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By Richard B. Phillips, Jr.

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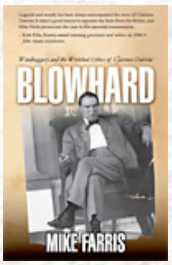

In his new book Mike Farris pulls back the curtain to reveal the unsavory truths behind Darrow's legend, from his willingness to bribe a jury to his lack of belief in the concept of right and wrong. Read more...

News & Announcements

Hemphill Dinner Announcement


Chief Justice Nathan Hecht

This year's dinner program will be a celebration of the service of Chief Justice Nathan Hecht's time on the Texas Supreme Court. Read more...

The Society's *Charting Constitutions and Taming Texas* Rocked the Aggies at TSHA's 2024 Meeting

Article and photos by David A. Furlow


Society President Richard Phillips presenting

The Society's panel program attracted a large audience at the Texas State Historical Association's 128th Annual Meeting in College Station on Friday, March 1. Read more...

And the Larry McNeill Research Fellowship in Texas Legal History goes to Michael Banerjee

Article and photos by David A. Furlow


Michael Banerjee

Holding two B.A's from Pennsylvania State University, a J.D. from Harvard Law School, and an M.A. from Berkeley Law, Michael is studying the interrelated histories of state, university, and corporations. Read more...

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FB: Texas Supreme Court Historical Society

Now Accepting Nominations for the Texas Appellate Hall of Fame

By Kirsten M. Casteñada

Texas Appellate Hall of Fame posthumously honors advocates and judges who made a lasting mark on appellate practice in the State of Texas. Read more...

Membership & More

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Join the Society

Richard B. Phillips, Jr.

Message from the *President*

When I was sworn in as President of the Society, I took an oath to "preserve for posterity the lives and work of the Supreme Court and the appellate courts of Texas." I've been thinking lately about the word "preserve" in that oath and what it means for the Society's work and mission.

The Society does an excellent job of "presenting" history. This Journal consistently publishes excellent histories of the Court and the law in Texas. In those articles, we learn the stories of our past. We see different interpretations of that past and sometimes how the lessons of those experiences can inform our circumstances today. The Taming Texas books help bring that history to life for Texas school children and help them to understand the judicial branch and its significance in their daily lives. Other books that the Society has published or been involved with tell these stories in more depth. Most recently, *Six Constitutions Over Texa***s** by Society Trustee William J. Chriss masterfully tells the stories of these constitutions to help us better understand the constitution we live under today.

W.E.B. DuBois said:

> "If then we are indebted to the past for so much of the present, is it not clear that we can only understand the present by continually recurring to and studying that past. … Study the past then, if you would comprehend the present."

The Society's work in publishing these histories makes it easier for more people to study the lives and work of the appellate courts of Texas.

But "preserving" is more than "presenting." While I was a student at the University of Texas School of Law, I took a legal history course from Professor Michael Churgin. The materials for that course were the Tom C. Clark papers, held at the Tarlton Law Library. I had the opportunity to hold in my hands memos written to and by Tom C. Clark and the justices he served with, including William O. Douglas, Robert H. Jackson, and Hugo Black. The papers had handwritten notations from the justices on them. We could trace the development of opinions, how votes shifted, and how the ultimate majorities were assembled.

This year, as part of the Society's spring board meeting, we visited the Harris County Historical Documents Room. Judge Mark Davidson graciously pulled several significant original case records. We saw the records of the first district court in the Republic of Texas (Hon. Benjamin Cromwell Franklin, presiding) and the first trial in that court (a charge of larceny of a pig). We saw the records of the last case decided by the Supreme Court of the Republic of Texas (fittingly, *Sam Houston v. Mirabeau Lamar*). Of a more recent vintage, we saw the original petition in *Texaco v. Pennzoil*, signed by Joe Jamail. (Of course, it was not just a "/s/" electronic signature; Joe Jamail signed it.)

More painfully, we saw records of the shameful history of slavery in Texas: a suit related to an attempted manumission; a suit for breach of warranty related to the sale of a human being. But to understand our history, we must wrestle with and try to understand the painful parts of it, too.

More hopefully, we saw the court record from a case that featured the first women juror in the state. The court's charge is directed to the "Lady and Gentlemen of the Jury" (although that court record is much more recent than it should have been).

There is something powerful about holding these primary source materials and leafing through them. But even looking at electronic copies of these materials (or even transcriptions of them) gives us a different view and appreciation of history than we can get by reading what others have written based on them.

The work of ensuring that these types of primary sources are available to future researchers is also an important part of the Society's mission. This is the "preserving" part of the President's oath. The Society's archives committee is working on revamping our work in this area. The Society maintains a portrait collection and the archives committee has spent important time on that collection, systematizing our records and making sure we are acting as responsible custodians of those paintings.

Now, the archives committee is working on other parts of our collection. We have possession of documentary materials that will be organized and preserved. And we are preparing to be able to accept and preserve other documentary materials and to ensure they are available to future historians to "present" the history. If you are interested in being involved in this effort or if you are aware of materials that should be part of the Society's collection, please reach out to me or Society staff.

In the meantime, please enjoy this issue. And, as always, if you have thoughts about how the Society can perform its mission or if you'd like to be more involved, please feel free to reach out to me at: rich.phillips@hklaw.com.

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Fellows Column

By David J. Beck, Chair of the Fellows

Photo by Alexander's Fine Portrait Design-Houston

The 2024 Annual Fellows Dinner was another success. All the Justices from the Texas Supreme Court joined the Fellows in March at the Lyndon Baines Johnson Presidential Library on The University of Texas campus in Austin for a wonderful evening of dinner, judicial history, and conversation. For many Fellows, it was their first time in this special venue. We appreciate Justice Bland, the Court's liaison to the Society, coordinating the scheduling of the dinner so that the other members of the Court could attend. This exclusive event is one of the benefits of being a Fellow. The attached photos will give you some sense of the evening's elegance, uniqueness, and fellowship.

I am pleased that our fourth Taming Texas book, entitled *Women in Texas Law*, was presented to the Court at the Fellows Dinner. This latest book captures the importance of the Texas women who shaped our law and justice system throughout Texas legal history and features the ten women who have served on the Texas Supreme Court. The book also presents other interesting historical information, such as a listing of women "Firsts" in state and federal courts. Copies of the new book were given to the Justices and the Fellows.

At the Fellows Dinner we have a tradition of having the wines for the evening provided by Fellows. Accordingly, I would like to thank Hon. Harriet O'Neill and Kerry Cammack, Larisa and Hon. David Keltner, Lauren and Warren Harris, and Randy Roach for providing the evening's special wines.

We are pleased to welcome our newest Fellow, Macey Reasoner Stokes of Baker Botts in Houston, who recently joined as a Greenhill Fellow. We are excited to have her as a Fellow and appreciate her generous support of our group.

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 would like more information, want to nominate someone as a Fellow, or want to join the Fellows, please contact the Society office or me.

FELLOWS DINNER

March 20, 2024 Photos by Erich Schlegel

Clockwise from upper left: Ben Mesches, Doug Alexander, Justice Jimmy Blacklock & former Justice Dale Wainwright; Justice Jimmy Blacklock & Jeff Oldham; Justice Rebeca Huddle, Justice Debra Lehrmann & Justice Jane Bland; Chief Justice Nathan Hecht & Marcy Greer; Doug Alexander & Shannon Ratliff; former Justice David Keltner, Randy Roach & Justice Jeff Boyd

Clockwise from upper left: former Justice David Keltner, Justice Debra Lehrmann, Randy Roach, Justice Brett Busby & Shannon Ratliff; Macy Stokes & Chief Justice Nathan Hecht; Justice Jane Bland & Doug Bland; Chief Justice Nathan Hecht, Nubile Devine & Justice Jeff Boyd; Justice Brett Busby, Skip Watson, Juanita Watson & Justice John Devine.

Left: Chief Justice Nathan Hecht accepts a copy of the newest Taming Texas book from Board Trustee Warren Harris; Justice Evan Young shows Justice Rebeca Huddle a page of the book featuring her.

FELLOWS OF THE SOCIETY

Hemphill Fellows

($5,000 or more annually)

David J. Beck*
David E. Chamberlain
Joseph D. Jamail, Jr.* (deceased)
Thomas S. Leatherbury
Richard Warren Mithoff*

Greenhill Fellows

($2,500 or more annually)

Stacy and Douglas W. Alexander
Marianne M. Auld
Robert A. Black
Hon. Jane Bland and Doug Bland
E. Leon Carter
Harry L. Gillam, Jr.
Marcy and Sam Greer
William Fred Hagans
Lauren and Warren Harris*
Thomas F.A. Hetherington
Jennifer and Richard Hogan, Jr.
Dee J. Kelly, Jr.*
Hon. David E. Keltner*
Lynne Liberato*
Mike McKool, Jr.*
Ben L. Mesches
Jeffrey L. Oldham
Hon. Harriet O'Neill and Kerry N. Cammack
Connie H. Pfeiffer
Hon. Jack Pope* (deceased)
Shannon H. Ratliff*
Harry M. Reasoner
Robert M. (Randy) Roach, Jr.*
Leslie Robnett
Professor L. Wayne Scott* (deceased)
Reagan W. Simpson*
Allison M. Stewart
Macey Reasoner Stokes
Cynthia K. Timms
Peter S. Wahby
Hon. Dale Wainwright
Charles R. "Skip" Watson, Jr.
R. Paul Yetter*

*Charter Fellow

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Editor-in-Chief's Column

Hon. John G. Browning

The Power of *History*

Carl Becker

Scholar Carl Becker once wrote that the value of history was not scientific, but moral. He asserted that "by liberalizing the mind, by deepening the sympathies, by fortifying the will," history "enables us to control, not society, but ourselves, a much more important thing; it prepares us to live more humanely in the present and to meet rather than to foretell the future." In recent years, particularly in the wake of its decisions in the *Bruen* and *Dobbs* cases, the U.S. Supreme Court has been both applauded and criticized for its reliance on history and tradition. Speaking personally, history serves as a reminder of both how far we have come as a nation, and of how far we still have to go.

I know this because of history's treatment of an Alabama lawyer named Arthur Madison during the waning days of World War II. In 1944, Alabama-born and Columbia-educated Madison, the son of former slaves, left his comfortable New York home and successful practice to return to his native Montgomery. In Alabama, a state with a Black population of nearly half, the voting rights of Black Americans had been suppressed for decades with a variety of racist regulations—from literacy tests and poll taxes to "understanding clauses" that required those seeking to register to vote to demonstrate an understanding of key Constitutional provisions to the satisfaction of white registrars. As a result of such Jim Crow measures, in 1944, out of thousands of Black residents eligible to vote, only about thirty-one registered voters were Black. Even Rosa Parks had been rejected the first two times she tried to register to vote.

Arthur Madison

Rosa Parks

Arthur Madison, already licensed in New York, became licensed to practice in Alabama in 1938, making him one of only two Black men actively practicing in the state. With the goal of registering as many as 50,000 Black voters in Montgomery and several other populous Alabama counties, Madison began filing voting rights lawsuits in December 1943 on behalf of multiple plaintiffs (including several relatives). However, Montgomery County Sheriff's deputies began a campaign of harassing Madison's clients. The would-be voters had their jobs and homes threatened if they did not withdraw their applications. The threats and intimidation worked on eight of Madison's clients, who asked that their cases be withdrawn and stated that they had never given Madison authorization to represent them. Madison quickly found himself facing trumped-up charges of violating Title 46, § 55 of the Alabama Code—appearing as an attorney for a party without authority to do so. In April 1944, within just a week, Madison was tried, convicted, and fined $2,500. Despite multiple appeals, the felony conviction was upheld. His license to practice law in Alabama was forfeited.


Gov. John Bel Edwards


Avery C. Alexander

Madison died in New York in 1957. In 2023, the Alabama State Bar Hall of Fame posthumously inducted Madison—but his license was never reinstated. I'm hoping to change that, and with the blessing of Madison's descendants, I will be filing a petition for his posthumous reinstatement to the bar. In 2022, Louisiana governor John Bel Edwards posthumously pardoned Homer Plessy (of *Plessy v. Ferguson* fame), supported by his state's seldom-used Avery C. Alexander Act. The 2006 law enables any person convicted of violating a state law or municipal ordinance whose purpose was to maintain or enforce racial separation or discrimination to obtain a pardon for such a conviction.

Hopefully, Alabama's governor and its Supreme Court will agree that this is a chance to right a historic injustice. The study of history enables us to see the discrimination that occurred before the passage of the 1965 Voting Rights Act in a whole new light, and to take steps that make us better as a society. The posthumous reinstatement of civil rights lawyer Arthur Madison is such a step.

In this issue, we look at another archaic practice—dueling—that cast a long shadow. Thanks to a quirk of law unique to Texas and only one other state, the dueling tradition still lingers a bit in Texas criminal law. We also feature an article by attorney Randy Gilbert about the complex legal issues surrounding the suspension of habeus corpus and the declaration of martial law in Texas during the Civil War. In addition, we are pleased to include reviews of two books—William Chriss' *Six Constitutions Over Texas* and Mike Farris' *Blowhard: Windbaggery and the Wretched Ethics of Clarence Darrow*. We hope you enjoy this issue.

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"Unwhipped of Justice"

The Conflict Between John Bankhead Magruder and the Texas Supreme Court

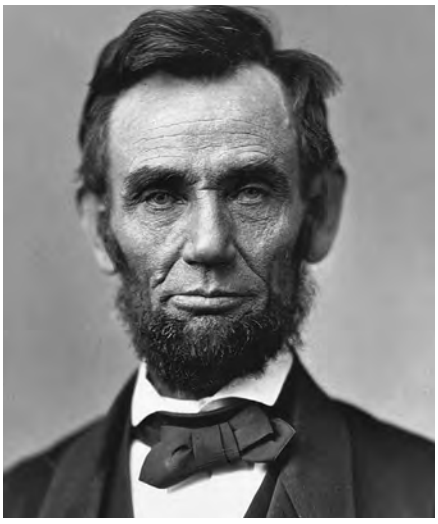
• Part 1 of 2 •

By Randal B. Gilbert

In the fall of 1863, General John Bankhead Magruder, commander of the Confederate Department of Texas, was beset with myriad difficulties managing the defense of the westernmost Confederate state. A chronic lack of manpower threatened invasions of the Texas coast, and the management of the cotton trade created almost insoluble problems. Additionally, he had been confronted with perceived sedition and treason in various parts of the state. His efforts to suppress dissent in the eastern German areas of Texas would lead to a true constitutional crisis in a dramatic conflict between the military and the civilian government. The complex legal issues centered on the detention of civilians by the military, the suspension of the writ of habeas corpus, and the defining of what constituted treason.

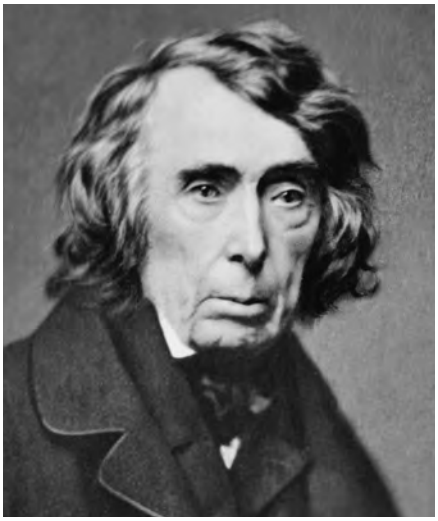
Gen. John Bankhead Magruder

Habeas corpus is often referred to in Anglo American jurisprudence as the "great writ." With its inception in the Magna Carta, its purpose is to prevent the illegal and unjust confinement of an individual. Literally meaning "to have the body," the writ directs an officer holding a prisoner to bring him into court and show just cause for the detention. Article I, section 9 of the United States Constitution sets forth the guarantee of habeas corpus, limited only that it can be "suspended in cases of rebellion or invasion where the public safety may require it." The Confederate Constitution adopted the identical language.

