



AltLaw Observes 10th Anniversary

The inaugural issue of the *AltLaw* was published 10 years ago. In that issue we promised to address timely legal issues of significance and public interest. We believed then and believe now in our first ALTruism: "A lawyer too big to try a small case is too small to try a big case." We have continued to try and to report cases both big and small.

In the decade since the *AltLaw* was first conceived, we have endeavored to represent the mission of The Law Firm of Alton C. Todd reflected in our motto: *Your Case Is Our Cause*.

Looking back, we see the consistency of our convictions. In the Summer 1996 issue, writing of the important right of a trial by jury, the *AltLaw* stated: "When logic and reason come into play, I believe that the collective wisdom of 12 citizens from different walks of life is better equipped than one person or select group." The summer and fall issues of 2005 reflect the same sentiment.

In the early issues, as now, we believed and stated that taxpayers pay for tort "reform." Then and now, we also advanced the fundamental right of Americans to sue.

Four years after the first *AltLaw*, The Law Firm of Alton C. Todd, located in Alvin, opened a satellite office in Friendswood, and in August of 1999, we purchased the historic Brown House at 312 South Friendswood Drive. There, on July 24, 2000, we officially opened for business, after renovating the structure while keeping the facade and interior walls intact to maintain its historic significance in the Friendswood community.

Through these years there have been honors and accolades, each enriching the law firm in a unique way: Alton C. Todd was named to the Friendswood ISD Education Foundation's Board of Directors when the foundation was established in 1999. In 1998, Todd was certified as a member of the Million Dollar Advocates Forum. In 2003, he was voted the top Personal Injury Lawyer and Best Civil Trial Lawyer by

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Summer Storms Leave Lasting Lessons

Hurricane Rita Painful Evacuation Drill

The hurricane that created the largest traffic jam in world history was not the now-retired Rita. Rita's reality for this Texas family barely fluttered a leaf or tweaked a raindrop.

It was her powerful predecessor Katrina, also retired, that warned some 2.5 million+ Texans to get out. And they did, in an unprecedented bumper-to-bumper freeway exodus driven by the intense images of helpless New Orleans residents trapped on rooftops just a few weeks earlier.

That cause and effect is history. But, Rita's legacy remains, her own strong mark of misery adding to the disruption and destruction affecting thousands of southerners in this summer of natural disaster.

Although Rita made landfall in a tiny, evacuated shrimping village, to the 370 residents of Sabine Pass who lost their lifetime accumulations, her impact was no less than the kind of wholesale damage seen up and down the Mississippi coast during Katrina.

The killer hurricanes of August and September 2005 will also be remembered for a few other common associations: mistakes, lessons and accountability.

While the evacuees of the Gulf Coast following Rita had a way to get out, unlike so many who perished in New Orleans, frenzied, slow-moving motorists ran out of gas, and there was nowhere to get it. Cars overheated, passengers suffered medical distress and died in the sweltering heat.

The arduous journey was born of fear and desperation, fueled by 24-hour non-stop TV predictions that the largest storm in the history of the Gulf, bearing down on Houston, could wipe Galveston off the map.

One hopes that the next evacuation will be better planned with priority given to the most vulnerable. Statements that there would be no emergency public transit, 911 service or major in-town shelters available for the duration of the emergency caused many Houstonians to panic and flee.

One hopes that, in the future, FEMA'S response will be quicker, that gas will be available along evacuation routes, that the media may be a little more reasoned, a little less emotional and that elected officials will not feel so inclined to go on TV to congratulate each other on their wonderful work.

But, the sad truth is that we can never get it right when dealing with nature and human nature. While the decision to evacuate may not be so easy the next time, as we fault the

government, media over-exposure and even gas stations, we also need to claim some responsibility for individual inconvenience.

The only good thing about hurricanes is their advance notice. That provides some freedom of choice in how to cope. Our choice was to batten down the hatches, and we worked round the clock, getting survival supplies, locating a generator, and boarding up our home and office. Then, we retreated to our windowless world and waited and prayed. This time Houston was spared; we were incredibly lucky, extremely grateful and ever-mindful of our neighbors to the east who

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Todds Prepare to Hunker Down

Is Diminishing Role of Jury Constitutional?

The discretionary tool called *remittitur*, used in appellate courts to alter a jury's verdict, is arguably unconstitutional. The federal courts have operated since 1822 under the inaccurate historical assumption that the practice existed in English common law in the 18th century. In *Blunt v. Little*, after the defendant in a jury trial moved for a new trial because of what he considered an excessive award for damages, Justice Story determined a damage amount that he found reasonable and which the plaintiff could accept as an alternative to a new trial.

