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Tame Transparency

An Open Letter to My Colleagues

June 2, 2014

The Honorable Members
Texas House of Representatives
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Dear Colleagues:

G. K. Chesterton wrote, "It is not the wild ideals which wreck the practical world; it is the tame ideals."[1] I fear this is especially true with respect to government transparency.

We must be certain that we do not settle for and condone a tame transparency—a professed openness in government operations, but one that in the end sees no evil, hears no evil, and protects the status quo. In our wrestling with issues that appear to be wrecking our political world, we must keep before us true transparency (the ideal) as it is espoused in our Texas Government Code:

> Under the fundamental philosophy of the American constitutional form of representative government that adheres to the principle that government is the servant and not the master of the people, it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.[2]

Since the end of the last special legislative session, I have been monitoring the ongoing investigation of the University of Texas System Regent Wallace Hall. With the recent vote that there are grounds for impeachment, it seems an appropriate time to share some observations and questions.

How did all this begin? The most recent precedent held that impeachment resolutions are considered by the House and referred to a committee or to the entire House for investigation. Such a resolution was filed on June 24, 2013, but never acted upon by the Speaker.[3] Instead, the Speaker issued a proclamation expanding the power of the Select Committee on Transparency in State Agency Operations (the "Committee") to "monitor the conduct of individuals . . ." in agencies under their jurisdiction.[4]

Despite there being no mention of Regent Hall in the proclamation, the Speaker's intent to focus on Hall was apparently communicated through other means. For an explanation of his rationale for proceeding in this manner, see his interview with Jay Root.[5] In this interview the Speaker states plainly that he sees his responsibility is to protect members from "threatening, aggressive, aggravating" approaches by regents and to do things openly.

So how did the Committee originally charged with "…monitoring the operations of executive and judicial state agencies as well as affiliated agencies, entities, foundations, and related support groups"[6] end up targeting a single regent for executing his oversight role as a regent? Wouldn't it make perfect sense for

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the Committee to use this platform as an opportunity to review material Regent Hall discovered in his oversight role as a regent? Why has the Committee passed on this opportunity?

For some who are confounded about what this fuss is all about, an explanation is in order. Wallace Hall was appointed by the Governor and confirmed by the Senate after an extensive application process to serve as a regent (trustee) for the University of Texas (UT) System. Regent Hall and nine other fellow volunteers are charged with oversight of the University of Texas at Austin and the fourteen other institutions that make up the UT System.

In his capacity as a regent, Wallace Hall became concerned and started seeking additional information on four major issues: [7]

1) Secret favoritism in faculty compensation at the UT Law School;
2) Secret favoritism in admissions to UT;
3) Systemic inflations and misreporting of non-monetary gifts by UT Austin; and
4) Lack of transparency in providing information to regents and to the public under the Texas Public Information Act.

Apparently, the more questions he asked, the more feathers he ruffled. Allegedly rushing to the defense of UT, a legislator filed a resolution calling for articles of impeachment against the regent. However, it concerns me that the legislator calling for impeachment has a son whose qualifications for admission to the UT Law School may have been one of the cases that raised the question about favoritism in admissions in the first place.

Throughout the Committee's proceedings, Wallace Hall has been publicly criticized for not appearing before the Committee. However, the type of participation contemplated by the Committee could be compared to the opportunity to bring the rope to your own lynching. The Committee did move to compel Hall to testify by subpoena as they did others, but then recalled the subpoena to Hall thereby not affording him the freedom to speak specifically about the admissions scandal.[8] Hall was instead given the opportunity to testify before the Committee (without a subpoena), but his counsel was not given opportunity to cross-examine witnesses. In other words, the Committee was only interested in one side of the story.

According to the report to the Committee by outside counsel, the original investigation into Regent Hall focused on three areas:[9]

1) Did Hall fail to disclose material information on his regent application?
2) Did Hall reveal information about students that violated their privacy?
3) Did Hall exceed his role as a regent by constantly requesting massive information from the University of Texas?

The answers were "no," "no," and "not according to his peers."

A letter attached to Hall's original application for a gubernatorial appointment stated:

> There was a question on the Appointment Application that did not provide enough room for a comprehensive response, but I wanted to address it now. Per the question on litigation, I have during the course of business in my capacity as a fiduciary both as an investor and operator been in litigation from time to time in addition to the two cases listed. Much of this has involved eminent domain lawsuits. I am happy to provide as much detail as required, if you and your office so desire to review it in its entirety.[10]

If Regent Hall was attempting to withhold information on lawsuits, hiding it in plain sight may have been a bold strategy. The truth is, the information was readily available.

