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IN MEMORIAM

ROBERT WILBURN CALVERT, THE PRUDENTIALIST

L. WAYNE SCOTT*

This issue of the *St. Mary's Law Journal* is dedicated to the memory of Robert W. Calvert, former Chief Justice of Texas, and a good friend of St. Mary's University School of Law.

* B.A., Southwest Texas State College; M.A., Baylor University; J.D., University of Texas. My thanks to Mike Hatchell and Professor Michael Ariens, for their help in preparing this essay, and to Todd Smith for his patience.

I met Judge Calvert as a freshman at the University of Texas School of Law. I was serving as Master of the Bench for Furnival's Inn, a fancy name for a small study group of freshmen. We had covered one of Judge Calvert's cases in Dean Leon Green's Torts class. (Dean Green and his co-authors included three of Judge Calvert's cases in the text we used, LEON GREEN ET AL., CASES ON THE LAW OF TORTS (1957): *Robert E. McKee, General Contractor, Inc. v. Patterson*, 153 Tex. 217, 271 S.W.2d 391 (1954); *Ford v. Panhandle & Santa Fe Ry.*, 151 Tex. 538, 252 S.W.2d 561 (1952); and *Renfro Drug Co. v. Lewis*, 149 Tex. 507, 235 S.W.2d 609 (1950)). One of the purposes of the First Year Law Inns of Court program was to encourage the study groups to invite speakers to assist them. Someone in our group came up with the idea that we should get Judge Calvert as a speaker. I wrongly assumed that this would be impossible. Not only did he answer his own telephone, but he met our group for dinner. It was a splendid evening, and he answered every question with candor. He even paid for his own meal.

To place the judge in context, a short outline of his life and career is necessary. Born in Lawrence County, Tennessee on February 22, 1905, Calvert moved to Texas in 1913. He was reared in the State Orphans Asylum (Home) in Corsicana, Texas. By the time of his death on October 6, 1994, Judge Calvert had held many offices and had accomplished many things. His activities are detailed, to some extent, in his autobiography.¹ A 1931 graduate of the University of Texas School of Law,² the judge practiced law in Hillsboro, Texas from March 1931 to September 1950. During that period, he held a variety of public offices: Criminal District/County Attorney of Hill County; member of the board of trustees of the Hillsboro Independent School District; state representative (1932-1938); Speaker of the House of Representatives of Texas; and chair of the Executive Committee of the Democratic Party of Texas.³ In 1938, he lost the primary election for the Democratic

I later had the pleasure of seeing him in action as I served my year as a briefing attorney for Judge Meade Griffin. For a young law graduate, making a presentation in conference before Judge Calvert was a harrowing experience. But then, it was harrowing for anyone appearing before the judge. Although there was no malice in his questions, he did not brook unpreparedness, and he expected everyone to have applied all rules of logic to determine the ultimate issue in the case. While serving as a bailiff for the court during that year, I watched one of the foremost lawyers in the state leave the courtroom in virtual tears because he was not sufficiently prepared and could not withstand the withering questions of the judge.

Over the years, Judge Calvert and I had many contacts. In particular, after his retirement, the judge was frequent moderator for programs held at St. Mary's University School of Law. His only requirement was that someone pick him up in Austin and drive him home. In turn, my only requirement for serving as course director for those programs was that I be allowed to drive the judge. The stories he told during those trips could fill volumes.

1. ROBERT W. CALVERT, *HERE COMES THE JUDGE: FROM STATE HOME TO STATE HOUSE: MEMOIRS OF ROBERT W. CALVERT* (Joseph M. Ray ed., 1977). As the years passed, the judge was rather embarrassed by the title, which was taken from a running joke on the popular television show *Laugh-In*. He insisted that the title was the idea of his publisher. Knowing Judge Calvert's penchant for what Judge Reavley calls "silly little jokes," that may or may not be true. His most-often-told "silly little joke" concerned a postcard purportedly sent by Judge Norvell while on vacation, reporting that he saw "two mooses (scratched out)—two meeces (scratched out)—one moose on one side of the road and one moose on the other side of the road." Recounting these little stories gave him great pleasure.

