IN THE SUPREME COURT OF TEXAS

NO. 06-0952

IN RE EDUARDO "WALO" GRACIA BAZAN

ON PETITION FOR WRIT OF MANDAMUS

Argued September 26, 2007

JUSTICE WILLETT, concurring.

Although the facts of this case are simple, resolving them has proven deceptively complex—a Bazanian knot, as it were—requiring the Court to untangle seemingly contradictory language in the Texas Constitution and Local Government Code, all while wrestling with our own off-the-mark caselaw. These provisions and our precedent yield a puzzle whose pieces, each clear in isolation, fit together inexactly. I agree fully with the Court's result: Texas constitutional and statutory law mandate Bazan's removal from office. In reaching that result, however, I would harmonize the discordant authorities in a manner that hews more closely to their explicit text, structure, and everyday meaning.

Several provisions in Texas law speak to whether convicted felons can seek or hold elected office. The instant removal action is premised on Article XVI, Section 2 of the Texas Constitution, which in its entirety reads: "Laws shall be made to exclude from office persons who have been

convicted of bribery, perjury, forgery, or other high crimes."[1] The framers' "exclude from office" directive has given rise to various statutes, including those in Chapter 87 of the Local Government Code related to the removal of county officers. Section 87.031 is styled "Immediate Removal" and declares categorically that "conviction . . . for any felony or for a misdemeanor involving official misconduct operates as an immediate removal from office." Clear enough. And if Section 87.031 were the complete statutory backdrop, today's case would be easy: Bazan loses.

Our analysis is complicated, however, by Section 87.001, which by its terms limits removal under the rest of Chapter 87 (including by definition Section 87.031) to post-election misconduct: "An officer may not be removed under this chapter for an act the officer committed before election to office." These nineteen words spark several vital but vexing questions and on the surface seem starkly at odds with both Article XVI's "exclude from office" command and Section 87.031's "immediate removal" language.[2] Our analysis is made tougher still by our 1989 decision in

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[1] The Court treats the constitutional reference to "other high crimes" as a blanket phrase that encompasses all felonies. ___ S.W.3d ___. I do not quarrel with this interpretation, but I note that our colleagues on the Texas Court of Criminal Appeals have taken a different stance. *Perez v. State*, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000) (en banc). In *Perez*, the defendant argued that he was entitled to a new trial because one of the jurors had been previously convicted of felony driving while intoxicated. *Id.* at 219. The court of appeals agreed, holding that Article XVI, Section 2 excluded convicted felons from serving on juries. *Id.* at 220. However, the Court of Criminal Appeals reversed, relying on the doctrine of *ejusdem generis* to hold that the reference to "other high crimes" in Article XVI, Section 2 is "limited to criminal conduct which demonstrates the same type of moral corruption and dishonesty inherent in the specified offenses." *Id.* at 221. Because felony DWI did not qualify as a "high crime" under this interpretation, the juror in question was not constitutionally disqualified from service. *Id.* The reasoning in *Perez* would not affect today's result—felony theft clearly qualifies as a "high crime" involving "the same type of moral corruption and dishonesty" inherent in bribery, perjury, or forgery. However, the difference could affect future removal cases, so the Court should pay future litigants the courtesy of discussing our sister high court's precedent and either distinguish *Perez* or adopt its less-sweeping interpretation of "other high crimes."

[2] Election Code Section 141.001(a)(4) is equally clear: "To be eligible to be a candidate for, or elected or appointed to, a public elective office in this state, a person must . . . have not been finally convicted of a felony . . . ." This provision is unambiguous but also inapplicable since Bazan has not yet exhausted his post-conviction appeals. "'The law is settled that a conviction from which an appeal has been taken is not considered to be a final conviction until the conviction is affirmed by the appellate court and that court's mandate of affirmance becomes final.'" *Fletcher v.*

Talamantez v. Strauss, a factually indistinguishable case that relied on Section 87.001 to bar removal under Section 87.031 since a reelection intervened between the crime and the resulting conviction.[3] I agree with the Court that *Talamantez* was wrongly decided, not just because it flouted Article XVI, Section 2, as the Court today rightly notes, but also because it misconstrued Section 87.001.