Violating private information? In Hall's public statements about political influence in the admissions process, he never mentioned a name. However, a legislator himself confirmed he had written a letter on his son's behalf to be admitted to law school.[11] Furthermore, the UT System had highly qualified outside counsel review the issue and found that no violation of policy or law had been committed.[12]

And on the issue of asking for too much information, how much is too much? Hall was interested in finding out how the University handled requests for public information. When a citizen requests information from a governmental entity, how can we check and know that the entity responded with all the information that is requested? One way is to ask to review responses to open records requests and to look for omissions and inconsistencies in them. This is what Hall did. He also made recommendations on how to improve the open records procedures for the UT System that were noted and appreciated by his fellow regents,[13] none of whom have accused him of violating a system rule or law.

Since the answers to the Committee's initial questions were not substantially critical of Hall, the scope was expanded to "abuse of office" and "whether acts of incompetence had occurred due to violations of the UT System's own rules and policies."[14] The report also claims "Hall used UT System information for his personal defense."[15] The whole issue is about UT System documents. What other information was he supposed to use? This subsequent and expanded investigation appears more like a vendetta than an honest review of conduct.

The Committee struck out on all accusations as evidenced by information included in their own report. Nevertheless, a vote was taken on the "threshold" issue of unspecified grounds for impeachment.

However, let's consider what Hall was interested in.

1) Secret favoritism in faculty compensation at the UT Law School—a legitimate concern. The Legislature actually investigated it after Hall became interested and passed legislation to address the potential for improprieties.[16]

2) Secret favoritism in admissions to the University—a legitimate concern. A report, prepared by the Regents and edited by the University,[17] still indicates some letters of recommendation from certain legislators exponentially increase a student's chances of enrollment.[18]

3) Systemic inflations and misreporting of non-monetary gifts—a legitimate concern. UT Austin was required (only after being instructed by the Chancellor) to remove $215 million in improperly reported software grants for FY2007-2012 from the totals reported to the Council for Advancement and Support of Education ("CASE").[19]

4) Lack of transparency in providing information to regents and to the public under the Texas Public Information Act ("TPIA") —a legitimate concern. Hall found that he could get a quicker response to a request if he made it as a private citizen under the TPIA than he could if he made it as a regent,[20] despite a regent having fiduciary oversight of that university. Chancellor Cigarroa has already acted to implement many of the recommendations made by Hall.[21]

In conclusion, Hall was four for four with his concerns. The Transparency Committee, continuing to overlook Hall's effective oversight, has struck out on their concerns, and yet they have decided to perpetuate the farce and spend our tax dollars to persecute the whistleblower. It is also troubling that "special" counsel has only submitted bills through November 2013 (which totaled $200,000). According to Sections 2 and 3 of the contract with Rusty Hardin & Associates, L.L.P., the Speaker must approve both Hardin's "work" and the payment of his bills.[22] Estimates of the "final" bill range from an additional $200,000 to $400,000 with the process being prolonged for months preparing the report to the Committee. Finally, no explanation has been given for Hardin's refusal (or third party directive) to produce the remaining bills, despite an express obligation in Hardin's contract to bill on a monthly basis.[23]

Though I have attended each Transparency Committee meeting that has been called since June 25, 2013, I was not allowed to attend any executive sessions or ask any questions from the dais, a privilege customarily allowed fellow members attending a committee meeting of interest. And, though the rulings of the co-chairs relegating me to the position of a silent "Hall Monitor" was frustrating, it didn't stop these questions coming to mind:

1) We have citizen oversight boards and committees to keep government in check. How do we expect to recruit people to volunteer for these positions when the Legislature (government) impeaches a member for doing the job for which he was appointed? Do we want go-along-to-get-along "oversight" that turns a blind eye to insider privilege? Or do we want true oversight that will shine light in all directions for the sake of honesty and all Texans?

2) On May 6, 2014, Co-Chairman Dan Flynn wrote a nine-page letter to Rep. Eric Johnson and copied the other members of the Committee. In it he stated his belief that Regent Hall's actions did not merit levels necessary for impeachment. Then on May 12, 2014, Chairman Flynn voted for a motion determining that grounds for impeachment did exist and publicly castigated Regent Hall.[24] Why did the Chair go to such lengths to demonstrate there were no grounds and then vote that there were?