2. Judge Calvert worked his way through college "operating the 'front' elevator in the [State] Capitol." ROBERT W. CALVERT, *HERE COMES THE JUDGE: FROM STATE HOME TO STATE HOUSE: MEMOIRS OF ROBERT W. CALVERT* 34 (Joseph M. Ray ed., 1977).

3. In his capacity as chair of the Executive Committee of the Democratic Party, Calvert presided over the canvassing of the votes in the 1948 Senate race between Lyndon Johnson and Coke Stevenson. His interpretation of the decision in *Ferguson v. Huggins*,

Party nomination for state attorney general. In 1939, however, as the unpaid lobbyist for the State Bar of Texas, he was successful in getting two significant measures through the legislature: the first created an integrated, organized bar; and the second granted rule-making power in civil cases to the state supreme court.⁴ He then became a member of the committee that drafted the Texas Rules of Civil Procedure, adopted by the Supreme Court of Texas in 1941. Judge Calvert assumed his seat on the Texas Supreme Court in 1950, and he served as chief justice of the court from 1961 until he retired in 1972. From that time until 1992, he was “of counsel” to the Austin firm of McGinnis, Lochridge & Kilgore. In his “retirement” he remained active, serving as chair of the 1974 state constitutional convention.

For trial and appellate practitioners, Judge Calvert was a guiding beacon. He would have been noteworthy had he only written two of his articles, *Development of the Doctrine of Harmless Error in Texas*,⁵ and “*No Evidence*” and “*Insufficient Evidence*” *Points of Error*.⁶ However, he wrote some twenty-five articles. He also

122 Tex. 95, 52 S.W.2d 904 (1932) led him to conclude that his committee’s duty was only ministerial, a decision that worked to Johnson’s advantage. ROBERT W. CALVERT, *HERE COMES THE JUDGE: FROM STATE HOME TO STATE HOUSE: MEMOIRS OF ROBERT W. CALVERT* 126–27 (Joseph M. Ray ed., 1977). When the issue of whether to accept the vote in Jim Wells County as certified came before the full Executive Committee, it appeared for a while that Calvert would cast the deciding vote. In the end that was not the case, but his explanation of how he would have voted casts considerable light on the man and his fidelity to the law:

I was not hesitant or reluctant to vote on the motion because of the pressures in the situation; but I did not wish to vote to break the tie only to have the vice-chairwoman appear and vote to create another tie. I was fully convinced that an election fraud had been perpetrated in Jim Wells County, by which 201 votes had been mysteriously added to Johnson’s total vote and one had been added to Stevenson’s total. Nevertheless, I would have voted for the motion. I could not have done otherwise with the Supreme Court opinion in *Ferguson v. Huggins* before me.

Id. at 128. For a further description of this event, see ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MEANS OF ASCENT* 344-48 (1990).

4. ROBERT W. CALVERT, *HERE COMES THE JUDGE: FROM STATE HOME TO STATE HOUSE: MEMOIRS OF ROBERT W. CALVERT* 99 (Joseph M. Ray ed., 1977).

5. Robert W. Calvert, *Development of the Doctrine of Harmless Error in Texas*, 31 *TEX. L. REV.* 1 (1952).

6. Robert W. Calvert, “*No Evidence*” and “*Insufficient Evidence*” *Points of Error*, 38 *TEX. L. REV.* 361 (1960). These two articles not only established the boundaries of judicial review in Texas, but they also demonstrated Calvert’s unswerving dedication to the jury system.

wrote 378 opinions.⁷ Each of these decisions was tightly written, tightly reasoned, and decisive. Whether you agreed with the outcome, you had to like the style. His overall perspective on the law, particularly procedure, remains a lasting legacy. The procedural system he helped create was, compared to the preceding laws, a "forgiving system," which allowed courts to reach the merits of cases. The substantive law he helped develop was progressive and clear, and, through him, always applied without regard to results.

