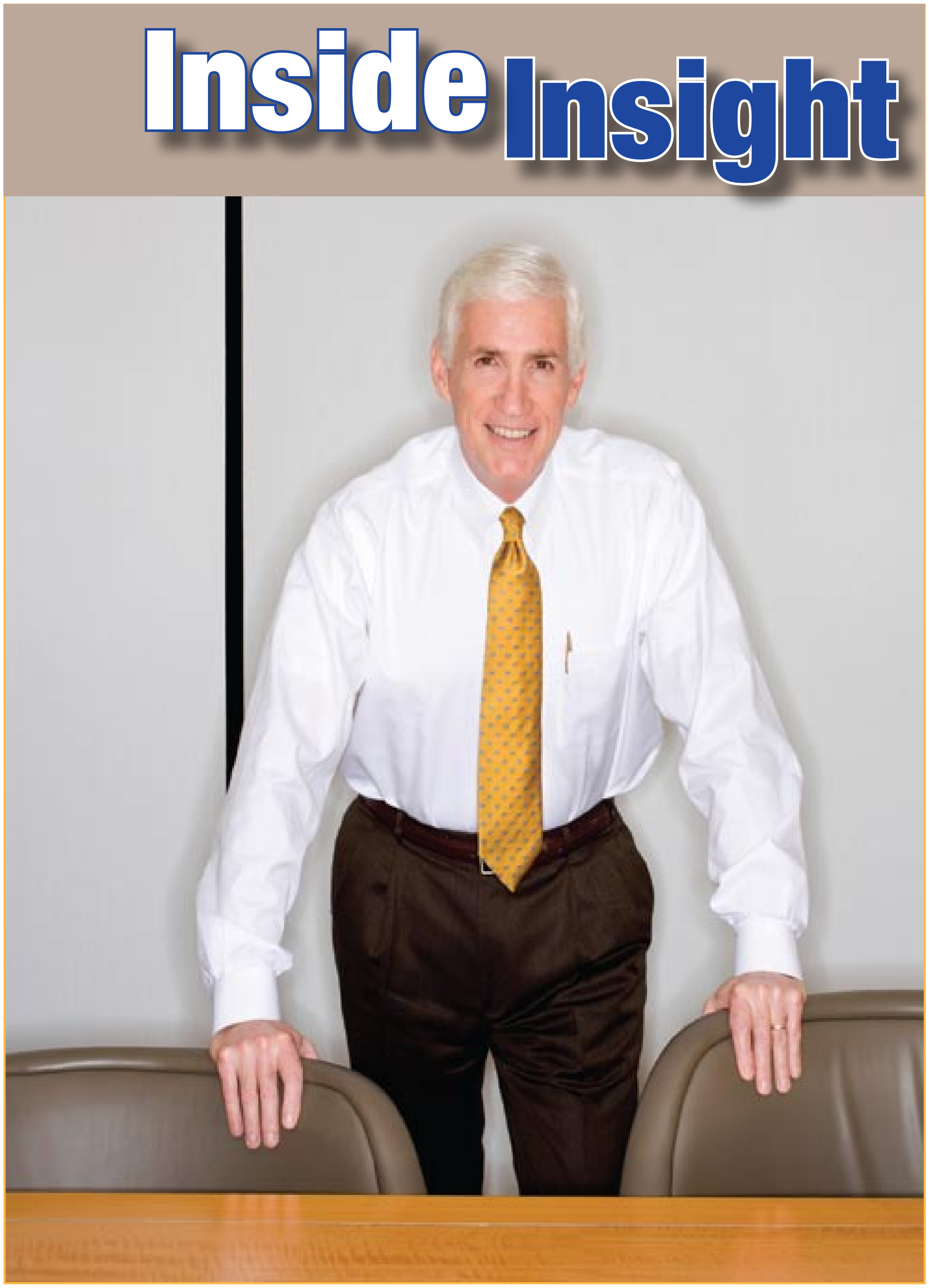
TEXAS LAWYER

September 27, 2010

An ALM Publication

Former Justice Scott Brister Talks About Experience, Amici and Activist Judges



by MARY ALICE ROBBINS

It has been a year since Scott Brister stepped down as a justice on the Texas Supreme Court, so *Texas Lawyer* thought it was a good time to get his perspective on all things related to the state's highest civil court.

