

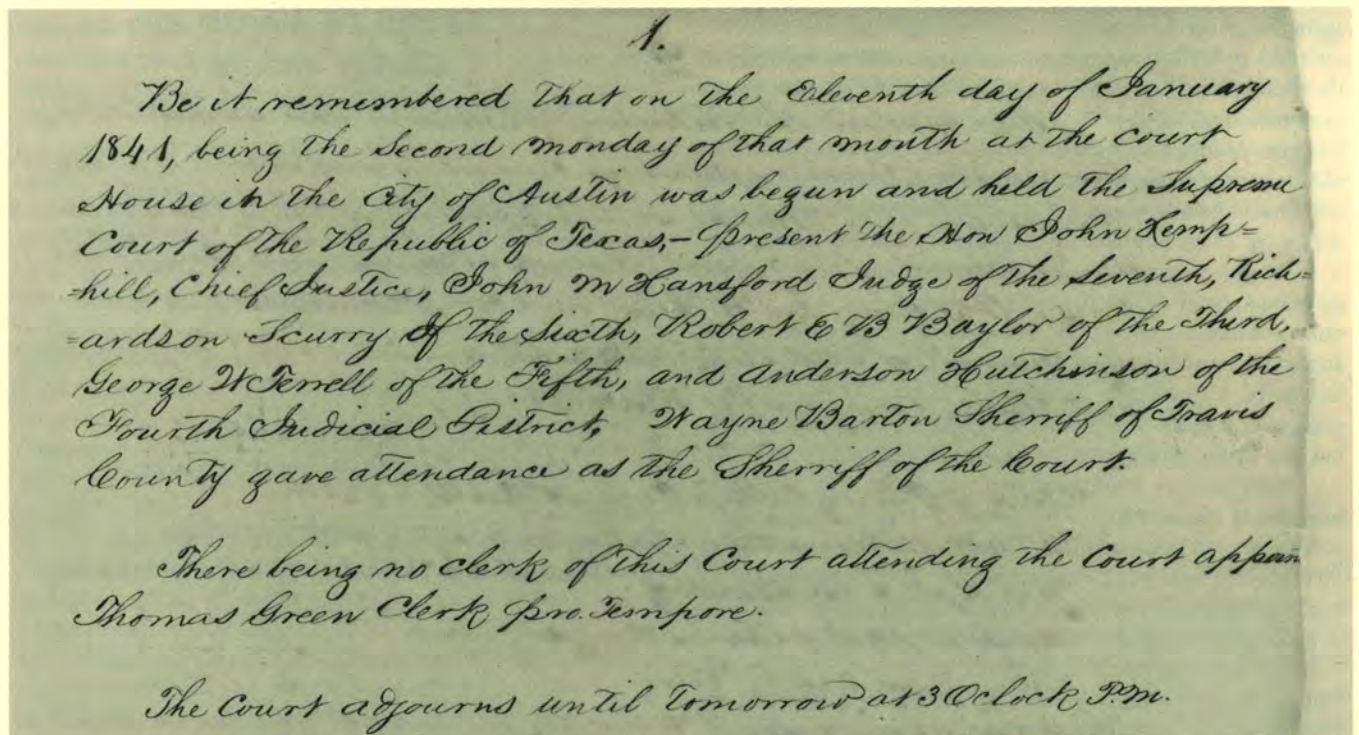
Be It Remembered

The Newsletter of The Texas Supreme Court Historical Society

Volume 1

Number 1, June 1994

The Texas Supreme Court Historical Society Purpose and Goals



Republic of Texas Supreme Court minutes entry for January 11, 1841

Archives Division - Texas State Library

This is the inaugural issue of *Be It Remembered*, the newsletter of The Texas Supreme Court Historical Society. The Society was founded January 13, 1990, on the sesquicentennial of the first meeting of the Supreme Court of the Republic of Texas. The original incorporators were former Chief Justices Robert W. Calvert, Joe R. Greenhill, and Jack Pope. Generous initial funding was provided by a number of law firms and individuals as part of the Texas Supreme Court's sesquicentennial activities.

The purposes of the Society include the collection and preservation of information and artifacts relating to the Supreme Court of Texas and the Texas judiciary in general, the encouragement and production of scholarship relating to the history of the Texas judiciary, and the education of the public on the role of the judicial branch of government in the development of Texas. The Society is a nonprofit corporation approved by the Internal Revenue Service under section 501(c)(3) of the Tax Code.