Judge Calvert was a remarkably neutral jurist, despite his political background. When he became a judge, he ceased being a politician. His successor as chief justice, Judge Joe R. Greenhill, speaking at the memorial service for Judge Calvert before the Supreme Court of Texas on January 18, 1995, remembered:

Calvert did not hesitate to follow an established rule even if it appeared to reach an unpopular or undesirable result in a particular case. Since he disciplined himself rigidly to follow the law, he was impatient with judges who would want to depart from the rule to reach an equitable or just result. He divided judges into two classes: law men and equity boys. I must confess that on some occasions I fell into Calvert's classification of "equity boys." In some respects, I was almost as firm in my views as he was, and I could feel Calvert's displeasure.⁸

Judge Calvert described this division of "law men and equity boys" as

between those, on the one hand, who wanted to decide cases in accordance with what they conceived to be the ruling law, and thus to try to keep the law predictable for lawyers and the trial courts, and those on the other hand who wanted somehow to reach what they considered a just result in a particular case, even if it involved bending the rules of law somewhat to achieve the desired result.⁹

In this light, it is not surprising that Judge Calvert would be critical of the actions of the Texas Supreme Court in the tumultuous

7. Chief Justice Joe R. Greenhill (Retired), Remarks at the Memorial Service for Robert W. Calvert in the Supreme Court of Texas (Jan. 18, 1995) (transcript on file with the *St. Mary's Law Journal*).

8. *Id.*

9. ROBERT W. CALVERT, *HERE COMES THE JUDGE: FROM STATE HOME TO STATE HOUSE: MEMOIRS OF ROBERT W. CALVERT* 164 (Joseph M. Ray ed., 1977).

1980s, when the court took a decidedly liberal turn.¹⁰ Since Calvert had been regarded as a liberal, it was difficult for him to conceive of himself as, or be seen by others as, a conservative. He was a vocal proponent of changes in the judicial selection and tenure process, and a critic of the judicial activism of the Texas Supreme Court. Because of the rhetoric of that time, future historians may regard him as simply a formalist. That would be a mistake. It would appear that he was a prudentialist in the tradition of Alexander Bickel. He was aware of the revolt against formalism, known by the name of legal realism, but he could never accept the assertion that law was equated with politics.¹¹

10. It may be improper to describe the judicial political split of the 1980s in terms of liberal and conservative, but the terms were current at the time. In reality, the division was between those for the plaintiffs and those for the defendants, primarily in personal injury cases. The attack on established precedent took two routes. One occurred in the area of procedure, and it was accomplished by legislation or rule changes intended to liberalize venue, special issue submission, and discovery. The other was substantive, occurring primarily through the decisions of the Texas Supreme Court. For a more detailed description of the era, see Anthony Champagne, *The Selection and Retention of Judges in Texas*, 40 Sw. L.J. 53, 65–91 (1986); Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146 (1988); John L. Hill, Jr., *A Time of Challenge: Judicial Reform in Texas*, 52 TEX. B.J. 165, 168–69 (1989); Donald W. Jackson & James W. Riddlesperger, Jr., *Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court*, 74 JUDICATURE 184 (1991).

11. Judge Posner provided the following description of prudentialists:

The prudentialists emphasize human fallibility, urge humility, counsel adherence to immemorial custom, deplore breaking with the past, recommend prudence as the central principle of politics and judgment as the central principle of law, elevate the particularism and (apparent) lack of system of the common law over the generalizing tendencies of statutes and codes, and stress the limitedness of intellect as a tool of social reform.

RICHARD P. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 443 (1990). Judge Posner further opined:

[L]egal prudentialism is a double-edged sword. If it is cautionary against judicial policy making, it is, or at least ought to be equally cautionary against formalism. The formalist's battle cry—*ruat coelum ut fiat justitia* (let the heavens fall if necessary in order to do justice)—will strike a prudent person as moral fanaticism. Burke's own formulation of prudentialism is strongly antiformalist, indeed pragmatist: "All government, indeed every human benefit and enjoyment, every virtue and every prudent act, is founded on compromise and barter. We balance inconveniences; we give and take; we remit some rights, that we may enjoy others; and we choose rather to be happy citizens than subtle disputants."

