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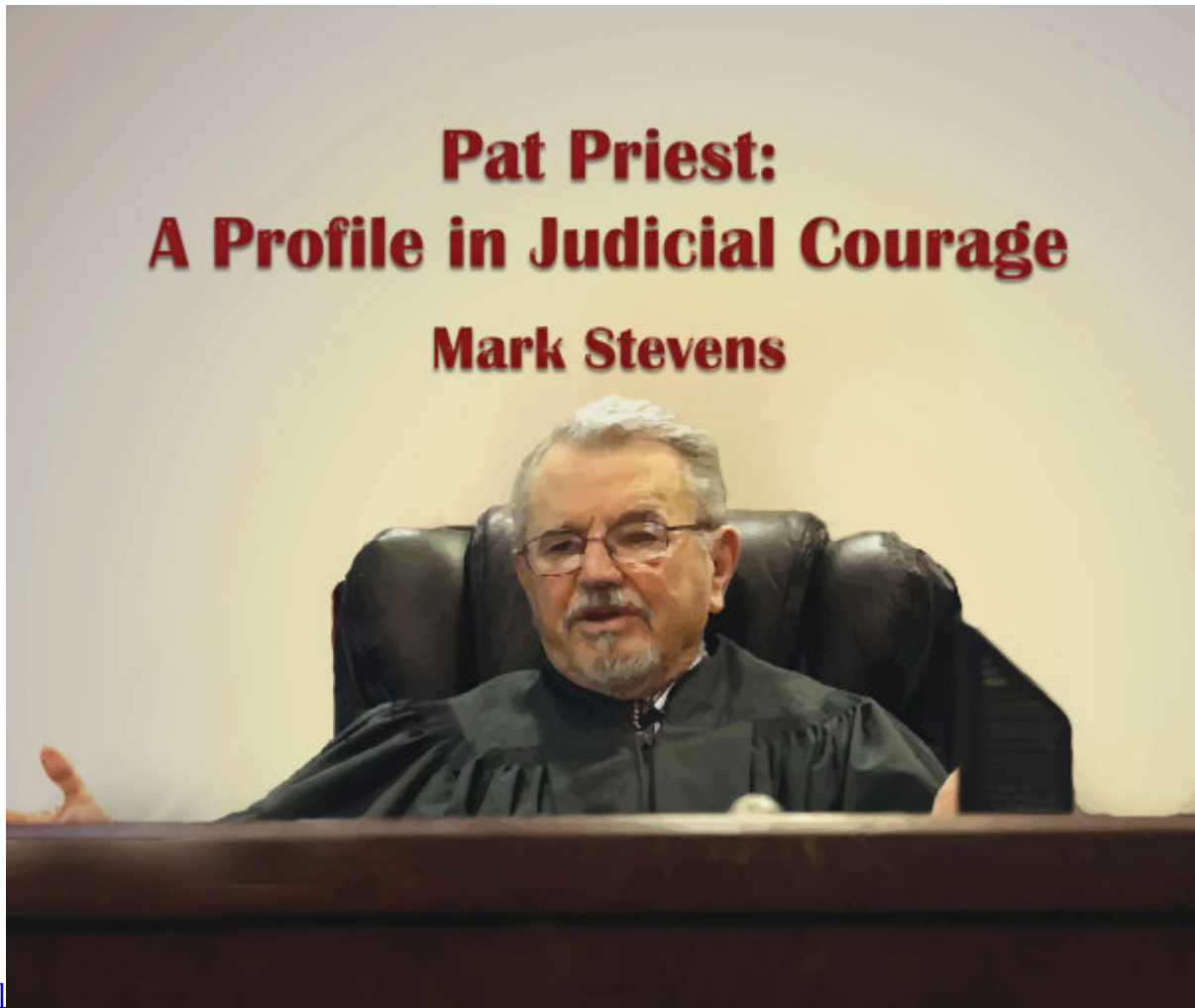
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Pat Priest: A Profile in Judicial Courage

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A. Just call Priest.

The following scenario played out hundreds of times in the Bexar County Courthouse over the last four decades: Some thorny issue of substance or procedure would arise during a trial or hearing, and the judge would call a brief recess to solve the problem. The judge would retire to chambers and close the door, but no books would be consulted, no computers queried. Instead, the judge would get on the phone with Judge Pat Priest, who would answer most questions off the top of his head, completely and accurately.

