In the
Supreme Court of Texas

In re Administrative Law,
Real Topic of Interest

Presented at the
Advanced Administrative Law Course 2011
Held in Austin, Texas

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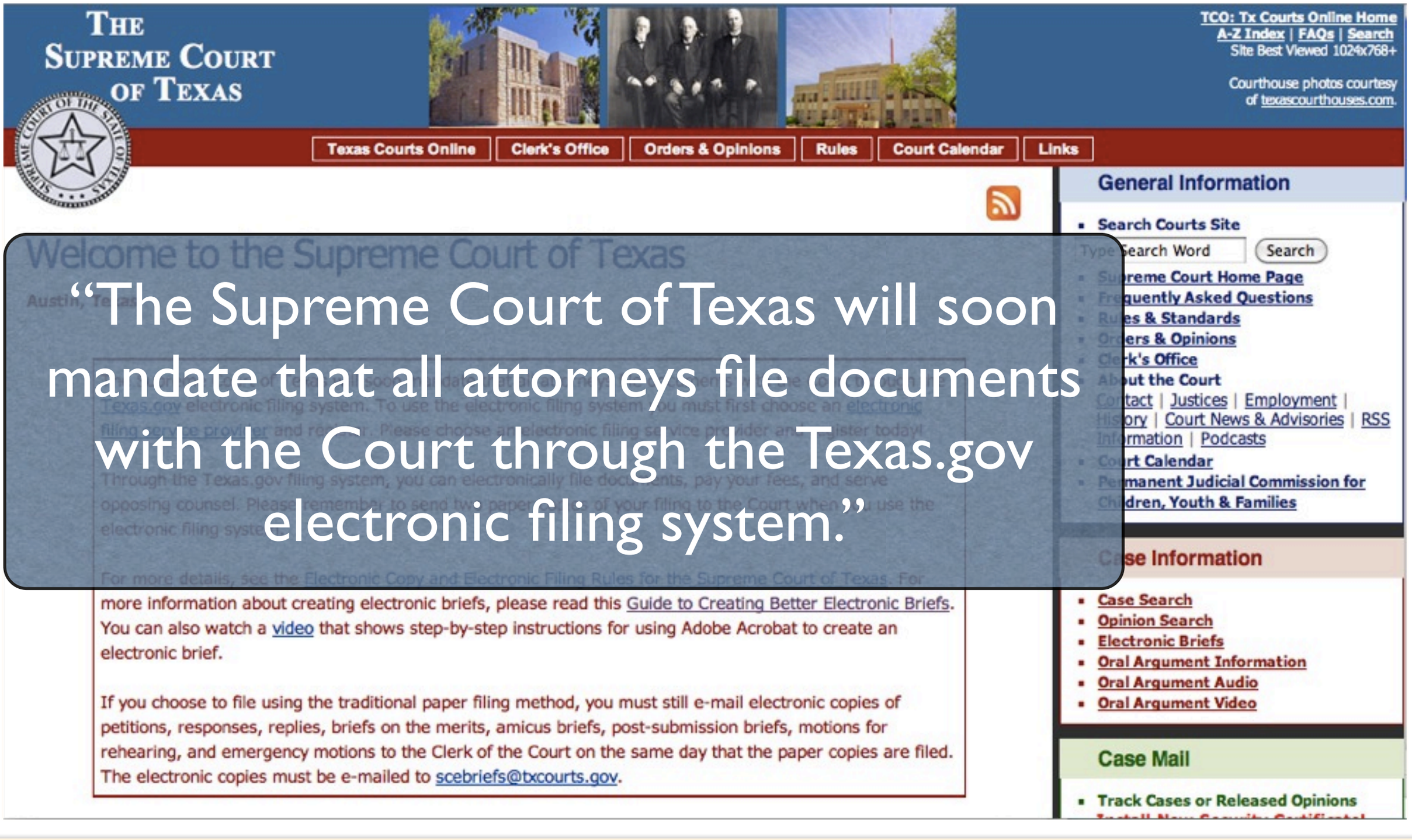
I. What's happening at the Court now?

The story that's (still) above the fold...