Brister knows the Texas Supreme Court from the inside out. After graduation from Harvard Law School in 1980, he served a year as a law clerk for then-state Supreme Court Chief Justice Joe Greenhill. Brister went on to serve as a jurist in the state's court system for 20 years. Prior to his 2003 appointment to the Supreme Court by Gov. Rick Perry, Brister served as a judge on Houston's 234th District Court from 1989 to 2000, as a justice on Houston's 1st Court of Appeals in 2001 and as chief justice of Houston's 14th Court of Appeals from 2001 to 2003.

After leaving the state Supreme Court in September 2009, Brister joined Andrews Kurth as a partner in Austin and as head of the firm's appellate section.

Brister recently sat down with *Texas Lawyer* senior reporter Mary Alice Robbins to talk about the Texas Supreme Court. The discussion has been edited for length and style.

Mary Alice Robbins, senior reporter, *Texas Lawyer*: How do you think the Texas Supreme Court has changed over the last 10 years and can you provide some specific example of changes?

Scott Brister, partner, Andrews Kurth: Ten years ago, I think the court was dominated by judges from Dallas . . . and then by the middle and end of the decade by judges from Houston. . . . I think that reflects when Republicans started becoming judges since a lot of the judges were appointed. It was a Republican state so early on in the '80s, judges in Dallas all became Republican. About 10 or 15 years later in Harris County, with the Republican sweep of `1994 . . . I think most of the judges in Houston were Republican. The pool of people with judicial experience the governor would pick from or a party would pick from shifted from Houston to Dallas over that time period. . . . Of course, now, both Dallas and Houston have shifted back to Democrats. So my expectation would be, if the state continues Republican, you will see a Republican governor appointing more judges from outside Houston or Dallas.

Robbins: How do you think the completely Republican state Supreme Court has changed jurisprudence in Texas and do you believe those changes have improved the jurisprudence?

Brister: I think any collegial court, appellate court with several judges, would be better if you had people across the political spectrum. I just think the broader range of views you have sitting at the table, the better decisions you're going to have. But the people obviously don't think that, because they want to keep electing Republicans and Democrats. It's interesting. If you look at the states that elect their Supreme Court . . . there are seven. The main ones are Texas, Illinois, Ohio, Pennsylvania, Michigan. What do those states have in common? I think the answer is a lot of people. It's a big population. You're talking about the second, fifth, sixth, seventh and eighth largest states by population [and they] all elect [judges] on a partisan ballot. So the reason you might do that is because if you have a state where millions of people are going to vote in judicial elections, the problem is going to be they're not going to know who the judges are. Judges, without running into *Caperton* problems, are not going to be able to raise the money to explain who they are. And the partisan label tells you something. It may not be very exact and in a lot of cases, I don't think it is. But it's better than nothing. It's better than in a big state, going into the polls and people voting for whoever has the catchiest name or who's named after a movie star or whatever. . . . I do think we're stuck with electing partisan judges, because I do think people believe judging is more partisan now than they did 30 or 40 years ago. And the majority of people want to reflect their own partisan views to some degree. Everybody says they don't want partisan judges but everybody wants the judges to rule like they think that they ought to rule. How are you going to do that — partisan appointments? Of course, appointments can be just as partisan as elections can be. There is something to be said to having the court reflect the political views of the majority. There's something to be said against it, of course, which was the argument we had 200 years ago at the founding. But there are arguments both ways.

Robbins: We hear a lot of talk these days about activist judges. Do you feel the Supreme Court justices have ever been activists? Explain why or why not.

Brister: It depends on your definition of activist. . . . Activist doesn't mean a judge who is busy or works hard. Activist is a judge that does things that judges shouldn't do. My definition of activist is somebody who has decided "I don't think people should be able to do this or have that kind of health care policy or have other things that are legislative or executive in tone." . . . To me the question is, are judges doing something beyond what judges normally do, for instance, creating a common-law cause of action? I think if a judge creates a common-law cause of action, that's not activist. That's what common-law judges have done for hundreds of years. I think if a judge rewrites a statute to make it like they want it to be, that is an activist, because a statute is a statute. If they want to declare it unconstitutional, that's fine if you've got some reasonable basis for doing so. You can't just rewrite it, because that's the Legislature's job. . . . I know that judges in general, and the court is no exception, are frustrated a lot of times by statutes that don't answer questions that are difficult questions. But I think the court is very concerned about not going beyond what judges traditionally have done.