The name of this newsletter, *Be It Remembered*, duplicates the first three words written in the first surviving minute book of the Supreme Court of the Republic of Texas. It also expresses a central aim of the Society—to encourage respect and appreciation for the Texas judicial system by preserving information about Texas courts and judges. The first issue of *Be It Remembered* also marks an important step in the maturation of the Society, from planning and organizational efforts to production of publications.

The first volume of the Society's proceedings is in the publication process. The first editorial board consists of Judge Mark Davidson of the 11th District Court (Houston), J. Chrys Dougherty of Graves, Dougherty, Hearon & Moody, (Austin), Warren Harris of Porter & Hedges (Houston), Dr. Harold Hyman of Rice University's History Department, and Professor Tom Russell of The University of Texas Law School.



A Letter From the President

The idea for a Texas Supreme Court Historical Society came from a Spring 1989 conversation I had with Lyn Phillips, wife of Chief Justice Tom Phillips. As we lamented the many interesting matters about the Court that were not recorded and preserved, we discussed the role of the United States

Supreme Court Historical Society in maintaining the High Court's history. The upcoming sesquicentennial of the Texas Supreme Court seemed to be the right kind of event to use as a springboard for the creation of a Texas organization.

The enthusiasm of several current and former members of the Texas Supreme Court, combined with the support of the executive staff of the State Bar of Texas, the Texas Young Lawyers Association, and other volunteer members of the Bar, made the celebration of the Court's sesquicentennial on January 13, 1990, a notable event. The secretary of state issued a charter for the Texas Supreme Court Historical Society on that day.

You have in your hands our first publication effort, the newsletter *Be It Remembered*. It is modest, but it is a beginning of which we are proud. The Society also plans to publish an annual journal in addition to the newsletter, which we would like to be a significant contribution to judicial history. We seek your support and your contributions of not only money, but also historical material for future publications.

With the very limited resources available, it is imperative to promote membership in the Society. Membership is available to anyone interested in our goals. Although we anticipate that lawyers and judges will constitute a large percentage of our membership, we would like to encourage anyone interested in history to participate in our activities.

Our approval by the Internal Revenue Service under section 501(c)(3) makes memorial gifts to the Society tax deductible. We would like to encourage such gifts, which will be formally acknowledged both to the donor and the representative of the person memorialized or honored.

We welcome comments and suggestions about this newsletter or any Society activity.

State Bar of Texas 1994 Annual Meeting - Austin -

TEXAS SUPREME COURT HISTORICAL SOCIETY ANNUAL MEETING

**Thursday, June 23
9:30 am to 11:00 am
Water Room
Austin Convention Center**

**"Chief Justice John Hemphill,
the Civil Law, and Legal Innovation
on the Texas Supreme Court,
1840-1858"**

Presenters

**Dr. Tim Huebner
Florida International University**

**Dean Frank Newton
Texas Tech University School of Law**

The Texas Supreme Court Historical Society *Be It Remembered*

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Courts of Appeals Centennial Celebrations

The year 1992 marked the one-hundredth anniversary of the organization of the "modern" Texas appellate judicial system. Several ceremonies or special events were held around the state to commemorate the events of 1892. The centenary of the Texas Court of Criminal Appeals was the November 1992 *Texas Bar Journal's* cover story. An article on the court's formation in that issue, written by Alicia Lockheed (Liddell, Sapp-Houston), contains a great deal of good material, including contemporary newspaper debates over the wisdom of a bifurcated supreme court and intermediate courts of civil appeals.

The First Court of Appeals celebrated its centenary October 9, 1992, at the South Texas College of Law in Houston, in a building that the First and Fourteenth Courts share with the school. The proceedings featured a presentation on court history by James M. Grace, Jr. (then a law clerk to U.S. District Judge Samuel B. Kent, now a Baker & Botts associate), as well as personal observations by retired Chief Justice Frank G. Evans and a keynote address by Justice Raul Gonzalez of the Texas Supreme Court. A videotape of the ceremony and a program have been secured by the TSCHS and are available for member viewing or scholarly research.

