



# Journal of the TEXAS SUPREME COURT HISTORICAL SOCIETY

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## The Legendary Life and Tumultuous Times of **Chief Justice John Hemphill**

by David A. Furlow

**F**or the past sixteen years, the Texas Supreme Court Historical Society has honored the state's first Chief Justice by naming its annual fundraising event the John Hemphill Dinner. Judges, justices, lawyers, and others attending the annual event find a short biography of the man in their dinner brochure. But sometimes members want to know more about the man whose name the Society commemorates. Where did he come from? How did he become a lawyer and a judge? Where and how did he die? Why was he special? Why has the Society chosen to honor him at its annual dinner? John Hemphill's life offers a fascinating story of how frontier law evolved as Texas developed from a republic guarded by forts into a state governed by courts.

**John Hemphill's early years.** Like other prominent leaders of early Texas – Stephen F. Austin, Lorenzo de Zavala, William Barrett Travis, David Crockett, and Sam Houston – John Hemphill grew up outside of Texas but came here as quickly as he could. He was born to a Presbyterian minister, the Reverend John Hemphill, Sr., and his wife Jane Lind Hemphill, in Blackstock, in the Chester District of South Carolina, on December 18, 1803. He attended public school in South Carolina, then continued his studies at Jefferson College (now Washington and Jefferson) in Washington, Pennsylvania from 1823 to 1825 or 1826 (the sources differ). John Hemphill showed early promise at Jefferson College, graduating second in his class. For several years he taught school and dreamed of becoming a lawyer.

**The beginning of a frontier legal career.** In 1829, Hemphill began his legal studies in Columbia, South Carolina. After gaining admission to Chancery Court, he moved to Sumter, South Carolina, where he entered private practice. He edited a newspaper in 1832 and 1833, before joining the U.S. Army, where he served as a second lieutenant in the Seminole War of 1836 in Florida. The malaria he contracted while in the Army adversely affected his health for the rest of his life. In 1838, two years after the Battle of San Jacinto, Hemphill moved to Texas to set up his law practice in Washington-on-the-Brazos. He devoted much of his time during the next few years to learning the Spanish language and mastering the intricacies of Castilian law.

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**An appointment to the district court bench — and to the Texas Supreme Court.** John Hemphill rapidly advanced in public opinion and political influence during the term of Texas President Mirabeau B. Lamar. In January 1840, he was elected by the Texas Congress to serve as judge of the Fourth Judicial District, which meant he also served ex officio as an Associate Justice of the Texas Supreme Court. On December 5, 1840, he defeated a favored incumbent, James Webb, the former Attorney General of Texas, by the narrowest of margins — two votes of fifty-four cast in both houses of Texas' Congress — to replace Thomas J. Rusk as Chief Justice.

**The Council House Fight of March 19, 1840 and a judge's "long knife."** As a district court judge, Hemphill presided over an alternative form of dispute resolution when several Comanche war chiefs agreed to attend a parley in San Antonio's Council House. Thirty-three Penateka Comanche chiefs and warriors, accompanied by thirty-two other Comanches, arrived in San Antonio on March 19, 1840. Disagreements between the pro-peace party and the pro-war party among Comanche leaders complicated the prospects for a comprehensive settlement. The chief who headed the delegation, Muk-wah-ruh, favored making peace with the Texans. He and his diplomatic delegation of Comanche chiefs brought along several Mexican children and Matilda Lockhart, a sixteen-year-old white captive who had been abducted with her sister in 1838.

Matilda Lockhart inflamed the Texans' emotions when she declared that her captors had physically and sexually abused her. Mary Ann Maverick, a member of the Maverick family that purchased the Alamo (and gave their distinctive name to both unbranded cattle and a twenty-first century presidential candidate), described how Matilda "was utterly degraded, and could not hold up her head again. Her head, arms, and face were full of bruises, and sores, and her nose [was] actually burnt off to the bone—all the fleshy end gone, and a great scab formed on the end of the bone. Both nostrils were wide open and denuded of flesh. She told a piteous tale of how dreadfully the Indians had beaten her, and how they would wake her from her sleep by sticking a chunk of fire to her flesh, especially to her nose..." Matilda Lockhart also knew enough Comanche to understand the Council House Indians' intentions. She revealed that the Comanches held another fifteen Texas prisoners — and that tribal leaders intended to ransom these hostages one by one to secure the highest price for each.