3) At the May 15, 2014, meeting of the UT System Board of Regents, Chairman Foster asked Regent Hall to resign after underscoring that he often agreed with Regent Hall and appreciated his hard work.[25] If the Board agrees with and respects Regent Hall, why did the Chairman make this request unless there is outside pressure and other motives at play?

   This extraordinary appeal by the Chairman provoked a former Board of Regents chairman, Charles Miller, to challenge Chairman Foster directly in a letter and express his consternation at Foster's call for Hall's resignation. Miller calls on the Chairman and the Chancellor to "come clean." He implores them "to describe to the public the serious difficulties that have existed continuously for a long time between the leadership at U.T.–Austin and the Chancellors, the System staff, the various Board members and Chairs—and that these management problems existed long before Regent Hall joined the Board."[26]

4) At a May 21 Transparency Committee meeting, a member of the Committee grilled a representative of the UT System on the intention of the Board in keeping Regent Hall if he was indicted for a criminal action.[27] Why is the Board being pressured by the Committee to take action against Regent Hall?

5) In August 2013 Regent Alex Cranberg recorded an executive session in which Chancellor Francisco Cigarroa provided his assessment of President Bill Powers. His statement about the recording and his extensive notes taken during that meeting along with Regent Hall's are published in *The Texas Tribune*.[28] It is my understanding that the Committee has that recording in their possession, yet not all Committee members have heard it. Why not? One member of the Committee was informed that it had no relevance. I beg to differ. I have listened to it carefully and agree with Regent Cranberg that "the Transparency Committee will find it helpful to them; I believe it to show that the entire Board operated in a professional and considered way in discussing a very difficult and charged topic." I urge each member of the Committee and all my colleagues to listen to the recording. You may obtain a copy for legislative purposes by signing a confidentiality agreement.

6) Why all the protest? Do members of the legislature really need to be protected by the Speaker from a lone regent with one vote? Are we afraid of the light shining in our direction? What really is motivating this investigation and impeachment proceedings against one regent? A vendetta? A desire to stifle, muzzle, and thwart those shining the light in directions that might cause the mighty to fall? Do we only believe in transparency when we can control it?

Reading the Hardin report to the Committee, reviewing its voluminous exhibits and attachments, considering what the report and the Committee has omitted, and understanding how this investigation has proceeded is an arduous task. But, members, we must do so if we are going to get at the truth. The integrity of the process and the well-being of UT Austin, the UT System, and the people of Texas deserve no less. We must preserve true transparency in government—our wild ideal that "each person is entitled . . . at all times to complete information about the affairs of government and the official acts of public officials and employees." A tame transparency does not serve the people. It gives the appearance of openness but instead inhibits real government reform.

The implications of our actions loom large. I encourage you to review the facts and pose your own questions. Your constituents deserve no less.

For Texas and liberty,

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[1] Gilbert K. Chesterton, *Heretics, 12th ed.* (New York: John Lane Company, 1919, Kindle Locations 2028-2029). See Chapter XVIII "The Fallacy of the Young Nation." http://www.gutenberg.org/ebooks/470

[2] Texas Public Information Act, Texas Government Code §552.001 (Austin: Texas Legislature Online, Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993). http://www.statutes.legis.state.tx.us/SOTWDocs/GV/htm/GV.552.htm

[3] H.R. 230, 83rd Legislature 1st Called Session (2013).

[4] Joe Straus, "Proclamation," (Austin: House of Representatives, June 25, 2013). Expanded jurisdiction of the House Select Committee on Transparency in State Agency Operations. http://www.lrl.state.tx.us/scanned/speakerdocs/speakerproc06252013.pdf

[5] *The Texas Tribune*, "TribuneFest: A Conversation With Joe Straus," by Jay Root, Texastribune.org, October 10, 2013, 37:51–43:15, http://www.texastribune.org/2013/10/03/tribunefest-a-conversation-with-joe-straus/

[6] Straus, "Proclamation," (Austin: House of Representatives, January 31, 2013). Created the House Select Committee on Transparency in State Agency Operations. http://www.lrl.state.tx.us/scanned/speakerdocs/speakerproc0131133.pdf