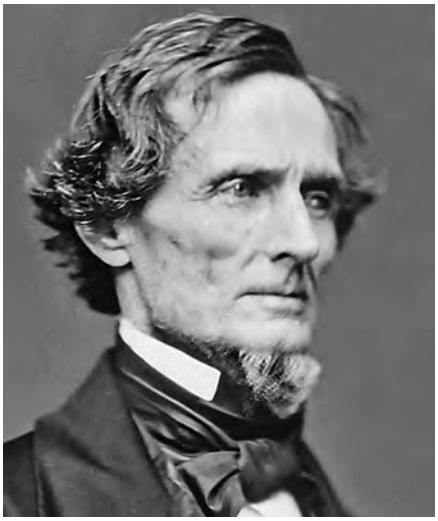


President Abraham Lincoln

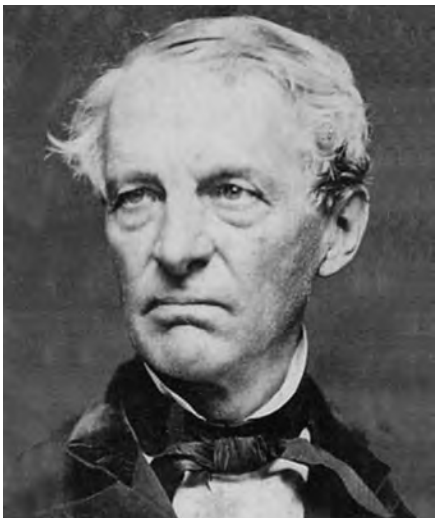
The legal concept of the suspension of habeas corpus is to give arresting authorities or the military the ability to arrest and hold individuals without charge or trial. The procedural question of who has authority to suspend the writ had never been raised until April 1861 when Abraham Lincoln declared that the writ was suspended in all areas of resistance to United States authority. Widespread arrests occurred in Baltimore, which were quickly challenged in the courts. Chief Justice Taney, writing an in chambers decision in *Ex Parte Merriman* decreed that Congress must first authorize the suspension of the writ before the



Chief Justice Roger B. Taney



Jefferson Davis



Samuel Cooper

President could actually suspend it.[1] Future suspensions in the United States were thereafter authorized by Congress.

The Confederate Congress was also faced with the suspension issue, but Jefferson Davis never attempted to suspend the writ without congressional approval. The first Suspension Act was passed in February 1862, authorizing the President to "Suspend the privilege in such towns, cities and military districts as shall in his judgment be in such danger of attack by the enemy as to require the declaration of martial law for their effective defence." The law expired on September 16, 1862. The second session of the First Confederate Congress, convening in August 1862, again took up the issue of the suspension of the writ. The issue of suppression of civil liberties, even in time of war, was a troublesome one. There had been numerous declarations of martial law by various commanders throughout the south, and this disturbed the Congress. In apparent response to this pressure, Adjutant and Inspector General Samuel Cooper had, by General Order 56 in August 1862, declared that "military commanders have no authority to suspend the writ of habeas corpus." By subsequent General Order 66 on September 12, 1862 Cooper further ordered "all proclamations of martial law by general officers and others, assuming a power vested only in the President, are hereby annulled."[2]

The House Judiciary Committee undertook an in-depth look at the issue, and made a report to the congress on September 13, 1862. The issues of suspension of habeas corpus and the declaration of martial law were deeply intertwined and the committee sought to make some clarification. It determined that martial law had never been defined in the "late union," and then proceeded to carefully analyze the legal fundamentals. As a general rule, the military has no authority to arrest a citizen except for some violation of military law, and even then must turn the detained person over to the civil authorities. When martial law is declared in an area, there is an end to the civil courts' jurisdiction, and the military has free rein to arrest and detain as it chooses. The congress had been flooded with complaints from governors and other state officials about the summary imposition of martial law throughout the Confederacy, and the committee sought to balance the need for control in extraordinary circumstances while providing safeguards for citizens from abuses by the military. The committee concluded that only Congress could authorize the

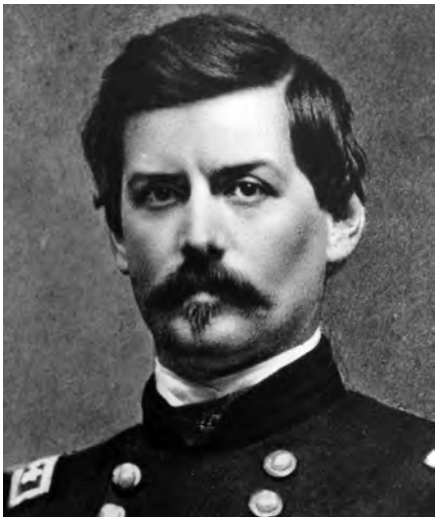
1 William M. Robinson, Jr. *Justice in Grey: A History of the Judicial System of the Confederate States of America* (New York, Russell and Russell, 1941), 384.

2 Official Records, War of the Rebellion, Union and Confederate Armies, Washington, Government Printing Office, 4, III, 83.

declaration of martial law, and that the president could suspend the writ of habeas corpus only with the approval of Congress. The majority of the Confederate Congress was prepared to tolerate and authorize carefully monitored curtailments of civil liberties under a suspension act. While not specifically legislating authority to proclaim martial law, it sent a clear message that the military did not have the authority to indiscriminately proclaim martial law. The new suspension bill was passed on October 13, 1862, and expired on February 11, 1863. It gave the president the power to suspend the writ in all parts of the country for "arrests made by the authority of the Confederate Government, or for offenses against same."[3]

No further suspension acts were proposed until February 1864, when Jefferson Davis requested the Congress to again give him the authority to suspend the writ. On February 4, the House Judiciary Committee reported out a suspension bill which was passed the next day by a 58 to 20 majority. The Senate took it up on February 6, and passed it by 14 to 10 on February 11. Davis signed it on February 15. The more conservative Senate had made the bill much more limited than the previous acts. The act authorized the suspension of the writ for thirteen specific offenses, including treason, conspiracies to overthrow the government, assisting the enemy, encouraging servile insurrection, encouraging desertion, espionage, holding concourse with the enemy, trading with the enemy, conspiracy to liberate prisoners of war, conspiracy to aid the enemy, resisting or abandoning the Confederate States, burning bridges or destroying any lines of communication, and destroying any military property. Most significant was the language "Such suspension shall apply only to the cases of persons arrested or detained by Order of the President, Secretary of War, of the General Commanding the Trans-Mississippi Department." The President was required to appoint officers to investigate the cases of all persons arrested in order for them to be released if improperly detained, unless they could be speedily tried "in the due course of law." The act did not prevent a court from issuing a writ, but the officer holding the prisoner was not required to answer or deliver the prisoners to any court if he certified under oath that the prisoner was held under the authority of the law. This language would become critical to its interpretation in the courts. The act took effect on its signing and expired automatically on August 1, 1864.[4]

Major General John Bankhead Magruder had a colorful and dramatic record of service in the Confederate army. Commonly known as "Prince John," he had received early fame commanding at the first land battle of the war at Big Bethel, Virginia in May 1861. He had delayed Union General George B. McClellan's advance up the peninsula at Yorktown by making a handful of soldiers appear to be thousands, and on May 26, 1862, had been awarded the command of the newly created Trans-Mississippi Department. However, poor performance during the Seven Days campaign coupled with allegations of incompetence and drunkenness resulted in the quiet revocation of the Trans-Mississippi command in favor of Theophilus Holmes. Magruder remained in limbo for several months, and on October

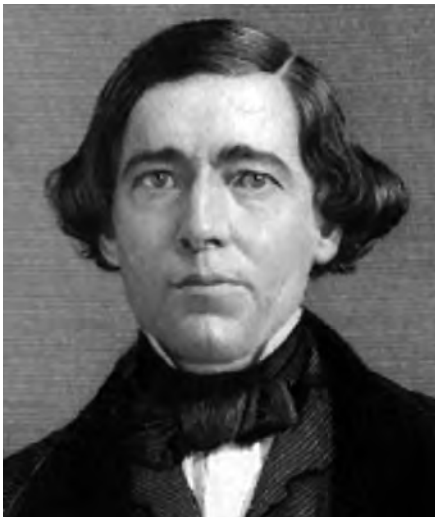


General George B. McClellan

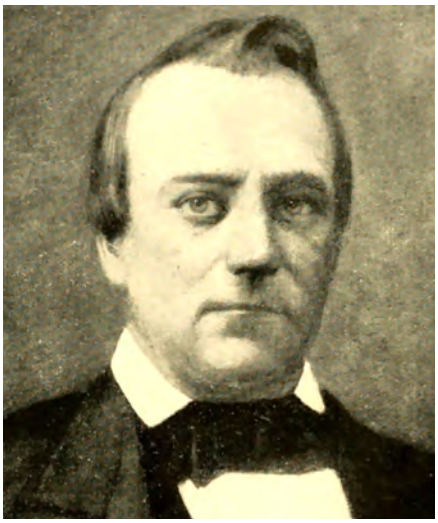
[3] John B. Robbins, "The Confederacy and the Writ of Habeas Corpus," *Georgia Historical Quarterly*, Vol 55, (Spring 1971), 88-89.

[4] *Justice in Grey*, 390.

10, 1862, was assigned to the lesser command of the District of Texas. He arrived in Texas and assumed command in early November 1862. [5] He would receive immediate initial public acclaim by masterminding the retaking of Galveston on January 1, 1863. It would be one of his last happy days.



Gen. Paul Hebert



Gov. Francis Lubbock

Although the habeas corpus suspension issues would not arise in Texas until the spring of 1864, dissent was not new to the counties abutting the Colorado River below Austin. In late 1862 and early 1863 there had been organized efforts in these areas to resist the drafting of State Troops into Confederate service. Under the Texas Militia Act of 1861, all male citizens between the ages of eighteen and fifty were obligated to enroll in militia companies, and the state was divided into thirty-three militia brigade districts. The Governor was authorized to call out a specified number of militia during any insurrection or invasion, or upon the request of the President of the Confederate States. In response to the Union occupation of Galveston, on November 8, 1862, Gen. Paul Hebert had requested Governor Francis Lubbock to call out state troops for Confederate military service. Even though the request was not from the President, Lubbock complied, and on November 11, called for 5,400 state troops to muster for ninety days service. Under the Militia Act, if there were not a sufficient number of volunteers, the militia districts were authorized to draft a sufficient number by drawing names from a hat.

The draft caused an immediate uproar in the heavy German areas southeast of Austin. The number of volunteers was not sufficient in Fayette County, and on December 23, 1862 a draft was held there. Many of the men selected refused to take the oath and be sworn in for Confederate service. An enrolling officer was beaten and driven from the community of Industry in adjoining Austin County. Public meetings were held throughout the region and a large meeting was held at Roeder's Mill in the northwest corner of Austin County on December 31, 1862. Over six hundred men were present including delegates from Austin, Washington, Fayette, Lavaca, and Colorado counties. A number of men spoke against the conscription act including Reinhard Hillebrand of Biegel, Ernst Seeliger of Industry, and Dr. Lewis of LaGrange. A resolution was passed that the communities organize infantry and cavalry companies for their defense. [6]

On January 4, 1863, one hundred and twenty German citizens of the Biegel community in eastern Fayette County met and issued a declaration to General William G. Webb, in command of the 2nd Brigade of Texas State Troops, stating a number of grievances. The published grievances

[5] Official Records, War of the Rebellion, 9/713 (I,IX, 713)[given command]; 19/ 855 (I,XIII, 855)[Holmes assigned]; ar62_870 (1,XXXIV, Pt2, 870) [Smith quote] ; XV,826 [ordered to Texas]; second quote William Pitt Ballinger Diary November 18, 1862- October 20, 1864, Typescript, Center for American History, University of Texas at Austin, p 144.

[6] Official Records, War of the Rebellion, 1, XV, 926; The report listed Louis as an American; Roeder's Mill is now the community of Shelby, Texas in Austin County. "Shelby, Tx." *The Handbook of Texas Online*.

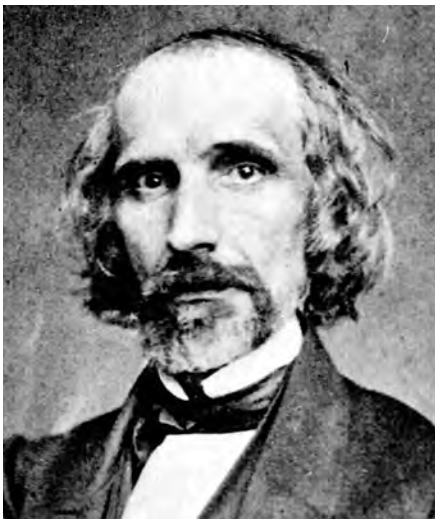
included that script issued to soldier's families was worthless; that men were being called up at planting time, which would leave their families without food; and that although they had been promised access to penitentiary cloth, it had not been made available to them even though "negro-holders, whom we could name, can get such things and fetch them home." The address concluded with the following:

> *"In view of the foregoing we take the liberty hereby jointly to declare that unless the Army and we obtain a guarantee that our families will be protected, not only against misery and starvation, but also against vexations from itinerant bands, we shall not be able to answer the call, and the consequences must be attributed to those who caused them.*
>
> *"Furthermore, we decline taking the army oath (as prescribed) to the Confederate States, as we know of no law which compels Texas troops, who are designed for this State, to take the same.*
>
> *"It is the unanimous wish of those assembled in this meeting to apply to Brig. Gen. W. G. Webb to use all of his influence to the effect that the men now drafted for militia service be permitted to stay at home until they have finished planting."*


Reinhard Hildebrandt

The document was written in German, and signed by five representatives of the gathering, including Reinhard Hildebrandt of Fayette County.[7]

On January 3, A. J. Bell, the enrolling officer for the western District of Austin County, had reported to Austin that the Germans in Fayette and adjoining counties were in open rebellion to the Government. Prompt action resulted from both the military and Texas officials. On January 5, 1863, Magruder ordered Col. Peter Hardeman's first cavalry regiment [Arizona Brigade] to march to Alleyton, and from there to spread out and arrest the ringleaders. The next day Magruder advised CS Secretary of War James Seddon, "Disaffection exists in a greater degree than has been represented to me, but will not spread if promptly put down; if not, it will increase." On January 6, 1863, Governor Lubbock went to LaGrange and met with the dissidents for three days. In a display of what would become a pattern of disregard for the law, and the ability to twist facts to suit him, Magruder proclaimed martial law in Colorado, Fayette, and Austin counties on January 8th. Provost-marshals were assigned to each of the three counties affected. General Order 66 had only annulled prior declarations of martial law, and while the order had stated it was a power vested only in the President, it had not directly forbidden future declarations. [8]


James Seddon

[7] Official Records, War of the Rebellion, 1, XV, 929. "Webb, William Graham." *The Handbook of Texas Online*. Hillebrand is shown in many documents as "Hildebrand." The correct spelling of Hillebrand will be used in this paper.

[8] Official Records, War of the Rebellion,1, XV, 925, 931, 932, 945, 956.

