Affirmed on Rehearing En Banc; Majority and Dissenting Opinions of June 8, 2000, are Withdrawn and Substituted with Majority, Concurring, and Dissenting Opinions filed March 15, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00109-CR & NO. 14-99-00111-CR

JOHN GEDDES LAWRENCE and TYRON GARNER, Appellants

V.

THE STATE OF TEXAS, Appellee

On Appeal from County Criminal Court at Law No. 10
Harris County, Texas
Trial Court Cause Nos. 98-48530 and 98-48531

CONCURRING OPINION
ON MOTION FOR REHEARING EN BANC

I agree with the result reached by, and reasoning utilized by, the majority opinion. However, I write separately only to address one of the arguments raised by amicus curiae. Amicus curiae alleges that by overruling the prior panel's decision, this Court will have succumbed to improper political pressure and asserts "[t]he best way for this Court to rebuke those who attempted to exercise improper political influence in the present case is to affirm the well-reasoned panel opinion."

The Texas Code of Judicial Conduct provides the guiding principals for every judge of this State in the performance of his or her judicial duties. TEX. CODE JUD. CONDUCT, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon 1998 & Supp. 2000). Each judge in Texas is instructed to "not be swayed by partisan interests, public clamor, or fear of criticism." *Id.* at Canon 3(B)(2). What amicus curiae requests this Court to do is, in effect, no different from what those who leveled political attacks against the majority in the panel opinion hoped to achieve, *i.e.*, a certain desired result.[1] In other words, amicus curiae asks this Court to shirk its bound duty in order to decide a difficult question of law differently from what it believes to be the correct resolution. Amicus curiae's request is grounded on the mistaken notion that any different result must surely be on the basis of political pressure, without crediting the members of this Court with the integrity to carry out their duties in strict accordance with the Texas Code of Judicial Conduct and with careful consideration of the legal issues presented in this appeal. As amicus curiae suggests, attacks on the judiciary, like the one following the panel opinion, may have the effect of increasing the potential that the public's confidence in our courts will diminish because of a perception, however erroneous, that we have made a political decision, not a legal one. But the response to such a reckless and irresponsible act cannot be that we ignore our duty to decide the law we have been entrusted to interpret. Attempts to politicize this opinion—regardless of their origin—have no place in our decisionmaking process, nor are attacks from opposing interests immune from creating the very same perception in the mind of the public that may now exist as a result of earlier inappropriate attempts to influence this decision.

"Judges are called upon to make hundreds of decisions each year. These decisions are made after consideration of opposing contentions, both of which are often based on reasonable interpretations of the laws of the United States and the Constitution." *Second Circuit Chief Judges Criticize Attacks on Judge Baer*, 215 N.Y.L.J. 4 (March 29, 1996). Unless there is a basis for disqualification or recusal, all judges must decide the matter

[1] In its brief to this Court, amicus curiae describes the political attacks as including a "letter circulated by local [Republican party] officials in an attempt to influence the outcome of the case."

brought before them. TEX. CODE JUD. CONDUCT, Canon 3(B)(1); *Rogers v. Bradley*, 909 S.W.2d 872, 879 (Tex. 1995) (Enoch, J., responding to Justice Gammage's declaration of recusal) (citing *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 823–24 (Tex. 1972)). As one jurist has commented with regard to our duty to decide difficult matters presented to us:

> All judges face the likelihood of being publicly criticized . . . for decisions that they render. It goes with the territory. A judge's oath is to decide cases based on the law and the facts . . . .

Carl E. Stewart, *Contemporary Challenges to Judicial Independence*, 43 LOY. L. REV. 293, 306 (1997). There is simply no place for suggesting that the members of this Court are pandering to certain political groups or deciding a case as a means to achieve a politically desired end.[2] And to do so only adds unnecessarily to the already politically charged climate created by the people amicus curiae purports to condemn.

Today we have been called upon to decide whether section 21.06 of the Texas Penal Code lacks a rational basis or otherwise violates the constitutional right to privacy found in the constitutions of either Texas or the United States. We have done so—not because of political pressures, as amicus curiae has suggested, but despite them.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Concurring Opinion filed March 15, 2001.

En banc.

Publish — TEX. R. APP. P. 47.3(b).

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[2] *See, e.g.*, Stephen B. Bright, *Policital Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. Rev. 308, 313 (1997) (observing that "[i]t is irresponsible for critics of the courts to argue that only results matter, without regard to the legal principles that govern judicial decisionmaking.").