Id. at 445 (quoting *Speech on Conciliation with America*, in *THE PHILOSOPHY OF EDMUND BURKE: A SELECTION FROM HIS SPEECHES AND WRITINGS* 37 (Louis I. Bredvold & Ralph G. Ross eds., 1960)).

One of Judge Calvert's unpublished speeches sheds considerable light on the tenor of the Texas judicial system in the 1980s, and on his own judicial philosophy.¹² The judge was upset by quotes from two sitting justices of the Texas Supreme Court in an article in the Fort Worth Star-Telegram. He responded in a speech given to the Texas Association of Defense Counsel on September 30, 1983. The first remark that drew his ire was to the effect that "Calvert would follow an 1888 law even if it led to absurd results." The other observation was, "[w]hen Calvert was [on the court], an oil company, an insurance company, a utility company or a bank could not lose a case."¹³

In response to the first statement, Judge Calvert pointed to two of his decisions as instances in which he had no difficulty in departing from prior law: *Landers v. East Texas Salt Water Disposal Co.*¹⁴ and *Watkins v. Southcrest Baptist Church.*¹⁵ In the speech, he explained: "My own philosophy is that a prior decision should not be overruled unless it becomes clear from its use and influence over a reasonable period of time that it is more harmful than beneficial to society as a whole or to a substantial segment thereof."¹⁶

12. My thanks to Mike Hatchell of Tyler, Texas for locating this speech in his "Calvert file."

13. Robert W. Calvert, Remarks to the Texas Association of Defense Counsel 7 (Sept. 30, 1983) (transcript on file with the *St. Mary's Law Journal*).

14. 151 Tex. 251, 248 S.W.2d 731 (1952) (overruling *Sun Oil Co. v. Robicheaux*, 23 S.W.2d 713 (Tex. Comm'n App. 1930, judgm't adopted) and allowing joinder of joint tortfeasors in one action). Judge Calvert noted:

[O]ur courts seem to have embraced the philosophy, inherent in this class of decisions, that it is better that the injured party lose all of his damages than that any of several wrongdoers should pay more of the damages than he individually and separately caused. If such has been the law from the standpoint of justice, it should not have been; if it is the law now, it will not be hereafter. The case of *Sun Oil Co. v. Robicheaux* is overruled.

Landers, 248 S.W.2d at 734.

15. 399 S.W.2d 530 (Tex. 1966) (Calvert, C.J., dissenting) (urging overruling of doctrine of charitable immunity.) In his dissent, Judge Calvert stated:

The doctrine of charitable immunity is a court-made doctrine. I would abolish it outright, preferably *instantly*, without distinction as to the nature or character of the various charitable organizations. I would agree to abolish it prospectively so that liability would attach only in cases arising hereafter. Finally, if driven to it, I would abolish it effective upon adjournment of the Regular Session of the 60th Legislature in 1967, thus permitting the Legislature to act in the matter if it wished to do so.

Watkins, 399 S.W.2d at 536 (Calvert, C.J., dissenting).

16. Robert W. Calvert, Remarks to the Texas Association of Defense Counsel 8 (Sept. 30, 1983) (transcript on file with the *St. Mary's Law Journal*).

Responding to the second comment, the judge pointed to his first and his last opinions as evidence of his evenhanded approach to plaintiffs.¹⁷ He recalled that “I stretched automobile collision insurance coverage to the breaking point in holding that it covered a collision with rushing flood waters of the Concho River. The insurance company lost.”¹⁸ Calvert then added:

I admit, as of course I must, that during my Supreme Court service I also wrote opinions in favor of oil companies, insurance companies, banks and other corporations. Indeed, a leading plaintiff’s trial lawyer, Warren Burnett, once told me, “Judge, the trouble with you is you don’t have any judicial philosophy; you will write a case one week for an injured person and the next week for an insurance company.” I plead guilty to the latter part of the charge.¹⁹

Having refuted to his satisfaction the two charges, and having confessed to part of the Burnett charge, he turned to attack the political approach to decisionmaking, as represented by an article written by Professor Joel B. Grossman.²⁰ Judge Calvert stated that Grossman “advocated insertion into the Code of Judicial Conduct a judicial tenet that a judge’s ‘primary duty is to achieve justice in each individual case, applying the law so that a fair and equitable result is achieved.’”²¹ Judge Calvert had two responses to this approach to the law.