[7] Rusty Hardin, *Investigative Report to the House Select Committee on Transparency in State Agency Operations regarding Conduct by University of Texas Regent Wallace Hall and Impeachment Under the June 25, 2013 Proclamation,* Appendix (Rusty Hardin & Associates L.L.P., March 2014), APP 00037–APP 00045. http://www.house.state.tx.us/_media/pdf/Appendix-ALL.pdf

[8] House Select Committee on Transparency in State Agency Operations, *Hearing on the Impeachment of University of Texas Regent Wallace L. Hall, Jr., November 12, 2013, Before the House Select Committee on Transparency in State Agency Operations*, Minutes, (Austin: Texas Legislature Online, 83rd Legislature, 2013). http://www.legis.state.tx.us/tlodocs/83R/minutes/pdf/C4652013111209001.PDF

[9] Hardin, *Investigative Report*, Introduction and Executive Summary, 3-4. http://www.house.state.tx.us/_media/pdf/Investigative-Report-Committee-on-Transparency-in-State-Agency-Operations.pdf

[10] Hardin, *Investigative Report*, Appendix, APP 00060.

[11] Reeve Hamilton, "Pitts Says He Wrote Law School Letter for Son," (Austin: *The Texas Tribune*, September 3, 2013). http://www.texastribune.org/2013/09/03/pitts-admits-writing-recommendation-letter-son/

[12] Hardin, *Investigative Report*, Appendix, APP 00215–APP 00222.

[13] Ibid., Appendix, APP 00085–APP 00087.

[14] Ibid., Introduction and Executive Summary, 4.

[15] Ibid., Introduction and Executive Summary, 11–12.

[16] H.B. 12, Texas Government Code §659.0201 & §659.026 (Austin: Texas Legislature Online, Effective June 14, 2013) http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=HB12

[17] Dan Sharphorn and Wanda Mercer, *The University of Texas System U.T. Austin Admissions Inquiry*, (Austin: University of Texas System, May 2014). http://www.utsystem.edu/sites/utsfiles/documents/inquiry/ut-austin-admissions-inquiry/admissions-report-final.pdf

[18] John Cassidy, "Dozens of UT Law's least qualified students are connected politically," *Watchdog.org Texas Bureau*, May 13, 2014, http://watchdog.org/144169/ut-law-school-hookups/

[19] *Audit of Developmental Activities at The University of Texas at Austin FY 2013*, (Austin: The University of Texas System Audit Office, May 2013), 4-5.

[20] Hardin, *Investigative Report*, Appendix, APP 00080.

[21] Ibid., Appendix, APP 00085–APP 00087.

[22] The Texas Legislative Council and Rusty Hardin & Associates, L.L.P., "Contract for Legal and Personal Services," August 21, 2013.

[23] Jon Cassidy, "Attorney in UT case hides six-figure charges despite terms of contract," *Watchdog.org Texas Bureau*, February 27, 2014, http://watchdog.org/130384/ut-hardin-contract/

[24] Dan Flynn to Eric Johnson, May 6, 2014, *The Texas Tribune,* http://s3.amazonaws.com/static.texastribune.org/media/documents/201405081525.pdf

[25] The University of Texas System Board of Regents Meeting, May 15, 2014, Video, 27:28–30:29, http://videoportal.utsystem.edu/Mediasite/Play/6dcf9e3ae31a44ee9616ba49fd882c591d

[26] Charles Miller to Paul Foster, May 27, 2014, Quoted in article by Tony McDonald, "Former Board of Regents Chairman Criticizes Foster." *Empower Texans*, May 27, 2014. www.empowertexans.com/education/former-board-of-regents-chairman-criticizes-foster/

[27] House Select Committee on Transparency in State Agency Operations, *Hearing on the Impeachment of University of Texas Regent Wallace L. Hall, Jr., May 21, 2014, Before the House Select Committee on Transparency in State Agency Operations*, (Austin: Texas Legislature Online, 83rd Legislature, 2014), Video 42:46–48:39. Questions from Rep. Trey Martinez Fischer to Barry McBee, J.D., Vice Chancellor for Government Relations in the U.T. System. http://tlchouse.granicus.com/MediaPlayer.php?view_id=28&clip_id=8337

[28] Reeve Hamilton, "UT Regent Recorded Chancellor without His Knowledge." *The Texas Tribune*, April 28, 2014 https://www.texastribune.org/2014/04/28/ut-regent-recorded-chancellor-without-his-knowledg/

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