



SNAIL'S PACE

An Analysis of the Texas Supreme Court's Growing Backlog

February 2008

Introduction

When individuals, business owners, patients, or families turn to the courts to help resolve disputes and mete out justice, they rightfully expect an expeditious, efficient resolution. Sadly, expeditiousness and efficiency are hard to come by at the Texas Supreme Court. Indeed, our state's highest court operates at a snail's pace, leaving individuals and business owners in limbo while the Court's backlog continues to expand.

We have examined court records for the past three terms and have discovered that the Court's backlog is a direct result of the failure of individual justices to do their jobs expeditiously, and of the chief justice to ensure the efficient operation of the Court.

As has been reported previously by the media, the Court has amassed a record backlog of cases.¹ Our research shows that the backlog of cases left pending each year has increased by more than 300% over the course of this decade. We will discuss the growth of the backlog later in this report, but we believe it is important to determine its root cause. Our research shows that members of the Texas Supreme Court are failing to keep up with the demands of their docket.

Over the last three terms, the average number of cases produced by each justice has decreased by 25% while the average length of time to write opinions has increased 31%. In fact, it is not uncommon for justices to write fewer than four signed opinions in a given year, and it is also not uncommon for justices to average more than 18 months to write an opinion. So, the Court as a whole is doing less while taking more time to do it.

In this report, we discovered several startling trends that demonstrate that justice truly is delayed at the Texas Supreme Court:

- The Court took an average of 852 days (2.3 years) to dispose of a case in the 2006-2007 term, an increase of 24% from the 2004-2005 term.
- Justices took an average 416 days to write an opinion after the Court has heard oral arguments. This represents a 31% increase from 04-05 to 06-07.
- Justices Wainwright and Johnson have fallen behind their colleagues' output by routinely taking longer to write fewer opinions.

¹ Janet Elliott, *Cases piling up before justices*, SAN ANTONIO EXPRESS-NEWS, January 27, 2008.

- The Court’s backlog has steadily increased from 14 in fiscal year 2000 to 60 in FY2007, an increase of 328%.
- The Court has left 72 cases pending for more than a year. An additional 31 cases have been pending for more than 2 years.

By the Court’s own admission, they are failing to meet the guidelines laid out for them by the Legislature. State budget writers include performance measures by which they gauge the efficient use of taxpayer resources. Lawmakers laid out a 100-day goal for disposing of all matters pending before the Texas Supreme Court.² This includes cases, motions, and all other matters. In a report to the Legislature, the Court has admitted it took the Court 209 days to handle pending matters in fiscal year 2007, more than double these budgetary performance measures.³

Cases in which a consumer has won at the lower appellate level comprise the majority of cases the Court accepts for review. By keeping these cases on hold for inordinate amounts of time, the Court makes it more likely that injured patients will go without recompense for lost wages and medical expenses, individuals will be forced to declare bankruptcy, and matters involving children are delayed.⁴ But the costs exist not simply on the individual level; there are costs to the public’s faith in the Texas Supreme Court.

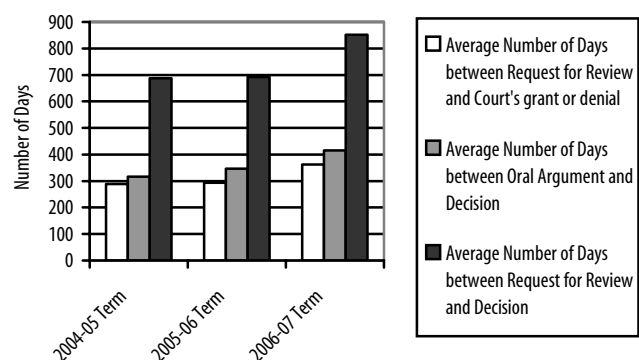
Taxpayers have a right to know that their resources are being used efficiently and individuals and businesses with matters pending before the Court have a right to expect a timely resolution to their case. With an ever-increasing backlog, cases that are left sitting on the Court’s desk for a year or more, and justices failing to keep pace with the demands of their job, the Texas Supreme Court is clearly falling short of fulfilling its obligation to Texas taxpayers and litigants.

Length of Time Pending

Our research revealed that no matter how one examines the data, cases are left pending at the Court for a startlingly long period of time. We used three separate measurements in our examination of the time that cases with signed opinions are left pending.

1. The number of days that elapses from the date review is requested until the date the Court decides whether or not it will consider the case.
2. The amount of time that elapses from the date the Court hears oral argument to the date it issues its decision.
3. The amount of time that passes from when review is requested until an opinion is issued.