One problem with result-oriented decisions is that there are no definitive guidelines in the decision-making process, and to get there from here the opinion-writing judge must all too often either ignore

17. See *Moore Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 939–40 (Tex. 1972) (rescuing local hamburger franchise from judgment in favor of Phillips Petroleum); *Renfro Drug Co. v. Lewis*, 199 Tex. 507, 519, 235 S.W.2d 609, 617 (1950) (allowing plaintiff injured while using business premises as shortcut to recover as implied invitee). “There were many others in between, too numerous to recount.” Robert W. Calvert, Remarks to the Texas Association of Defense Counsel 5 (Sept. 30, 1983) (transcript on file with the *St. Mary’s Law Journal*).

18. See Robert W. Calvert, Remarks to the Texas Association of Defense Counsel 5 (Sept. 30, 1983) (transcript on file with the *St. Mary’s Law Journal*) (referring to *Providence Washington Ins. Co. v. Proffitt*, 150 Tex. 207, 239 S.W.2d 379 (1951)).

19. *Id.* at 6.

20. Joel B. Grossman, *A Political View of Judicial Ethics*, 9 SAN DIEGO L. REV. 803 (1972).

21. Robert W. Calvert, Remarks to the Texas Association of Defense Counsel 2 (Sept. 30, 1983) (transcript on file with the *St. Mary’s Law Journal*) (quoting Joel B. Grossman, *A Political View of Judicial Ethics*, 9 SAN DIEGO L. REV. 803, 814 (1972)).

controlling guidelines altogether or run rough-shod over them while giving them a proverbial "lick and a promise."

....

Another problem with the [Grossman] philosophy is that it presents a serious question of standards of review. If the only issue at the trial court level is "justice" and a jury makes fact findings, are those findings to be reviewed by no evidence and weight and preponderance tests, or is the appellate court to review them by asking, "are they just?" Then, would the only question to be briefed and decided on appeal from a bench-trial judgment be, "Is this judgment just?"

....

Moreover, with justice as the only issue in each individual case, there can be no predictability in the law; neither litigants nor their lawyers can decide with a semblance of confidence whether to compromise and settle, or to stand and fight, or to run away to live and fight another day.²²

Whether you agree or not, there was no question where Judge Calvert stood.

More than his opinions and his articles, more than the offices he held and the positions he took, Judge Calvert's greatest contribution was the example he set. Many in the current generation of trial and appellate practitioners grew up trying to follow his model. His rigorous insistence on honesty and integrity, his piercing logic and analytical ability, and his encyclopedic knowledge were all trademarks. These were complemented by his marvelous humor, his great generosity, and his modesty (except about golf).

At his direction, no eulogy was given at his funeral. Rather, after his burial, there was a memorial service, presided over by his good friend and former colleague, Judge Tom Reavley. Those assembled were asked to say anything they wanted to about him, good or bad. The stories were all warm and good. Had everyone there told their story, the program would still be going on, but then the judge would not have liked that. He ran a tight ship. "Never on time," he would say, "always early." He once told an appellate advocate who asked for more time to conclude a presentation that "no argument was ever won by another minute of talk." So, this short essay will not go on, but will conclude with the note that Chief Justice Robert W. Calvert lived life without looking over his

22. *Id.* at 6, 7.

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shoulder. He steered a straight course. His life was good, long, and productive. His conclusion to the 1983 speech summarized it all: "Ladies and gentlemen, I have had my say. I have no apologies to make to anyone for anything I have said, and I thank you for furnishing me the forum."²³

23. *Id.* at 13.