Armed with this newly acquired knowledge, the sitting judge would return to the bench, confident and ready to rule. Sometimes the judge would freely acknowledge the assist received, sometimes not. Regardless, experienced lawyers knew exactly what had happened, and whether or not counsel benefited from the ruling given, they at least knew the ruling they got was sound, since it had come from a scholar. And Pat Priest was a legal scholar. He graduated from St. Mary's law school *magna cum laude* in 1969 even though he had worked full time to help support his family. Board certification in criminal law was initially offered to Texas lawyers in 1975, and Priest was certified in the inaugural group. He was an adjunct professor of law at St. Mary's, teaching Criminal Law and Procedure and Trial Advocacy. In 1998 he authored, and thereafter regularly updated, a respected legal treatise *Texas Courtroom Criminal Evidence*. Over the years he taught thousands of lawyers and judges at seminars, in the courtroom and over the telephone.

B. Judge Priest let lawyers be lawyers.

To be sure, intelligence and legal knowledge are valuable qualities, but, as we all know from experience, these alone do not make a great judge. A judge who is biased, or lazy, or mean or all of those is a menace, and brains make such a judge worse, not better. Besides being learned in the law, Judge Priest was revered for his fairness by both the prosecution and the defense, never favoring one side over the other. He had a strong work ethic and always gave the public its money's worth, arriving early and staying all day, Monday through Friday. He had a sense of humor. He was patient and respectful to every litigant and lawyer who appeared before him. He listened to arguments and ruled thoughtfully, he did not put time limits on voir dire, he did not punish people or lawyers for going to trial, and he did not bust plea bargains. He would not rule in your favor every time, of course, but you always knew his rulings were honest, and if you got an adverse ruling he would never try to trick you into waiver on appeal.

Pat Priest¹ was elected to the 187th Judicial District Court of Bexar County in 1980, and he served there until retiring in 1994. In 1995, he became a Visiting Judge and later a Senior Judge, and he presided regularly in civil, criminal, and juvenile courts all over the State of Texas until 2018. He died in San Antonio on October 12, 2018, at the age of 77. Lawyers will miss Judge Priest for his erudition, and for the way he ran his courtroom. But more than anything we will miss his judicial courage.

C. Pat Priest was first a brave defense lawyer, then a brave judge.

After law school, Priest hung out his shingle as a criminal defense lawyer. Eventually he would office at "quince-quince"² with a formidable cast of lawyers including Nick Rothe, John Hrcir, Antonio Cantu, David Chapman, C. E. Cantrell, and Sid Harle. He was a proud charter member and director of the Texas Criminal Defense Lawyers Association. In his 12 years as a solo practitioner, Pat Priest earned recognition as one of the best defenders in South Texas.³

1. It's not easy doing what we do.

Perhaps his most notorious client was Donald Gene Franklin, charged with capital murder in 1975. The crime alleged against Franklin was particularly brutal, and that alone was enough to attract the attention of almost everyone in San Antonio. What really seemed to incense the public, though, was that Franklin's first two trials were nullified for legal errors, and for many people, the inability of the courts to speedily convict and execute this man was proof that the legal system was broken, and that lawyers especially criminal defense lawyers were the root of all evil.⁴ Lawyer Priest took a lot of heat for representing Franklin, mostly from non-lawyers unschooled in the Sixth Amendment, but also from a few people who should have known better.

When he ran for the 187th in 1980, those running the campaign of the incumbent judge disgracefully attacked Priest in a large newspaper ad run just days before general election. He was identified as the lawyer

who defended Donald Gene Franklin, convicted killer of nurse ****. Twice. The same ad criticized him for having no prosecutorial experience, and claimed that over 65% of [his campaign contributions were] personally generated by four criminal defense lawyers. Fortunately for those interested in justice in Bexar County, neither this despicable dirty trick, nor the power of incumbency, fooled the voters, and the right man was elected. Pat Priest proved he was a brave man by his long and successful representation of Donald Gene Franklin, in the face of lynch-mob hostility in San Antonio. And although he would spend the rest of his career on the bench, he continued to show extraordinary courage there as well.