New faces at the Court

joined October 2009

joined May 2010

2011 authorship stats (through June 24, 2011)

Opinion Statistics

Fiscal Year 2011
Sept. 2010 through Aug. 2011

Click on a number for more details

Justice	Majority	Per Curiam	Concurring	Dissenting	Concurring & Dissenting	Other
Jefferson	4	?	3	2	0	0
Hecht	8	?	1	1	0	0
Wainwright	9	?	0	1	2	0
Medina	6	?	1	2	0	0
Green	3	?	0	1	0	0
Johnson	8	?	0	4	0	0
Willett	3	?	5	1	0	1
Guzman	6	?	1	1	0	0
Lehrmann	2	?	0	2	0	0
Totals	**49**	**32**	**11**	**15**	**2**	**2**

28 separate opinions

so far...

Source: DocketDB.com

What about the backlog?

Fewer oral arguments in the past two terms has kept the backlog from growing

Effort to clean out oldest opinions before a Legislature-mandated report in August

And after that August report? SCOTX has *already* granted enough cases to take it through the November argument sitting

What's the new voting dynamic?

Texas Supreme Court voting-affinity data

for the 2011 fiscal-year term

(September 1, 2010 to June 24, 2011)

With At Least One Split Opinion (20) | Joined same opinions | 2011 | Refresh

	Hecht	Jefferson	Wainwright	Medina	Green	Johnson	Willett	Guzman	Lehrmann
Hecht		52.9	66.7	66.7	72.2	61.1	55.6	80.0	33.3
Jefferson	52.9		47.4	47.4	68.4	31.6	33.3	50.0	52.6
Wainwright	66.7	47.4		50.0	65.0	80.0	42.1	64.7	45.0
Medina	66.7	47.4	50.0		55.0	45.0	26.3	70.6	55.0
Green	72.2	68.4	65.0	55.0		63.2	52.6	70.6	55.0
Johnson	61.1	31.6	80.0	45.0	63.2		47.4	58.8	30.0
Willett	55.6	33.3	42.1	26.3	52.6	47.4		56.2	42.1
Guzman	80.0	50.0	64.7	70.6	70.6	58.8	56.2		52.9
Lehrmann	33.3	52.6	45.0	55.0	55.0	30.0	42.1	52.9	

Percentage who joined the same opinions

Source: DocketDB.com

Texas Supreme Court voting-affinity data

for the 2011 fiscal-year term

(September 1, 2010 to June 24, 2011)

With Dissents From Judgment (14) | Agreed in judgment | 2011 | Refresh

	Hecht	Jefferson	Wainwright	Medina	Green	Johnson	Willett	Guzman	Lehrmann
Hecht		58.3	69.2	61.5	69.2	53.8	84.6	90.9	53.8
Jefferson	58.3		38.5	61.5	76.9	23.1	41.7	63.6	69.2
Wainwright	69.2	38.5		42.9	57.1	78.6	61.5	58.3	35.7
Medina	61.5	61.5	42.9		50.0	28.6	46.2	75.0	78.6
Green	69.2	76.9	57.1	50.0		46.2	69.2	58.3	71.4
Johnson	53.8	23.1	78.6	28.6	46.2		69.2	41.7	21.4
Willett	84.6	41.7	61.5	46.2	69.2	69.2		72.7	38.5
Guzman	90.9	63.6	58.3	75.0	58.3	41.7	72.7		50.0
Lehrmann	53.8	69.2	35.7	78.6	71.4	21.4	38.5	50.0	

Agreement in the judgment, when there is a true dissent

Source: DocketDB.com

Who agrees most often on the judgment?

90%+

80%+

75%+

Who agrees <u>least</u> often on the judgment?

29%

23%

21%

Do the Justices fall into voting groups?

Which groups agree more than 66% of the time?

69%

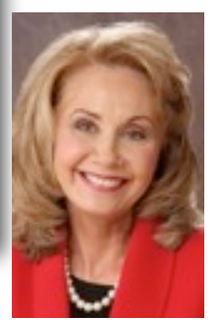
69%

73%-91%

79%

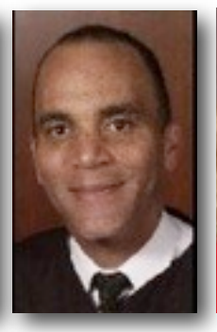
69%

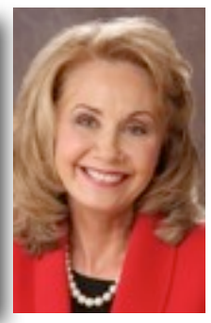
75%



79%

(but not Guzman - Lehrmann)