The Texans, including District Judge Hemphill, believed that the Comanches had deliberately deceived them. The Texans mistakenly assumed that one leader of the Comanche could speak for all, when, in truth, the tribe more closely resembled a confederacy of independent war-bands. Comanche War Chief Muk-wah-ruh stated that he and his colleagues had brought in the only captive their group owned, and that other Anglo prisoners were held by a diffuse group of tribes he could not command. "How do you like that answer?" he asked the men across the table.

The commissioners and soldiers did not like Chief Muk-wah-ruh's answer at all. Emotions flared and harsh words

ensued. Incensed Texas militia soldiers immediately entered the Council House to support the commissioners, who told the Comanche chiefs that, despite their status as ambassadors, they would remain as hostages until the Comanches freed all of their remaining Texan captives.

The Comanche war chiefs, who now sought to bolt the Council House, shouted to their fellow warriors for assistance. The fight turned fatal as Texans attacked several of the Indian chiefs, while other soldiers killed most of the Comanche warriors in the courtyard. One of the chiefs pulled a knife and attacked Judge Hemphill. Historian Clarence Wharton described the judge's response: "Judge Hemphill drew a long knife from under his judicial robes and slew his antagonist." That "long knife" may have been a Bowie knife of the kind Jim Bowie had made popular among settlers during the years preceding and following the Battle of the Alamo.

The breakdown of negotiations proved tragic for both the Comanches and their captives. This violent brawl inflamed emotions on both sides and led to a series of retaliatory raids, as Texans sought to recover individuals abducted from their homes while Comanche leaders resolved to redeem their lost pride and avenge a breach of diplomatic immunity. The resulting war spared neither young nor old. But no one doubted John Hemphill's personal bravery or self-control after he defended himself with a dagger drawn at the Council House Fight.

**Adjutant General of the Republic of Texas.** In addition to serving as Chief Justice, John Hemphill brandished a sword and pistol in several campaigns against the Comanche Indians. After voters returned Sam Houston to the Republic's presidency on December 12, 1841, Hemphill accepted an appointment as Acting Adjutant General to assist General Alexander Somervell in dispatching a Republic of Texas military expedition to the Rio Grande: the Somervell Expedition that culminated in the ill-fated Mier Expedition to Mexico.

**The John Marshall of the Texas Supreme Court.** Chief Justice Hemphill developed a reputation as a careful, scholarly jurist whose well-reasoned opinions burnished the Texas Supreme Court's reputation. Possessed of a quiet dignity on the bench, he listened attentively to the lawyers who appeared before him. He wrote thirty-seven opinions while on the Republic's Supreme Court, serving as an Associate Justice or as Chief Justice in every session of the court during the Republic era. In 1846, after Texas' annexation by treaty, Governor J. Pinckney Henderson appointed Hemphill Chief Justice of the new Texas Supreme Court, and the Texas Senate unanimously approved the appointment. He served that post until November 1858, when he resigned to take Sam Houston's place as United States Senator. In all, he served more than seventeen years on the court. His contributions to Texas jurisprudence were so significant that some historians have called him the John Marshall of Texas.

Fluent in Spanish, Chief Justice Hemphill analyzed and cited such Castilian legal authorities as the *SIETE PARTIDAS*



(the fundamental law later used to decide the fundamental law later used to decide many Texas cases involving land and water rights relating back to original Spanish and Mexican law grants), the *Escrie* (*Escriche*) and other Spanish legal authorities.

In *Allcorn v. Hall*, Dallam 433, 434-35 (Tex. 1841), Chief Justice Hemphill applied Spanish law to resolve a contractual dispute in one of the Texas Supreme Court's earliest cases. He based a later decision, *Garrett v. Nash* Dallam 497, 498-501 (Tex. 1843), on Spanish law, which he used to determine the legal effect of remarriage on widow's inheritance from her prior husband's estate, in reliance on principles enunciated in the Spanish-language *El Diccionario do Legislaí*. In *Smith v. Townsend*, Dallam 569 (Tex. 1844), he referred to "such Spanish works as are within the reach of the Court...."