General William Webb as the Militia District commander was ultimately responsible for getting the draftees into service. On the 12th Webb reported to Hardeman that the Governor was vigorously attempting to affect a conciliation, and that the dissidents also included non-Germans. The general had himself met with 120 German citizens on January 8 at La Grange. They had stressed "their willingness to defend the State, provided they had guarantees that their families should be supported in their absence, but they expressly declared that they declined to take the oath to the Confederate States, because they knew of no law requiring State troops to take that oath." Webb concluded that "Mild measures have been determined upon by the State officers as long as they will avail, but after the men are all (that will go) got into service then the Governor intends to deal with the ringleaders." This did not satisfy Magruder, for on January 13 Hardeman was sent the following terse order: "General Magruder directs that without unpacking you will proceed at once to carry out your original instructions in regard to quelling the Germans."[9]

By January 21, the rebellion was over, but the arrests were not. Lt. Col. Henry Webb, Assistant Adjutant General for the Arizona Brigade of which Hardeman's unit was a part, reported to Magruder that the "Germans and others who had been in rebellion have all quietly submitted to the draft and all have come to the different rendezvous and been enrolled as soldiers. Those who were not drafted and are at home profess to be loyal and promise to submit cheerfully to the laws of the State and Confederacy." Webb frankly advised that "Colonel Hardeman's command are the most disorderly, outrageous set of men I ever knew. Their officers have no control over them. They are guilty of all kinds of excesses. The planters and inhabitants generally complain to me that they nearly strip them of everything they can lay hands on, and kill their beeves and hogs and steal their poultry."[10]

On January 26, Hardeman reported that although most of the dissidents had gone into militia service, there were still some leaders that had not, and he was taking fifty troopers to look for them. The calvary utilized loyal citizens to guide them to the recalcitrants, and things rapidly got out of hand. Col. Henry Webb reported to Magruder's adjutant Edmund P. Turner on February 11 that some of the arrests were made with "much cruelty and violence to women and children and to the prisoners arrested," and that Webb intended to investigate. New Ulm in Austin County had become a new hot spot, and a number of complaints had been received from women as to their treatment. Upon investigation by Webb, it was determined that the military had not committed the outrages, but they were done by the citizens guiding the military. Women had been knocked down, one was nicked by a bayonet, and another was struck in the face with a musket butt. Hardeman dispatched Lt. William J. Wheeler of his regiment to investigate. Wheeler also reported that the violence had been committed by citizens but that Lt. Stone who had commanded one of the detachments had not exercised sufficient control over either his men or the citizens aiding him. There was apparently not a great deal of local sympathy to the military, as in two instances where the arrested civilians had been turned over to local magistrates, they had been promptly discharged and released by the civil authorities. [11]

The request for state troops by Magruder had stirred political controversy as well. There had been continued spats between Magruder and the governor over the control of the called-

[9] Official Records, War of the Rebellion, 1, XV, 945-6.

[10] Official Records, War of the Rebellion, 1, XII, Pt 1, 956.

[11] Official Records, War of the Rebellion, 1, XV, 979-990.

up troops, and it was apparent that Magruder's actions were resented by the Legislature. In February a bill was introduced to amend the Militia Act to prohibit any state troops called into Confederate Service from being taken outside the state. The bill passed on March 7, 1863. Even though Lubbock had been generally cooperative with the Davis administration, one of his primary concerns had been the inability of the Confederate army to provide protection to citizens from Indian depredations along the western frontier. The obvious concern of both the legislature and the Governor was that if state troops mustered into CS service were removed from the state, that there would be no ability to protect the western frontier.

The dissent in the affected counties only ebbed during the summer of 1863, but did not go away. Many of the men drafted in December of 1862 had still not reported and Militia General Webb was still attempting to round them up. In September of 1863, a one-page pamphlet entitled "*Common Sense*" began to circulate in central and southeast Texas. Not signed, and dated "Dallas County, September 1863," the broadside decried the perilous condition of the country as a result of the war. It stressed the loss of civil liberties, the death of thousands of men, and the impoverished circumstances of the general public. It concluded:

> "This is the people's war. The people voted for the war and it came. They can vote for peace if they choose, and it must certainly come! *The whole thing after all lies in the ballot box.* Let the people but speak everywhere; at home, to each other, through the press, if it be not too heavily manacled; and above all through a convention. That would be lawful, proper and right. None but tyrants and the wicked fear a convention of the people. So thinks one who was at VICKSBURG." [12]

Although claiming to have been written in Dallas by a confederate soldier, the real authors of this publication were David Baldwin of Houston, and Dr. Richard R. Peebles of Hempstead. It was printed by O. F. Zinke, a German immigrant whose shop was in Houston. Magruder was again quick to act on this perceived seditious publication, and by October 11, 1863 had arrested Baldwin, Peebles and Zinke.

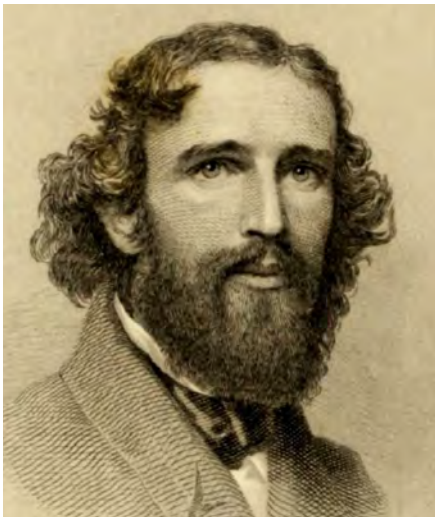
Magruder advised General E. Kirby Smith of the pamphlet and underlying sedition on October 11, claiming to have uncovered a "widespread conspiracy involving the Federal army as well as federal prisoners at Camp Groce near Hempstead." He asserted that Peebles and Baldwin were the ringleaders. Magruder apparently had not decided whether to continue to detain Baldwin and the others or send them out of the country as Peebles was being held in jail in Houston, and Baldwin and Zinke had been sent to San Antonio. Magruder stated that he would send Peebles on to San Antonio "to avoid the writ of habeas corpus" and to "gain time" until he could receive instructions from Smith. Furthermore he asked for authority to declare martial law and suspend the writ of habeas corpus. He concluded with this appeal to Smith -

Gen. E. Kirby Smith

[12] Official Records, War of the Rebellion, 1, XXVI, Pt 2, 456; *Common Sense*, Broadside, American History Center, University of Texas at Austin.

"Boldness and promptness are absolutely necessary. As you are really the Government on this side of the river, cut off as we are from the President, I think you would be perfectly right to exercise the power conferred upon him by Congress. I agree with you that we should be more particular, in our isolation, in exercising any authority not possessed by us, unless absolutely necessary; but I think the President would fully justify it if the public safety were clearly in jeopardy by a combination of traitors. Please answer as soon as you receive this." [13]

Although Magruder had alleged complicity with the prisoners of war at Hempstead, the union inmates at Camp Groce seemed to know little of what was going on. The prisoners had been aware of troop movements in early September as they could see trains with soldiers passing by their camp. The enlisted men who were captured at Sabine Pass on September 9 arrived at the camp within a week of their capture, but the officers had been detained in Houston. Lt. Col. Charles Nott of the 176th New York remarked that sometime in September "we learnt, too, that Union men in Houston, were bold and defiant, and talked openly of a change in masters." Another inmate reported that news of the arrests of Union men in Houston was often heard. Security was tightened. On the evening of October 5, the Union officers arrived at Camp Groce, and on the next day the camp commander received orders to keep them segregated from the older prisoners. On October 18, the camp was completely searched, all of the inmate's money was taken away, and all of their letters and diaries were taken away and never returned. Colonel A. J. H. Duganne of the 176th New York commented that the separation of the newer prisoners and the search was because of "the suspicion of a secret correspondence between these officers, who had so recently come from Houston, and some Union men lately arrested in that city." [14]


Col. A. J. H. Duganne

The arrests created some concern in the general public that the military could arrest citizens for non-military offenses. On October 13, 1863, Magruder addressed troops at Camp Lubbock near Houston concerning the arrests, which was reported by the Houston *Telegraph* on the 16th and the *Austin State Gazette* on the 21st. It is probable that as of the 13th, Magruder was more inclined to send the prisoners out of the state, and the editor of the *Gazette* apparently thought that the men would be exiled. Magruder's tone was somewhat defensive, but he stated the policy that he would hold to for the ensuing six months, when he stated:

"In times like the present, I consider it my duty to act promptly and fearlessly, and I have not hesitated to assume the responsibility of ridding the State of those who have been plotting against our liberties .... In ordinary times I should have waited for the civil authorities to have taken cognizance of which these men have been guilty; but the times and circumstances surrounding us are of such a character as to admit

[13] Official Records, War of the Rebellion, 1, XXVI Pt. 2, 302.

[14] Charles C. Nott, *Sketches in Prison Camp* (New York, Anson D. Randolph, 1865) 108; Charles P. Bosson. *History of the Forty-Second Regiment Infantry Massachusetts Volunteers* (Boston, Mills, Knight and Co. 1886) 424; A. J. H. Duganne, *Twenty Months in the Department of the Gulf* (New York, J. P. Robens, 1865) 273-274.

no delay on my part. Under the plea of military necessity, wrong may sometime be perpetrated upon the citizens, but it has been my aim to protect the citizens from danger and wrong, and the removal of these bad men from your midst without waiting the action of the civil authorities, I know I have been acting by no other motives than the welfare of the citizens of the State."[15]

In the same communication, Magruder advised that the Confederate States Attorney, George Mason, was in Tyler, and that he had written to him that he return immediately. Magruder then added;

"I have been fortunate enough, however, to be assisted by the counsel of the Hon. Horace Cone, an able and learned gentleman of this city, whom I have assigned to duty as judge-advocate-general of this district, with the pay and allowances of a captain of cavalry, as compensation for his services. He has conducted the investigations in the most able and successful manner, and is a true patriot and a good lawyer. I think the appointment has had a very good effect, and I respectfully request, general, that you confirm the appointment as soon as possible."


Constantine Buckley

Cone would be a critical player in this drama.

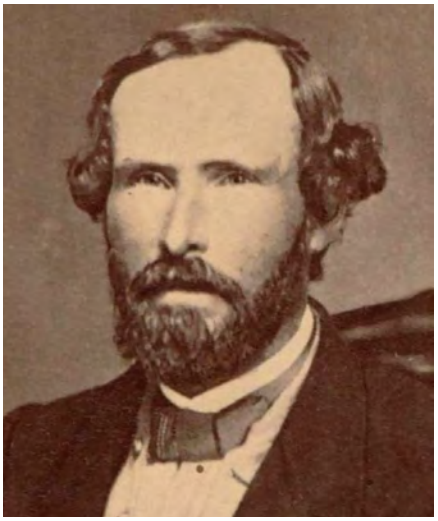
Born in Virginia in 1820, Cone had moved to Alabama as a young man, where he was licensed to practice law. Moving to Brazoria in 1850, he had been elected to the Texas House of Representatives in 1853. In 1857 he relocated to Houston, where he became one of the leading attorneys in the State, representing the Texas and New Orleans Railroad. He spent a significant amount of time in New York in 1860 on railroad business and did not return to Texas until January 1861. In the same year he was again elected to the Texas House of Representatives. After the resignation of Speaker Constantine Buckley, Cone declined the speakership. Serving as the Chairman of the Finance Committee, Cone was responsible for the passage of an unpopular tax bill in 1862. He also championed funding for the completion of the Texas and New Orleans railroad as a military necessity. The Texas and New Orleans railroad had been completed from Houston to Beaumont, and the New Orleans, Opelousas and Great Western was completed from New Orleans to Brashear City. Cone proposed additional funding to expedite linking the two lines.


Judah P. Benjamin

In March and April of that year, Cone had gone to Richmond to confer with Confederate authorities regarding the railroad. He carried with him a letter of introduction to Secretary of War Judah P. Benjamin from Governor Lubbock. Lubbock stated that

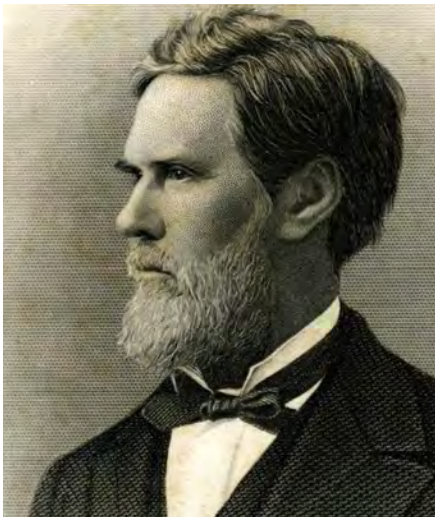
[15] *Austin State Gazette*, October 21, 1863.

Cone was in Richmond on personal matters as well as on a business matter for which he was carrying a letter for Benjamin. Lubbock further advised that Cone could transmit military funds for Texas on his return trip. A large part of the business obviously dealt with the Texas and New Orleans Railroad, as a bill was pending in Congress for additional funding. On April 19 the House reported out a resolution which was approved by the Senate on the same day. On May first, new Secretary of War George Randolph announced that the congress had appropriated one and a half million dollars for the project.


George Randolph

Cone had returned to Texas by April 22, as on that date he was paid $225.00 by Captain T.S. Moise of the Quartermaster Department in Texas for expenses in his trip to Richmond and for returning with $910,000.00 in funds for the Confederate Pay and Ordnance Department. All in all it was not a bad trip for Cone - he successfully represented his railroad client and had his expenses paid by the Army in Texas! He billed the Confederate Quartermaster Department $255.00 for his expenses. [16]

On May 21st, 1862, General Paul O. Hebert, Commanding the Department of Texas, proclaimed Martial Law over all of the coastal counties of the State by basis of his General Order Number 41 and a week later he extended it over the entire state of Texas. The purpose of this act was to curtail speculation and the depreciation of Confederate Money. Probably because of his political connections and legal skills Cone was approached by Hebert's Assistant Adjutant General, Captain S. Boyer Davis, to serve as "Judge Advocate General" for Hebert. On June 12, 1862, Cone responded that he would serve if appointed. On June 16th Hebert appointed a military commission to hear martial law cases. Cone was named Judge Advocate and Recorder of the Commission. The Commission met and promulgated rules and regulations for handling cases brought before them including that any punishment could not exceed ten days confinement unless there was prior approval from Hebert. On July 14th, Cone published the rules of the Commission. Martial Law would last under these Orders until November 1862. [17]


William Pitt Ballinger

William Pitt Ballinger thought that the men had been sent out of the state as he noted on October 11, 1863 that Baldwin, Zinke and Peebles had been shipped to Mexico. Ballinger noted

[16] HBT online, "Horace Cone"; Official Records, War of the Rebellion, ar 127_984; Journal of the Congress of the Confederate States of America, 1861-1865. Published/Created: Washington, Govt. print. off., 1904-05. Vol 2, pp 195- 199; OR 27_1109: Receipt, April 22, 1862; Cone to Moise, Horace Cone Compiled Military Service Records, National Archives, Washington.

[17] Official Records, War of the Rebellion, 9-716; Cone, CSR, Cone to Davis, June 12, 1862; Official Records, War of the Rebellion, 9, 735.; *The Tri-Weekly Telegraph* (Houston, Tex.), Vol. 29, No. 25, Ed. 1 Friday, May 23, 1862 (Martial Law over Coastal counties); *The State Gazette*. (Austin, Tex.), Vol. 13, No. 45, Ed. 1 Saturday, June 14, 1862 (Martial Law extended to entire State); *The Tri-Weekly Telegraph* (Houston, Tex.), Vol. 28, No. 44, Ed. 1 Friday, June 27, 1862 (Cone appointed to Commission); *The Tri-Weekly Telegraph* (Houston, Tex.), Vol. 28, No. 51, Ed. 1 Monday, July 14, 1862, (Cone's announcement of rules of the Military Commission).

that the letters from Peebles that had been found among Baldwin's papers "exhibit a fiendish hostility, which seems surprizing." He concluded his diary entry that "I have written an article for the *News* on Military Power, intending to strengthen the hands of our Gen. Vs. secret combinations & at the same time, confine them to real military dangers, which I hope will do some good."[18]

Responding to Magruder on October 13, Smith ordered him to send a full statement regarding the evidence that had been uncovered by return courier, and to ensure that the prisoners be closely held. Smith subsequently advised Magruder that he had no power to declare martial law and ordered him to consult with both Confederate and State judicial officers to "prevent any embarrassments arising from writ of habeas corpus, and that if needs be the prisoners could be hidden from the reach of the courts until a proper course could be plotted." It should be noted that "walking warrants" were a common practice in most jurisdictions until the 1950's. If there was insufficient evidence against an individual, a sheriff in one county would enlist the aid of other jurisdictions to issue warrants for the person, and move him from county to county to prevent a writ of habeas corpus from being served.[19]

Reflecting the relatively rapid communications between Houston and Shreveport, Magruder responded on October 16. He stated that it would take weeks to copy all of the papers but enclosed a copy of "Common Sense" and a narrative summary of the other evidence prepared by Horace Cone. Magruder stated that no writs of habeas corpus would be sued out as the conspirators feared for their lives if they were released.[20]


Gen. Benjamin Butler

Cone's summary related that he had caused the arrest of the ringleaders and had searched Baldwin's office, finding a large number of letters and correspondence which he deemed to be treasonable. Additionally he found on Baldwin's person a letter purported to have been written in Dallas to a newspaper enclosing a copy of "Common Sense." The seized material dated from early 1862, and consisted primarily of correspondence between Baldwin and Peebles, but there also were copies of letters sent by both to friends and relatives in the north. The documents were generally derogatory of everything Confederate, laudatory of Union successes, and even extolled the great services of Federal General Benjamin Butler, expressing hopes that Butler would be named Lincoln's Secretary of War. The most damning portion of the correspondence called for an abolition of slavery and the recitals that Baldwin had gone to Galveston to take a "good look at the fortifications there." The implication was that this information had been sent to someone in the north. The letters clearly identified Peebles and Baldwin as the authors of *Common Sense*, and although Magruder had proclaimed their actions a conspiracy, the letters contained nothing that indicated any active association with union forces. Additionally, nothing in the synopsis attributed

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[18] William Pitt Ballinger Diary November 18, 1862- October 20, 1864, Typescript, Center for American History, University of Texas at Austin, 110.

