarthy). I commend this interview to anyone interested in learning more about McCarthy's remarkable life.

Law Review.[4] He wrote a chapter on defamation for the torts volume of *Washington Practice*, the standard reference guide for attorneys practicing law in Washington state.[5]

Silas Wright, the sixteenth governor of New York, observed that "[t]he office should seek the man, not man the office."[6] Former Texas Supreme Court Chief Justice Tom Phillips, with the strong support of then-Lt. Gov. Bob Bullock, convinced the Legislature to create the office of Staff Attorney for Public Information in 1997,[7] then invited McCarthy, a veteran journalist at the *Austin American-Statesman*, to serve in the new position. McCarthy made it his business, to keep the public informed about the Texas Supreme Court's business. Former Chief Justice Wallace B. Jefferson summarized the innovative things McCarthy did:

> Long before influencers dominated social media, Osler developed a listserv dispensing the Court's opinions and administrative orders to a broad audience of lawyers, journalists, academics and, importantly, the general public. He explained in plain terms how the Court processes cases and shares internal discussions with staff attorneys and law clerks. He simplified the questions the Court granted for review, summarized the Court's decisions, answered journalists' questions, and lectured school students.[8]



Example of McCarthy's email viewed on a mobile phone

---

[4] William Osler McCarthy, "Restricting Artful Pleadings against the Press: The Supreme Court Brings Constitutional Considerations to Actions Where Truth Offers No Defense," 25 *Gonzaga Law Review* 519 (1989-1990).

[5] Kirby, "Distinguished Alumni Awards," *NTXE-News*.

[6] Silas Wright (attribution), quoted in Edward Parsons Day, *Day's collacon: an encyclopaedia of prose quotations, consisting of beautiful thoughts, choice extracts and sayings, of the most eminent writers of all nations, from the earliest ages to the present time, together with a comprehensive biographical index of authors, and an alphabetical list of subjects quoted*. (London: Low, Marston, Searle, and Rivington, 1884), 684.

[7] Wallace B. Jefferson, Chief Justice, Texas Supreme Court (ret.), "A Tribute to Osler McCarthy: A Life Well Lived in the Law," *Texas Bar Blog, State Bar of Texas* (Aug. 27, 2021), https://blog.texasbar.com/2021/08/articles/people/a-tribute-to-osler-mccarthy-a-life-well-lived-in-the-law/.

[8] Jefferson, "Tribute to Osler McCarthy," *Texas Bar Blog*.

Attorneys, especially appellate practitioners, looked forward to opening McCarthy's Friday morning email to learn about the status of their cases before the Court.

I remember looking forward to reading McCarthy's "**ET SIC ULTERIUS**" column every Friday morning. The most important news always concerned the status of cases. Like most appellate lawyers, I wanted to learn the fate of petitions for review my friends and I filed and the outcome of cases my friends and I argued. But the Osler-gram I looked most forward to reading every Friday morning was the column entitled "Returning Now to Yesteryear."

One of the most compelling stories McCarthy circulated concerned a Chief Justice's delivery of the Court's *State of the Judiciary* address every March. When I read McCarthy's notice of the March 2017 address, I reached out to ask him to write about State of the Judiciary speeches. He wrote a fine article that set forth the history of the Texas Supreme Court's State of the Judiciary addresses in plain, clear English.

"The ritual of the Chief Justice's biennial State of the Judiciary address to the Legislature seems a historical mainstay in this state," McCarthy began, "but the tradition is only thirty-eight years old. By statute in 1977, the Legislature invited the Chief over to chat. And Chief Justice Joe R. Greenhill came first, on January 31, 1979." McCarthy traced the addresses back to Chief Justice Robert Calvert who "set the idea in motion for a biennial address to the Legislature in 1971."[9]

ET SIC ULTERIUS

Recent administrative orders

Emergency pandemic orders
The Court issued an amended emergency order Wednesday – No. 38 – making certain changes in courtroom protections but reaffirming discretion by trial judges and establishing a tiered schedule to resolve the backlog of child-protection cases. For questions about the Court's emergency orders, contact coronavirus@txcourts.gov.

¡A luchar por todos!