The First Court of Appeals' centennial celebration also inspired a substantial *Houston Lawyer* article on the court's history, by James Grace and Christopher Anglim (special collections librarian at the South Texas College of Law). In addition to background on the development of the Texas courts-of-appeals system, the article contains a wealth of detail on the First Court of Appeals. This includes the ongoing rivalry between Galveston and Houston for the court's location (Galveston initially won, but the court moved to Houston in 1957) and the constant battle with a burgeoning docket that led to establishment of Texas newest appeals court, the Fourteenth, in 1967. The article also includes a decent amount of the trivia that leavens dry history, such as the Galveston courthouse's resident ghost and the plague of grasshoppers that infested the bathrooms in its first Houston quarters.

The Second Court of Appeals celebrated its centennial on October 8, 1992, in its Fort Worth courtroom. Speakers included David Evans (president of the Tarrant County bar), Justice Jack Hightower, representing the Texas Supreme Court, and Judge Pete Benavides, representing the Texas Court of Criminal Appeals. The ceremony was marked with an unusual degree of solemnity, due to the recent deaths of two attorneys and the wounding of two judges in a July 1, 1992, courtroom shooting. Judge Benavides' comment summed up the feelings of many:

[T]his commitment to the rule of law is dangerous, and no one can possibly know more about it than the people that are in this room and are familiar with the tragic events that occurred here this summer. We lost some good friends, and we nearly lost some great judges. So we see the courage that it takes and the risks that are taken by those people entrusted with making sure that this country stays true to the rule of law and to the idea that we are all equal under the law.

A full transcript of the Second Court's ceremony is printed in *West's Texas Cases* (843-844 S.W.2d). A copy of the court's brochure commemorating the occasion also has been obtained for the TSCHS archives.

The Third Court of Appeals held its centenary in Austin on November 6, 1992. Speakers included Justice Jimmy Carroll, Mrs. John Powers, Caroline M. LeGette (Thompson & Knight—Austin, representing the briefing attorney's perspective), and Jim D. Bowmer (Bowmer, Courtney, Burleson, Normand, & Moore-Temple). Justice Marilyn Aboussie presided over the dedication of the courtroom, which took place at the same time.

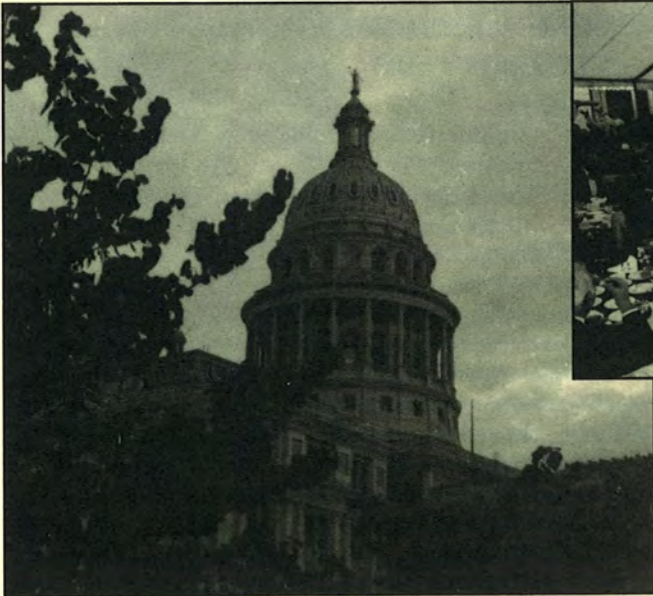
The Fourth Court of Appeals celebrated its centennial in dual ceremonies at San Antonio. Retired Chief Justice Jack Pope spoke to the San Antonio Bar Association on August 25, 1993, on the first century of the Fourth Court. On September 2, 1993, with Chief Justice Blair Reeves presiding in the courtroom, Justice Jack Hightower spoke for the Texas Supreme Court, Judge Charles Baird for the Court of Criminal Appeals, and Justice Shirley Butts for the Fourth Court of Appeals.

The San Antonio Bar Foundation prepared a booklet that records each site for the court since 1893 and also includes biographies of each of the chief justices, justices, and the seven clerks who have served the court.

Excerpt from Written Remarks of James C. Bowmer at the Third Court of Appeals Centennial Celebration

"J. Frank Dobie said that as late as 1889, Texas was still country-living and frontier-minded. But if the frontier ended in 1889, most Texans hadn't gotten the word yet in 1892, when this Court was created. It had been less than thirty years since buffalo and antelope roamed the plains in Central Texas. It had been twenty years, more or less, since the last Indian raids in this area. The reconstruction had ended only eighteen years before, and with it the end of the infamous reconstruction semicolon court. Many schools, as late as 1892, still opened their sessions singing the 'Bonnie Blue Flag.' Ten years or less before, the famous cattle trails still ran north through unfenced land, and the most famous of them all, the Chisholm Trail, reached its zenith between Austin and Belton on its way to Kansas. And just a few years before, the Texas Rangers had rounded up all the men in one Central Texas county; good and bad, into a pasture and had separated the sheep from the goats."