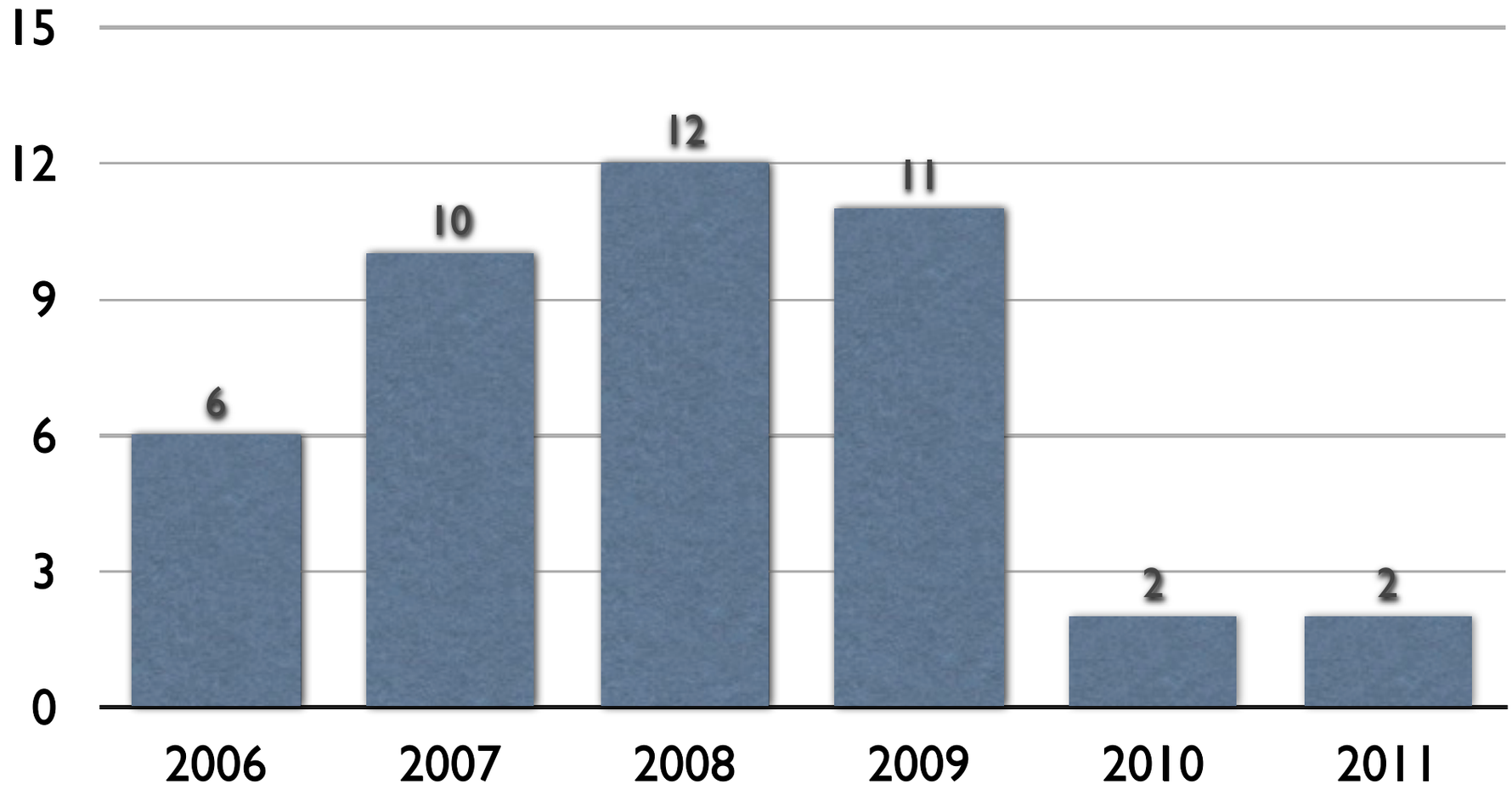




69%-77%

No “swing” Justice because we aren’t seeing many “swing” cases

Five-vote majorities



Close votes in 2011 Term

TEXAS COMPTROLLER OF PUBLIC ACCOUNTS v. ATTORNEY GENERAL OF TEXAS AND THE DALLAS MORNING NEWS, LTD., No. 08-0172.

open records, confidential information, computer databases

Opinion of the Court

Concurring and Dissenting

Not Sitting

MARSH USA INC. AND MARSH & MCLENNAN COMPANIES, INC. v. REX COOK, No. 09-0558.