Inbox **3 Texas Supreme Cou...**

RETURNING NOW TO YESTERYEAR

And we think it's cold in Texas now
On this day in 1899, according to the Texas State Historical Association, Tulia reported the coldest temperature recorded in the state: minus 23 degrees Fahrenheit. (Tulia, of course, is suburban Plainview to some people from Plainview.) That temperature in Tulia resulted from a Blue Norther ushering in the "Big Freeze" that in one night reportedly killed as many as 40,000 cattle in Texas. … on this date in 1914 the first stone was set for the Lincoln Memorial, Lincoln's 105th birthday. The memorial was dedicated eight years later, May 22, 1922. The keynote speaker, Dr. Robert Moton, president of Tuskegee Institute, delivered the keynote address, promoting equality among the races. But he spoke to a largely segregated audience and was seated in a segregated area. … and on this date in 1959 the Lincoln Memorial replaced sheaves of wheat on the back of the penny. … in one of those memory locks akin to, say, the Kennedy assassinations for a few of us, I remember hearing about the penny redesign on the radio just outside Dalhart on a family weekend dash to Ratón so my parents could watch the ponies at La Mesa Park. … finally … on this date in 1999 the Senate acquitted

[9] Osler McCarthy, "A Brief History of the Short History of the State of the Judiciary in Texas," *Journal of the Texas Supreme Court Historical Society*, vol. 7, no. 1 (Fall 2017), https://www.texascourthistory.org/Content/Newsletters//TSCHS%20Journal%20Vol_7%20No_1final.pdf.

Journal of the
TEXAS SUPREME COURT HISTORICAL SOCIETY

Fall 2017 Vol. 7, No. 1 General Editor Lynne Liberato Executive Editor David Furlow

Columns

Message from the President
By Dale Wainwright
This fall the Society has already held the John Hemphill Dinner, a Portrait Dedication Ceremony, and a Texas Appellate Hall of Fame Induction Ceremony. Read more...

Hon. Dale Wainwright

Executive Director's Page
By Sharon Sandle
The history of the impact of storms like Hurricane Harvey can be found in the way the Texas courts addressed the aftermath. Read more...

Sharon Sandle

Fellows Column
By David J. Beck
The latest book in the Taming Texas series, part of our Judicial Civics and Court History Project, is an exciting addition. Read more...

David J. Beck

Executive Editor's Page
By David A. Furlow
Groundwater and surface water are so important that our Editorial Board chose to dedicate this issue to the history of water law in Texas. Read more...

David A. Furlow

Lead Articles

It's the Law—*Your* Own the Water under *Your* Land: The Evolution of Texas Groundwater Law
By Edmond R. McCarthy, Jr.
The title for this article is taken from a billboard displaying similar text along State Highway 79 in Franklin, Robertson County, Texas. Read more...

Texas drought in the 1950s

Texas Groundwater Law from Its Origins in Antiquity to Its Adoption in Modernity
By Dylan O. Drummond
Before "ownership in place" and the "rule of capture" were recognized in Texas, the debate between the two concepts had already raged for some 2,000 years. Read more...

From the Roman Emperor Justinian's "Digest"

A Brief History of the Short History of the State of the Judiciary in Texas
By Osler McCarthy
The ritual of the Chief Justice's biennial State of the Judiciary address to the Legislature seems a mainstay in this state, but the tradition is only thirty-eight years old. Read more...

Chief Justice Joe R. Greenhill delivered the first address

Features

Texas Supreme Court and Court of Criminal Appeals Pass Emergency Relief Orders in Hurricane Harvey's Wake
By Dylan O. Drummond
Texas's two highest courts—for the first time—issued a slew of emergency administrative orders to assist litigants as well as both the bench and bar. Read more...