2. This judge, unlike some, was not cowed by the sensationalistic media.

In 1989, a San Antonio police officer was killed when he confronted two brothers burglarizing a hamburger joint on San Antonio's north side. The brothers were charged with capital murder, and soon after their arrest, a particularly aggressive reporter for a local television station wrangled an incriminating interview with one of them thanks, in large part, to some indispensable assistance from a high-ranking deputy in the sheriff's office. In a moment of unity seldom seen in a capital case, both the defense and the prosecution agreed that they all needed to see the reporter's notes relating to this event to determine the level of involvement by the sheriff's office. The television station brought in a team of civil litigators to argue that the notes were privileged, but they failed to persuade Judge Priest, who ordered disclosure. The reporter refused to comply with the order, defiantly promising that "they can have my notes when they pry them from my cold gnarled dead fingers." While our law does not empower judges to pry notes from reporters' fingers cold, dead, gnarled, or otherwise it does provide a remedy for the non-compliant that has proven remarkably effective over the years. Judge Priest found the reporter in civil contempt and ordered him to jail for six months.



[4]

After the contempt hearing, the reporter's lead attorney made this statement: "The judge is clearly wrong in this case. . . . Because this is a very controversial case, the judge reacted in a way that goes against the First Amendment."

One could only wonder what sort of "controversial" cases big-firm civil lawyers manage to squeeze into careers that otherwise focus on protecting the pocketbooks of the rich and famous. However controversial this lawyer's caseload might have been, it was laughable to hear him suggest that Pat Priest, who had spent the last 21 years of his career making life-and-death decisions in any number of the most serious of criminal cases imaginable, ruled the way he did because this was a "very controversial case."⁶

Not surprisingly, the media rallied strong in support of their martyred colleague; not surprisingly, they used the power of their pens to bash the Judge. A press conference was held on the steps of the jail, and in attendance were the main news anchors from all four of San Antonio's major television stations, joined by executives from both local newspapers and representatives of various professional journalism organizations. As the fair and friendly newspaper reported the next day, "[s]peakers chastised Priest for infringing on First Amendment protections and called for [the reporter's] release."⁷

Newspapers all over the country, including the *New York Times* and the *Washington Post*, covered the story,

as did ABC's Nightline program, and the tenor of all this coverage was the same: A San Antonio jurist had illegally imprisoned a heroic reporter for doing his constitutional duty to get the news to the public. And it was surely not lost on many of the consumers of this news that this injustice was being done to help a couple of cop killers.

Despite this intense media-driven pressure, Judge Priest stood by his order. After serving about two weeks in jail, the reporter agreed to testify and provide his notes after obtaining a release from a person he identified as one of his confidential sources, and Judge Priest then released him. Evidence gained from the reporter's testimony and notes formed the factual basis of a motion to suppress the incriminating statement, and once again, Judge Priest was called upon to make another unpopular decision. He granted the motion to suppress, finding that the private-citizen reporter and the deputy sheriff had combined to deny the defendant his right to counsel in violation of the Sixth Amendment to the United States Constitution. The State immediately appealed, and the Fourth Court of Appeals reversed the order of suppression.⁸ The brothers took plea bargains that avoided the death penalty, and eventually both were released from prison on parole.

3. Judge Priest understood the proper purpose of bail; many others did not.

In the early 1990s, drive-by shootings and other violent crimes plagued San Antonio, and politicians were hungry for scapegoats. In 1992, the media ran a series of stories reporting a developing conflict between some of the district judges and a then little-known city magistrate. The magistrate, who would become known as "The Hammer," began setting exorbitant bonds on people arrested for violent crimes. In one publicized case he set a \$10 million bond for a 28-year-old man charged in two sexual assaults. And the newspapers reported that the magistrate "routinely" set multimillion-dollar bail bonds.⁹ Although this surely impressed the public, case law at the time left no room for doubt that bonds like this were almost always unconstitutionally excessive.¹⁰ When the magistrate's cases were later indicted and assigned to a district court, lawyers would file writs to lower the bonds, and the district judges would have to choose between pandering to the public or following the law. For judges like Pat Priest and Terry McDonald (who presided over the 186th District Court), the choice was simple. Simple, maybe, but it came with a heavy political price. When Judges Priest and McDonald followed the Constitution and not the mob, the door was opened for the magistrate to self-righteously announce how high he would set bonds if he had the chance. Bound by the canons of judicial conduct, Judge Priest could only say this: "I do what I think is right and make no apologies to anybody for doing my job."