"The first five of the judges (two of whom were Civil War veterans) did not attend law school but 'read law' in a lawyer's office and under his tutelage. This does not mean they were not well trained. . . . It was tough schooling, and I am sorry our Bar Examiners eventually discontinued it."



The Texas Supreme Court Historical Society Dinner

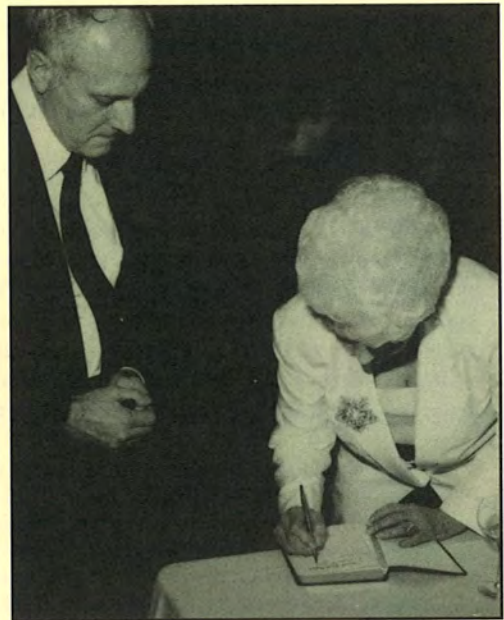
As many readers know, The Texas Supreme Court Historical Society put on a black tie gala dinner on June 4, 1993. The dinner, held in conjunction with the dedication of the Tom C. Clark Building, named in honor of the only Texan to serve on the United States Supreme Court, featured Governor Ann Richards as keynote speaker.

Clockwise from above: The Texas Capitol, recently re-emerging from months of scaffolding erected to restore the exterior of the grand edifice.

Addressing the crowd seated under a tent erected in front of the Supreme Court Building, Governor Richards told of an East Coast dowager who attended a Texas garden party in the summer and asked her Texas hostess why wealthy Texans didn't just go somewhere cooler in the summer. The Texas hostess replied in a puzzled voice, "But dear, it's hot everywhere in Texas during the summer."

Governor Richards signed the guest register for John Adams, Clerk of the Supreme Court.

The David Chapel Baptist Church Choir sang several songs at the dedication of the Tom C. Clark Building.





Clockwise from below right: Ms. Rhonda Harmon, law clerk to the Honorable Sam D. Johnson and recent graduate of Baylor Law School, performed the "Star Spangled Banner."

Governor Richards gave tips on a career in public service to Society Treasurer Bill Whitehurst's daughter Rebecca, while Bill and wife Stephanie looked on.

The foyer between the high courts' chambers was transformed temporarily from its usual function as a place for last-minute rehearsals for oral argument into the scene of a prebanquet reception.

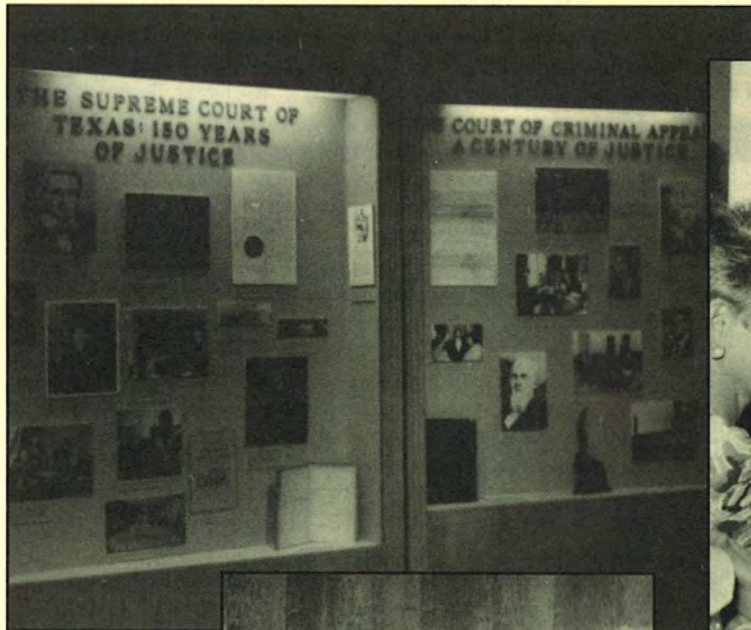
Mrs. Lena Hickman and a friend contemplate the memorial photograph of the late Judge Marvin O. Teague.