The problem with the logic in this situation, however, is that the plaintiff has no real choice other than taking the *remittitur* or settling the case, because even if a second trial would result in a greater or the same verdict as the previous jury's, the same judge will preside and that judge has already determined the maximum amount that a reasonable jury could award.

Increased plea bargaining, tort-reform laws limiting jury awards, and Supreme Court rulings giving judges new power to screen the evidence presented to jurors all contribute to marginalizing the role of the jury. Courts are routinely reversing and rendering their own decisions in place of the jury's that heard the evidence. If one is a strict constructionist of the Constitution and Bill of Rights, how can this be?

Court statistics show that jury trials are a rapidly shrinking part of federal court caseloads, with only 4.3 percent of federal criminal charges now ending in jury verdicts, down from 10.4 percent in 1988. The number of federal civil cases resolved by juries has also dropped to 1.5 percent from 5.4 percent in 1962. And the awards that civil juries do make are being overturned with greater frequency. Federal appeals courts are reversing certain types of civil jury awards twice as often as they did a few years ago. Jurors who decide cases are mystified, embittered and feel betrayed when their work comes to nothing, and the Supreme Court has done as much as any court in the country to accelerate the trend. In two major rulings in 1993 and 1999, justices directed trial judges to screen technical and scientific testimony before it reached jurors.

ALT-RUISM

**People Don't Care What You Think
Until They Think You Care.**

An in-depth study, resulting from extensive research by Suja A. Thomas, Assistant Professor at the University of Cincinnati College of Law, and published in the Ohio State Law Journal, Vol. 64, focuses on the plaintiff's right to a jury trial and examines for the first time the English common law on *remittitur* and a new trial for excessive damages.

The starting point to understand the current constitutional authority of *remittitur* is the Supreme Court's 1935 decision in *Dimick v. Schiedt* which stated in the context of a discussion of *additur* (increasing damage awards) that any re-examination of facts found by a jury should be only according to practices in existence at English common law in 1791.

In this case the jury awarded the plaintiff \$500 for personal injury resulting from the defendant's negligence in operating an automobile. The plaintiff moved for a new trial on grounds that the verdict was inadequate. The judge ordered a new trial unless the defendant consented to an increase of the jury award to \$1500. The defendant consented, but the plaintiff appealed, arguing that the case should be allowed to be tried by another jury. The Court of Appeals reversed, holding that *additur* was in violation of the Seventh

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What Was He Thinking?

Governor Blames Lobbyists For School Finance Failure

In the summer issue of *The Altlaw*, following Governor Rick Perry's recall of the Legislature for a special 30-day session to fix school finance, the problem was unresolved. It still is.

It was the governor's fourth try to pass school finance reform. "Today I share the tremendous disappointment of millions of taxpayers, teachers, parents over the Legislature's failure to act on property tax relief and education reform," Perry said on August 19. Saying that he would not call another special session, Governor Perry publicly blamed the Legislature's inaction on business lobbyists.

Perry's admission of the influence of special interests on the Legislature was not the most politically astute statement by a governor seeking re-election. Further, despite his deference to "average Texans," as the voice that legislators should be hearing, the implication that he is separate from and above those influential business lobbyists rings just a little false. While legislators were debating the school finance issue, Perry's re-election campaign was raising \$2.5 million. Of that amount, \$100,000 each came from Houston Toyota wholesaler Thomas Friedkin and Houston home builder Bob Perry, according to a report Perry filed with the Texas Ethics Commission in August.

The Un-Patriot Act

TRIAL BY JURY INTRUSION WEAKENS "HEART AND LUNGS OF LIBERTY"

"In suits at common law, where he value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

How many Americans even know that the above words constitute the 7th Amendment of the U.S. Constitution, protecting the right to trial by jury, not only in federal cases but also guaranteed in most state constitutions?

It is the 7th amendment that equalizes the playing field by empowering jurors—12 ordinary citizens not running for re-election or owing favors to anyone—to safeguard from arbitrary perversion of the law both defendant and plaintiff, and that includes the corporate builder of an unsafe car, as well as its irresponsible drunken driver. The exercise of the rights safeguarded by the 7th amendment, however, is not popular with the current administration

beholden to its political and corporate supporters. Under the guise of "tort reform," they have magnified the "inconveniences" that arise from damage awards by juries and perpetuated the myth of frivolous lawsuits and excessive jury awards. Every conceivable incident of economic harm from rising malpractice rates and the closing of small businesses to higher prices for goods and services is blamed on a litigation crisis that simply does not exist.