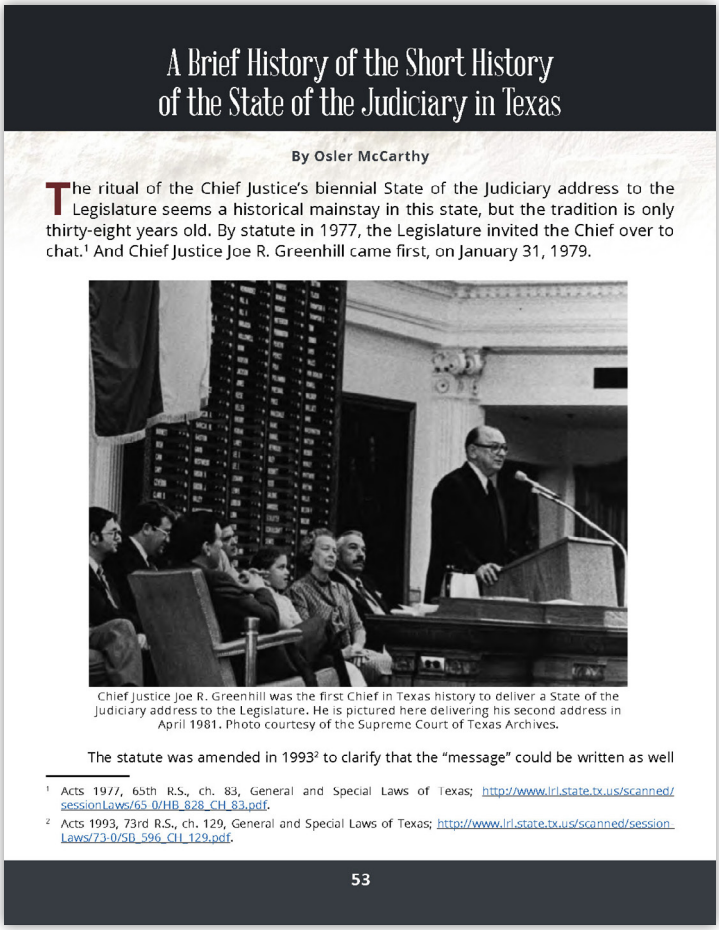
Flooding in Houston

22nd Annual John Hemphill Dinner: Chief Judge Diane P. Wood Was the Featured Speaker
By Marilyn P. Duncan
Photos by Mark Matson
Almost 400 attendees filled the Grand Ballroom of the Four Seasons Hotel in Austin to enjoy dinner and the evening's program. Read more...

Attendees toast memorialized Court members

Retired Supreme Court Justice Scott Brister's Portrait is Unveiled
By Dylan O. Drummond
Photos by Mark Matson
The portrait, presented to the Texas Supreme Court in a ceremony in its courtroom, was beautifully painted by Hill Country artist Patsy Ledbetter. Read more...

Portrait detail



A Brief History of the Short History of the State of the Judiciary in Texas

By Osler McCarthy

The ritual of the Chief Justice's biennial State of the Judiciary address to the Legislature seems a historical mainstay in this state, but the tradition is only thirty-eight years old. By statute in 1977, the Legislature invited the Chief over to chat.[1] And Chief Justice Joe R. Greenhill came first, on January 31, 1979.

Chief Justice Joe R. Greenhill was the first Chief in Texas history to deliver a State of the Judiciary address to the Legislature. He is pictured here delivering his second address in April 1981. Photo courtesy of the Supreme Court of Texas Archives.

The statute was amended in 1993[2] to clarify that the "message" could be written as well

[1] Acts 1977, 65th R.S., ch. 83, General and Special Laws of Texas; http://www.lrl.state.tx.us/scanned/sessionLaws/65-0/HB_828_CH_83.pdf.

[2] Acts 1993, 73rd R.S., ch. 129, General and Special Laws of Texas; http://www.lrl.state.tx.us/scanned/sessionLaws/73-0/SB_596_CH_129.pdf.

53

The Fall 2017 issue of the Journal containing McCarthy's excellent article

On September 13, 2021, State Bar of Texas Public Affairs Committee Chair Julie Doss presented Mr. McCarthy with the Committee's resolution honoring exemplary service on September 13, 2021:

"**WHEREAS**, Mr. McCarthy became a fixture of Texas Supreme Court to lawyers and journalists across the state and a place where the public could readily find easily digestible information.

"**WHEREAS**, among his duties, Mr. McCarthy simplified and summarized the Court's opinions and orders and offered educational highlights for an audience of lawyers, journalists, and the public.

"**WHEREAS**, Former Chief Justice Wallace B. Jefferson noted that Mr. McCarthy's impact was to give readers everywhere added insight into the court's work through plain-spoken narration.

"**WHEREAS**, Mr. McCarthy was similarly a fixture on the State Bar of Texas Public Affairs Committee for an astounding 17 years, 2004-2021.

"**WHEREAS**, Mr. McCarthy also served on the *Texas Bar Journal* Board of Editors Committee from 2000 to 2002 and on the Communications/Outreach Committee from 2008 to 2010.