The archivists at the Governor Bill and Vara Daniel Center for Legal History prepared an excellent exhibit on the history of the Texas Supreme Court and the Court of Criminal Appeals.

Former Chief Justice and Allene Pope reminisce with Elmer Akins, a longtime employee of the supreme court clerk's office and a member of the David Chapel Baptist Church Choir.



Photos by Al Adcock



Justice Lies in the District: A Review

James W. Paulsen

Charles L. Zelden's *Justice Lies in the District: The United States District Court, Southern District of Texas, 1902-1960* (Texas A&M Univ. Press 1993)(\$49.50), is a book well worth reading. The dust jacket bills it as a "groundbreaking study of a representative lower federal court" and the text largely follows through on the promise. First, the basics: The book contains just over 200 pages of text, about 75 pages of notes, an extensive index and bibliography, and a list of court personnel (unfortunately, already dated by the recent death of court clerk Jesse Clark). *Justice Lies in the District* is an institutional legal history with an economic bent. As the title makes clear, the focus is on the court's first six decades, although some information on later events in the civil rights movement also is included.

The author's decision to focus on the Southern District of Texas may in part be a function of geography—the book stems from a Ph.D. dissertation at Rice University—but the author has some other good reasons for singling out the Southern District of Texas for study. Although the newest of the four federal district courts in Texas (established 1902) the Southern District was by 1931 the single busiest single-judge federal court in the United States. In 1961, despite expansion to four judges, it ranked in the top ten busiest districts. In 1990, about to expand to eighteen judges, it ranks as one of the four largest and busiest federal district courts in the country.

While the book is billed as covering only the period from 1902 to 1960, the first chapter is a bonus—an overview of the history of the old "District of Texas." The chapter provides useful background on the land disputes of the early years of Texas, the Civil War and Reconstruction period, and the battle over legal turf between the federal government and the Texas Railroad Commission. Unfortunately, the fact that the principal focus of the book is on a much later period necessitated a somewhat cursory treatment of all these subjects. Students of Texas legal history therefore are still in need of a good treatment of such matters as the career of John M. Watrous, the first federal judge in Texas and the target of sporadic efforts at impeachment almost from the beginning of his service.

The overarching theme of the book is a variant of legal realism that some may find objectionable. In the introduction, Zelden refers to the Southern District's "private agenda" in setting judicial priorities and making decisions in cases. This agenda, to Zelden, was "the promotion of Southeast Texas' economic, social, and political development through private means."

For this reader, at least, the book's theme has both good and bad aspects. On the positive side, the promotion of business interests in line with the judges' background and personal philosophies does provide a unifying vision for what might otherwise be a disorganized discussion of a welter of decisions. On the negative side, one might legitimately be concerned that Zelden has unconsciously exercised some selectivity in picking the cases to be highlighted from the accumulation of sixty years of decisions.

Happily, the text adequately lays most such doubts to rest. Indeed, Zelden sometimes seems so scrupulously fair that he becomes his own best critic. He comments, for example, that "[t]he judges' active support of Texas business interests did not mean . . . that they were subservient to any particular interests or consciously followed some blueprint of cultural or social hegemony. . . . The judges' primary role was to do their duty as federal judges as best they could." Throughout, the book is laced with

examples and counter-examples, providing a welcome balance, but also leading to some doubts whether the court really had as much of an "agenda" as some of Zelden's conclusory statements might indicate.

Zelden's writing is clear and vivid, making the occasionally dry subject matter much more palatable. This is not to suggest, however, that the book is without its moments of human interest and even high drama. District Judge Waller T. Burns' role in breaking up a San Antonio-based plot to invade Mexico and his later role in assuring lenient treatment for the political influential ringleaders, makes good reading. The description of District Judge Kennerly's handling of the successful Kirby Lumber receivership opens a window into the Great Depression and its effect on the economy of a region. Judge Hutcheson's concern for prison reform and leniency to Prohibition violations is well-documented and interesting. Likewise, the discussion of the Southern District's role in the condemnation of land for military bases, as well as its massively increased workload of industrial accidents, sets out in microcosm the total economic mobilization required for waging World War II.