[19] Official Records, War of the Rebellion, 1, XXVI, Pt 2, 303.

[20] "CONE, HORACE" *The Handbook of Texas Online*; Official Records, War of the Rebellion, 1, XXVI, Pt 2, 328.

any acts or correspondence to either Hillebrand or Seeliger.[21]

The arrests caused some public concern and comment. Ernst Seeliger of Industry in Washington County was arrested, as was Reinhard Hillebrand of Rutersville in Fayette County. A squad of eleven soldiers arrived at Hillebrand's house on the night of October 18, searched it, and then took Hillebrand to Houston on the morning of the 19th. A number of other LaGrange citizens were arrested at the same time. Gideon Lincecum of Brenham, in a letter to a friend on October 22, 1863 commented: "I was really taken by surprise when I heard that the Tories had been arrested. There are a great many more implicated in the plot. Dr. Lewis and nine other traitors were arrested in LaGrange day before yesterday, and on their way to Houston passed through Brenham yesterday evening. I hope our authorities may be in possession of all their names and that the guards, or somebody else, may hang every one of them." Hillebrand, Seeliger, and Louis had all spoken at the anti-draft meetings in January and were surely familiar names to Magruder.[22]

William B. McClellan, editor of the *LaGrange Patriot,* was literally setting type for an article urging that the military turn the culprits over to the civil authorities when he also was arrested by a provost guard on October 28. Five other Fayette County men were arrested at the same time, including G.W. Sinks, F.W. Grasmeyer, George D. Harwell, August Jungbecker and L. Lindsay. Sinks, fifty years old, and originally from Ohio, had been the Chief Clerk of the Republic of Texas Post Office Department, and his wife had been instrumental in establishing the Monument Hill cemetery for the victims of the Mier Expedition in 1848. Lindsay, forty-eight and a Virginian by birth, was a lawyer and slave owner. Harwell, sixty-one, was from England and listed his occupation as "Gentleman" in the 1860 census. McClellan, fifty-three and a native of Virginia but a Texan since before statehood, had been District Clerk of Fayette County prior to the war. Grasmeyer, also fifty-three, had emigrated from Hamburg, Germany to Texas in 1831, and was a prosperous farmer. He had been the target of a scathing attack by the March 24, 1861 LaGrange *State Rights Democrat* accusing him of not only being a unionist, but that he had supported Santa Anna and had been a traitor to Texas in 1836. Jungbecker, at thirty-eight, was the youngest of the group. Also a German immigrant, he was a school teacher. The men were not informed of the reason for their arrest, and their offices and homes were completely searched and then the detainees were literally marched off to Houston. Only the intervention of friends who provided conveyances prevented them from doing the hundred miles on foot. They were released on October 31 with an

Antonio López de Santa Anna

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[21] Butler had been condemned for his infamous woman order of New Orleans, stating that any woman showing insult to any member of the US Army would be treated as a prostitute.

[22] Official Records, War of the Rebellion, 1, XXVI, Pt 2, 328; Letter Louis Hillebrand to Pendleton Murrah, Pendleton Murrah Papers, Texas State Archives. Hillebrand was probably one of the people arrested in January 1863, as Mrs. Hillebrand's letter states that this was the second time that he had been arrested by the military. Jerry Bryn Lincecum, Ed. *Gideon Lincecum's Sword: Civil War Letters from the Texas Home Front*, (Denton, Texas; University of North Texas Press, 2001) 245. Lewis was forty-nine-year-old Dr. B.W. Louis of LaGrange and had spoken at one of the mass antidraft meetings in January, 1863.

incomplete explanation by Major Hyllestead of Magruder's staff that an anonymous informer had related to the authorities that he had heard the group making disloyal statements. McClellan was back in time to finish his uncompleted typesetting and get out an expanded issue of the *Patriot* by November 5. Of the men taken in the later arrests, all were released except Hillebrand and Seeliger who were ordered to be moved to San Antonio on November 25 to join Peebles, Baldwin and Zinke.[23]

The concept of military arrests of civilians was disturbing, and public pressure began to mount against Magruder. On November 24th Magruder published a circular explaining and defending his actions. The circular set forth the basic facts, and perhaps most telling were the following remarks;

> *"I do not desire to assume authority that does not properly and legitimately attach to my position as commanding general of this district. I have no intention to usurp power and disregard the restraints thrown around me by the civil law of the land. I desire, as all good citizens should, to obey the laws and resist oppression. But there are times and circumstances when a military commander must act upon the moment, when to delay would not only be dangerous, but might be fatal, and at such time and under such circumstances I shall never shrink from the responsibility of acting*."

Referring to the men who had been arrested and released, Magruder stated that it was not because there were no grounds for suspicion of their disloyalty, but only because there was not sufficient evidence to warrant holding them further. Magruder asserted that he had sent a synopsis of the evidence against the detained men to the governor, with a request that a "sufficiently stringent law may be passed by which the military authorities may be relieved from the necessity of arresting and confining men who should be dealt with by the civil tribunals." The circular concluded with the lengthy synopsis of the evidence that had been prepared by Horace Cone.[24]


E. H. Cushing

On the same day, E. H. Cushing, editor of the Houston Telegraph, wrote to Magruder requesting permission to print excerpts of, if not the entire circular, "because an attempt is being made to create some prejudice against you on account of their arrest. The only way to meet this attempt is by placing the facts broadcast before the public. These facts will make public opinion all right."[25] The move to win the battle of public opinion evidenced the legal dilemma in which Magruder was finding himself. Although Magruder had publicly stated he was holding

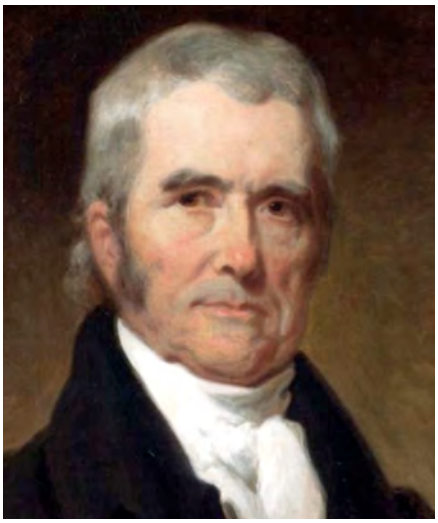
[23] LaGrange *Patriot*, November 5, 1863; United States Eighth Census (1860), Fayette County, Texas; Aubrey L. McClellan, *William Brownlow McClellan - Early Texas Newspaperman, His Life & His Descendants* (El Cerrito. Ca., Rahara Enterprises, 1990); LaGrange *State Rights Democrat*, March 23, 1861; Special Order Number 321, Paragraph "X", November 25, 1863, Department of Texas, New Mexico and Arizona, National Archives and Records Administration, Record Group 109, Chapter II, Vol. 110 (page 113).

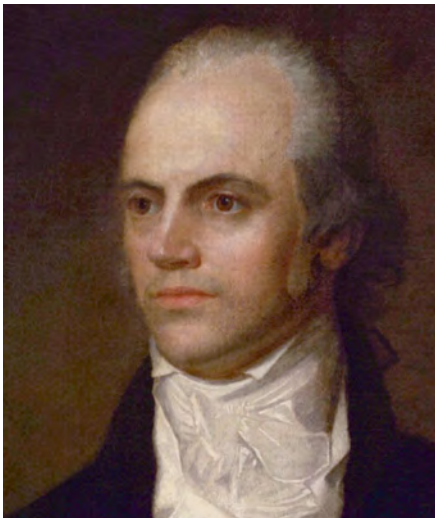
[24] Official Records, War of the Rebellion, 2, VI, 561.

[25] Ibid., 560.

the dissidents for delivery to the civil authorities, there was a serious question of with what offense could they be charged? Had the men committed treason, had they entered into a criminal conspiracy, or had they done nothing actionable? An analysis of existing law would indicate that they had not legally committed the offense of treason.

Article III, Section 3 of the United States Constitution established the American definition of treason - "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." Both the Confederate Constitution and the Texas Constitution adopted the identical language [Art. 1, Section 22]. Additionally, under both the 1848 and 1856 Texas Penal Codes, the Texas legislature had made misprision of treason an offense, which is knowing that treason had been committed and failing to report it to the authorities.


Chief Justice John Marshall


Aaron Burr

English common law had recognized seven types of treason, ranging from killing the sovereign to counterfeiting. The framers of the Constitution adopted only the third and fourth "species" of common law Treason, that being making war against the state and adhering to the enemy. The requirement of two witnesses was a unique American addition as no other crimes require two witnesses. The landmark United States case on Treason had been John Marshall's opinion in the trial of Aaron Burr. Departing from the common law, Marshall held that a conspiracy to commit treason without an overt act of war was not actionable treason. Similarly, "adhering to the enemy" had been held to mean the actual providing of supplies, support or information. In the context of the seized materials, it becomes apparent that the broadside and letters, although clearly derogatory of the Confederate War effort, were probably legally inadequate to sustain a conviction under Confederate or state law. Additionally, under the Texas Penal Code, conspiracy was limited to attempts to commit murder, robbery, arson, burglary or theft.[26] The general public however, swayed by the press, would not be impacted by legal technicalities.

The tension in the state further heightened in early November 1863. In Tyler, a plot was uncovered between the federal prisoners held at Camp Ford and unionists George Whitmore, John Whitmore, and George Rosenbaum. More than seven hundred prisoners were bivouacked in an open field, and the Whitmores were conspiring to effect a mass breakout that included

[26] William Draper Lewis (ed) *Commentaries on the Laws of England in Four Books, by Sir William Blacstone* (Philadelphia, Rees Welsh and Company, 1897)1479-1492; *US V. Burr,* 4 Cranch, 469 (1807): United States Constitution, Art. III, Section 3; Confederate States Constitution Art. III, Section 3; Texas Constitution, Art. I, Sec. 22; *The Penal Code of the State of Texas, adopted by the Sixth Legislature* (Galveston, The News Office, 1857) Title XXI, Chapter 1.

sacking the town of Tyler. The discovery of the plot caused no little panic. The conspirators were arrested, and planters brought slaves to the camp and quickly erected a stockade. The Whitmore brothers and Rosenbaum were initially placed in the county jail on November 12, and after a week thrown into the newly completed Camp Ford stockade with the Union prisoners of war. Court records indicate that the men actually communicated details of the plot to a Confederate sergeant posing as an escaped Union prisoner and gave him money and a pistol. There were no state proceedings filed against them, and the records of the Confederate District Court no longer exist. Under existing law, this would have been clearly a treasonous act, but as there was only a single witness, the unique American requirement of two witnesses would have precluded a conviction. The men were released in the fall of 1864 after a year in military custody. [27]

By the end of November, the circular was being printed in newspapers as far away as San Antonio, and the publication had the result predicted by Cushing. On November 30, Major A.G. Dickinson, commanding the post of San Antonio, wrote Magruder that the article had caused great excitement in the city. He had doubled the guard on the prisoners, but even so he was fearful that a mob would wrest them from him and hang them. He had been treating the prisoners with kindness, to the point of allowing them to visit relatives at his home while under guard. Dickinson indignantly stated. "Had I known of the black and deep-dyed villainy of these men (of which I think I should have been informed), I should never have accorded to Peebles the privileges which, through his family, I felt almost compelled to grant. "[28]

In the meantime, Magruder realized that he had never had a confirmation from Smith of his request in October that Cone be named his "Judge Advocate General." Writing to Smith on November 24, 1863, Magruder reiterated his request stating it "may have been overlooked in the large number of communications presented for the consideration of the Lieut. Gen. Cmdng." He lauded Cone's accomplishments as a lawyer of high standing who had turned down an appointment as Texas Secretary of State by Governor Murrah because of his service to Magruder. Again, digging at CS Attorney George Mason who was "frequently absent," Magruder asserted that he did not know what he would have done without Cone. He requested that Cone be appointed an Assistant Adjutant General with rank of Captain, and that he be assigned to duty as "Judge Advocate General." The letter might very well have been prompted by the fact that Cone's position as "Judge Advocate General" was being printed in every paper in the state, and that Magruder needed confirmation for a staff officer with no legitimate appointment or authority. Smith replied to Magruder on December 3rd, indicating that he had forwarded the request to the War Department in Richmond with a "strong recommendation" that the appointment be approved. At the same time, Smith noted that he had received a verdict from a General Court Martial that had been signed by Cone in early November. Smith asserted that Cone had no commission, and as such the Order was illegal and void.

Smith's endorsement of Magruder's request for appointment bears closer scrutiny.

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[27] Randal B. Gilbert "The Building of the Camp Ford Stockade" *Chronicles of Smith County, Texas* Smith County Historical Society, Tyler, Texas, Vol. 24, No. 2, Fall, 1985.

[28] Official Records, War of the Rebellion, 1, XXVI Pt2, 458: *The Tri-Weekly Telegraph* [Houston, TX], Friday, November 27, 1863, 1.

"*H.Q. Trans Miss. Dept.*
Shreveport, December 1, 1863

Respectfully forwarded for the favorable consideration of his Excel. The President. Gen. Magruder really requires more assistance in his Adj. Gen's office - His selection of Mr. Cone is Judicious.

I believe that an officer his character and legal attainments near Gen. Magruder as a legal advisor will not only relieve me of some embarrassment, but will materially increase the success of General Magruder's administration"

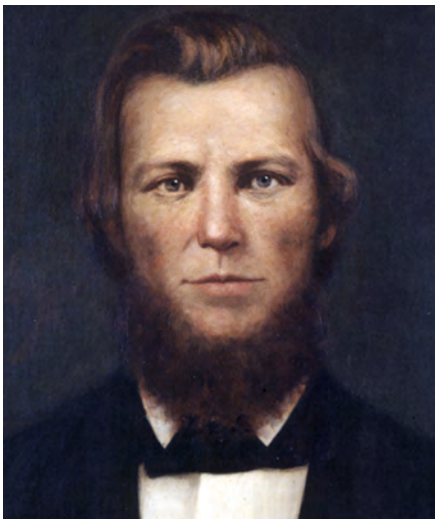
Confederate Adjutant and Inspector General Samuel Cooper took a decidedly different posture.

"*Gen Magruder is very liberal in his recommendations for appointment of officers for the general staff. He denominates this gentleman as "My Judge Advocate General" when he well knows that there is no such office recognized by the confederate laws. He also knows, as an officer of experience, both in the former service and this, that in appointing General Court Martial it always been the practice to detail an officer of the army to perform these duties. This application should* ***be at once*** *checked and Gen. officers should be required to refer to Acts of Congress before they commit themselves in making recommendations for illegal appointments. Gen. Magruder has his full compliment of staff officers.*

Jan. 22, 1864.
S. Cooper Adj. And Insp. Gen."