I. What Does "Before Election to Office" Mean?

This four-word phrase in Section 87.001 seems unambiguous on its face, but when applied to a *reelected* official like Bazan, it gets murky. In such cases, does "before election to office" mean before the first election or before the most recent election? Bazan's crime occurred in 2001, after his 2000 election but before his 2004 reelection. So does Section 87.001 only forgive misdeeds that predate Bazan's initial election (thus requiring him to remain on the straight and narrow once he takes office) or does it mean, as Bazan insists, that he cannot be removed under Chapter 87 for misdeeds committed while in office but that predate his most *recent* election (thus forgiving his 2001 misconduct)?

I think it manifestly means the former and relates to an official's entire tenure in office, not merely his current term in office. Our Constitution's concern for the integrity of public office allows no room for the notion that reelection operates to spare elected officials from the full effects of felonies committed during a prior term, whether or not they were known to the voting public. As I read Section 87.031, a felony conviction based on acts committed at any time while holding office requires immediate expulsion, whether the crime occurred during the present term or during a

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State, 214 S.W.3d 5, 6 (Tex. Crim. App. 2007) (quoting *Jones v. State*, 711 S.W.2d 634, 636 (Tex. Crim. App. 1986)).

[3] 774 S.W.2d 661 (Tex. 1989) (per curiam).

previous term. The protection provided by Section 87.001 applies only to acts committed before an officer's first "election to office." Granting legal sanctuary to public officers convicted of felonies committed while in office is hard to conceive and, as a judge, even harder to confirm. An official who commits a high crime on the last day of his prior term is no less unfit than an official who commits a high crime on the first day of his present term.

My view, however, has not carried the day with this Court historically. We held eighty-four years ago in *Reeves v. State,* a state-initiated quo warranto action, that in a removal proceeding targeting an official who had been reelected, the then-applicable phrase "prior to his election to office" barred removal during Term B for derelictions that occurred during Term A.[4] *Reeves* held that removal must occur during the same term as the misconduct and that reelection, in effect, absolves an official of the office-related consequences of any Term-A sins.[5]

The facts in *Reeves* are somewhat similar to those in this case (although *Reeves* was a quo warranto removal action, not, as here, a proceeding where removal is an automatic consequence of a felony conviction). Both involve county officials who committed third-degree felonies while in office but prior to being reelected. Reeves was elected sheriff in 1920, reelected in 1922, and indicted in 1923 for acts committed during 1921-23, spanning both terms.[6] The jury found misconduct in both terms, and Reeves argued on appeal that he was protected from removal by

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[4] 267 S.W. 666, 667, 669 (Tex. 1924).

[5] *Id.* at 669.

[6] *Id.* at 667; *Reeves v. State*, 258 S.W. 577, 577-78 (Tex. Civ. App.—Texarkana 1924), *rev'd*, 267 S.W. 666.

Article 6055 (predecessor to Section 87.001) for any first-term offenses.[7] The Court agreed: "Reeves . . . could not be removed from office during his second term for offenses committed during his first term."[8] The Court reasoned that removal could only be predicated on "acts committed subsequent to an election to the term the officer is holding, and from which it is sought to oust him."[9] The Court concluded that evidence of misconduct during a prior term is prejudicial and inadmissible, and a jury mulling removal may only consider same-term misconduct.[10]

We reaffirmed *Reeves*'s "reelection restricts removal" rule in *Talamantez*, where we held a county commissioner could not be removed from office following his conviction for pre-reelection acts.[11] In the instant case, Bazan argues that the trial court's removal order "directly contradicts Section 87.001," which "trumps Section 87.031."

I frankly am troubled by both *Reeves* and *Talamantez*, and I flatly reject their implicit message that Section 87.001 protects officials who commit felonies while in office so long as they succeed in concealing their misbehavior so that any resulting conviction comes, if at all, after reelection. As these two cases construe Section 87.001, you can win election, commit a felony, win reelection, get convicted, and stay in office. Indeed, if two elected officials were partners in crime, but Official A was reelected before being convicted while Official B was convicted before being

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[7] *Reeves*, 267 S.W. at 667, 669.

