

represented by the unsuccessful, remaining two-thirds of the alien H-1B beneficiaries may be presumed to find solace in the eager arms of our global competitors.

At the end of the legislative session, Congress enacted interim continuing appropriation measures that included, *inter alia*, an extension of the immigrant investor regional center pilot program and the “E-Verify” program. E-Verify is an Internet-based program jointly administered by the U.S. Department of Homeland Security and the U.S. Social Security Administration that allows employers to verify the employment eligibility of their employees. Although widely criticized for its technical flaws, E-Verify will become mandatory for all federal contractors and subcontractors on Jan. 15, 2009, pursuant to a presidential executive decree.

In order to deter employers from illegally hiring undocumented aliens, ICE continued its campaign of highly publicized raids on worksites. Immigration violations, in most cases, involve civil rather than criminal laws. ICE, however, is pursuing criminal sanctions against both employers and unlawfully employed aliens. Employers may be charged with harboring undocumented aliens, engaging in a pattern or practice of hiring such aliens, or unlawfully collaborating in the production of false documents. Aliens who present false documents to gain employment may be charged with identity theft or other crimes.

In early 2008, ICE introduced a new tactic of mass criminal trials for undocumented aliens apprehended in worksite raids. The due-process concerns raised by this practice, as well as the opprobrium heaped on ICE as a result of the shock to coworkers, communities, and families attributed to the tactics used, appears to have discouraged ICE from expanding this approach in subsequent raids during the year.

The desultory approach to immigration regulation pursued by federal authorities in 2008 appears to have encouraged states and municipalities across the country to continue a trend of enacting laws seeking to stem illegal immigration in their communities. The localization of immigration regulation has resulted in often-contradictory or paradoxical requirements for such disparate groups as employers, landlords, or alien automobile drivers. For example, in Texas, aliens temporarily present frequently find that they are ineligible for a state driver’s license even though they may be lawfully here for professional assignments associated with international commerce.

Looking forward, the challenge for those making immigration law and policy will be to balance the need to maintain secure borders and curtail illegal migration while encouraging legitimate international talent to find a home in the United States. At present, the former goal seemingly has overwhelmed the latter.

This review of the year began with the observation that there is no easily discernable thread running through immigration law in 2008. Rather than a well-told tale, the review reads

like a grocery list that is a few ingredients short of a soufflé. The half-baked schemes of federal immigration authorities or state legislators, in the long run, will not serve well the best interests of the United States.

In January 2009, a new president will take office and a new Congress will be seated. Burdened by global recession, war, and burgeoning deficits, it is unclear when, or if, the federal government can muster the will to tackle immigration reform. President-elect Barack Obama has expressed interest in reform that creates a path to lawful status for undocumented aliens. Under normal conditions, one might expect a Congress controlled by Democrats to enact immigration reform legislation. The specter of rising unemployment during a recession, however, may dissuade Congress from enacting legislation perceived to favor alien workers, whether legal or undocumented, over citizen voters. But this is a tale for next year. Only the passage of time will reveal whether it will be a tale full of sound and fury or what it might signify.

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TEXAS SUPREME COURT

By KENT RUTTER

As 2008 began, the Texas Supreme Court received some unfavorable attention from the press. Newspapers and television newscasts across the state reported that the Court’s backlog had reached its highest level in years. While some of the media’s statistics were questioned, the point was indisputable — between 1999 and 2007, the Court’s backlog had more than doubled.¹ Frequent turnover disrupted the Court’s work during those years, and the number of causes left undecided at the end of each term soared from 50 to 106.

In February, Chief Justice Wallace Jefferson sat for interviews with the media. “I think the court could do better,” Jefferson said.² As the year progressed, the Court did improve, significantly reducing its backlog for the first time in almost a decade. At the end of the 2008 term, the Court carried about 80 causes — 25 percent fewer than the year before.

More Decisions, More Debate

The Court attacked the backlog in two ways. First, it decided more causes. In 2007, the Court issued 131 deciding opinions — 21 percent more than the year before.³ In 2008, the number climbed still higher, to 136.