In study after study by impartial organizations (not analyses financed by special interest groups) the data has shown no link between tort costs and the economy:

- **During a 10-year period, (1993-2002) tort filings in 35 states declined, in Texas by 40 percent.** (National Center for State Courts)

- **From 1992-2001, the number of all civil trials in the nation's 75 largest counties decreased by 47 percent and in tort jury trials the median award declined by**

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Altlaw Anniversary

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Galveston lawyers. In 2004, he was named a Texas Super Lawyer and, in 2005, honored by the College of the State Bar.

The Altlaw was proud to report in the Spring 2005 issue that Alton C. Todd had won one of the top 10 verdicts in 2004.

The Altlaw has always featured items of human interest, as well as the hard news legal activity affecting the firm. In the past 10 years, we have covered our gains and losses on a personal, as well as professional level. On October 3, 1997, Alton C. Todd wrote of the passing and the influence of a beloved mentor, Charlie Britt, for whom Todd began working in Alvin in 1975.

The Altlaw also reported with pride the passing of the New York bar by Jeff Todd, son of Alton C. Todd: "We hope to see Jeff return to practice law in Texas within the next few years." Now, that hope has become a reality, as Jeff is associated with a Galveston law firm.

In these years we have been fortunate to travel and to report of idyllic vacations in many parts of the world, the Mediterranean, northern Europe, Southeast Asia, Macchu Pichu and the Galapagos Islands, the Eastern Caribbean and South Africa.

In this decade we have been blessed by the addition of a new son-in-law, two daughters-in-law, and four grandchildren.

In all ways we have grown and now, as a lawyer for 34 years, I readily re-inforce with conviction the words of a Spring 1999 article in *The Altlaw*: "I am proud to serve in a profession that offers legal recourse to the wronged in our society when there is nowhere left for them to turn."

THE ALTLAW™

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History of Supreme Court Reflects Importance of Judicial Independence

When John G. Roberts, Jr., was confirmed as the 17th Chief Justice of the Supreme Court, he joined the ranks of a prestigious group whose history contradicts the stereotype of a staid, somber, united group. In spite of the presidents' and the Senates' traditional efforts to appoint justices who share their political philosophies, members of the Court have consistently displayed independence from the other branches of government, and appointed justices have not always acted or voted as the presidents who appointed them might have expected.

Prior to his confirmation, Roberts, legal mentor of the late Chief Justice William Rehnquist, summarized his judicial philosophy: "If the Constitution says that the little guy should win, the little guy will win in my court; if the Constitution says that the big guy should win, then the big guy will win. My obligation is to the Constitution."

Independence from other branches of government inherent in that obligation has many times distinguished decisions of the Supreme Court. For example, although the Court favored his economic policies, they did not adopt, in 1936, after President Franklin D. Roosevelt's re-election, his proposed legislation that would permit him to appoint as many as six additional justices.

Presidents have not always appointed members of their own political party. Abraham Lincoln appointed Stephen J. Field, a prominent Democrat in 1863. In 1940, FDR elevated Justice Harlan Fiske Stone, Republican, to Chief Justice. In 1945 Harry Truman appointed Senator Harold H. Burton of Ohio, a Republican. In 1956 President Eisenhower appointed William J. Brennan, a Democrat.

The lessons of history are clear and positive reflecting the significance and independence of the Supreme Court:

- Twenty percent of Supreme Court nominations have been unsuccessful.
- The first Supreme Court nominee to be rejected by the Senate was John Rutledge, a signer of the Constitution and nominated by our first president in 1795.
- In 1844 and 1845, President John Tyler made six attempts to fill vacancies on the Court, five of which were unsuccessful.
- In 1969 and 1970, the Senate rejected two of President Nixon's nominees. President Reagan's nominee, Robert H. Bork was defeated in 1987.
- During the Supreme Court's first decade—1790-1800—5 of the first 12 men to serve on the Court resigned, while 3 other nominees declined either appointment to the

Court or promotion to Chief Justice, most reasoning that the Court lacked "energy, weight and dignity."