[8] *Id.* at 669.

[9] *Id.*

[10] *Id.*

[11] *Talamantez v. Strauss*, 774 S.W.2d 661, 661-62 (Tex. 1989) (per curiam).

reelected, identical offenses could result in opposite results based on election timing. It is unimaginable to me that taxpayers would underwrite the former's salary and the latter's incarceration. What a deal: You can break the very same laws that taxpayers pay you to enforce, the very same laws that you swore to "preserve, protect, and defend,"[12] all without fear of removal if voters reelect you before jurors convict you. It gets better. Under Bazan's view, you can hold elected office yet be disqualified from voting;[13] you can serve as a law enforcement officer even though, worse than hapless Barney Fife, you cannot carry even an unloaded firearm;[14] you can (according to a formal Attorney General opinion) serve as a peace officer even though your peace officer's license has been revoked.[15] Few things undermine public confidence in government more than elected officials who exude "do as I say, not as I do" sanctimony, except perhaps a legal system that enshrines such sanctimony by divorcing crimes from consequences. Texas law should not reward officials for being adept at hiding their criminality until after the election passes, and while some other states' laws expressly limit removal to misconduct committed during the same term,[16] Texas law, in my view, does not require that removal be confined to present-term acts. The expiration of a term in no way prevents prosecution under the criminal law; nor should it prevent ouster under the removal law.

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[12] TEX. CONST. art. XVI, § 1(a).

[13] TEX. ELEC. CODE §§ 11.001(a)(1), 11.002(4).

[14] TEX. PENAL CODE § 46.04(a).

[15] Op. Tex. Att'y Gen. No. JC-0514 (2002).

[16] *See State v. Hasty*, 63 So. 559, 561 (Ala. 1913); *Eagleton v. Murphy*, 156 S.W.2d 683, 686 (Mo. 1941).

A straight-up application of *Reeves* and *Talamantez* would require us to reinstate Bazan, but I believe these two cases were wrongly decided. They should not be clarified or distinguished, but overruled altogether.[17] The Court today agrees that our 124-word opinion in *Talamantez* ignored the Constitution's controlling language, which plainly requires laws that "exclude from office" certain people—namely felons.[18] Beyond this oversight, I believe *Talamantez* is wrong for another reason.

II. What Does "Act" Mean?

Our decision in *Talamantez* relied exclusively on Section 87.001's broad language—no removal "for an act the officer committed before election to office"—and on its face the word "act" sweeps broadly, appearing to forgive felonies as mercifully as misdemeanors. In my view the interpretation that best honors Article XVI's directive to exclude felons is one that reads "act" in Section 87.001 to mean a nonfelonious act, including behavior that is not necessarily criminal at all. "Low-crime" convictions don't make you constitutionally ineligible to hold office, and the only pertinent statute that mentions misdemeanors is Section 87.031, which requires immediate removal upon conviction for "a misdemeanor involving official misconduct."

Notably, Section 87.001 uses the generic word "act"—not "high crime[ ]" (as in Article XVI, Section 2) or "felony" (as in Section 87.031) or anything that suggests "act" even means "unlawful act." True, Subchapter C ("Removal by Criminal Conviction") is focused solely on criminal wrongdoing, but not Subchapter B ("Removal by Petition and Trial"), where the three listed grounds

[17] Because the Court declines to overrule *Reeves*, the rest of my opinion presumes *Reeves*'s continuing vitality.

[18] TEX. CONST. art. XVI, § 2.

for removal—incompetency, official misconduct, and intoxication—are not all criminal in nature.[19] You may be incompetent at your job or drunk at your house, or both, but neither is a crime under Texas law. Read naturally and contextually, "act" in Section 87.001 includes noncriminal wrongdoing, and in my view, the criminal wrongdoing it does include must be nonfelonious wrongdoing, and *only* nonfelonious wrongdoing.