Robbins: Do you think it's always been that way with the Texas Supreme Court? Are you talking about the current court or the court in the past?

Brister: I think back in the '80s, the charges about the Texas Supreme Court being activist, again a lot of that was common-law stuff. . . . For instance, Judge [Jack] Pope, in the advent of comparative causation in Texas . . . he just did that; the court just did that. But that's what courts do. Causation at that time was something the courts decided on a common-law basis rather than now that the Legislature's gotten involved so that it becomes a statutory matter. It would depend on the particular item. Is what the court is ruling, is that an area judges traditionally govern or outside the area that judges traditionally govern?

Robbins: There have always been complaints, at least in the last decade or so, that the Supreme Court is too defense-oriented. If you disagree that the Supreme Court is too defense-oriented, please explain your answer.

Brister: It depends on whether you're talking about particular cases or just in general. The fact of the matter is, all appellate courts reverse plaintiffs' verdicts more often than defense verdicts for a very simple reason: the burden of proof. In a typical cause of action, a plaintiff has to prove contract breach and damages caused. Or for negligence, you have to prove standard of care, breach, causation and damages. Almost any case, you've got three, four, five elements of proof. Now for a plaintiff to win on appeal as a matter of law, how many of those do you have to prove as a matter of law in your favor? And the answer is all of them. For a defendant to win as a matter of law on appeal, how many do you have to prove were in your favor as a matter of law? And the answer is one of them. If the defendant can disprove one of them as a matter of law, the defendant wins. . . . I've done a lot of speeches on the PC [per curiam] reversals the court does. We don't need oral argument on this. This is a simple issue; it's straightforward, we're reversing. And over the last 10 years, the great majority of those have been from the 10th Court in Waco and the 13th Court in South Texas, way out of proportion to the other courts. I would say on those, almost all of those reversals were defense-oriented. But that's because those courts were not applying simple, straightforward law. If the court was more defense-oriented than the state in general, those numbers would be even. But if you've got one or two courts that are very plaintiffs-oriented, then one of the jobs, in my view, of the state Supreme Court is to make sure the law is the same in all parts of the state. You can't have the law be one thing in South Texas and something different in North Texas. So to some degree the number of defense-oriented rulings by the court is, frankly, to correct two outlier court of appeals districts, where just the opposite was the rule.

Robbins: From time to time, the Supreme Court comes under fire because justices receive campaign contributions from parties who appear before the court. One example was Bob Perry. When the court ruled in Perry's favor in *Perry Homes v. Cull*, did that give the public the perception that campaign contributions can affect the court's decisions?

Brister: That's always going to be a problem, as long as you're got campaign contributions. Now the contributions themselves have become more partisan lately. But it used to be standard up to five or six years ago that big county or statewide, you would expect contributions from both the plaintiffs bar and the defense bar. If that's the case, then any way you rule in a case, then somebody in *The Wall Street Journal* can run an article saying that you took money from the winning side. You also took money from the losing side, but that's never going to show up in those articles. That's unavoidable. A counter-example I always cite: Two of my former colleagues on the 1st and 14th Courts, Harvey Hudson and Tim Taft, both spent their whole lives doing criminal appeals, very bright and very well regarded. Both, when they ran for the Court of Criminal Appeals, said, "I'm not going to take money from lawyers." And both of them got beat like a drum. If you're going to take the position that I'm not going to take campaign contributions, it's like a new restaurant in Austin opening up and saying, "We want to be recognized on our merits and we're not going to advertise." Well, you're going to go under. You have to advertise. And the same is true for people running for office in the primary. Now in a general election, I don't think money raised and spent makes much difference. . . . As long as the state is either strongly Democratic or strongly Republican, I don't think you can make a difference. But in the primary, where people don't have a party label to go on, you simply have to advertise in some way, or you're going to lose.

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Robbins: And that takes money, and lawyers often are the ones who give?