The final endorsement was from Secretary of War James Seddon on January 26, 1864, which stated tersely; "M.G. In view of your endorsement below, I am unwilling to appoint - JAS" Even though Cone's appointment was denied, and presumptively was returned to Magruder, it had no impact on the good general. Cone would continue as "Judge Advocate General." [29]

Magruder's message to Governor Pendleton Murrah in mid-November had already borne fruit. On Friday, November 20, State Representative C.W. Buckley filed a bill "entitled an Act to define and punish sedition and to prevent the dangers which may arise from persons disaffected to the state." The bill was referred to the Judiciary Committee which reported the bill out favorably on Monday the 23rd. On the first of December the bill was passed and sent to the Senate. The Texas Senate was seemingly more conservative than the house, and there was seemingly some opposition to the bill in the higher body. On November 25, Magruder ordered Cone to Austin "for the purpose of conferring with the Governor and Legislature, on the defense of the State under existing circumstances." Cone, with his reputation and legislative experience, was apparently dispatched to attempt to insure the passage of the legislation.


Gov. Pendleton Murrah

[29] Magruder to Smith, November 26, 1863, with endorsements, Smith to Magruder, December 3, 1863, Compiled Service Record, National Archives, Horace Cone.

Even so, on December 7 the Senate Judiciary Committee reported out a substitute bill which was passed on December 9. The Senate passage was reported to the House on the 10th, approved by that body, and sent to the governor who signed it on December 14. Although the original house bill had been captioned as an anti-sedition measure, the final act made no mention of sedition and merely expanded the scope of and penalties for treason. An anti-sedition bill had been introduced in the Confederate Congress in late 1863 and had met fierce opposition, especially from Senator Louis Wigfall of Texas, and had not passed. In light of the opposition to that bill, and the general negative connotations that had been associated with the Alien and Sedition Acts of the John Adams administrations, it is probable that the Senate substitute was a complete rewrite of the original bill and was somewhat "watered down" from the house version.[30]

The act amended Articles 231-234 of the 1856 Texas Penal Code. The existing code had merely defined treason as stated in the constitution and provided a punishment of death or life imprisonment. Misprision of treason [failing to report treason within five days] was punishable by a term of imprisonment not exceeding seven years or a fine not exceeding two thousand dollars. The amendments also greatly broadened the definition of treason. The bill made it unnecessary to prove an actual communication with the enemy, and then expanded the categories of acts constituting treason as "Any act, the tendency of which is to give aid and comfort to the public enemy, committed with the intent to aid his operations, or defeat or interrupt those of this state, or the Confederate States, is an overt act within the meaning of the Constitution. The intent is to be determined by the declarations or other conduct of the party, taken in connection with the act."

The crime of Misprision of Treason was also expanded. It became a crime not to report someone who was "intending to commit treason," but it did exempt communications between spouses, and that a mother did not have to report a child's treasonable intentions. Intent to commit treason was defined as being "evidenced by any declaration made by the party to any act which would constitute treason, whether made orally or in writing, taken in connection with any conduct showing the purpose to be real." Additional prohibited acts of misprision included: (1) advising another person to join the public enemy, or in any way aiding or assisting another person to join the public enemy; (2) publicly maintaining that either himself or any other inhabitant of Texas does not owe obedience or duty to this State, or that he does owe obedience to the government of the public enemy; (3) privately maintaining that either himself or any other inhabitant of Texas does not owe obedience or duty to the State, or that he does owe obedience to the government of the public enemy, with the intent to induce another citizen to avoid the performance of his duties to the State; and (4) writing, printing, publishing, any letter, book, address, or other writing, [or assisting in the same] maintaining the right or duty of any citizen of the State to give aid or comfort to the public enemy, or that any citizen owes obedience or duty to the government of the public enemy. Finally, the Act amended Penal Code Article 780 to include Treason within the conspiracy statute and gave it the same penalty as conspiracy to commit murder, which was not less than two nor more than ten years. In any event, this Act would not have been effective as to the conduct of Peebles, Baldwin, et al, as it was passed after the fact, and was in effect shutting the gate after the horse was out.

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[30] Texas House and Senate Journals, Special Order Number 321, Paragraph "XVII", November 25, 1863, Department of Texas, New Mexico and Arizona, National Archives and Records Administration, Record Group 109, Chapter II, Vol. 110, 115.

On December 21st Magruder wrote Texas governor Pendleton Murrah requesting that he allow the use of the Texas penitentiary for the confinement of "political criminals." No response can be located, and Murrah had turned down earlier requests from Magruder to house prisoners of war.[31]

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[31] Official Records, War of the Rebellion, 1, XXVI Part 2, 520.

End of Part 1

Part 2 of this article will appear in the TSCHS Summer '24 Issue.

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Return to Journal Index

Dueling in Texas:
A Curious Legal History

By Hon. John G. Browning

I. INTRODUCTION

For most Americans, the notion of dueling conjures images of the famed Alexander Hamilton – Aaron Burr duel in 1804. For others, the medieval "trial by combat" may come to mind, either in the form of actual historical examples or the mano e mano matches on television shows like "Game of Thrones" that were inspired by these historical antecedents. But the truth is, the Code Duello once held sway as a means of vindicating one's honor—particularly in the antebellum South. So pervasive was the problem of young men seeking to avenge real or perceived slights to their "honor" that, eventually, states began passing anti-dueling laws.

A 1902 depiction of the July 11, 1804 duel between Aaron Burr and Alexander Hamilton.

It was such a problem among lawyers, in fact, that states also began requiring aspiring attorneys to swear separate oaths vowing that they had not nor would not engage in duels. Some of these antiquated provisions survive today. Today, in Kentucky, Section 228 of the state constitution requires all officers of the state and all members of the bar to swear that they:

> have not fought a duel with deadly weapons within this State nor out of it, nor have I sent or accepted a challenge to fight a duel with deadly weapons, nor have I acted as second in carrying a challenge, nor aided or assisted any person thus offending, so help me God.

However, before this article proceeds with its discussion of the "Code Duello," its heyday in U.S. and Texas history, and the rise of anti-dueling laws, let's acknowledge one curious fact about dueling and Texas law. Apparently, dueling is still arguably legal in two states. Washington is one, and yes, Texas is the other.

Both states have a "mutual combat" law that sets them apart from other states. In Texas

"mutual combat" is an affirmative defense in specific assault cases. Texas Penal Code 22.06 ("Consent as Defense to Assaultive Conduct") provides that the victim's effective consent or the actor's reasonable belief that the victim consented to the actor's conduct is a defense if "(1) the conduct did not threaten or inflict serious bodily injury; or (2) the victim knew the conduct was a risk of: (a) his occupation; (b) recognized medical treatment; or (c) a scientific experiment conducted by recognized methods."

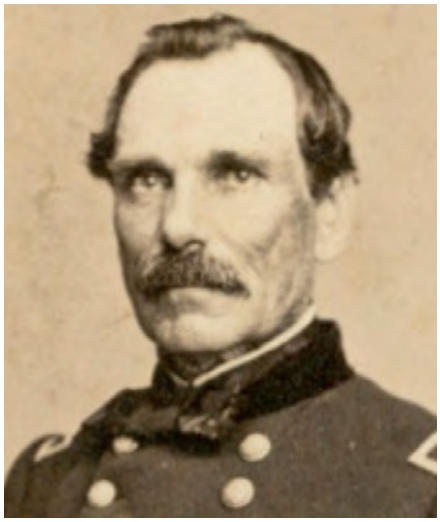
I'm no criminal defense lawyer, but it seems like if we're talking about a situation involving mere fisticuffs in which both parties agree to "step outside," the "mutual combat defense" might apply—at least for charges of assault, aggravated assault, or deadly conduct.

II. THE CODE DUELLO

The first recorded duel on what was to become American soil was fought at Plymouth, Massachusetts on June 18, 1621.[1] Oddly enough, for a custom that would eventually be associated with "gentlemen," it involved two servants—Edward Doty and Edward Leister—and ended bloodlessly.[2] By the time of the American Revolution, dueling had become firmly entrenched in American culture, despite a number of colonial laws banning the practice. After the war, dueling only increased in popularity.

Dueling was governed by a strict code of honor, which became known as the Code Duello. Under its reasoning, if a gentleman's honor or character had been challenged or insulted, the gentleman was bound to confront his accuser in a duel to re-affirm his honor. There were specific enumerated rules for sending a challenge, receiving a challenge, carrying out the duties of a second, loading the weapons, and conducting the duel itself. The rules could get rather elaborate, perhaps in an effort to enable the seconds to talk sense into the duelists and prevent bloodshed. In 1842, a young Abraham Lincoln was challenged to a duel by James Shields over remarks the future president had made about banking in Illinois. The duel was to be held at Bloody Island, Missouri (where dueling was legal). Fortunately, by the time the Illinois parties arrived at the destination, the perceived slight had been satisfied and no duel took place.

Abraham Lincoln in 1846



James Shields

Although the North (especially New York) was an early hotbed for dueling, the practice became less favored as a means of settling disputes for the simple reason that the code of chivalry and gentlemanliness had ceased to be a central measuring stick for human activity, having been

[1] Robert Baldick, *The Duel: A History of Dueling*, 115 (1970).

[2] *Ibid.*

largely replaced by success in business. As the noted historian Lawrence M. Friedman bluntly put it, "Southerners fought duels, while Northerners sued each other."[3] In the South, the Code Duello was subscribed to wholeheartedly by white gentlemen who fancied themselves as something of an aristocracy. Southerners even embraced dueling as a part of the regional distinctiveness that set them apart from Northerners.

Yet officially, the practice of dueling was condemned, and beginning around 1800, Southern states passed a variety of laws that theoretically punished those who dueled as well as severed the link between dueling and forms of social approval like holding political office (Northern counterparts like Massachusetts and Connecticut had done this prior to the Revolution). Kentucky banned duelists from holding public office in 1799, followed by North Carolina in 1802, Tennessee in 1809, and Virginia in 1810.[4] Other states like South Carolina, Georgia (1815), Alabama (1819), and Mississippi (1822), carried it a step further by not only barring duelists and their seconds from holding public office, but also banning them from practicing law or medicine.[5] Most anti-dueling laws further stipulated that when one combatant died, not only the opposing duelist but also the seconds would be guilty of murder.


Gov. John Lyde Wilson

For decades, however, such anti-dueling laws were largely ineffectual, and were seen—as one scholar has described it—as "sops to vocal minorities opposed to dueling," the passage of which "did not signal any change in the majority's actual tolerance of the practice."[6] South Carolina's law, for example, was signed into law by a governor who was himself a veteran duelist, and years later, the state's citizens twice elected as governor John Lyde Wilson, who had authored what was viewed as a classic guide to dueling. The anti-dueling laws were rarely enforced, and legislatures that required anti-dueling oaths made a frequent practice of granting exemptions or amnesties to newly elected legislators who had fought duels. Mississippi granted fifteen such amnesties as late as 1858, for example.[7] Another scheme was to change the effective date of a state's anti-dueling oath, so that a previous duel's date wouldn't disqualify a legislator from taking his seat. Kentucky, for example, changed the effective date of its anti-dueling oath fifteen times between 1821 and 1848![8]

Essentially, by the 1820s, virtually every Southern state had passed laws or adopted constitutional provisions that not only punished duelists and their seconds, but also struck at every step in the dueling process—such as sending or accepting a formal challenge to a duel. But these laws rarely worked because enforcement of them relied too heavily on men who were deeply embedded in the very practices that these laws sought to dismantle. In the antebellum

3 Lawrence Friedman, "Dead Hands: Past and Present in Criminal Justice Policy," 27 *Cumberland Law Review*, (1997), 903–17.

4 C.A. Harwell Wells, "The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America," 54 *Vanderbilt Law Review* (2001), 1805, 1826.

5 *Ibid.*

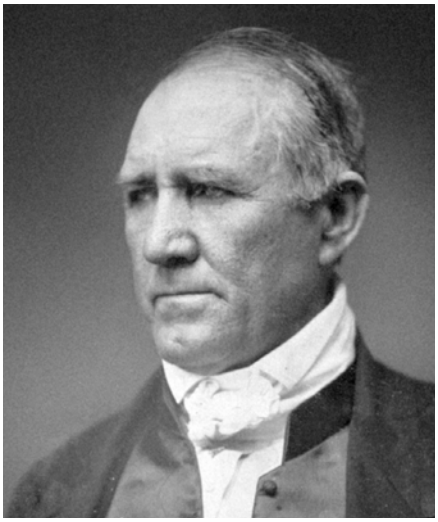
6 *Ibid.*,1827.

7 Wilmuth S. Rutledge, "Dueling in Antebellum Mississippi," 26 *Journal of Mississippi History* (1964), 183, 190.

8 David Roberts Lewis, "Dissent to Dueling: Arguments Against the Code Duello in America," (unpublished M.A. thesis, Vanderbilt University 1984), 34.

era, dueling or even murder charges were rarely brought against duelists.[9] And even when they were, sympathetic juries convicted infrequently. In 1850, the Louisiana Supreme Court went so far as to say that the state's anti-dueling oath for legislators was justified by the fact it was the only measure that would curb the practice, since juries were loath to impose punishment.[10]

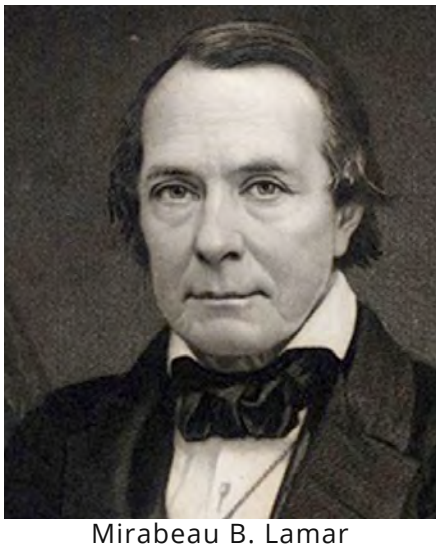
While not strictly "Southern," states that were settled in large part by Southerners did display this aspect of the region's culture—dueling. Illinois and California had a fair number of duels, as did Texas. As the next section illustrates, this unfortunate vestige of Southern culture had its heyday during the early years of the Republic of Texas.

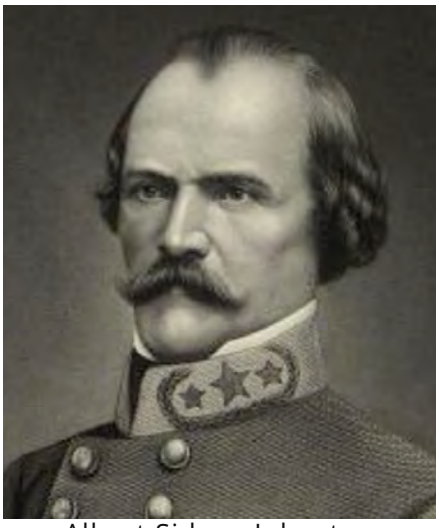

Sam Houston

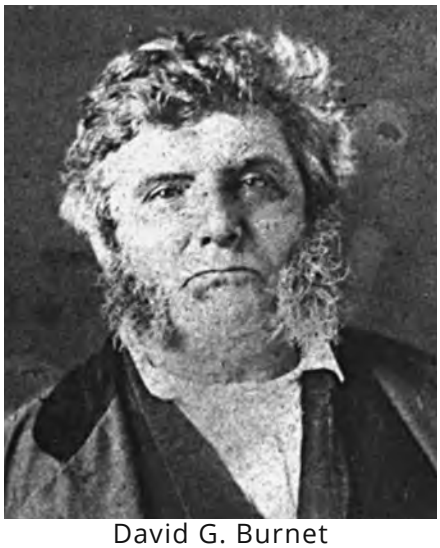
III. DUELING IN EARLY TEXAS

Fighting a war for independence from Mexico did not make Texans reluctant for further bloodshed in the form of dueling; if anything, it was as much in vogue in the early years of the Republic as it was throughout the South. At times, it seemed the only person *not* spoiling for a fight was Sam Houston. Houston was challenged to duels on multiple occasions by a host of other Texas luminaries, including Commodore Edwin W. Moore, Mirabeau B. Lamar, Albert Sidney Johnston, David G. Burnet, and others. Yet he never accepted any of these challenges. For example, in 1841, Houston and Vice President Burnet engaged in a running war of words in the press, with Burnet referring to Houston as


Edwin W. Moore


Mirabeau B. Lamar


Albert Sidney Johnston


David G. Burnet

[9] One study noted that there was a total of only seventeen published appellate cases dealing with anti-dueling laws in the states of Alabama, Arkansas, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia before 1860. Warren F. Schwartz, "The Duel: Can These Men be Acting Efficiently?," 13 *Journal of Legal Studies* (1984), 320, 327.

