

Supreme Court Tackles Texas

The high court has waded into the thicket of Texas politics, agreeing to review controversial redistricting there that produced ballot box gains for Republicans, but criminal charges for GOP Congressman Tom DeLay.

By Tim Storey

It's the middle of the decade, so why all the attention to redistricting? The U.S. Supreme Court has shaking us from our slumber, agreeing to hear several challenges to the fabled Texas 2003 congressional redistricting.

The outcome of the litigation could have far-reaching consequences for how legislatures redraw their own districts, as well as U.S. House lines. If the high court issues a decision that limits the practice of gerrymandering, legislatures will never be the same again.

Among the key questions the Court is considering is whether there are constitutional limits on a legislature's ability to redraw districts for partisan gain. In other words, can legislatures continue to engage in the practice of partisan gerrymandering?

The cases from Texas are perhaps the most well-known chapter in redistricting since Massachusetts legislators drew a map in 1812 that led to the birth of the term "gerrymandering." In that infamous episode, map-makers aligned with Massachusetts Governor Elbridge Gerry drew a state Senate plan to help elect Gerry partisans. A clever newspaper editor dubbed the plan a "Gerrymander" saying that the contorted districts resembled a salamander, and coined a new term to describe the art of drawing electoral districts to favor one group over another.

THE TEXAS RE-REDISTRICTING

The Texas redistricting odyssey began in 2001 when the Legislature, at the time politically divided with Democrats controlling the House and Republicans the Senate, failed to enact a new congressional map using recently minted 2000 census data. Plaintiffs rushed to court and demanded a judicial remedy in time for 2002 congressional elections. A federal court in Texas complied and adopted a new plan for the 2002 election



through which Democrats won 17 of the districts and Republicans 15.

In the same election, Republicans seized the Texas House of Representatives for the first time since Reconstruction, partly due to a new, more GOP friendly, redistricting plan. The Republican takeover of the Legislature set in motion a plan to redo the congressional map. One of the key architects was Congressman Tom DeLay, who at the time was U.S. House Majority Leader. DeLay asked Republicans in the Texas Legislature to push through a controversial new map designed to maximize GOP seats. DeLay and his allies argued that the plan merely corrected decades of abusive gerrymandering at the hands of Democrats in a state that was trending heavily Republican at all levels of government.

Democrats in the Texas House vehemently opposed the effort. In one of the most highly publicized events in the annals of redistricting, more than 50 Texas House Democrats quietly left the state and holed up in Oklahoma as the legislation was pend-

ing. The gambit worked temporarily by denying the House the necessary quorum, and the redistricting effort failed as the Legislature adjourned.

A few weeks later, Governor Rick Perry called the Legislature into special session once again to take up congressional redistricting. This time, the Senate Democrats took flight to Albuquerque, N.M. Eventually one of the Democratic senators, Senator John Whitmire, returned to Austin, and the Republican-led Legislature enacted a new map for congressional districts in October 2003. The plan was subsequently approved by the U.S. Justice Department under its Voting Rights Act and put in place for 2004 elections.

The new redistricting was followed by the election of 21 Republicans and 11 Democrats to the U.S. House—a net gain of six seats for the GOP.

OFF TO COURT

Plaintiffs immediately challenged the new map in federal court on various grounds

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REFORMERS DEALT MAJOR SETBACKS

including a claim that it violated the U.S. Constitution as an impermissible partisan gerrymander. No legislative plan has ever been invalidated by a court as an illegal partisan gerrymander even though the Supreme Court ruled in the 1980s that there could conceivably be a constitutional claim against egregious line drawing. The biggest hurdle for those seeking to overturn partisan redistricting is establishing a standard to define an illegal plan. In various trials at the lower court level, challengers failed to convince a judge to undo the Texas re-redistricting. Eventually an appeal made it to the Supreme Court. The Court sent the case back to Texas for yet another hearing in light of a recent decision it had made in a Pennsylvania partisan case.

In that instance, the high court found that there was no acceptable standard for striking down as unconstitutional a redistricting plan drawn to the advantage of one political party over another. However, the Court was sharply divided. Justice Anthony Kennedy provided the swing vote in *Vieth vs. Jubelirer* to dismiss the claim of excessive partisan gerrymandering in the Pennsylvania congressional map. Justice Kennedy left the door cracked for a future suit when he wrote, "If workable standards do emerge to measure these burdens, however, courts should be prepared to order relief."