As Chief Justice, John Hemphill repeatedly urged the attorneys who argued before him to provide citations to Castilian legal precedent to help resolve difficult cases. At a time when prejudice caused other Texas judges to disdain anything but Anglo-American common law, Chief Justice Hemphill cited Castilian precedent and Mexican custom as binding authority. In *Thowenin v. Rodriguez*, [no number in original], 24 Tex. 468, 1859 Tex. LEXIS 233 (1859), for example, he analyzed Articles 96 and 98 of *Decree 277 of the Laws of Coahuila and Texas*, and the *Elements of Spanish Law*, Titles XI and XII, *De la Contestacion* and *De la Citation* to address issues about procedure, notice, and curators:

Under the Spanish law, even if the party were legally cited, no valid judgment could be rendered before the contestatio litis was formed, or issue joined. Should this be omitted, the judgment would be null, and no definitive sentence could be given, except in case of contumacy. (See *Elements of Spanish Law*, title XII, page 254, *De la Contestacion*; also the law authorities before cited.) If it were proper to appoint a curator, he should have been notified; and notice cannot be presumed where there was no appearance. (See Titles XI. and XII. of the *Elements of Law*, before referred to, of *Citation* and *Contestation*.) The same principles will be found translated in Johnston's *Institutes of the Civil Law*. (See *Citation* and *Contestation*, pages 309-312.) *Thowenin*, at \*9.

Chief Justice Hemphill lamented the Texas Congress' 1840 adoption of common law and always sought, through his written opinions, to preserve "something of the liberal spirit of the civil law." In *Mexican Law and the Texas Courts*, attorney Andrew Walker observed that,

One of [Chief Justice Hemphill's] greatest judicial achievements was his success in harmonizing the common law and civil law elements of Texas jurisprudence. Hemphill used the weight of his position to urge attorneys to look to Mexican and Spanish authority for precedent by authoring the first opinions that laid out Mexican law as part of the Texas canon. Women had greater rights under Spanish law than English law, and Hemphill used

the more feminist basis of Spanish law to vigorously support the community property section of the 1845 constitution. e of [Chief Justice Hemphill's] greatest judicial achievements was his success in harmonizing the common law and civil law elements of Texas jurisprudence. Hemphill used the weight of his position to urge attorneys to look to Mexican and Spanish authority for precedent by authoring the first opinions that laid out Mexican law as part of the Texas canon. Women had greater rights under Spanish law than English law, and Hemphill used the more feminist basis of Spanish law to vigorously support the community property section of the 1845 constitution.

In subsequent years, the influx of Anglo-American immigrants and their insistence on the use of American precedent familiar to them made judges less willing to consider Castilian and Mexican law than Chief Justice Hemphill was in the 1840s and 1850s. The civil law precedents established during his years on the court, however, remained influential, and his contributions to Texas jurisprudence have endured.

Hemphill played a primary role in drafting the judicial section of the Texas Constitution now found in article 5. He consistently placed a liberal construction on the rights of married women while serving as a delegate to the Constitutional Convention of 1845 and in deciding cases. In cases such as *Sampson & Keene v. Williamson*, 6 Tex. 102 (1851), he acted to preserve homestead rights, thus protecting the form and content of Spanish community property law as well as the 1839 statutory homestead exemptions so important to a new nation of "Gone to Texas" debtors seeking to protect their homes from creditors. The constitutional provisions Judge Hemphill sought to preserve remain an important part of Texas law to this day, as reflected in Article XVI, Section 15 (community property) and Article XVI, Section 50 (the homestead exemption).

**John Hemphill's last years.** John Hemphill surged ahead of his times by laying the foundation of Texas law, respecting the strength of Texas' Castilian legal traditions, and enhancing the rights of women and homesteaders. Nevertheless, he suffered from the limitations of his Southern roots. Blind like so many of his contemporaries to the evils of slavery, Hemphill replaced Sam Houston as Texas' United States Senator in 1858 after Houston refused to support the secession of southern states that led to the Civil War.

On February 4, 1861, Texas' Secession Convention elected Hemphill and six other delegates to participate in the convention of Southern states then meeting in Montgomery, Alabama, which soon came to be known as the Provisional Confederate Congress. When Texas seceded from the Union, the Senate expelled Hemphill and another fourteen other? U.S. Senators by resolution in 1861. As a member of the Provisional Confederate Congress, Hemphill served on the Commercial and Financial Independence, Finance, and Judiciary committees and on the special committee to digest the laws. He urged friends to

shoulder arms on behalf of the Confederacy. While serving in the Provisional Confederate Congress, he took ill. He died of pneumonia in Richmond during January of 1862.