Construing "act" as excluding "high crimes" reconciles every constitutional and statutory provision pertinent to this case. It respects Article XVI, Section 2 as well as Sections 87.001 and 87.031. Reading "act" the opposite way, to include felonies such that, as Bazan contends, Section 87.001 "trumps Section 87.031" and bars removal of Term B officials for Term B convictions based on Term A crimes, clashes head-on with the Constitution's insistence that those convicted of "high crimes" be excluded from public office. Bazan's proposed construction, in my view, means one of two things: (1) Sections 87.001 and 87.031 are hopelessly irreconcilable, or (2) Section 87.001 is unconstitutional because it prescribes what Article XVI proscribes. Because we try to interpret statutes in a way that avoids constitutional conflicts,[20] I would read "act" in Section 87.001 to excuse only misdemeanors and noncriminal acts, an interpretation that reads related statutes relatedly and effects the Constitution's unequivocal intent that convicted felons not hold office.

In sum, Section 87.001 is a statutory exception to automatic removal under Section 87.031, and given Article XVI's "no felons" mandate, "act" must be construed narrowly to mean a nonfelonious act that occurred before the officer ever entered office.

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[19] TEX. LOC. GOV'T CODE § 87.013(a).

[20] *See* TEX. GOV'T CODE § 311.021(1); *Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 169 (Tex. 2004).

III. What Does "Under This Chapter" Mean?

In my view, the Court strays unnecessarily from Section 87.001's enacted text, which bars removal "under this chapter"[21] for pre-election acts. Notwithstanding this whole-chapter declaration, the Court scours the background minutiae of 130-year-old statutes to conclude that "this chapter" does not really mean the entire chapter, but only Subchapter B, which governs removal for civil misfeasance. The Court concludes that Subchapter C is untouched, that Section 87.001 does not do what it says it does.

I disagree. The Court's civil-criminal distinction in Part III makes eminent sense, but we must take the Legislature at its word: "under this chapter" in Section 87.001 means just that—the chapter, the whole chapter, and nothing but the chapter—nothing more, but just as surely nothing less. I presume "under this chapter" does not mean "under Subchapter B" because the Legislature drafted, voted on, and approved the former, not the latter.[22] We must be driven by what lawmakers did, not driven to spruce up what they did because we think they meant to do something else. Having said that, the Court and I arrive at largely the same bottom-line view of what type of misbehavior requires removal.

The only external restriction on the scope of Section 87.001 is that imposed by the Texas Constitution, and Section 87.001 is powerless to thwart the constitutionally required removal of officials convicted of "high crimes."[23] Beneath this constitutional ceiling, Section 87.001 can freely

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[21] TEX. LOC. GOV'T CODE § 87.001.

[22] *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 651 (Tex. 2006).

[23] *See* TEX. CONST. art. XVI, § 2; *see also In re Bates*, 555 S.W.2d 420, 428 (Tex. 1977).

forgive not only the grounds for removal listed in Subchapter B but also (and this is where I differ slightly from the Court) any Subchapter-C criminal offenses that do not rise to the level of "high crimes." Section 87.001 may properly be interpreted to protect officials from removal for misdemeanor-level crimes, including those committed after the official first took office, without offending the Constitution. So while the Court says Section 87.001 applies only to acts of civil misfeasance (Subchapter B) and never intersects with Section 87.031 (Subchapter C), I believe reading "under this chapter" to mean "under Subchapter B" rides a tad roughshod over the language of Section 87.001 and forgives a tad less than is required.

IV. Conclusion

Elections may forgive a multitude of sins, but in Texas, once you swear your first oath of office, staying in office means staying felony-free.

To be absolutely clear, I see the interaction of Texas legal authority this way:

- "High-crime" convictions (felonies)—either before or after you were first elected—make you constitutionally ineligible to run for office or to remain in office.

- Thus, if you are a convicted felon, you cannot seek office to begin with, and if you are convicted of a felony after you are elected—no matter when the underlying acts took place—you cannot remain in office.

- To satisfy Article XVI, Section 2, Section 87.001 can only forgive acts that are not constitutionally disqualifying—that is, misdemeanors or noncriminal acts; it cannot forgive felonies.

This interpretation, in my view, honors the supremacy of the Constitution's "no felons" directive while also reconciling and giving effect to the text of Sections 87.001 and 87.031. Because

the Court's construction, in my view, achieves the former at some expense to the latter, I concur in the judgment only.

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Don R. Willett
Justice

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