San Antonio Mayor Nelson Wolff could not resist joining the fray. Describing himself as "disturbed and angry," he created something he called a "Citizens' Crime Commission" to conduct a top-to-bottom examination of a criminal justice system that, he said, favored criminals instead of victims. In addition to boldly creating the commission, the mayor "himself a licensed attorney" continued to work the media, calling some citizens-accused "violent animals" who must be taken off the street and given death sentences when it is justified. And he insisted that "local judges must act responsibly" when setting bonds for violent offenders and should be held accountable by voters. . . . These actions send a message out to the criminal element that we are not committed or sincere in our fight against crime. As noted, Judge Priest almost always believed that the canons prevented him from replying to criticism, however unfounded it was. This time he permitted himself this one response about the abilities of our mayor: "Nelson never was a very good lawyer."¹¹

Wolff also lashed out at what he termed jurors who "start crying" over the plight of killers on trial instead of the victims. Demonstrating a complete misunderstanding of the role of judges and juries, Wolff went on to say this at a news conference at City Hall: "Our judges, juries, and probation officers must walk in the shoes of the victims and their families."¹²

This level of ignorance would have been surprising in anyone who had passed an eighth-grade civics class, but it was positively shocking when one remembers that Mayor Wolff was a licensed attorney. These were

the kind of attacks Judge Priest faced on a regular basis, just for doing his job.

On December 29, 1992, the *San Antonio Express-News* ran an editorial styled, "Murder City, Texas." Among other things it stated: "Until there is enough prison space for all weapons offenders, and unless judges keep those involved in weapons violations behind bars (are you listening Judges Terry McDonald and Pat Priest?), the murder record will continue to rise annually."

4. Given his detractors in the media, it is unsurprising that Judge Priest was not elected again.

In 1993, Judge Priest announced he would retire from the trial bench at the end of the year. Several lawyers lined up in both primaries to replace him, and the rallying cry for them all was "victims' rights." Little time, if any, was devoted to defendants' rights, or to the Constitution, or to judicial courage. "The Hammer" announced his candidacy, proclaiming the need to "return our district courts back to the people," stating: "Our district courts as a whole have been dominated by the criminal defense lawyers of this city." Although he won the Democratic primary in March 1994, he lost the general election to his Republican opponent.

In December 1993, Justice Shirley Butts announced that she would not seek re-election to Place 1 on the San Antonio Court of Appeals. Judge Priest then declared his candidacy for this position in the upcoming Democratic primary. A lawyer with little criminal experience who had served as a municipal judge in a small bedroom community on the outskirts of San Antonio ran against Judge Priest and won the primary by more than 4,000 votes, despite the fact that Priest had been the overwhelming choice of lawyers polled in a State Bar of Texas survey. Though victorious in the primary, the former municipal judge lost to his Republican opponent in the general election.

D. Senior Judge Pat Priest, for the next 23 years.

I have never been a fan of the visiting- or senior-judge system, which allows former judges to return to the bench to serve with no electoral mandate and little or no accountability to the public or to the lawyers and defendants who appear before them. Occasionally, though, this flawed system produces good results, and that was the case with Judge Priest. In 1995 he was back in courthouses throughout the State, but most often in and around San Antonio. He carried on as before: working every day and all day; respecting and listening to all who appeared before him; and ruling in every case, as he felt the law and the facts required him to do, without worrying one damn bit about what the media thought or published.

In the years to come, people who knew Pat Priest will tell stories about what a great legal scholar he was, and they will be right. They will praise him for his fairness and judicial temperament, and again, they will be right. I hope, though, that lawyers and judges who think about Judge Priest will be inspired by his singular and extraordinary judicial courage, and that, when they find themselves in a situation that requires courage on their part, they will ask: What would Pat Priest do? Ruling correctly, according to the law and the evidence, with no regard for how it might look on the front page, would be the best way to honor the memory of Judge Pat Priest.

E. And he was a good and humble man.

I have spent all my time so far talking about those qualities of Judge Priest that we would wish on all our judges: intelligence, integrity, diligence, fearlessness. In the end, though, it might be most important of all that Pat Priest was a decent, humble man who loved his family, served his community, and treated all those around him with dignity and respect.