The author also has a good eye for the details that lend flavor to the chronology. Reporting on the nomination of the first judge for the Southern District, Waller T. Burns, he quotes Thomas Dodd's statement that "as a life long Democrat" it gave him "great pleasure to bear evidence favorable to this Republican." During prosecution of the Reyes conspirators, we are told that Judge Burns personally saw to it that the principal defendants had plenty of pillows in their jail cells.

While the district court's printed decisions are the single most used source, supplemented by the usual secondary sources, the book also draws liberally upon private papers of some judges and interviews with retired judges and court "insiders." In at least one case, Zelden's use of these sources permits conclusions that otherwise might be branded as the worst form of "psychohistory." On April 16 and 17, 1947, two vessels loaded with ammonium nitrate fertilizer exploded while docked at Texas City. The toll exceeded 500 deaths and \$200 million in property damage. This disaster also set up one of the first cases to apply the new Federal Tort Claims Act of 1946.

Discussing the decision by Judge Kennerly to interpret the FTCA narrowly so as to create government liability—a ruling later repudiated by the United States Court of Appeals for the Fifth Circuit and the United States Supreme Court—Zelden goes well beyond the legal arguments set out in the district court's opinion. He explains that "[t]he judge's heart bled for [the plaintiffs'] losses" since "[t]hey were his neighbors and in need. To limit the FTCA would deny these people a remedy for their hurt and potentially harm the region's continued development."

Of course, Judge Kennerly also had good legal arguments, as Zelden points out. Not only were the Fifth Circuit and Supreme Court decisions accompanied by substantial dissents; the Supreme Court's position itself was modified within a few years. Nonetheless, the author's speculation regarding Judge Kennerly's possible motivations is not mere psychological surplusage. A footnote explanation makes it clear that Zelden's conclusions were woven from a fabric of interviews with knowledgeable insiders—Judge John R. Brown (who was plaintiffs' counsel in the Texas City case), three former judicial colleagues, and Judge Kennerly's son.

History and Services of the Texas State Law Library

One of the best kept secrets in Texas legal circles is the existence of the State Law Library. This public law library is not well known, especially outside of Austin. The library staff is eager to change this low profile and welcomes requests from anyone around the state needing law library services.

The 62nd Legislature passed S.B. 528, effective June 8, 1971, "transferring the function, duties and libraries of the library of the Supreme Court, the Court of Criminal Appeals, and the Attorney General's Office to the State Law Library." Set up as a separate state agency, the State Law Library has a mandate to provide a legal reference facility for the supreme court, the court of criminal appeals, the office of the attorney general, other state entities, and citizens of the state.

The State Law Library is governed by a three-member library board to be composed of the chief justice of the supreme court, the presiding judge of the court of criminal appeals, and the attorney general. The members may designate a personal representative to serve in their place. The current library board consists of Justice Jack Hightower of the supreme court, Presiding Judge Michael McCormick of the court of criminal appeals, and Susan Garrison of the office of the attorney general.

The library board held its first official meeting on September 1, 1971. Justice Jack Pope of the Supreme Court was elected to be the first chairman, Judge Wendell Odom was elected vice-chair. The third member of the board was Alfred Walker of the office of the attorney general. One of the first acts of the newly formed board was to appoint Mrs. F. DeBogory Hortan, who was then serving as the supreme court librarian, as the first director of the State Law Library. In its twenty-three year history, the library has had only four directors: F. DeBogory Hortan (September 1, 1971 - June 1, 1972); Marian Boner (June 1, 1972 - September 1, 1981), James Hambleton (September 1, 1981 - June 1, 1987), and Kay Schlueter (July 1, 1987 - date).

The library has an extensive collection of primary and secondary legal sources. The full national reporter system, the American Law Reports series, and texts of federal and Texas statutes and regulations are available as well as a wide collection of law reviews, treatises, legal encyclopedias, dictionaries, and other reference sources useful to legal research. The library actively collects Texas state documents and serves as a depository for U.S. government documents and State Justice Institute grant materials. Paper sources are supplemented with computer databases. Lexis/Nexis, Westlaw, Datatimes, Dialog and CCH Access are available on a fee basis. Librarians perform searches for library clients, so no prior training with a particular database is needed in

order to make use of it.