State Bar of Texas Public Affairs Committee Chair Julie Doss presented McCarthy with the State Bar's Resolution. Photo by Jack Plunkett, provided by courtesy of Julie Doss and the Freedom of Information Foundation of Texas.

"**Be It Therefore Resolved** that the State Bar of Texas Public Affairs Committee honors William Osler McCarthy with this resolution for his exemplary service to the Supreme Court of Texas, his dedication to public knowledge and information, his service to the State Bar of Texas and its committees, and his commitment to the legal profession as a whole.

"**Resolution Adopted** this 13th day of September 2021 by the State Bar of Texas Public Affairs Committee."

McCarthy volunteered for Meals on Wheels and orchestrated the work of lay volunteers for the Bethell Hall services at St. David's Episcopal Church in Austin. McCarthy, his wife, Diana, and their two children live in Austin, Texas.[10]

[10] Kirby, "Distinguished Alumni Awards," *NTXE-News*.

David A. Furlow *is a lawyer/historian who served as Executive Editor of the* Journal of the Texas Supreme Court Historical Society *from 2011 through 2020.*

Return to Journal Index

Hemphill Dinner Announcement

On December 3, 2021, the Society will hold its 26th Annual Hemphill Dinner live at the Four Seasons Hotel in Austin, Texas. The Society originally planned to hold the Hemphill Dinner on Friday, September 3, 2021. Unfortunately, when cases of COVID across Texas began to rise dramatically over the summer, the Society elected to postpone the Hemphill Dinner. We're looking forward to welcoming our guests in December for what we believe will be a wonderful evening of good food, fellowship with our colleagues, and an entertaining program.

The keynote speaker for the event is Lisa Blatt: "SCOTUS Legend," and veteran U.S. Supreme Court practitioner. Because of the changed date for the dinner and her busy oral argument schedule before the U.S. Supreme Court, Ms. Blatt will not be able to join us in person for the event. But we are fortunate that Immediate Past President Cynthia Timms was able to sit down with Ms. Blatt to record an engaging and informative interview that we will show during the program on December 3. The interview covers Ms. Blatt's experiences as an attorney appearing before the U.S. Supreme Court as well as her reminiscences from her time as a clerk for Justice Ruth Bader Ginsburg, who was serving on the U.S. Court of Appeals for the D.C. Circuit at the time of Ms. Blatt's clerkship.

Lisa S. Blatt

Each year, the Texas Center for Legal Ethics presents the Chief Justice Jack Pope Professionalism Award to a judge or attorney who personifies the highest standards of professionalism and integrity in appellate law. This year, the Pope Award will be presented to former Chief Justice Ann Crawford McClure of the El Paso Court of Appeals.

The Society has had an enthusiastic response to this year's dinner, and tickets for the dinner have sold out. If you are interested in placing your name on a waiting list should additional tickets become available, you can either call the Society at its office: (512) 481-1840 or you can email: tschs@sbcglobal.net.

Return to Journal Index

Our Society Presents "The Lives and Legacies of Texas' Earliest Black Lawyers" at TSHA's 126th Annual Meeting in February 2022

By David A. Furlow

The Society will present a panel-program at the Texas State Historical Association's 126th Annual Meeting beginning at 9:00 a.m. on Saturday, February 26, 2022. The event will occur at the AT&T Center at 1900 University Ave, Austin, Texas 78705. The AT&T Executive Education and Conference Center is located downtown on the northwest corner of Martin Luther King Boulevard and University Avenue, at the south entrance to The University of Texas at Austin.

The program will occur in the AT&T Center. Photo courtesy of TSHA.

The Society's panel-program will be an important part of the annual meeting. Activities will begin on Wednesday, February 22nd and continue through Saturday the 26th. Our Society's session title is "We Stand on Their Shoulders: The Lives and Legacies of Texas' Earliest Black Lawyers." Because of this Saturday time-slot, speakers can participate, and members can attend, without losing a day of work. The Society encourages all members to register for the conference, beginning on November 15, 2021, at: https://am.tsha.events/.

Tom Leatherbury, the Society's President, will introduce the panel using an introductory PowerPoint. The Hon. John G. Browning will serve as the panel's first speaker. His presentation will be "William A. Price: From a Legacy of 'Firsts' to a Civil Rights Milestone." The Hon. Carolyn Wright, the former Chief Justice (ret.) of the Texas Fifth District Court of Appeals in Dallas, will then present her program "John N. Johnson: Texas' First Civil Rights Lawyer." I will present a short Commentator's

PowerPoint to comment on those two presentations and direct audience questions to the speakers. The Society will provide additional information, including the room number where the program will occur, during the weeks before the conference begins. *See* https://am.tsha.events/sessions/we-stand-on-their-shoulders-the-lives-and-legacies-of-texas-earliest-black-lawyers/.