I close with a story that Daryl Harris shared at the memorial service for Judge Priest on October 17, 2018. It shows the man's humanity as clearly as anything I can think of. Daryl is not from San Antonio, but likes to say that he and his wife got here as soon as they could. He has been a prosecutor for the last 18 years and

tried many cases before Judge Priest, when both were tasked with handling mostly cases involving sexual assaults against children. These, of course, were the kinds of cases the elected judges most wanted to avoid. Daryl remembered a situation all trial lawyers find themselves in from time to time. The jury had retired to deliberate its verdict, and the judge, the defense, and the prosecution were sitting in the courtroom, unable to focus on new work and awaiting that awful buzzer. Daryl had brought some sausage to the gathering, the lawyers were enjoying the feast, and they invited the Judge to join them. He did, but he noticed another person all the others had overlooked. It was the defendant sitting alone in the jury box, and the one person in the room who had more to gain or lose by the jury's verdict than all the others combined:

Judge Priest came down off the bench, got himself a piece of sausage, and then cut another piece and gave it to the defendant. Much like San Antonio had accepted me, Judge Priest was accepting this person into the group and the moment. I don't remember who I tried that case against, I don't remember the verdict, but when my group of friends got the word of Judge Priest's passing . . . and we started to trade stories . . . that's what I remembered. He demonstrated his faith, and I hope that I can come close to his standard in living mine.

Notes

1. Official records list his name as "Wayne Patrick Priest," but I never heard him called either Wayne or Patrick.
2. These great lawyers shared offices for years in suite 1515 of the Tower Life Building, hence the name.
3. Between October 2015, and December 2017, Judge Priest contributed a number of articles to the *Voice for the Defense* that briefly and humorously chronicled some of his more interesting cases as a defense lawyer. [\[5\]These are archived on TCDLA's Voice Online website.](#)
4. *Franklin v. State*, 606 S.W.2d 818, 850 (Tex. Crim. App. 1978)(prosecutors improperly used Franklin's pretrial silence and the exercise of his Fifth Amendment privilege). Franklin was re-tried, and again he was convicted and sentenced to death, but the trial court granted a motion for new trial because of jury charge error. He was convicted and sentenced to death a third time in 1982, after Priest had been elected judge, and this conviction was affirmed on appeal. *Franklin v. State*, 693 S.W.2d 420, 422 (Tex. Crim. App. 1985), *cert. denied*, 475 U.S. 1031 (1986).
5. I have omitted the nurse's name from this article. The newspaper ad for the incumbent judge did not.
6. For what it is worth, I am certain that the courtroom work the reporter's lawyers did was done well and honorably, and that if they billed at the rate that lawyers of their stature do, they made a lot of money and earned every penny. I still insist, though, that their out-of-court suggestion that Judge Priest buckled under pressure is patently absurd. And their further claim that Judge Priest was "clearly wrong?" was in fact, itself, clearly wrong. The reporter filed a petition for writ of habeas corpus challenging the contempt order, and Federal District Judge H. F. Garcia denied relief, citing the seminal case of *Branzburg v. Hayes*, 408 U.S. 665 (1972), for the well-established proposition that the First Amendment did not shield the reporter from providing notes of his interview of the defendant. *Karem v. Priest*, 744 F. Supp. 136, 137 (W.D. Tex. 1990).
7. *San Antonio Light*, July 6, 1990.
8. *State v. Hernandez*, 842 S.W.2d 306, 319 (Tex. App.?San Antonio 1992, *pet. ref'd*), *cert. denied*, 509 U.S. 927 (1993).
9. *San Antonio Express-News*, January 10, 1993.
10. Although the case law has become less friendly to presumptively innocent citizens in recent years, in the

early 1990s, the Court of Appeals sitting in San Antonio could hardly have been more clear: Reducing to \$75,000 the \$1,000,000 bond set for a capital murder defendant, that Court observed that while bonds of \$300,000 to \$1,000,000 would not necessarily be unconstitutional, "it would be an unusual case which would justify such a high bail amount." *Ex parte McDonald*, 852 S.W.2d 730, 735 n.4 (Tex. App. San Antonio 1993, no pet.); *see also Ex parte Wood*, 952 S.W.2d 41, 43 (Tex. App. San Antonio 1997, no pet.) (reducing the total bond in this death penalty case from \$450,000 to \$70,000, finding that "only in rare circumstances would such amounts be justified?").

11. *San Antonio Express-News*, August 8, 1992.

12. *Id.*

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