[10] Dwight v. Rice, 5 La. Ann. 580, 581 (1850).

"Big Drunk," "Half Indian," and other insulting nicknames. For his part, Houston accused Burnet of being "an ex-hog thief." Burnet dispatched his "second," Speaker of the House Branch T. Archer, with a "note" (the formal challenge). Unfazed, Houston refused to accept the challenge, and Archer returned the note to Burnet unopened.


Branch T. Archer

The young Republic had, like the Southern states, officially condemned the practice of dueling since its earliest days. On December 21, 1836, the Texas Congress passed a law providing that "Every person who shall kill another in a duel shall be deemed guilty of murder, and on conviction thereof shall suffer death." It also stated that seconds would face punishment as well. The statute continued to say that "Every person who shall be the bearer of any challenge for a duel, or shall in any way assist in any duel, shall, on conviction thereof, be fined and imprisoned at the discretion of the court before whom such conviction may be had."

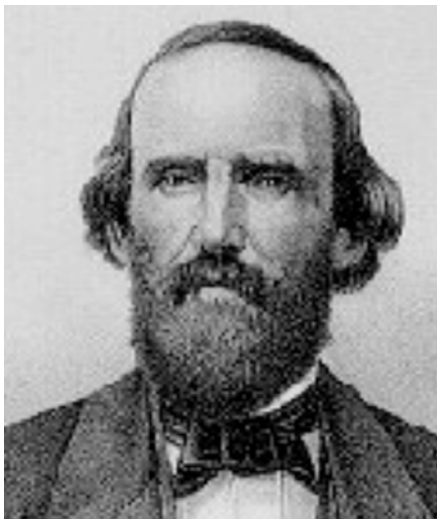
Regardless of this legal prohibition, dueling ran rampant in 1837 and 1839, particularly among officers of the Army of the Republic of Texas. The editor of the *Texas Sentinel* even lamented (in the wake of one such duel), "We would opine that there was fighting enough to be had on our frontier without resorting to private combats." A shockingly high percentage of officers and public officials were either killed or seriously wounded in duels. In June 1837, army surgeon Chauncey Goodrich (described as a "truculent Mississippian") and Levy L. Laurens (reporter for the House of Representatives) dueled with rifles at twenty yards after Goodrich accused Laurens of stealing a $1,000 bill. Laurens fell, mortally wounded. In 1836, a Captain Graham dueled with a Captain Stanley on Galveston Island. The cause of the duel was who had priority in choosing cuts of beef for their respective units. Yes, they had a beef over . . . beef, and Captain Stanley wound up dead as a result. In 1837, a Major Stiles Leroy killed another major, James W. Tinsley, in a duel arising out of a dispute over a horse.

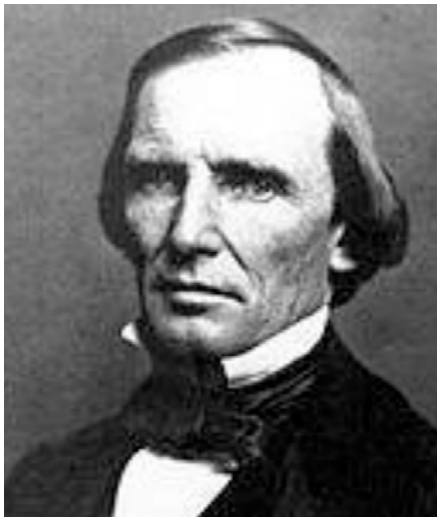

Col. Lysander Wells

Even heroes of San Jacinto were not immune to these "affairs of honor." In May 1840, Colonel Lysander Wells, a cavalry officer and friend of Sam Houston, met on "the field of honor" at Seguin's Ranch near San Antonio with infantry officer Captain William D. Redd (a protégé of Mirabeau Lamar). The duel "was occasioned by some unimportant dispute," and further hastened by "fiery spirits." Wells and Redd fired simultaneously and neither missed; Redd was shot through the heart and Wells was struck in the head—both died. Rank apparently was not a deterrent. Albert Sidney Johnston, the commanding general of Texas' army, tried to avoid duels but was not always successful. On February 4, 1837, Felix Huston—who had briefly commanded the army—issued a challenge to Johnston, who'd been appointed commander in January 1837, succeeding Huston. Huston considered Johnston's promotion as an effort "to ruin my reputation and inflict a stigma on my character."

On February 5, 1837, the two met on the Lavaca River. Huston, "a most expert marksman," was the better shot. After three exchanges of fire, Huston shot Johnston and gravely wounded him. Although Johnston almost died and only recovered after several months, he never spoke with regret about the duel. He considered it "a public duty" that he owed and felt that he would never have had the respect of his soldiers if he had "shown the least hesitation in meeting General Huston's challenge."

Even Texas Rangers were drawn into duels. Ben McCulloch had run for a seat in the Texas House of Representatives against Alonzo B. Sweitzer, and there had been bad blood between the two during the campaign. However, three weeks after the election, Gonzales County was raided by a marauding Native American war party. Both McCulloch and Sweitzer were dispatched; but when they argued over who had picked up the trail of the attackers, Sweitzer challenged McCulloch to a duel. McCulloch declined, putting their shared task of neutralizing the Indians first. Days later, after abandoning the pursuit, McCulloch sought out Sweitzer by the campfire and asked if he was ready to resume their plans for a duel. Caught unprepared, Sweitzer declined. In accordance with the Code Duello, McCulloch pronounced Sweitzer as "a blackhearted, cowardly villain, in every respect beneath the notice of a gentleman."


Ben McCulloch


Reuben Ross

But after the company returned to Gonzales, Sweitzer again challenged McCulloch, this time with a friend, Reuben Ross, delivering the challenge. While McCulloch refused to recognize the challenge, he did respect Ross. Ross, acceding to the code of honor, tendered himself in Sweitzer's place. McCulloch accepted, and on October 6, 1839, the pair faced off with rifles at forty paces in a field two miles north of Gonzales. Ross fired, severely wounding McCulloch.

The story doesn't end there. McCulloch was indicted for "contriving and intending to break the peace of this Republic, setting at naught the quiet and good morals of this community" by "wickedly, willfully, and maliciously" accepting the challenge. As with other dueling cases, however, the district attorney elected not to prosecute, and the case was dismissed. Several months later, McCulloch's brother Henry shot and killed Ross. For Alonzo Sweitzer, who had arguably started this mess, he found out the hard way that dueling ends badly; in 1841, he was killed in a pistol duel with Robert S. Neighbors. McCulloch recovered from his wound and went on to serve as a Confederate general during the Civil War. He died at the Battle of Pea Ridge in Arkansas on March 8, 1862.

Texas, as a republic, passed another law on January 28, 1840— "An Act to Suppress

Dueling."[11] Like other states, this law purported to close a loophole featured in many anti-dueling laws by criminalizing the act of leaving the state to conduct a duel—thereby frustrating the provisions of the anti-dueling law. Mississippi, for instance, had added such a "leaving the State to elude" feature. Texas followed suit, but neglected to include a venue provision in the statute mandating where the prosecution must be commenced. This provided courts with a built-in excuse to decline enforcement of the law. In 1855, in considering the state's appeal of an indictment of John H. Warren, the Supreme Court of Texas exercised this reason.[12] In Smith County, Warren was indicted for "consent to become a second to one W.H.P. to fight a duel," encouraged the same W.H.P. to fight a duel, and also left the state "for the purpose of eluding the provisions of [the anti-dueling law]."[13] But based on the absence of any venue specified in the indictment, the Supreme Court affirmed the lower court's dismissal, holding that "every offense must be charged with a venue" and that "the present indictment is bad for the want of a venue."[14]

In Texas, as in other former Confederate states, the Civil War destroyed the romantic notions attached to arranged combat. But as the next section indicates, the Code Duello was dying, but not dead.

IV. A LINGERING SHADOW

After the carnage of the Civil War, the Code Duello seemed to have lost its allure to those in the South with outdated notions of chivalry and honor. Yet dueling remained here and there. As one historian, Ben Truman, noted in 1884:

> Practically, public opinion sustains the consolidated enactments for the suppression of dueling in the United States; and, as an institution, it may be said to have ceased to exist in our beloved country—notwithstanding the Cash – Shannon duel in South Carolina in 1880, the Elam – Beirne meeting in Virginia in 1883, and later, the remarkable encounter in Louisiana between a soda-water seller and a catfish dealer of New Orleans, which was fought with rapiers and lasted eighty-three minutes before either of the combatants drew blood.[15]

Other commentators have pointed to even later duels, including an 1889 duel in Cedar Bluff, Alabama between J.R. Williamson and Patrick Calhoun.[16] One author noted that dueling "dwindled in the South after Reconstruction because southern society was no longer hospitable to it."[17] As she elaborated,

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[11] Hart. Dig., Art. 870 et seq. (Jan. 28, 1840).

[12] State v. Warren, 14 Tex. 406 (Tex. 1855).

[13] *Ibid.*

[14] *Ibid.*

[15] Ben C. Truman, *The Field of Honor*, (1884), 86. Truman refers to the last fatal duel in the United States fought between Colonel William M. Shannon and Colonel E.B.C. Cash in Darlington County, South Carolina on July 6, 1880.

[16] James R. Webb, "Pistols for Two . . . Coffee for One," *Am. Heritage* (Feb. 1975), 83–84.

[17] Alison LaCroix, "To Gain the Whole World and Lose His Own Soul: Nineteenth-Century American Dueling as Public Law and Private Code," 33 *Hofstra Law Review* (2004) 501, 555.

> The code of honor ultimately failed the South because the South relied too heavily on it, constituting itself as a region around a stylized ritual lacking any organic social function. Instead of a restatement of the public norms that governed social interaction, the duel had become a discrete code, a script to be performed as a demonstration of nationality.[18]

One Southern state, however, actually witnessed a brief revival of dueling in the early 1880s. Between 1879 and 1883, Virginians were sharply divided over the state debt. Two factions, the "funders" and the "readjusters," clashed heatedly in the state legislature and in the press over how the debt should be resolved.[19] The bitter conflict over "the soul of the state" resulted in ten challenges to duels and six actual duels.[20]

Yet dueling occasionally persisted, in part because overzealous prosecutors would attempt to charge defendants with violating antiquated anti-dueling laws that were still on the books. Dueling, courts recognized, was not merely planned combat but a complex, outdated social ritual that relied on both participants and observers to give it some sense of meaning. As the Kentucky Court of Appeals noted in 1909, not every fight—even if agreed to— is a duel. A duel, the court held, is not just a fight but "a combat with deadly weapons, fought according to the terms of precedent agreement and under certain or prescribed rules . . . prescribing the utmost formality and decorum."[21]

This view was followed by multiple Southern states. In Georgia, a conviction for homicide—not dueling—was upheld where two individuals, who had planned to meet later for a duel, met earlier and fought, resulting in one death.[22] Occasionally, there were even insurance implications. In Mississippi, the appellate court rejected an insurance company's contention that the insured had died in a "duel," and not been murdered, where the insured's policy would have been invalidated had he died in a duel.[23] An appellate court in Missouri dismissed a similar coverage argument by an insurance carrier.[24]

Texas courts underwent a similar change in thinking after the Civil War. In Texas' 1879 Penal Code, after "justifiable homicide," "excusable homicide," "homicide by negligence," "manslaughter," and "murder," there remained a separate entry for "dueling."[25] Article 610 provided that:

> Any person who shall, within this state, fight a duel with deadly weapons or send or accept a challenge to fight a duel with deadly weapons either within the state or out of it, or who shall act as a second, or knowingly aid or assist in any manner those thus

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[18] *Ibid.*

[19] James T. Moore, "The Death of the Duel: The Code Duello in Readjuster Virginia, 1879–1883," 83 *Virginia Magazine of History and Biography* (1975), 259, 262.

[20] *Ibid.*, 260.

[21] Ward v. Commonwealth, 116 S.W. 786, 878 (Ky. 1909) (reversing a conviction for violating an anti-dueling statute).

[22] Bendrick v. State, 54 S.E. 683, 684–85 (Ga. 1906).

[23] Baker v. Supreme Lodge, K.P., 60 So. 333 (Miss. 1913).

[24] Davis v. Modern Woodmen of America, 73 S.W. 923 (Mo. App. 1903).

[25] Penal Code of the State of Texas, Feb. 21, 1879 (passed by the Sixteenth Legislature) (Austin).

> offending, shall be deemed guilty of a felony, and upon conviction shall be punished by confinement in the penitentiary not less than two nor more than five years.[26]

Article 611 of the Code went on to state that if in any duel fought in the state a combatant should be killed, or "receive a wound from which he afterward dies within three months," the surviving party "shall be deemed guilty of murder in the first degree and be punished accordingly."[27]

However, as in other states that had once embraced and then lost their taste for the Code Duello, Texas courts gradually abandoned the notion of dueling as a more romanticized form of single combat rather than as a dispute resulting in homicide. In one 1908 decision, the Court of Criminal Appeals overturned the conviction of a C. Daughtry for "sending a challenge to fight a duel with deadly weapons in violation of Tex. Penal Code art. 715."[28] The Lubbock defendant challenged the evidence, which was fairly meager. The only prosecution witness had testified that he had received several telephone calls from the defendant, in which Daughtry had asked to meet him to discuss a letter containing allegations the witness had made against Daughtry.[29] The court found it "doubtful that the language in the letters was to be construed as an offer to fight with deadly weapons," and further observed that "the person never swore that the defendant was talking with him over the phone or that the handwriting contained in the letters was the defendant's handwriting."[30] Accordingly, it reversed the conviction.

By 1925, the Court of Criminal Appeals was drawing clear distinctions between the ritualized duels of old and the concept of "mutual combat." In *Griffin v. State*, the court considered the appeal out of Young County of H.S. Griffin for murder, and whether the trial court's instruction on dueling had been warranted.[31] Griffin and Hugh Riley, Jr. had gotten into a dispute over a land deal in Archer County, which resulted in a lawsuit over the location of a property line. After Griffin learned on May 16 that Riley was having a fence built on the disputed land, there was a confrontation between the two men which ended with Griffin saying he would be back.[32] When Griffin returned, the disagreement escalated with tragic consequences, as the court described:

> Defendant claims to have told [Riley] that he (defendant) had stopped the fence builders and requested [Riley] to await the coming of his lawyer, but that [Riley] instead of agreeing to this, expressed his intention of coming through the fence; that he dropped his shotgun against the fence, and presented his rifle as if to shoot, and did shoot about the same time defendant fired.[33]

The jury had been instructed that "A duel is a combat or fight engaged in by two persons with deadly weapons by agreement or prearrangement. Any person who wounds another in a duel

[26] *Ibid.*

[27] *Ibid.*

[28] Daughtry v. State, 113 S.W. 14, 54 Tex. Crim. 394 (Tex. Crim. App. 1908).

[29] *Ibid.*

[30] *Ibid.*

[31] Griffin v. State, 274 S.W. 611, 100 Tex. Crim. 641 (Tex. Crim. App. 1925).

[32] *Ibid.*

[33] *Ibid.*

from which such wounded person dies within three months thereafter, is guilty of murder."[34] Griffin objected because the indictment had not charged dueling, and because the evidence didn't support the submission of such a charge.