In 2005, lower courts again held trials considering the legality of Texas's redistricting under the new decision in *Vieth vs. Jubelirer*. And again, courts upheld the Texas effort, prompting immediate appeals. It was late 2005 when the Supreme Court, after holding a somewhat extraordinary six internal sessions, agreed to hear four cases against the new Texas map.

In yet another twist, while the Court was considering whether to hear the challenge, *The Washington Post* published a leaked 73-page memo from career attorneys at the U.S. Justice Department. In it, veteran lawyers recommended to their politically appointed superiors that the Texas plans be denied approval and rejected for violating the Voting Rights Act. The assistant attorney general at the Department of Justice ultimately overruled the bureaucrats and approved the plan. Many observers think that the revelation of this internal dissent at the Department of Justice drove the high court to hear the cases.

Efforts at redistricting reform are more substantial now than at any point in more than 30 years, but proponents for change were dealt a major setback in last November's elections. Voters in California and Ohio soundly defeated measures aimed at radically overhauling the decennial process of redrawing legislative and congressional lines.

California governor Arnold Schwarzenegger called for a special election in November for voters to decide on a measure that would have wrested control of redistricting from the legislature and given it to a team of three retired judges chosen at random. Under the proposal, California voters would have voted on the redistricting plans drawn up by the judges. The proposition also called for the plans to be drawn without political data including the location of incumbent legislators—a process akin to how Iowa conducts redistricting. California voters soundly defeated the proposal with just under 60 percent rejecting the idea.

Ohio voters also trounced a reform proposal in November with nearly 70 percent voting no. The Ohio measure was part of a package of reforms put on the ballot by a group called Reform Ohio Now. The measure would have taken redistricting authority from the commission in Ohio that currently draws the lines and given it to a different commission constrained by a highly technical requirement to produce competitive districts.

The apparent lack of competitiveness in legislative and congressional elections is what drives many reformers to target the redistricting process as the culprit. For example, Cali-

fornia voters often heard that not one of the state's 172 legislative and congressional districts changed party control in the 2004 election.

Tom Mann, a senior fellow with the Brookings Institution, recently edited a book on the relationship between redistricting and declining electoral competition. Mann believes that redistricting is contributing to the heightened partisan polarization in Washington, D.C., because members of Congress do not face realistic challenges to their jobs. Most of them represent districts drawn to favor heavily one of the two major parties.

"The worry is that members from totally safe districts tend to hear only what they want to hear, and they don't listen to those across the aisle. It contributes to ideological polarization," says Mann.

So did the losses in California and Ohio deal a fatal blow to reformers? George Mason's Michael McDonald says no. "The redistricting reform movement isn't dead. There's a new effort in California and reformers are active in Florida and Massachusetts." In 2005, more than 20 state legislatures considered bills to reform the redistricting process but none passed. One measure to shift Texas redistricting to an independent commission was sponsored by Texas Senate Republican Jeff Wentworth and actually cleared the Senate before dying in the House. Currently, 12 states entrust legislative redistricting to an appointed commission. If reformers have their way, fewer legislatures will be drawing lines in 2011 following the next census—only four years away.

"I was somewhat surprised the Supreme Court took the case," says University of Pennsylvania Law School Professor Nate Persily. "I think it was the culmination of all the stuff happening in the news."

TO THE HIGH COURT

The Supreme Court heard an unusual two hours of oral arguments in the Texas cases on March 1 and a decision is expected before the term ends in late June. The Court asked the parties to the lawsuits to address several questions in their briefs and arguments. The first issue is simply whether it is legal for a state to draw new districts solely for partisan

purposes once a redistricting plan has already been used for elections. A related issue is whether using 2000 census data in 2003 is too long a time gap.

The high court will also consider several claims that the Texas plan ran afoul of the Voting Rights Act of 1965. One claim is that the new map dismantled a district which even without a majority of African-American voters had consistently elected the candidate preferred by them. Whether a congressional or legislative district with less than a mathematical majority of minority voters is protected by the Voting Rights Act is not only a key question in this case but

WHO'S WINNING THE BATTLE FOR 2010 CONGRESSIONAL SEATS?

Recent estimates from the U.S. Census Bureau confirm what demographers have been observing for the past several years. States in the South and West are growing rapidly while states in the Northeast and upper Midwest are barely growing at all.