One surprise in 2008 was that the justices decided more causes even though they agreed with one another less. Typically, when the justices devote more time to writing separately, they have less time to produce opinions for the majority. But in 2008, as the number of deciding opinions rose, the number of concurring and dissenting opinions rose as well. The justices wrote separately 37 times in 2007 and 62 times in 2008 — an increase of 68 percent.

Another surprise was that the justices decided more causes while relying less heavily on *per curiam* opinions. *Per curiam* opinions typically are shorter than signed majority opinions and are issued without oral argument, so the Court can issue more of them in less time. But in 2008, even as the Court decided more causes, the percentage of *per curiam* opinions fell from 53 percent to 44 percent.

A final surprise was the role of Justice Harriet O’Neill. The Court’s leading author of dissenting opinions in 2005, 2006, and 2007, Justice O’Neill abruptly became the Court’s leading author of signed majority opinions in 2008. “I suppose I’m getting persuasive in my old age,” she told the *Texas Lawyer*.⁴ The leading author of *per curiam* opinions was Justice Scott Brister, and the leading author of concurring and dissenting opinions was Justice Don Willett. Taking all opinions into account, the justices’ total output reached its highest level since 1998. After authoring 170 opinions in 2007, the justices authored 212 opinions in 2008 — an increase of 25 percent. Over the past four years, the justices’ total output has increased 74 percent.

A Selective Approach

Deciding more causes was only half the solution to the backlog problem. That was apparent in 2007, when the Court decided more causes but also added more to its docket. Even as productivity surged, the backlog grew.

In 2008, the Court was more selective in granting review. According to the Office of Court Administration, the Court received roughly the same number of petitions as before but granted fewer. The percentage granted, after rising from 9.1 percent to 15 percent between 2000 and 2007, fell to 12.8 percent in 2008. In appeals from the 9th Court of Appeals in Beaumont, the grant rate was zero — the Court denied 38 petitions and granted none.

Time to Disposition

By most measures, the reduced backlog did not result in faster decisions. According to one prominent court observer, in cases in which the court heard oral argument, the average disposition time remained about the same — approximately 14 months between filing and oral argument, and approximately 13 months between argument and a decision.⁵

One positive sign in 2008 was that the Court issued *per curiam* opinions more quickly. The average time between filing

and a *per curiam* opinion fell from 17 months to 13 months. And as the backlog dissipates, faster decisions may lie ahead.

Listening to the Past

To many practitioners, when the Court began streaming live video of oral arguments over the Internet in 2007, it seemed that the future had arrived. In 2008, the clerk’s office turned its attention to the past, digitizing audiotapes from past oral arguments and making them available online. It is now possible to click a link and be transported as far back as January 1988 — the month that then-Chief Justice Thomas R. Phillips arrived at a court that included Justices Franklin Spears, C.L. Ray, William Kilgarlin, and Oscar Mauzy. The recordings may be heard at www.supreme.courts.state.tx.us/oralarguments/audio.asp.

Justice James A. Baker, 1931–2008

In June, the Court mourned the passing of former Justice James A. Baker, who joined the Court in 1995. Justice Baker was known for his formal yet gentle demeanor, his clear and logically organized opinions, and his strict adherence to traditional standards for mandamus and appellate review. Justice Baker was a friend to the appellate bar and a dependable presence at appellate continuing legal education programs, which he always monitored from the front row. Justice Baker retired from the court in 2002.

Notes

1. Unless otherwise noted, the years referenced in this article are fiscal years, which end on Aug. 31. The statistics are based on figures from the Office of Court Administration as well as the author’s own analysis.
2. “Work Ethic of Texas Justices Questioned” (WFAA television broadcast, Feb. 28, 2008) (available at http://www.wfaa.com/sharedcontent/dws/news/localnews/tv/stories/wfaa080228_mo_justice.2bb8cf9.html).
3. The term “deciding opinions,” as used by the Office of Court Administration, includes *per curiam* opinions and signed majority and plurality opinions. The term excludes concurring and dissenting opinions.
4. John Council, “Voting Independent: Shifting Majorities, Vigorous Dissents Characterize Court’s Term,” *Texas Lawyer*, Sept. 15, 2008, at 1.
5. Pamela Stanton Baron, “Texas Supreme Court Docket Analysis: September 1, 2008,” State Bar of Texas Advanced Civil Appellate Practice Course (2008).

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