employment law, non-competes, consideration

Opinion of the Court

Concurring

Dissenting

EBERHARD SAMLOWSKI, M.D. v. CAROL WOOTEN, No. 08-0667.

sufficiency of expert report, medical malpractice

Opinion of the Court

Concurring

Concurring and Dissenting

Dissenting

IRVING W. MARKS v. ST. LUKE'S EPISCOPAL HOSPITAL, No. 07-0783.

scope of med mal, premises liability

Opinion of the Court

Concurring

Concurring

Concurring and Dissenting

Concurring and Dissenting

Close votes in 2010 Term

SOUTHWESTERN BELL TELEPHONE COMPANY v. MARKETING ON HOLD, INC. D/B/A SOUTHWEST TARIFF ANALYST, No. 05-0748.

class action, class certification

Opinion of the Court

Dissenting

Not Sitting

II. Big docket trends that might affect your Admin Law cases

Trend #1:
Lots (and Lots) of Takings Cases

And many have a regulatory flavor

Takings case with regulatory themes, already argued and waiting for a decision

Texas Rice Land Partners v. Denbury-Green Pipeline-Texas,
No. 09-0901 =>
Is a pipeline company's approved application to the Railroad Commission conclusive proof of condemnation power and "public use," or can those be disputed in the condemnation proceeding?

City of Dallas v. VSC LLC,
No. 08-0265 =>
The city seized some cars that had been towed by a towing company, asserting its police powers under other law. The company claimed this was a taking. The Dallas Court sided with the company.

Edwards Aquifer v. Day,
No. 08-0964 =>
Among other issues, whether the State can demand that landowners offer proof of prior use to keep an already-vested property right.

City of Dallas v. Heather Stewart,
No. 09-0257 =>
Does a city's administrative process for condemning a house as a public nuisance preclude relitigation of those issues in a later takings action?

There are more to be argued this Fall

City of Austin v. Whittington,
No. 08-0964 =>
Dispute about "Block 38," which is now the parking for the Austin convention center. The key question is whether there is a "bad faith" limitation on the government's condemnation power.

Battle may come down to whether the plaintiff's idea of "bad faith" is really an aspect of "public use" and thus part of the constitutional limit on the government's power.

Hearts Bluff Game Ranch, Inc. v. State of Texas,
No. 10-0491 =>
Hearts Bluff wanted to use its land as a wetlands mitigation bank to obtain and sell federal credits. It alleges that the State designated the same area as a potential future water reservoir that might, at some future date, be condemned. Hearts Bluff contends this was a targeted action to prevent it from using its land to maximum advantage today. The question is whether this is a taking.

Why all these takings cases?

In several, the complaints are really about *other* government decisions that did not offer a good remedy.

In that sense, takings law is being invoked as a safety valve for cases limited by sovereign immunity.

That tactic didn't work for contract cases. Remains to be seen here.

Trend #2:
Information Privacy

It's early days...
but the Court does seem willing
to consider real-world changes in
technology when evaluating the
PIA (and perhaps
other administrative regimes)

Texas Comptroller of Public Accounts v. Attorney General of Texas, No. 08-0172 (Tex. May 27, 2011)

PIA request filed for government payroll database. Comptroller withheld the exact dates of birth, while seeking an AG opinion about whether that was protected.

> 552.101: "information considered to be confidential by law, either constitutional, statutory, or by judicial decision"

> 552.102: ""information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy"

<u>Wrinkle:</u> The birth date information was really only useful when combined with *other* information. Newspapers wanted it to be able to match this data with other databases. And employees feared that it could be combined with other data to facilitate identity theft.

Even though the Comptroller had largely abandoned the 552.102 argument on appeal, the Court decided on that basis anyway.

> Given the unique circumstances of this case and the third party interests at stake, we conclude that the Comptroller's petition "fairly include[s]" an argument that section 552.102 applies....

In re John Does 1 and 2, No. 10-0366 (Tex. Apr. 15, 2011)

Rule 202 discovery sought against Google, trying to uncover identity of anonymous bloggers to support a libel cause of action.