Measures of Delays at Texas Supreme Court



In the 2004-05 term, Justice Jefferson’s first term as chief justice, the average number of days between a request for review and the Court’s grant or denial of review was 289 days, the average number of days between the oral argument and decision was 317 days, and the average number of

² Legislative Budget Board, State Budget Fiscal Years 2006-2007, Texas Supreme Court Performance Measure Targets.

³ Texas Supreme Court, 80th Regular Session, Fiscal Year 2008 Operating Budget, Section II.D. Summary of Objective Outcomes.

⁴ See Appendix for a sample of cases affected by the Court’s backlog.

days between a request for a review and the Court’s decision was 687 days. By the most recent completed term, however, the average number of days in all three of these categories had increased by 20% or more. The table below illustrates the steady growth in the time it takes the Court to dispose of cases.

Table 1: Average Days for Texas Supreme Court to Dispose of Cases

	Review Requested to Granted/Denied	Oral Argument to Opinion Issued	Review Requested to Opinion Issued
2004-2005	289 days	317 days	687 days
2005-2006	293 days	347 days	692 days
2006-2007	362 days	416 days	852 days

Individual Justices’ Output

After examining the delays of the Court as an institution, we drilled down to measure the output of individual members of the Court.

Over the past three terms, the average number of cases authored by the justices has decreased by 25%, from eight to six. After compiling statistics on the number of signed opinions authored each year, it is clear that certain justices routinely fall behind their colleagues’ output. **Justice Wainwright has written fewer than the average number of opinions during each of the past three terms. Additionally, Justices Green and Johnson have failed to keep pace in the two terms they have been on the Court.**

We also compiled data examining the average length of time it takes each justice to complete an opinion after the court has heard oral argument. This is particularly illustrative because it is during this phase of the process that the responsibility falls entirely on the justice writing the opinion. There are no procedural matters, motions, or attorney briefs that could delay the completion of an opinion. The only factor is the ability of the justice to write the opinion and convince a majority of the Court to join. **Justices Hecht, Wainwright and Johnson routinely take longer than average to complete opinions. Justice Wainwright’s track record is particularly troubling. On average, he is taking two years to write a single opinion.**

Table 2: Number of Opinions Authored & Average Length of Time to Write Opinions

	2004-05 Term		2005-06 Term		2006-07 Term	
	Opinions Authored	Average Days Argument to Opinion	Opinions Authored	Average Days Argument to Opinion	Opinions Authored	Average Days Argument to Opinion
Jefferson	10	250	9	318	9	407
Hecht	11	401	7	474	6	661
O’Neill	14	297	7	373	6	412
Wainwright	5	424	3	749	4	728
Brister	13	221	7	218	12	314
Medina	2	114	6	305	4	403
Green			5	261	2	156
Johnson			3	356	5	565
Willett			3	159	6	333
Court Average⁵	8	317	6	347	6	416

⁵ The following justices (who are no longer sitting) also wrote opinions during the 2004-05 term, and those opinions were used to calculate the averages: Justice Priscilla Owen: 10 opinions (434 days), Chief Justice Tom Phillips: 7 opinions (341 days), and Justice Steven Smith: 4 opinions (291 days).

It is also instructive to look at these statistics together to determine which justices are routinely below average in the number of opinions they write and above average in the length of time it takes to complete their work. The chart below shows that two members of the current Court – Justices Wainwright and Johnson – have fallen behind in both categories multiple times.

Table 3: Texas Supreme Court Justices Who Routinely Perform Below Average

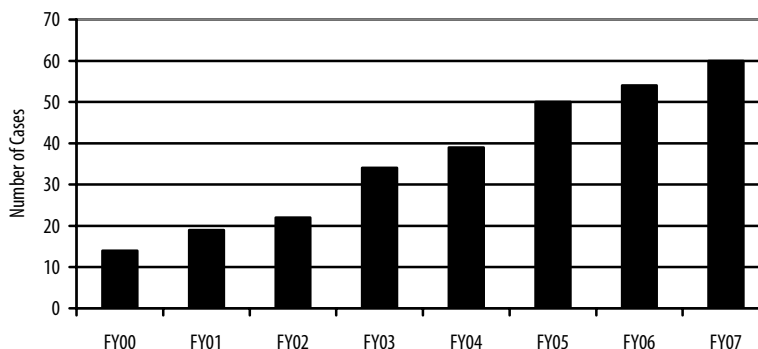
	2004-05 Term		2005-06 Term		2006-07 Term	
	Opinions Authored	Average Days Argument to Opinion	Opinions Authored	Average Days Argument to Opinion	Opinions Authored	Average Days Argument to Opinion
Wainwright	5	424	3	749	4	728
Johnson			3	356	5	565
Court Average⁶	8	317	6	347	6	416

Number of Cases Left Pending

The Court’s failure to produce opinions and clear its docket is evident in the ever-increasing number of cases left pending from year to year. There are two important and distinct ways to measure the backlog:

1. The number of cases left pending each year in which review has not been granted or denied.
2. The number of cases in which oral argument has been heard but a decision has not been issued.