Whether a library client needs a quick reference question answered, a search performed, or copies of material supplied, the request can be made in person or by fax, mail, or telephone. Study space is available for in-house use of materials and self-service photocopiers are provided. The library offers photocopying and faxing services on a fee basis. Although the library has a very small staff, most requests are filled the day they are placed.

Most library materials circulate for use outside of the library for three-hour or one-week time periods. Some materials may be available for mail check-out depending upon the title and the arrangements that can be made for timely delivery and return.

In order to cope with the difficult economic times faced by the state in recent years, the library has implemented various new programs. To supplement limited staff, the library has an active volunteer program with 832 hours of donated time in 1993. The library is also actively seeking grants from state and federal sources to supplement state appropriations for providing quality legal information services. The Friends of the State Law Library (FOSLL) was created in 1992. A 501(c)(3) organization, the Friends group was organized to offset the difficult state funding situation and to inform more people about the services of the library. The Friends group is encouraging donations for chairs given in honor or in memory of individuals designated by the purchaser. These chairs will be used to furnish the two large reading rooms in the new library quarters in the Tom C. Clark Building. Chair contributions can be in any amount with \$695 the amount needed to purchase one chair.

Various levels of membership are available in the Friends of the State Law Library. All members will receive a subscription to the library's newsletter and a waiver of service charges for library services such as photocopying and computerized research. Membership information is available at the end of this article.

The staff of the State Law Library looks forward to serving members of The Texas Supreme Court Historical Society. If you are in the Capitol Complex area, please drop in and see our beautiful new space on the ground floor of the Tom C. Clark Building at 205 West 14th Street. We are also interested in gathering more information about the history of our library, the libraries that were put together to make up our agency, and the development of the Texas legal system, so please let us hear from you if you have information. For more information about library services or the Friends Group, contact Kay Schlueter, State Law Library, P.O. Box 12367; Austin, Texas 78711, telephone: (512) 463-1722; fax: (512) 463-1728.

Friends of the State Law Library Information Request

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Please return this form to: Friends of the State Law Library, P.O. Box 12367, Austin, Texas 78711.

Memorials

M.P. "Rusty" Duncan

Memorial proceedings for Judge M.P. "Rusty" Duncan, a member of the Texas Court of Criminal Appeals from 1987 until his death February 28, 1990, at the age of 43, were held April 8, 1993. Speakers included Rick Hagen (a former briefing attorney), Bill Wood (a former law partner), and Skip Duncan (Judge Duncan's brother). The proceedings are printed in West's *Texas Cases* (851-852 S.W.2d XXXIII).

Zollie Steakley

Memorial proceedings for Justice Zollie Steakley, a member of the Texas Supreme Court from 1961 through 1980, were held June 4, 1993. Justice Steakley died March 24, 1992, at age 83. Speakers included retired Chief Justice Joe Greenhill and a nephew, Zollie Steakley II. The proceedings have not yet been printed.

Marvin O. Teague

Memorial proceedings for Judge Marvin O. Teague, a member of the Texas Court of Criminal Appeals from 1981 to his death February 20, 1991, at age 57, were held June 11, 1993. Speakers included Ken McLean (a friend), Judge Jan Breland (a former briefing attorney), Judge Sam Houston Clinton, and Mrs. Teague. The proceedings are printed in West's *Texas Cases* (853-854 S.W.2d XXXIII).

Membership Application

In recognition and support of the goals of The Texas Supreme Court Historical Society, I apply for membership under the following category and enclose my check:

- Benefactor \$5000 +
- Major Sponsor \$2500-4999
- Sponsor \$1000-2499
- Patron \$500 annual dues
- Contributing \$100 annual dues
- Individual \$20 annual dues
- Student \$5 annual dues

In support of The Texas Supreme Court Historical Society my donation of \$_____ is enclosed.

I/my firm is interested in information concerning sponsorship of an historical project or program. Please contact me.

Name _____

Firm _____

Address _____

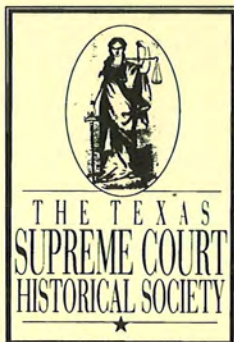
City _____ State _____ Zip _____

Phone _____

Inscribe my membership certificate as follows:

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The Texas Supreme Court Historical Society
P.O. Box 12673, Austin, Texas 78711



The Texas Supreme Court
Historical Society
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