> PRK argues that compliance with Rule 202 was excused because of its agreement with Google. It is true that "[e]xcept where specifically prohibited, the procedures and limitations set forth in the rules pertaining to discovery may be modified in any suit by agreement of the parties . . . ." TEX. R. CIV. P. 191.1. But PRK and Google were not the only parties to the proceeding. Rule 202.3(a) requires that "all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit" be served with the petition and given notice of hearing. TEX. R. CIV. P. 202.3(a). PRK asserted that relators would be defendants in the anticipated lawsuit, and by their motions to quash, relators made an appearance in the proceeding. PRK and Google could not modify the procedures prescribed by Rule 202 by an agreement that did not include relators.

Mandamus granted to stop discovery because agreement to modify Rule 202 was invalid where the anonymous parties did not agree (because they would be the defendants in the ultimate action).

Texas Department of Public Safety v. Cox Newspapers, No. 09-0530 (pending)

The information sought in this PIA case involves expenses and similar records of Governor Perry's travel-security detail.

Here, the DPS is arguing ***for*** a common-law privacy exception to the PIA that protects this information. The theory is that information that could affect a person's safety (here, the Governor's safety) is protected under common-law notions of privacy.

Might consider how the privacy interests of third parties might align with (or against) your client's interests

Trend #3:
Clash of the Statutory Absolutes

"When it comes to presenting a proposed construction in court, there is an accepted conventional vocabulary [that] still, unhappily, requires discussion as if only one single correct meaning could exist. Hence **there are two opposing canons on almost every point.**"

Karl Llewellyn

Texas Lottery Commission v. First State Bank of DeQueen, No. 08-0523 (Tex. Oct. 1, 2010)

Article 9 of the UCC and amendments to the Lottery Act about assigning last 2 years of a prize, passed 13 days apart in the same legislative session.

The Court rejected any argument to look at "canons of construction" because it found the language of the UCC Article 9 to be unambiguous --- and to specifically reflect how the Legislature wanted to resolve conflicts with other statutes.

Holding: The later-enacted, more specific Lottery Act provisions were interpreted to have no effect.

Texas Lottery Commission v. First State Bank of DeQueen, No. 08-0523 (Tex. Oct. 1, 2010)

Among other things, the Commission argued for deference:

> Finally, the Commission asserts that we should give serious consideration to the Commission's construction of the Lottery Act, by which it gives full effect to the assignment restrictions. *See Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993) ("Construction of a statute by the administrative agency charged with its enforcement is entitled to serious consideration, so long as the construction is reasonable and does not contradict the plain language of the statute."). But here we are not construing the Lottery Act. We are construing the UCC and determining whether it renders sections 466.406 and 466.410 of the Lottery Act ineffective. The Commission does not argue that it is charged with enforcement of the UCC, and even if it were so charged, its interpretation of the UCC contradicts the plain language of that statute. *See id.*

Court noted the "serious consideration" deference standard, said it can't resolve a conflict with other statutory regimes.

State v. PUC (CenterPoint), No. 08-0421 (Tex. Mar. 18, 2011)

Electric-deregulation true-up case, about how the PUC calculated what CenterPoint could collect.

As part of the process for creating new markets in energy, CenterPoint was required to auction certain quantities of its products. It failed to meet the threshold for one of them, missing by about $5000. The PUC, as a result, chose a different formula to true-up CenterPoint's assets, diminishing its payout by more than $400 million.

State v. PUC (CenterPoint), No. 08-0421 (Tex. Mar. 18, 2011)

SCOTX reversed. And buried within its analysis is a very rare canon of statutory construction: that an "impossible condition" is to be avoided.

> *This is a quirky canon of construction. As described by the Court, the canon is backward-looking: the Legislature could not have known that this set of auctions would be "impossible" to meet until later.*

In part because it would have been an "impossible" condition, SCOTX held that it was not a condition at all.

Focus on *whether* the statute is ambiguous

Tools to test ambiguity	Tools to find legislative intent
"probable winners"	"possible losers"

Lottery Commission

one law says it trumps other laws...

consumer protection, structure & scheme, would render Lottery Act provisions meaningless

CenterPoint

"impossible condition" => eliminate one possible meaning

arguments about structure & scheme, agency deference

III. Selected decisions and pending petitions about admin law

Decisions

Theme:

Agency Deference

Statutory-construction cases that involved regulatory regimes

Texas Lottery Commission v. FSB of DeQueen (Oct. 1, 2010)	Text of one statute trumps any agency deference to other
In re Billy James Smith (Mar. 4, 2011)	Look at agency/AG opinion for parolee/probation
Railroad Commission v. Texas Citizens for a Safe Future (Mar. 11, 2011)	"Serious consideration" deference when ambiguous
State v. PUC (Mar. 18, 2011)	No deference if would be "impossible condition"
Ojo v. Farmers Group (May 27, 2011)	Opinion leans on agency interpretation of statute Heated concurrences about role in judicial decisions

In re Billy James Smith,
No. 10-0048 (Tex. Mar. 4, 2011)

Wrongfully convicted former inmate, who had been on parole at the time of the wrongful conviction.