Brister: Who's going to give you money? It's going to be lawyers or people who are frequently involved in litigation. So as long as you're electing judges, you're just going to have to put up with the unsightly fact that people who give money are the people who have an interest in what comes out. To me, there's also the chicken and the egg problem. Was George Bush conservative because conservatives gave him money, or did conservatives give him money because he was already conservative? To the extent people see a quid pro quo, I don't see that. In fact in the *Perry* case, without disclosing any internal conversations, I sometimes felt the opposite from some members of the court, that they were bending over not to be in Perry Homes' favor, because of the appearance.

Robbins: So, it [Perry's campaign contributions] did have an effect?

Brister: I think it can. A lot of good judges will do that, will be especially sensitive to it, sometimes to the extent of bias against a contributor rather [being] in favor.

Robbins: The Supreme Court in Texas is not supposed to be an error-correction court anymore. However, there have been an increasing number of mandamuses. Do you have an explanation for that?

Brister: The [Texas] Constitution doesn't say the court's not supposed to do error correction. I think the court is supposed to do error correction. Why have a Supreme Court if you've got appellate courts all over the state? One of the main jobs of the state Supreme Court is not just to decide tough questions but to keep the law the same in different parts of the state. . . . I don't know [if] there are more errors today than there were before. I couldn't say on that. But I think error correction is an important function. I think everybody would agree that correcting small errors is not an important function. But a lot of times a small error, if it's taking place in a thousand cases, is a big error, and so you need to say something. . . . The medical malpractice expert report statute was passed because in certain courts, a case could last for years and years. No expert would support the plaintiff's case, but it would last forever and would end up settling because you couldn't get it dismissed. So the Legislature, as they tend to do, came in [and said], "Well, we're going to have everybody . . . [file an expert report] within 120 days." You're going to throw out some good cases in that, but the problem was some cases were never being thrown out. . . . If there are judges who are violating their oath of office because they disagree with a statute, then absolutely some appellate court needs to issue a mandamus and tell them, "Yes, you are going to follow the law." Probably, also on mandamus, the expense of litigation is having something to do with that increase. So few cases are going to trial now, because it's so expensive. And so, a case is going to settle. What is settles on depends on what the law is. So in effect, in some mandamus cases, you're getting a ruling on what the law is, because the case is never going to get appealed from a trial any way. . . .

Robbins: I had noticed over the past several years that the Supreme Court hears a lot of insurance cases. . . . Can you tell me how the court actually decides which cases it will hear? Is there any kind of formula?

Brister: Well, no. Certainly "big cases." . . . I've told attorneys this: "Be careful what you ask for." If you've got an iffy theory as a plaintiff's counsel, if you get a $100,000 verdict, nobody may review it. But if it's $100 million it's going to get reviewed. It just is. I've got to say the insurance cases puzzle me, because they're very boring. You would think before people pay millions of dollars in premiums, they or the insurance company would know what the policy means. You would think somebody would read it and say, "Well, what do you mean by accident?" but apparently not. They just go for years [not knowing] is mold covered or not. You would think somebody would have discussed that sometime. Finally the courts have to settle it. Maybe that's because there are just too many lawyers writing the policies. I don't know. I don't think conflicts [jurisdiction] is as important at the Texas Supreme Court as it is at the U.S. Supreme Court. I think the court is more interested in new statutes. The Legislature has been very involved in civil litigation, passing tort reform and lots of other things. So when there's a new statute on procedural or civil litigation things, the court is going to be more interested in that. And I have to say, what kind of practice the judges had before they came on the court [is a factor]. I know for me there were issues that came up, that I remembered facing . . . as a trial judge. So when it [an issue] came to the Supreme Court, I'd say, "We need to fix this. We need to straighten this out." So, depending on what the judges' background was, what kind of personal experience they had, that will affect which cases get granted, too.

. . .

Robbins: There have been a number of cases in which the Texas Supreme Court has granted rehearing. In some instances, the court has issued a completely different opinion, basically reversing itself. That would include *Marks v. St. Luke's Episcopal Hospital* [decided Aug. 27]. We had rehearing and a certainly different decision. . . . Why does that happen? Why does the court not get it right the first time?