**Chief Justice Hemphill's legacy.** Although he died in Virginia, his friends knew that his heart belonged in Texas. Chief Justice John Hemphill's body now lies in the State Cemetery in Austin. During an 1883 ceremony celebrating the presentation of Hemphill's portrait in the Texas Supreme Court, Chief Justice Asa Willie discussed his predecessor's place in the development of Texas law:

His ability as a judge was most fully developed when he found himself without precedent or authority for the questions under consideration. It was then that his capacity for profound and lucid reasoning was most fully displayed, and from his own luminous mind light was shed upon the subject of discussion which made the most abstruse points seem clearly elucidated to any mind.

On August 21, 1876, the Legislature honored his memory by naming Hemphill County, in the Panhandle, after him. The town of Hemphill, Texas in Sabine County also commemorates the remarkable career of Texas' John Marshall, Chief Justice John Hemphill.

### Authorities Consulted

When compiling a list of historical sources and citations, the editors of an e-journal must decide whether to adopt the most recent stylistic forms in the most recent edition of the BLUE BOOK: A UNIFORM SYSTEM OF CITATION (currently in its nineteenth edition), use the unique-to-Texas forms in the most recent issue of the GREENBOOK: TEXAS RULES OF FORM, or, instead, adhere to norms followed by most publishers of historical journals. Since this is an historical journal, we have chosen the last alternative. The editors of this e-journal will always accept, but never require, that authors submit articles in BLUE BOOK format.

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*Lynne Liberato*

# On *Making History*

**L**IKE A LOT OF LAWYERS, I would have been a history major if I could have made a living from it. Starting in the 8<sup>th</sup> grade, I read every historical biography I could lay my hands on. I searched the Arlington Public Library for biographies about women. That meant I read a lot of biographies about American Red Cross founder Clara Barton. As I recall, I read of no other woman. But biographies of lawyers were plentiful.

The leap from appreciating history to studying law is a short one. Lawyers predominate among the figures of American history. By definition, our history shapes our law and our law shapes our history. Just as precedent controls the law, history informs the present.

Focusing on the history of our state judicial system is the task of the Supreme Court Historical Society. Elsewhere in this e-Journal, our executive director **Bill Pugsley** will tell us more about the Society's mission. Suffice it to say, the Society will focus this year on benefits to members. This e-Journal – our first edition — represents this commitment to member service. Co-editors **David Furlow** and **Ruthie Piller** will offer news, historical features, regular columns and recognition. David, an appellate lawyer at Thompson & Knight, is also an accomplished historian. As you will see, he makes history fun. Ruthie, an appellate lawyer at Hays, McConn, Rice & Pickering, is a former reporter for the Houston Chronicle and talented veteran editor of legal publications.

As co-editors, David and Ruthie head the e-Journal Committee. They are but two committee chairs leading our efforts for 2011-12. I will write more about their tasks in future editions, but other committee chairs are as follows:

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This wealth of talent is also led by **Warren Harris**, appellate specialist at Bracewell & Giuliani, who is president-elect. Warren is the busiest lawyer I know. If you want something done and done well, ask Warren. Warren will continue to implement the strategic vision of our former president, **Larry McNeill**, as carried on by my immediate predecessor, **Judge Craig Enoch**. We are also fortunate to have **Justice Paul Green** serve as the Court's liaison to the Society. Together with our passionate executive director **Bill Pugsley** and his dedicated assistants **Marilyn Duncan** and **Mary Sue Miller**, we plan to make history this year. Chapter 1 is before you.

— **Lynne Liberato**, Haynes and Boone L.L.P.



# *The Mission* *of the* Texas Supreme Court Historical Society

**THE MISSION** of the Texas Supreme Court History Society has evolved substantially since the organization was established over two decades ago. In the early years, whenever founder and first president Judge Jack Hightower talked about the Society's mission, he did so in terms of providing a repository for the Supreme Court's historical artifacts. He envisioned retiring justices delivering their personal papers, photographs, campaign materials, and memorabilia to the Society for safekeeping. However, the space available for storing such material was always limited, leading the Society to cease accepting full collections, and instead to act chiefly as a coordinator and facilitator rather than as an archival collector. In that role, the Society works with retiring justices to place their papers in an appropriate facility and then assists researchers in locating judicial collections deposited around the state. Items that continue to be accepted by the Society tend to be more visual, personal and specialized.