If this population trend continues, 11 congressional seats could shift following the 2010 census. Florida and Texas would be the big winners each gaining three seats, with Ohio and New York forfeiting two seats each. According to an analysis by Clark Bensen of Polidata, a Virginia based demographics firm, the other winners would be Arizona gaining two seats and Georgia, Nevada and Utah each picking up one. Illinois, Iowa, Massachusetts, Michigan, Minnesota, Missouri and Pennsylvania could each lose one U.S. House seat. Bensen cautions that the census data do not reflect the effects of last fall's devastating hurricanes.

Overall, the U.S. population swelled to 296.4 million people in 2005. Nevada continued its 19-year streak of being the fastest-growing state adding 3.5 percent to its population from 2004 to 2005. Florida and Texas actually added the most people, with Florida increasing by more than 400,000 residents since 2004 and Texas adding about 388,000.

Massachusetts, New York and Rhode Island actually lost population between 2004 and 2005, as did the District of Columbia. North Dakota and Ohio grew by only a fraction during the past year.

With the exception of Delaware, all 10 of the fastest growing states were in the South and West. The 10 fastest growing states from 2004 to 2005 were, in order, Nevada, Arizona, Idaho, Florida, Utah, Georgia, Texas, North Carolina, Delaware and Oregon.

also for many other states with growing Latino and African-American populations. Another Voting Rights challenge against the 2003 plan claims that the map diluted the votes of Latino voters in one specific district just as they were poised to elect their preferred candidate in the next election.

KENNEDY'S SWING VOTE

Those looking to overturn the Texas congressional districts clearly are trying to sway Justice Kennedy, assuming that he is the critical swing vote. According to Gerald Hebert, one of the plaintiff's attorneys arguing the case, "There is a very different dynamic on the Court than when they heard the *Vieth* case, but all the plaintiffs' arguments are targeted first and foremost at Justice Kennedy." Plaintiffs are also hopeful that new Justices Roberts and Alito will be receptive to arguments that failed to persuade their predecessors.

No one is certain how far-reaching a Supreme Court ruling might be if they do overturn the Texas maps. The mere fact that the justices agreed to hear the cases indicates that they may be inclined to carve out some new limits on gerrymandering. Pennsylvania Law School Professor Nate Persily predicts that the Court will "reverse and say that a mid-decade redistricting for only partisan reasons is out of bounds."

That finding will not necessarily have dramatic consequences for other states, but could signal that the high court is willing to define specific limits on a state's ability to draw partisan maps. In a Georgia legislative district case in 2004, the Supreme Court overturned the state's plan saying that one-person, one-vote standards could not be stretched if the only

rationale was partisan advantage. George Mason University professor and redistricting expert Michael McDonald agrees with Persily that the high court is likely to overturn the Texas map and declare that partisan gain is not a reason for mid-decade redistricting. McDonald also believes that, "the Supreme Court is not looking to invalidate a large number of state redistricting plans. I think they will narrowly tailor a decision about Texas mid-decade redistricting."

Long time redistricting attorney Mark Braden, who has consulted with parties supporting the Texas re-redistricting, thinks differently. "There are not five votes to throw out this map," he says. "And frankly, there is no limit on how many times a state can redistrict in the constitution or federal statute unless they [the Supreme Court] pluck it out of thin air."

Texas legislative leaders are also confident that they followed the law when they adopted the second redistricting plan. They expect the Supreme Court to validate their plan, pointing out that federal courts have repeatedly upheld it. "Two years ago, a federal three-judge panel approved Texas' congressional redistricting map. I welcome the Supreme Court's review, and I think they will agree that everything was done according to the law," says Texas House Speaker Tom Craddick.

Texas Senator Rodney Ellis, who led his fellow Democrats to Albuquerque, is hopeful that the Court will vindicate his initial opposition to the Texas effort and his exile in New Mexico. "The Court's decision to take up this case and provide extensive time for argument indicates it believes that this case has national importance," he says. "I am hopeful that the Court will overturn a map adopted through a scheme marked by extreme partisanship driven by leaders in Washington," says Ellis.

One thing is clear. The U.S. Supreme Court must take perverse pleasure in grappling with redistricting issues. Over the past 15 years, there has been an average of one major redistricting case every single year—an amazing record for a single issue.

Mark Braden says more litigation is a given. "By any stretch of the imagination, it is extremely unlikely that this case will settle the question of partisan gerrymandering," he says.

If the Supreme Court follows its recent history, justices will be back in the redistricting thicket at least a couple more times before actual line drawing begins anew in 2011. ■



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