Brister: Sometimes it happens because the judges change. In *Marks*, it didn't happen because the judges changed. Judges [Eva] Guzman and [Debra] Lehrmann voted the same way that I did and Justice [Harriet] O'Neill did, which was the former majority and now the dissent. I guess sometimes there is a reaction. It may be a reaction in the press. But sometimes amicus [briefs] come in only on rehearing, where you've had a case that has been under the radar, but it affects lots of other cases. . . . That, I think, would be one of the main factors.

Robbins: So the amicus briefs influence?

Brister: I think they do. . . . The issue in *Marks* is whether the hospital should have screwed the beds together. . . . How hard would it be to get a doctor to say, "If I'm going to put a patient in the hospital bed, I would hope the hospital would screw it together right." It can't be hard for most plaintiffs attorneys. One could argue that the way it [*Marks*] came out the second time is right, even though I still would have been with the dissent, because the message now to plaintiffs attorneys is: "Look, get an expert report on everything you're going to complain about. It may be a banana peel in the middle of the floor. Get an expert report on it." How hard can it be just to get an expert report on that? One could argue that that brighter line rule is better than the one I would have been for.

Robbins: The Supreme Court is slow. They've been trying to work through their backlog, but it still takes a while for the justices to work through a case. Why is that?

Brister: It stems, in my view, to the two-step process. Everybody that appeals files a 15-page petition. The other side doesn't even have to respond. I think 50 or 60 of the cases go no further. The petition is denied by the court. . . . For the half of the cases that they don't ask [for] full briefing on, the court is very fast, and that's the majority of cases. Some would argue that's the majority of cases that they ought to dispose of quickly, because they're the ones with the least merit. The problem with the two-step process is, by the time you do a petition and the court asks for a response, and they get a response, then the court asks for full briefing and they get full briefing. . . . By doing a two-step process you add at least six months. But it only affects cases where you're going to ask for full briefing. . . . Now, if you're talking about [an] argument [that] was held and the opinion hasn't come out for two, three or four years, I'm not going to try to justify that.

Robbins: There are some of those cases.

Brister: I know, and it's not justifiable. One could argue . . . it's OK to be slower on the cases they take, because those are the more complicated cases, and you want to make sure they get them right. But two, three, four years from oral argument, I just don't think there's any excuse.

Robbins: Why does it happen?

Brister: Different reasons, most of which you can't disclose. Sometimes it's because you're waiting on another case to issue. Sometimes it's because you're waiting on a single judge. Sometimes it's because the judge who wrote the first draft [of the opinion] retired, and the new judge doesn't agree with it. So, it's got to be rewritten by somebody else, but those are pretty rare. I left behind only one or two cases that I was writing.

Robbins: We've had three Texas Supreme Court chief justices — the last three — who have supported some kind of change in judicial selection. They specifically wanted some type of merit selection, although they have said merit selection with retention elections, as opposed to partisan elections. Where do you stand on that?

Brister: I was appointed to three of my four courts, so I like appointments. I like merit appointments. . . . But I do think elections play a role. Whether it's pleasant or not to have to go get interviewed by the *Houston Chronicle*, the *Austin American-Statesman* and newspapers in Tyler, Victoria and everywhere else, it's probably good for you and to hear what people are complaining about. Of course, you'll never see a federal judge do that.

Robbins: Do you think there's any opportunity for the public . . . to make mistakes?

Brister: Oh, absolutely. I think what we've had for 50 years is an appoint-retain system, because two-thirds of Texas judges first reach their bench by appointment. . . . The governor's people take these appointments seriously and get, by and large, great people — probably better people than you would have in a heads-up, everybody that wants to file, throw your hat in the ring and let's see who wins in a primary election. I just think the governor's appointees are better on the whole. . . . In my opinion, to be on the Texas Supreme Court, you ought to have been on a court of appeals. A court of appeals judge in Texas has to write 100 opinions a year, sign off on 200 more, and you just get trained for keeping things moving. I think it ought to be a prerequisite that you have to spend time on a court of appeals.

Robbins: That would eliminate certain people.

Brister: It would. Not everybody agrees with me. . . . As we saw in Judge Lehrmann's race, it doesn't matter to the voters in a primary whether you've been on the court of appeals or not. This is nothing against her [Lehrmann]. The court of appeals judges all split up the vote. I think they won most of the bar polls and all of them lost. TL

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