Cases Awaiting Decision After Oral Argument



Cases left pending for more than a year in which review has neither been accepted nor denied pose a particular problem at the Court. At least one court

watcher has dubbed this the “shadow docket.” These cases can easily be kept stagnating for two years or more, all the while increasing the cost to the parties. According to the Office of Court Administration, 72 cases have been pending for more than a year and an additional 31 cases pending for at least two years.⁷ With an average of 362 days between a request for review and the Court agreeing to take up a case, the Court is perilously close to having its entire docket overwhelmed by the shadow docket.

The number of cases left pending after oral argument at the end of each term has steadily increased from 14 at the start of the decade to 60 today.⁸ In the three years since Chief Justice Jefferson took the helm, the Court’s backlog has risen a whopping 53%.

⁶ *Id.*

⁷ Office of Court Administration, December 2007 Monthly Activity Report, Summary Status of Pending Cases or Causes.

⁸ Pamela Stanton Baron, Texas Supreme Court Docket Analysis, September 1, 2007.

Over the last three terms, the Court has averaged 118 opinions per year. The current 60 case backlog represents roughly 50% of the Court's annual output.

Conclusion

Texans have a right to expect that the wheels of justice operate efficiently. The Texas Supreme Court has a consistent trend of failing to meet that standard. The lives and livelihoods of Texas families and business owners are left in limbo while the Court sits on pending cases.

It is unacceptable that the Court takes more than two years to complete a single case. It is unacceptable that some justices handle just two cases in a year. It is unacceptable that the Court's backlog has risen more than 50% in just a few years.

As the administrator of the Court, Chief Justice Jefferson is responsible for ensuring the efficient operation of the Court. He is the ultimate steward of how the Court runs. It is incumbent upon him to implement changes that will reduce the backlog.

We have very real concerns about the public's confidence in the Texas Supreme Court and the judiciary as an institution. Texas taxpayers, as well as those that have matters sitting on the Court's docket, have a keen interest in seeing the Texas Supreme Court improve its performance. It is incumbent upon the chief justice and every member of the Court to ensure that justice is not only fair, but also efficient.

APPENDIX: Sample Cases

The cases caught up in the Texas Supreme Court's backlog affect consumers, patients, families, and business owners. Below is a sampling of key cases that each took longer than a year for the Court to address.

Moki Mac River Expeditions v. Drugg (04-0432)

Parents mourning the death of their 13 year old son were kept waiting for 1,030 days – nearly three years – from the time review was requested and the Court issued its opinion just to find out if they would have the opportunity to hold the wrongdoers accountable. After waiting nearly three years, the Court ruled against the family, leaving them with no ability to hold those responsible for their son's death accountable in Texas courts.

F.F.P. Operating Partners v. Duenez (02-0381)

A family that was injured by a drunk driver was kept waiting for 1,838 days – an astounding 5 years – from the time review was requested until the Court issued its final opinion. The Court originally ruled in favor of the family and then in a startling about face, reversed course and cleared the liquor store who sold the already intoxicated driver another case of beer of any responsibility.

Hyundai Motor Co. v. Vasquez (03-0914)

It took 849 days from the time review was requested until a decision was issued in this case involving a four year old girl who was killed when the air bag in her mother's car improperly inflated. The Court used this case to dramatically alter the way that potential jurors are questioned, allowing for clear evidence of juror bias to be dismissed.

Diamond Shamrock v. Hall (02-0566)

The Court kept a grieving widow whose husband was killed in a refinery explosion waiting for 1,107 days – 3 years – from the time review was requested until it issued its final opinion. After the delay, the Court ruled in favor of Diamond Shamrock despite evidence of gross negligence leading up to the explosion.

Diversicare General Partner, Inc. v. Rubio (02-0849)

An elderly, senile woman was raped in a nursing home after the home had allowed a violent patient to go unsupervised. Her family was kept waiting 1,124 days– 3 years – from request until the Court issued its opinion shielding the hospital of any responsibility for the protection of its patient.

Humble Sand & Gravel, Inc. v. Gomez (01-0652)

During the 2004-05 term, a worker suffering from a serious lung disease was kept waiting for 1,115 days – 3 years – from the date of request until decision. This decision severely weakened workplace safety measures and shielded manufacturers of dangerous products from accountability.

City of San Antonio v. Pollock (04-1118)

This case involves a toddler with leukemia seeking to hold her city accountable for exposing her to benzene. This little girl's family has been waiting more than three years since review was requested, yet no opinion has been issued.