The Court of Criminal Appeal began with a nod to history, observing that:

> We are not called upon to trace the history of the anti-dueling clauses in the Constitution and statutes of our state, nor the changes which have been made in the law and in the penalties until we find it reflected in its present form . . . It is well understood that the purpose of our Constitution and statutes regarding the matter was to discourage and discountenance the settlement of real or imaginary grievances (usually for reflections, real or apparent, upon one's honor) by resorting to the old code duello.[35]

Quoting the *Ward v. Commonwealth* decision from Kentucky, the court noted that the Code Duello of old was "a formal and decorous system, the requirements of which were carried out with the most punctilious formality."[36] Of Texas' provision, the court concluded that "the 'duel' had in mind by the framers of our Constitution and members of the Legislature was the combat arranged with some formality, and usually through the medium of friends acting as seconds."[37] The judges went on to draw a distinction between dueling and the more informal issue of "mutual combat" as a limitation upon a defendant's claim of self-defense. Ultimately, the Court reversed Griffin's conviction, stating that the "facts do not raise the issue of dueling," and that the charge should have been omitted.[38]

The *Griffin* decision heralded the end of the duel (in its classic terms) in Texas, although the doctrine of mutual combat remains. Despite this, prosecutors elsewhere continued to include instructions on "dueling" in occasional murder cases well into the late twentieth century. In an historically detailed opinion in 1990, the Alabama Court of Criminal Appeals reversed the conviction of a defendant while pronouncing the "extinction in Alabama of the evil 'commonly called a duel.'"[39] The court noted that every Constitution of Alabama from the first in 1819 to the last in 1901 had contained a provision to empower the legislature to pass laws to "suppress the evil practice of dueling," and that every prior edition of the Penal Code had contained an anti-dueling law.[40] The court also observed that Alabama law had required an anti-dueling oath by every public officer before taking office from January 7, 1836 to May 23, 1951.[41] It was a mistake, the court reasoned, to inject an issue as to dueling into the instant case, and it ordered that the case be tried again.[42]

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34 *Ibid.*

35 *Ibid.*

36 *Ibid.* (quoting Ward v. Commonwealth, 116 S.W. 786, 132 Ky. 636 (1909)).

37 *Ibid.*

38 *Ibid.*

39 Payne v. State, 391 So. 2d 140, 144 (Ala. Crim. App. 1980).

40 *Ibid.*

41 *Ibid.*

42 *Ibid.*

The last reported case in which charges of dueling were brought against a defendant was a 1990 New Mexico case, *State v. Romero*.[43] Romero had been convicted of dueling after he and his neighbor argued, both left to retrieve weapons, and then shot one another. The New Mexico Court of Appeals threw out Romero's conviction on the dueling charge since formal duels no longer occur.[44] As the court stated, "[T]his form of combat is long since dead."[45]

Dueling in Texas had its heyday during the Republic era, and to a lesser extent during the antebellum era of early statehood. While anti-dueling laws in the South started the death knell of this "barbaric practice" (as one court described it), it was the horrors of the Civil War that truly accelerated its demise. Despite this, vestiges of dueling lived on in the law. Today's "mutual combat" defense, unique to Texas and only one other state, is a relic hearkening back to a bygone age.

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[43] 801 P.2d 682 (1990).

[44] *Ibid.*

[45] *Ibid.*, 684.

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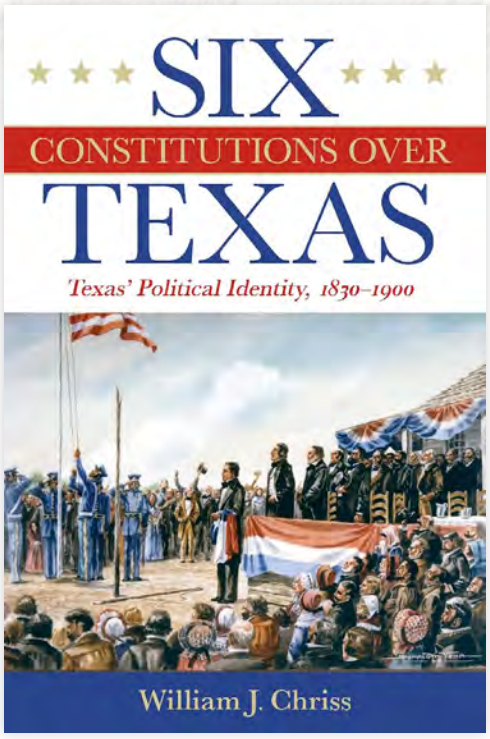
Book Review: *Six Constitutions Over Texas*

By Matthew Kolodoski

It is impossible to understand the history of Texas without considering its different constitutions over time, as the constitutions reflected the historical events and challenges faced by its people. By tracing the development, change, and outright replacement of Texas' foundational document—i.e., its constitution, Dr. William Chriss's *Six Constitutions Over Texas: Texas' Political Identity, 1830-1900* tells the vibrant story of Texas as it faced crises and changing times. Beginning with Spanish Texas and tracing Texas' history through independence from Mexico, the challenges of the Republic of Texas and statehood, the troubles of secession and Reconstruction, and the post-Reconstruction era, Dr. Chriss's book is an exhaustive account of how Texas' political elites dealt with the most important political issues of their day.



Six Constitutions Over Texas: Texas' Political Identity, 1830-1900, by William Chriss (Texas A&M University Press, 2024).

In addition to tracing the history of Texas' constitutions and their associated debates, Dr. Chriss also considers the "constitutional moments" that caused the creation of each new constitution. As explained by Dr. Chriss, "The six constitutions of Texas from 1836 to 1900 mark the watershed moments in this process. They epitomize the political and intellectual current of their times." Yet, as explored in Dr. Chriss's book, some of the constitutional changes involved elites working to "maintain wealth and hegemony" in a changing society, especially in the post-Civil War era. In considering these changes, Dr. Chriss examines the roles of class, ethnicity, and gender in Texas' history. A central component to this aspect of Dr. Chriss's work was Texas' troubling history of slavery, which has a central role in the text. The book also examines the difficulties faced by Texas' Reconstruction government following the formal end to slavery, including its eventual fall from power, and how Texas' post-Reconstruction government enmeshed certain racism, if not formal slavery, in Texas.

Dr. Chriss also considered various individuals (some more famous than others and some more notorious than others) who shaped Texas, its government, and constitutions. For example,

Dr. Chriss examines the roles of individuals like Stephen F. Austin and Sam Houston, who every school-aged Texan would know. But Dr. Chriss also considers others, like Oran Milo Roberts, who he described as "Texas' paradigmatic nineteenth-century prosecutor, politician, judge, orator, rebel, senator, 'redeemer,' governor, chief justice, university founder, and finally its historian." In so doing, Dr. Chriss considers the mythology of Texas and the role of those writing Texas history. For example, as explained by Dr. Chriss: "Indeed, part of *Six Constitutions* is a meta-history, the history of how a history (or a mythology) came about, and how it came to be so resilient." In so doing, Dr. Chriss brings a level of self-reflection and critical analysis to each of the constitutions he examines.

A notable feature of Dr. Chriss's work is its consideration of the role of cultural identity and "otherness," which permeates Texas' history and its various constitutions. Although Dr. Chriss evokes various questions in his work, a central question raised throughout the book involves: How does republicanism coexist with an exclusivist political or cultural identity? This question not only helps readers consider Texas' history in a retrospective manner, but the question also has a prospective component concerning our current political environment. In that way, Dr. Chriss's work is a broader work concerning political identity and both government and law.

In sum, Dr. Chriss's work is the definitive look at six constitutions over Texas between 1830 and 1900. However, it does much more than simply examine the constitutions. Dr. Chriss combines history, political theory, and constitutional doctrine into an exploration of Texas political identity. *Six Constitutions Over Texas: Texas' Political Identity, 1830-1900* is a worthwhile read for any attorney and judge, as well as students of government and political theory.

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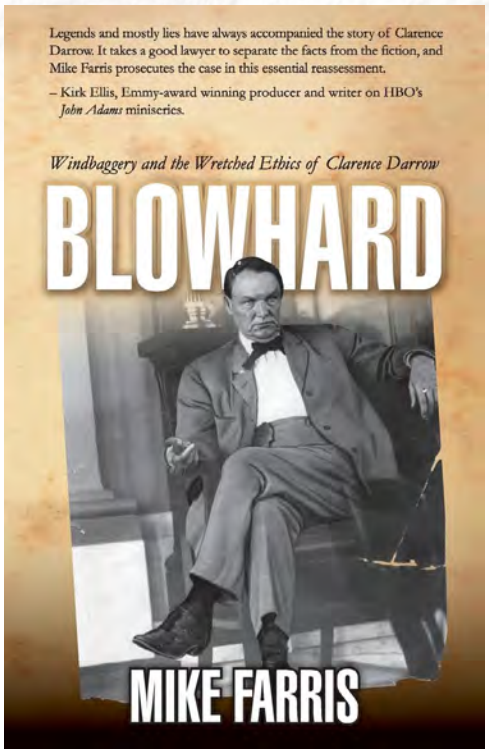
Book Review: *Blowhard: Windbaggery and the Wretched Ethics of Clarence Darrow*

By Hon. John G. Browning

For lawyers, the name "Clarence Darrow" usually conjures up one of those iconic figures of the legal profession—an attorney synonymous with the virtue of providing a defense for any individual or cause, regardless of its unpopularity or underdog status. Indeed, one earlier biographer of Darrow titled his work *Clarence Darrow: Attorney for the Damned*. Darrow earned a reputation for defending early labor leaders like Eugene Debs, teenaged murderers Nathan Leopold and Richard Loeb, and Tennessee schoolteacher John Scopes in the famed "Monkey Trial" of 1925 (immortalized on film in *Inherit the Wind*). In a closing argument while defending union leader Bill Haywood on murder charges, Darrow proclaimed, "It is not for him alone I speak. I speak for the poor, for the weak, for the weary, for that long line of men who, in darkness and despair, have borne the labors of the human race."



Blowhard: Windbaggery and the Wretched Ethics of Clarence Darrow, by Mike Farris (Stairway Press, 2024), 442 pages

In his new book *Blowhard: Windbaggery and the Wretched Ethics of Clarence Darrow*, retired Dallas attorney Mike Farris pulls back the curtain to reveal the unsavory truths behind Darrow's legend, from his willingness to bribe a jury and other individuals (he was twice tried for bribery) to his lack of belief in the concept of right and wrong. Farris' vividly written and meticulously researched book is an unwavering look at Darrow, the deeply flawed person and equally flawed lawyer. Farris convincingly, with the aid of trial transcripts and even Darrow's own words, knocks Darrow off his pedestal and provides "an analysis of, and commentary upon, Darrow's overwrought oratory and abysmal ethics as a lawyer."

The book begins with a look at Darrow's legend, aided in large part by the influence of the film *Inherit the Wind* and Spencer Tracy's portrayal of Darrow. It continues with an examination of the lawyer's two trials for bribery. Darrow beat both charges, but Farris is withering in his critique of the circumstances in each before concluding that Darrow was likely guilty in both trials. Along the way, Farris treats the reader to a front row seat to the overblown oratory and lengthy, specious objections for which Darrow was known. As Farris demonstrates, Darrow was no stranger to

gamesmanship, alternately invoking and blaming God in front of the jury, and resorting to lengthy recitations of poetry—including the "windbaggery" that was often on display. In the Leopold and Loeb trial, Darrow crafted what may have been the first "affluenza defense" for his two wealthy thrill-killer young clients.

By the time Farris' chronicle reaches the Scopes trial, we see Darrow not as the white knight riding to rally the cause of academic freedom, but as a mean-spirited, calculating person who leapt at the chance to belittle both organized religion and his nemesis, William Jennings Bryan. Farris concludes with his recounting of a past-his-prime Darrow's defense of the Massie case in Hawaii (the subject of another of Farris' wonderful books, *A Death in the Islands: The Unwritten Law and the Last Trial of Clarence Darrow*). That trial was a money grab for the seventy-four-year-old Darrow, who had suffered a number of financial reversals.

Blowhard is, as its author confesses, "harsh to Darrow," but "deservedly so." As Farris argues, an unflinching examination of Clarence Darrow reveals that he was not the romanticized legal crusader of legend, but rather "the poster child for why ethical rules and codes of professional conduct were promulgated." This book is equally compelling and courageous in its study of Darrow, and no reader will look at Darrow the same way again after reading this.

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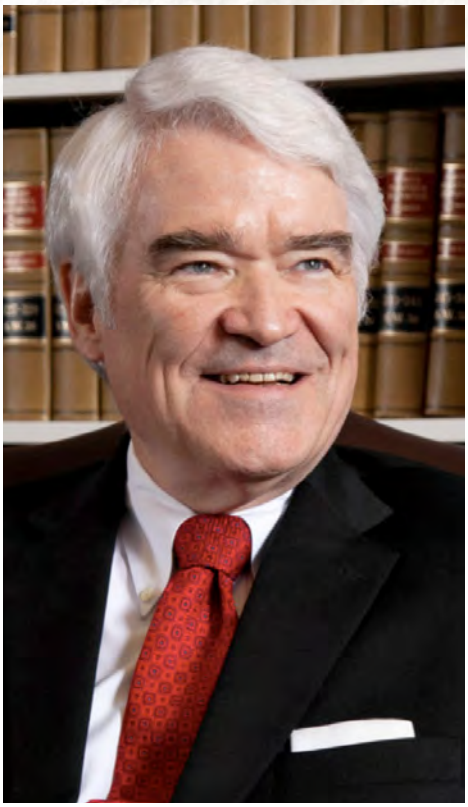
Hemphill Dinner Announcement



Chief Justice Nathan Hecht

The 29th Annual John Hemphill Dinner will be held on Friday, September 6, 2024, at 7:00 p.m. in the Grand Ballroom of the Four Seasons Hotel.

This year's dinner program will be a celebration of the service of Chief Justice Nathan Hecht's time on the Texas Supreme Court. The program will be emceed by former chief justices Thomas R. Phillips and Wallace B. Jefferson. Other features of the dinner are the presentation of the Jack Pope Professionalism Award and the Society's President's Award.

We anticipate this event will sell out so reserve your spot now.

Former Chief Justice Thomas R. Phillips

Former Chief Justice Wallace B. Jefferson

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The Society's *Charting Constitutions and Taming Texas* Rocked the Aggies at TSHA's 2024 Meeting

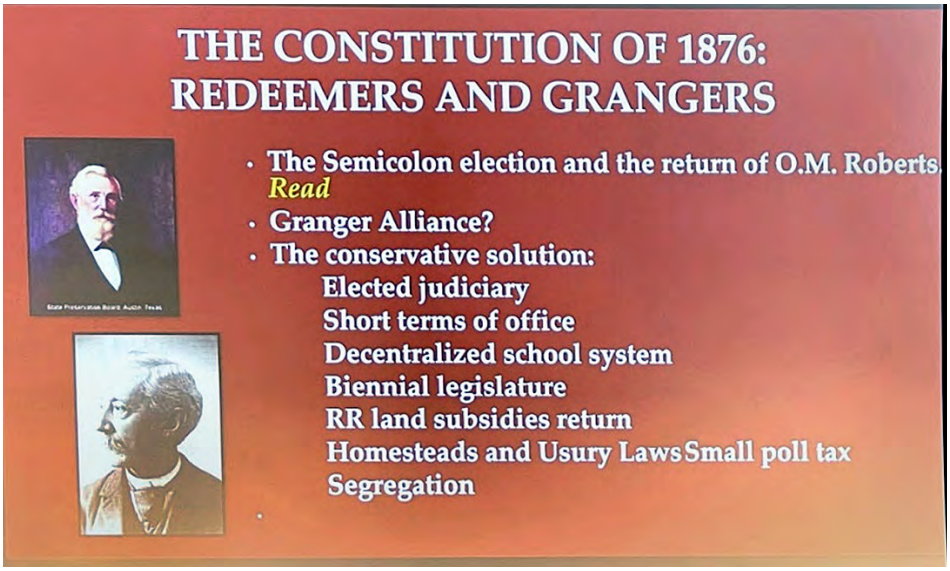
Article and photos by David A. Furlow

The Society's most recent panel program—*Charting Constitutions and Taming Texas*—attracted a large audience at the Texas State Historical Association's 128th Annual Meeting in College Station. The panel program occurred on Friday morning, March 1.

Society President Richard B. Phillips, Jr. and part of his presentation

The program got going when our President, Richard B. Phillips, Jr., discussed the Society's unique role in chronicling the history of the Texas Supreme Court, the Texas judiciary, and the evolution of Texas law. Mr. Phillips' PowerPoint showed the audience photos of the historical books the Society's authors have sponsored, the *Journal* it publishes, the conferences in which it participates, the Hemphill Dinner it organizes, and the educational activities it fosters.