A wide variety of panel programs about every aspect and era of Texas history are scheduled to occur from Thursday morning, February 24 through Saturday afternoon, February 26, 2022. In addition to our Society's session, TSHA's annual meeting features the Women in Texas History Luncheon at noon on Thursday, February 24 (https://am.tsha.events/sessions/women-in-texas-history-lunch/), the President-Elect's Reception Honoring Lance Lolley at 6:30 p.m. that same night (https://am.tsha.events/sessions/president-elect-reception-honoring-lance-lolley/), and a Book Lovers and Texana Collectors Breakfast at 7:30 a.m. on Friday, February 25 (https://am.tsha.events/sessions/book-lovers-and-texana-collectors-breakfast/).

The 2022 Texas State Historical Association Awards and Fellows Lunch will be held at noon on Friday, February 25, 2022 (https://am.tsha.events/sessions/2022-texas-state-historical-association-awards-and-fellows-lunch/). An award of the Larry McNeill Research Fellowship in Texas History (https://www.tshaonline.org/awards/larry-mcneill-research-fellowship-in-texas-legal-history) will occur during the 2022 Awards and Fellows Lunch.

Anyone interested in booking a room at the AT&T Hotel and Conference Center can do so by visiting https://book.passkey.com/go/TSHAMT0222. There are two parking areas available, at the AT&T Conference Center and across the street at the Bob Bullock State History Museum.

Please come join us for what's going to be an exciting and important program about the legal history this Society preserves, protects, and shares with the world.

Return to Journal Index

THE TEXAS SUPREME COURT HISTORICAL SOCIETY

DISCLAIMER

The Texas Supreme Court Historical Society (the "Society") is a nonprofit, nonpartisan, charitable, and educational corporation. The Society chronicles the history of the Texas Supreme Court, the Texas judiciary, and Texas law, while preserving and protecting judicial records and significant artifacts that reflect that history.

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

Return to Journal Index

2021-22 Membership Upgrades

The following Society members have moved to a higher dues category since June 1, 2021, the beginning of the membership year.

TRUSTEE

Kendyl Hanks

Rachel H. Stinson

Brandy Wingate Voss

Return to Journal Index

2021-22 New Member List

The Society has added 26 new members since June 1, 2021. Among them are 20 Law Clerks for the Court (*) who will receive a complimentary one-year membership during their clerkship.

TRUSTEE

Anthony Arguijo
Allyson Ho
Hon. Michael J. Truncale

CONTRIBUTING

Marshall Bowen

REGULAR

Phillip Allen*
Emily Bamesberger*
Sara Baumgardner*
Cece Burbach*
Zachary Carstens*
Randall Chapman
Elizabeth Herrera
Matthew Hines*
Charlotte Kelly*
Jessica Lee*
Travis Maples*
Jacob McIntosh*
Hannah Mery*
Evan Rios*
Katie Ritter*
Hannah Schiffman*
Kavid Singh*
Stephen Snow*
Kaylen Strench*
Holden Tanner*
Chelsea Teague*
Cody Vaughn*

Return to Journal Index

Membership Benefits & Application

Hemphill Fellow $5,000

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

Greenhill Fellow $2,500

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

Trustee Membership $1,000

- Historic Court-related Photograph
- All Benefits of Patron Membership

Patron Membership $500

- Discount on Society Books and Publications
- All Benefits of Contributing Membership

Contributing Membership $100

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

Regular Membership $50

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

eJnl appl 8/21

Membership Application

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

Member benefits increase with each membership level. Annual dues are tax deductible to the fullest extent allowed by law.

Join online at http://www.texascourthistory.org/Membership/.

Name _____

Firm/Court _____

Building _____

Address _____ Suite_____

City _____ State_____Zip _____

Phone (_____)_____

Email (required for eJournal delivery) _____

Please select an annual membership level:

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

Payment options:

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

Amount: $_____

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

Credit Card No._____Expiration Date _____CSV code_____

Cardholder Signature _____

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

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

eJnl appl 11/21

[Return to Journal Index](#)