- Approximately 4 of 5 nominations were successful since 1789
- Washington named Patrick Henry, an old man, to the Court, and Henry declined to serve.
- Although one of the most significant periods during the history of the Court was the long tenure of Chief Justice John Marshall (1801-1835), Marshall, in his only argument before the Court, defended a Virginia law abolishing payments to British creditors. He lost.
- Under the direction of Chief Justice Earl Warren, (1953-1969) the Court made a long series of landmark decisions, including the declaration of segregation in public schools and official sanctioned prayer unconstitutional.
- The Supreme Court, established by the Constitution and implemented under the Judiciary Act of 1789, was to be composed of 6 members, although the number of Justices has been 9 for almost all of its history, this number being set by Congress, not the Constitution.
- George Washington appointed the most Justices, 11, and FDR, second with 9 appointments.
- Only four presidents—William Henry Harrison, Zachary Taylor, Andrew Johnson and Jimmy Carter did not have the opportunity to appoint members to the Supreme Court.
- Lyndon Johnson selected the first black Supreme Court member, Thurgood Marshall.
- Ronald Reagan named the first woman to the Court, Sandra Day O'Connor.
- Chief Justice Warren E. Burger (1969-86) is best remembered for the 1973 ruling in *Roe v. Wade*, which established that the Constitution protects abortion rights.
- The most controversial decision during the rule of Chief Justice Rehnquist may be *Bush v. Gore* in 2000 which ended the Florida recount, following the presidential election, allowing Bush to become the 43rd president.
- The office, now held by John G. Roberts, Jr., is often incorrectly referred to as Chief Justice of the Supreme Court. The U.S. Code specifies the title as Chief Justice of the U.S.
- Nominees to the Supreme Court have always been lawyers.
- All current members of the Court have served as judges.

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RETURN SERVICE REQUESTED

Diminishing Role of Jury

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Amendment and therefore unconstitutional, even though *remittitur* was constitutional!

Despite the lack of any common law basis to support *remittitur*, the Supreme Court concluded, while refusing to hold *additur* constitutional, that courts in the future should not revisit the constitutionality of *remittitur*, stating “here, we are dealing with a constitutional provision which has in effect adopted the rules of the common law, in respect to trial by jury, as these rules existed in 1791. To effectuate any changes in these rules is not to deal with

the common law *qua* common law, but to alter the Constitution.”

The common law in 1791 was the rule that, according to the Seventh Amendment, could not be altered.

This study clearly shows that English courts did not employ *remittitur* to reduce verdicts, and it can be therefore argued that it is unconstitutional, even using an interpretation of the common law as evolving. At minimum, such an evolving view must preserve the place of the jury as the fact-finder as the jury functioned at common law.

Hurricane Rita

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did not dodge the bullet, whose lives and homes were smashed, their city services paralyzed.

The hurricane alphabet for 2005 had four names left at this writing. Although there are only six lists of names and they are rotated (this year’s names will not be used again until 2011), a name is retired when the hurricane is so devastating that it would be insensitive to use it again. It is our fervent hope and profound prayer that *Stan*, *Tammy*, *Vince* and *Wilma* will live to return another year.... and to repeat a weakened cycle.

The Un-Patriot Act

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56 percent, an inflation-adjusted decline of 65 percent. (United States Department of Justice)

• **Insurance payouts for medical malpractice claims more than doubled from 1986 through 1998, but insurance premiums actually declined; only in recent years have insurance companies astronomically hiked malpractice rates.** (Congressional Budget Office)

A national study of tort law changes released in May by the D.C.-based Economic Policy Institute clearly discredits the rhetoric that insurance lobbyists and politicians have used to support their case for imposing severe restrictions on individual legal rights. The report, found at www.texaswatch.org shows the flawed data used by the insurance industry to distort the truth and confuse the electorate.

The right to trial by jury was one of the primary reasons stated by Jefferson and John Adams for the U.S. Declaration of

Independence. Among the things the King had done, they wrote, was “depriving us in many cases of the benefits of trial by jury. In Texas, from 1836 when the state constitution was drafted to its re-statement in 1861 when Texas seceded, re-adoption in its entirety in 1866 and through the so-called carpetbagger government to the end of reconstruction when another constitution was put in place in 1876, trial by jury has been preserved

Our strongest statesmen have understood the complete and unfettered right of a trial by jury, among them John Adams who stated in 1774: “Representative government and trial by jury are the heart and lungs of liberty. Without them we have no fortification against being ridden like horses, fleeced like sheep, worked like cattle and fed and clothed like swine and hounds.”

Although we fervently defend freedom of the press and free speech, the right to

vote and the right to bear arms, Americans, misled by a government influenced by powerful interests with deep pockets, have failed to uphold with the same vigor our most important safeguard against wrong.

“It’s time,” as American University Professor Allan J. Lichtman wrote in *Voir Dire* (Spring 2005) “to say that we’re not going to shield the negligent and the incompetent or abandon those injured physically, emotionally and monetarily through no fault of their own. Ordinary Americans should rise up and say we’re not going to let the special interests tread on our Seventh Amendment rights.”

CLOSING STATEMENT

*We value your trust and your referral.
Thank you for the opportunity to represent
your interest and for recommending
THE LAW FIRM OF ALTON C. TODD.*