William J. "Bill" Chriss, J.D., Ph.D. took the stage next to share the story of his decade-long research and writing project which culminated in Texas A&M University Press's January 2024 publication of his book *Six Constitutions over Texas: Texas' Political Identity, 1830-1900.* An attorney, historian, and scholar who authored *The Noble Lawyer* in 2011, Bill Chriss wrote *Six Constitutions* to examine the many ways Texas's six constitutions erected a framework of law and organized



William J. Chriss and part of his presentation

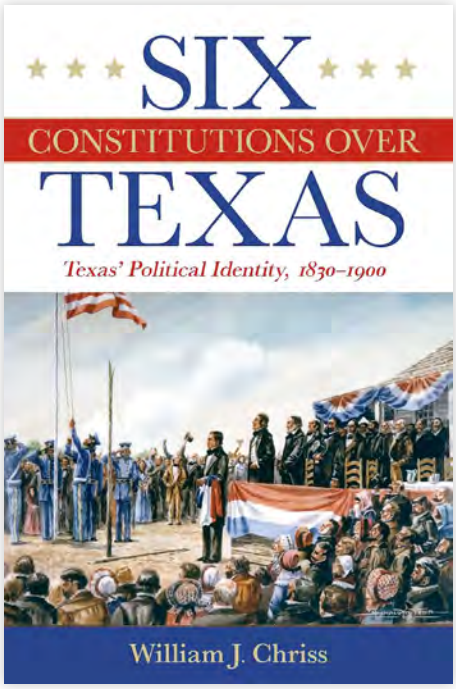
social priorities from the birth of an independent republic in 1836 until the present. University of Texas historian H. W. "Bill" Brands' Foreword to *Six Constitutions* highlights the importance of constitutionalism in words worthy of citation in an appellate brief:

> Americans are steeped in constitutionalism. We treat our Constitution as holy writ, the product of the "Miracle of Philadelphia," to use the title of Catherine Drinker Bowen's best-selling account of the convention of 1787, crafted by "an assembly of demigods," as Thomas Jefferson called the delegates to the convention…
>
> Yet if the Texas constitution doesn't inspire the awe accorded the American Constitution, it should inspire interest. Where the U.S. Constitution might be seen as the happy family of Tolstoy's famous formulation, the Texas Constitution is the unhappy—and therefore more interesting—one. And family it is, for the current Texas constitution has five elder siblings. And the rise and fall of the first five, and the evolution of the sixth—that of the half-thousand amendments—supply the historian scope for a tale of Tolstoyan proportions.

Bill Chriss's presentation told that Tolstoyan tale.

In his program's colorful PowerPoint, and in the introduction to his book, Bill discussed the "constitutional moments" when a society focuses on the priorities that define the legal relationships between a dominant majority and a marginalized minority. Bill told the story of Texas constitutionalism while revealing his own personal odyssey of writing and research. He re-examined the contributions of Anglos, Mexicans, Indians, and Germans to the development of Texas identity from the Revolution until the twentieth century. He then addressed how the Confederacy's Rebel Constitution severely restricted not only the circumstances of enslaved people but the right of their masters to free them. He delineated the sinews of Texas's Reconstruction constitutions. He then analyzed the so-called Redeemers' repudiation of racial equality in the Constitution of 1876, the rise of Texas's judiciary, the definition and disposition of public lands, and the role of the railroad in reshaping Texas's legal culture.

The author of *The Noble Lawyer*, Bill earned the Texas Bar Foundation's 2005 statewide Dan R. Price Award for service to the legal profession and excellence in teaching and scholarly writing. Over the years, he has provided legal ethics training to government agency and corporate attorneys, including lawyers employed by the State Bar of Texas, the U.S. Army, and American Airlines. He has shared insights with accountants, architects, attorneys, judges, insurance adjusters, real estate agents, and other professionals.



Bill is responsible for the Society's first publication through the Texas A&M University Press. Bill has donated all royalties from the sale of his book to the Society—and has already crisscrossed the Lone Star State promoting book sales. Bill spent the Friday afternoon of his panel presentation autographing copies of *Six Constitutions* at the Texas A&M University Press table displaying that scholarly press's most recent publications. Three weeks later, Bill spoke at Brazos Bookstore in Houston to an audience of attorneys and book-lovers. On April 18, 2024, Bill will speak about "The New Federalism and the Texas Constitution in Litigation and Appeals" and his *Six Constitutions* scholarship at TACTAS, the Association of Trial and Appellate Specialists in Houston. Everything about this project demonstrates that Trustee Bill Chriss is, indeed, a noble lawyer.

The Society's second major speaker was Warren W. Harris, a former president of this society and of the Houston Bar Association. He presented "Taming Texas: Teaching the Rule of Law to 7th Grade Students." No one could offer more insights about how the Society came to organize and present a major educational program that teaches young men and women about Texas law, courts, and history.

In conjunction with David J. Beck, Mr. Harris led the Society's Taming Texas educational project since its inception in a Houston Bar Association/Texas Supreme Court Historical Society joint venture in 2015. A past president of the Houston Bar Association, the Texas Supreme Court Historical Society, and the Texas Bar Foundation Fellows, he pioneered the Texas Supreme Court Historical Society's Fellows program, organized its *Taming Texas* Project, and administered its commission and funding of four textbooks written by historians James Haley and Marilyn Duncan. Our Society's Fellows spearheaded the project and funded it in conjunction with the State Bar of Texas Law-Related Education Department. The Houston Bar Association administered the project's classroom activities.

The *Taming Texas* project has brought lawyers and judges into 7th Grade Texas history classrooms to teach over 31,000 students in Houston, Dallas, and Austin about courthouse history, the rule of law, and the Texas Supreme Court's role in Texas' judicial system.

As Mr. Harris emphasized to the audience, the most important aspect of the project has been to bring students into personal contact with lawyers, judges, and justices who administer Texas's legal system. There is no better way to broaden the horizons of Seventh Grade Texas History

Warren Harris discussed the Taming Texas educational project.

students than to give them an opportunity to hear lawyers and ask them questions. The core of the project has always been the series of books written for seventh-grade students on Texas court history—beginning with the first one—*Taming Texas: How Law and Order Came to the Lone Star State.* Award-winning Texas historian James L. Haley authored that book along with co-author Marilyn P. Duncan, who edited and illustrated it. Haley and Duncan co-authored the remaining three books in the project.


Kirsten M. Castañeda

Kirsten M. Castañeda, another of our Society's trustees, served as the panel's commentator. She was responsible for directing questions from the audience to the speakers. But she did far more than that; she emphasized the importance of history to society, the legal system, and an educational system that ought to prepare students to master the challenges they will face after graduating from school. A partner in the Alexander, Dubose, Jefferson, L.L.P. law firm, and Chair of the State Bar of Texas Appellate Section, she showed an audience of historians, educators, and attorneys that she understood and shared their priorities and their passion for past, present, and future.

An honored tradition in Texas' historical community since the inception of the Texas State Historical Association, TSHA's Annual Meeting stands as the premier gathering for aficionados of Texas history, welcoming seasoned professionals, independent scholars, and attorneys determined to deepen their knowledge of law's lens on the world. This year's panel-presentation was another successful example of the Society's educational mission in action. This year's 2024 TSHA Annual Meeting attracted more than 600 attendees, as well as an audience of thirty people at our Society's panel program. TSHA's next annual meeting will occur from February 26 through March 1, 2025. Our Society looks forward to seeing you there.

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And the Larry McNeill Research Fellowship in Texas Legal History goes to Michael Banerjee

Article and photos by David A. Furlow

The Texas State Historical Association has awarded Michael Banerjee, a UC Berkeley School of Law Ph.D. student in Jurisprudence and Social Policy, the 2024 Larry McNeill Fellowship in Legal History. Holding two B.A's from the Pennsylvania State University, a J.D. from Harvard Law School, and an M.A. from Berkeley Law, he is studying the interrelated histories of state, university, and corporations. At Harvard, Michael served as a student attorney with both the Harvard Legal Aid Bureau and the Harvard Defenders. During the 2022-23 year, Michael served as law clerk to Vermont Supreme Court Chief Justice Paul L. Reiber. He is currently a law clerk at the Supreme Court of Hawai'i. TSHA awarded the Fellowship in response to Mr. Banerjee's submission, "America's Independent Republics: Texas, Vermont, and Hawaii." This Society has sponsored that TSHA annual award for the past six years. The Larry McNeill Research Fellowship in Texas Legal History is awarded annually for the best research proposal on some aspect of Texas legal history.

Author's photo of the Society's President Richard B. Phillips, Jr. and Michael Banerjee at the TSHA 2024 Annual Meeting Awards Banquet, March 1, 2024.

TSHA's decision reflects the value of comparative legal history as a means of exploring the creation of self-governing, republican forms of government on America's East Coast, West Coast, and Gulf Coast. "On the occasion of the sesquicentennial of Texan independence in 1986," Michael Banerjee wrote, "legal scholar James Paulsen wrote in the *Texas Law Review* that, "[u]nique among the states, Texas entered the federal union after a decade of existence as an independent nation. While Professor Paulsen is correct in that Texas was an independent nation before joining the union, Texas is actually one of three such states."[1] That's what I had always heard, but Mr. Banerjee described two other early forms of republican government.

[1] Michael Banerjee application, at 1, citing James W. Paulsen, "A Short History of the Supreme Court of the Republic of Texas," 65 *Texas Law Review* 237, 238 (1986).

"In 1791, Vermont joined the union after spending fourteen years as an independent republic, and, in 1959, Hawai'i joined after six decades as a territory preceded by more than a century of independence as first a kingdom and then a republic. As was the case with independent Texas, independent Vermont and Hawai'i both developed constitutional law that remains good law. But these three states are not as peculiar as one might think."

From the TSHA website.

When I first read the application, I thought that Mr. Banerjee might have failed to mention California's brief Bear Flag Republic. The California Republic (in Spanish, *República de California*), otherwise known as the Bear Flag Republic, was a secessionist state that broke free of Mexico in 1846 and gained military control of an area north of San Francisco around what is now Sonoma County in California. But the Bear Flag Republic was too brief and evanescent—it lasted a mere 25 days—to satisfy Mr. Banerjee's standard of shaping constitutional law still respected today. The Californians elected their military leaders, but did not get around to choosing a civilian leadership.[2]

"Historian Garry Wills wrote in 1978 that '[a]ll thirteen original colonies subscribed to the Declaration with instructions to their delegates that this was not to imply formation of a single nation,'" Mr. Banerjee continued. "If anything, July 4, 1776, produced twelve new nations (with a thirteenth coming in on July 15)."

Mr. Banerjee therefore proposed to write an article retelling the legal history of the United States across the eighteenth, nineteenth, and twentieth centuries by focusing on these three "independent-nations-turned-states, their respective constitutions, and their respective constitutional law," with a focus on "the otherwise confounding idea of dual sovereignty." Americans were in the habit of making little republics before they made a large one, and the latter's sovereignty depends on that of the former. "In this way, Texas's path was typical—rather than unique—and this makes Texas's story more—rather than less—interesting because it is characteristic of American state-building."[3]

Congratulations to Mr. Banerjee. The Society wishes him good fortune and smooth sailing as he works on the article proposed in his application.

TSHA is now accepting applications for the 2025 Larry McNeill Fellowship

Applications are now being accepted for the Texas State Historical Association's 2025 Larry McNeill Research Fellowship in Texas Legal History. Six years ago, our Society began working with TSHA to establish the Larry McNeill Research Fellowship in Texas Legal History in 2019 to honor Larry McNeill, a past president of the Society and TSHA. The $2,500 award recognizes an applicant's

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[2] Hubert Howe Bancroft, *History of California, Vol V* (San Francisco: History Publishing Company, 1886), 131–144.

[3] Banerjee application, citing Garry Wills, *Inventing America: Jefferson's Declaration of Independence* (Garden City: Doubleday, 1978), xvi (emphasis in original).

commitment to fostering academic and grassroots research in Texas legal history. TSHA awards the annual fellowship to an applicant who submits the best research proposal on an aspect of Texas legal history. Judges may withhold the award at their discretion.


Larry McNeill

Competition for the next Larry McNeill Fellowship is open to any applicant pursuing a legal history topic, including judges, lawyers, college students, and academic and grass-roots historians. The deadline for submission is November 15, 2024. An application should be no longer than two pages, specify the purpose of the research and provide a description of the end product (article or book). An applicant should include a complete vita with the application. Judges may withhold the award at their discretion. TSHA will announce the award at the Friday Awards Luncheon during TSHA's Annual Meeting in Houston on Friday, March 1, 2025 at the Royal Sonesta Houston Galleria, 2222 West Loop South, Houston, Texas.[4]

TSHA has set a November 15, 2024 deadline for submissions. Individuals wishing to apply should submit an application form and attach the proposal and a curriculum vita. Only electronic copies submitted through TSHA's link and received by the deadline will be considered. Anyone who has trouble submitting the form electronically should email TSHA at amawards@tshaonline.org or call TSHA Annual Meeting Coordinator Angel Baldree at 512-471-2600.

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[4] "Larry McNeill Research Fellowship in Texas Legal History," *Texas State Historical Association*, https://www.tshaonline.org/awards/larry-mcneill-research-fellowship-in-texas-legal-history (accessed April 13, 2024).

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Now Accepting Nominations for the Texas Appellate Hall of Fame

By Kirsten M. Casteñada, Chair of the Appellate Section

The Appellate Section of the State Bar of Texas is now accepting nominations for the Texas Appellate Hall of Fame. The Hall of Fame posthumously honors advocates and judges who made a lasting mark on appellate practice in the State of Texas.

The Section will honor Hall of Fame inductees at a presentation and ceremony during the State Bar's Advanced Civil Appellate Practice course, scheduled for September 5-6, 2024. Nominations should be submitted in writing no later than Thursday, May 30, 2024, using the button above.

Please note that an individual's nomination in a prior year will not necessarily carry over to this year. As a result, if you nominated someone previously and would like to ensure his/her consideration for induction this year, you should resubmit the nomination and nomination materials.

Nominations should include the nominator's contact information, the nominee's bio or CV, the nominee's photo if available, and all the reasons for the nomination (including the nominee's unique contributions to the practice of appellate law in the State). The more comprehensive the nomination materials, the better. All material included with any nomination will be forwarded to the voting trustees for their consideration in deciding whom to induct as part of this year's Hall of Fame class.

Nominations will be considered based upon some or all of the following criteria, among others: written and oral advocacy, professionalism, faithful service to the citizens of the State of Texas, mentorship of newer appellate attorneys, pro bono service, participation in appellate continuing legal education, and other indicia of excellence in the practice of appellate law in the State of Texas.

Please send your nominations to me at kcastenada@adjtlaw.com.

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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.

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2023-24 Membership Upgrades

The following Society members have moved to a higher Membership category since June 1, 2023.

GREENHILL FELLOW

Macey Reasoner Stokes

TRUSTEE

Chad Baruch

CONTRIBUTING

Delonda Dean

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2023-24 New Member List

The Society has added 32 new members since June 1, 2023. Among them are 20 Law Clerks for the Court (*) who will receive a complimentary one-year membership during their clerkship.

TRUSTEE

Tyler Talbert

Dr. Frank de la Teja

REGULAR

West Bakke
Reed Bartley*
Daniel Borinsky
Dasha Brotherton*
Courtney Cater*
Seth Cook*
Allison Ebanks
Emily Fitzgerald
Samantha Garza*
Josh Geesling*
Andrew Gould
John Heo*
Ben Hunt*
Lauren Little
Taylor Luke*
Clifford D. MacKenzie
Connor Madden*
Jacob Mathew*
Jake McIntosh*
Jordan Redmon
Mikaela Schulz*
Weldon Sloan*
Craig Smith
Lindsey Smith*
Cole Stenholm*
Andrew Swallows*
Jonah Ullendorf*
Sarah Winslow*
Hon. Lee Yeakel
Seth Young*

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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

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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

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