A second objective for the new organization was reinvigorating the dormant judicial portrait collection. Established in the 1890s with the donation of Justice Abner Lipscomb's portrait, the collection received a tremendous boost in 1938 with the donation of over 80 portraits commissioned by Judge Ocie Speer. By the 1950s, however, acquisitions had slowed to a trickle. The backlog of unpainted portraits swelled steadily until by 1990, the list ran upwards of thirty names, including every chief justice since John Hickman. Under Judge Hightower's guidance, the Society took up the responsibility of encouraging retired justices to select artists and find donors, and then coordinated the ceremony in which those paintings were presented to the court. Two and three portraits were donated each year for several years. With the backlog virtually eliminated, portrait dedications are down to one a year, and honor justices who have left the court since 2000. Together with the Ocie Speer donation and the ones hanging in the old courtroom, these portraits form a collection larger than the gubernatorial portrait collection hanging in the capitol rotunda.

Writing a history of the court, the third leg of the Society's original mission, was the last piece to fall into place, took the longest to gain momentum, offered the greatest challenge and, I believe, in the end, will prove its finest accomplishment. Producing a history that would update Harbert Davenport's 1917 *History of the Texas Supreme Court* and expand on Davenport's limited research seemed an obvious goal for the Society, but

few realized, at the time, the difficulties in exploring a century of history where very little had been written before. Soon after Professor Joe McKnight proposed the project in the late 1990s, the Society set about gathering any previously published material on the subject, sponsoring new research, and coordinating with law professors, practicing attorneys and a few judges to volunteer their time to analyze court cases, research opinions, and write about various phases of the court's history. Their efforts continued for over a decade with no foreseeable end. Then in 2008 at the urging of trustee and former justice Craig T. Enoch, the Society submitted a collection of essays on the Texas slave laws to the University of Texas Press, which not only accepted the manuscript for publication, but offered to cosponsor a new Legal Studies Series with the Society. As it happened, the Press had the first book in that series in the pipeline, a biography of Justice Tom C. Clark written by his daughter, Mimi Clark Gronlund. In one leap, the Society entered the world of publishing with two books on the shelf and a third on the way.

That third volume in the Texas Legal Studies Series will be the long-awaited history of the court. While the slave laws book was still in production, the Society contracted with award-winning Texas historian James L. Haley to write a narrative history, as opposed to legal history, of the Texas Supreme Court. He drew his material largely from the research, draft manuscripts, and law review articles the Society had assembled over the years. The manuscript was completed in spring 2011 and is under review at UT Press. When published next year, it will represent an important step in the Society's quest to bring the court's unique history to light. More books are being planned for the Legal Studies Series, and also with the Society's own imprint, established this year to publish books holding significant value to the legal community, but of limited sales potential for an academic press.

Preservation of historic documents, enhancing the judicial portrait collection and publishing a history of the Texas Supreme Court were three areas requiring the Society's immediate attention when it was established in 1990. Each has been addressed, while new concerns have been identified and brought to the fore. We will discuss those needs and how the Society intends to tackle them in the next issue.

— **Bill Pugsley**, Executive Director

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*To profit from the past, we must first preserve it.*

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## Member Benefits

### **Regular Membership - \$50**

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- \* Complimentary commemorative tasseled bookmark
- \* Invitation to Annual Hemphill Dinner and Recognition as Society Member
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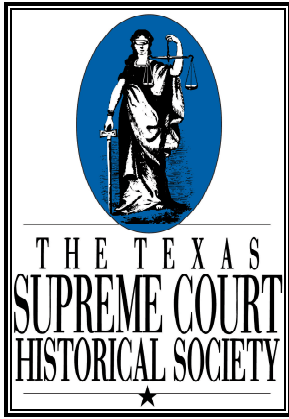
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- \* Complimentary Admission to Annual Fellows Reception
- \* Complimentary Hardback Copy of Society Publications
- \* Preferred Individual Seating and Recognition in Program at Annual Hemphill Dinner
- \* Recognition in All Issues of Quarterly *Journal of the Supreme Court Historical Society*
- \* All benefits of Trustee Membership

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