> A reasonable construction of a statute by the administrative agency charged with its enforcement is entitled to great weight. *Osterberg v. Peca*, 12 S.W.3d 31, 51 (Tex.1999), cert. denied, 530 U.S. 1244 (2000). Courts may give less deference to an agency's reading of a statute, however, when legislative intent is at issue rather than the application of technical or regulatory matters within the agency's expertise. *Flores v. Employees Retirement Sys. of Tex.*, 74 S.W.3d 532, 545-46 (Tex. App.-Austin 2002, pet. denied). We may also be guided by reasoned interpretations of a statute by officials of the state executive branch, particularly the attorney general. *Koy v. Schneider*, 221 S.W. 880, 885-86 (Tex.1920). The opinion of the attorney general is not binding on this Court, but it is often persuasive. *Holmes v. Morales*, 924 S.W.2d 920, 924 (Tex.1996).

In the end, the AG opinion was considered more persuasive than the Comptroller's current interpretation.

Railroad Commission of Texas, et al. v. Texas Citizens for a Safe Future and Clean Water, et al, No. 08-0497

one week later... (Tex. Mar. 11, 2011)

Should the Commission weigh traffic and water quality as aspects of "public interest" when deciding whether to approve shale gas drilling? (Legislative intent.)

SCOTX: Because the phrase is ambiguous, defer to the agency's interpretation so long as it is reasonable and consistent with the text.

Reversed COA for failing to afford that deference.

Dissent: Three Justices would have held this statute *unambiguous* (in context) and thus there was "no legitimate role for deference here"

I know what you're thinking.
"If only the Legislature would just tell us what it meant..."

Ojo v. Farmers Group, Inc.,
No. 08-0421 (Tex. May 27, 2011)

Holding: Texas law does not recognize a disparate-impact claim for discrimination that might result from credit scoring in setting insurance rates.

Real lesson: Code Construction Act is a lightning rod.

Ojo v. Farmers Group, Inc.,
No. 08-0421 (Tex. May 27, 2011)

Majority: "Even when a statute is not ambiguous on its face..." can consider factors mentioned in the Code Construction Act, because the Legislature said we could.

Willett (concurrence): "Today, with whiplash-inducing speed, the Court says the opposite, that even *absent* ambiguity, it will consider an agency's construction of the statute—and not merely as noninterpretive 'background,' but rather, as the Court declares, 'to determine the Legislature's intent.'"

Jefferson (concurrence): Defends using these other interpretative aids as part of craft of opinion writing.

Argued and Waiting for a Decision

Standing: Electronic Voting Machines

Andrade (Secretary of State) v. NAACP of Austin, et al.,
No. 09-0420 =>
Plaintiffs contend that it violates their rights not to have paper copies of the votes cast through electronic voting machines available for recounts.

State contends that these plaintiffs lacked standing because they cannot articulate a concrete injury.

Does the PIA have a common-law exemption that would protect the Governor's travel records?

DPS v. Cox Texas Newspapers,
No. 09-0530 =>

How does the PIA apply to certain SOAH proceedings?

Jackson v. SOAH, et al.,
No. 10-0002 =>
PIA request for records related to child-support license-suspension cases litigated in SOAH.

Cases To Be Argued This Fall

Can sovereign immunity be raised in an interlocutory appeal from an entirely different kind of order?

Rusk State Hospital v. Black,
No. 10-0548 =>

Interlocutory appeal about deficient medical-expert report.

State raises sovereign immunity within that appeal. Question is whether the COA should reach and resolve that question even though not (yet) raised below.

Validity of the rules governing home-equity lending in Texas

Finance Commission of Texas, et al. v. Norwood, et al.,
No. 10-0121 =>

Both consumer advocates and bank groups challenge certain rules adopted by Texas regulators over home-equity lending in Texas in the wake of the 2003 constitutional amendments.

The Austin Court upheld some of the agency "interpretations" of those constitutional provisions and rejected others.

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