

Redistricting update

New Districts in Place for 2002 Elections

Districts for the Texas House and Senate, State Board of Education (SBOE), and U.S. Congress, revised to account for population shifts revealed by the 2000 census, appear to be settled, at least for the 2002 elections. The Legislature did not enact any redistricting plan. The five-member Legislative Redistricting Board (LRB) drew districts for the House and the Senate, and federal court panels drew the SBOE and congressional districts. A federal court panel also revised part of the LRB House plan to address objections made by the U.S. Justice Department under the federal Voting Rights Act and rejected legal challenges to the LRB Senate plan.

The districts approved by federal court panels still could be challenged before the U.S. Supreme Court, and several parties to previous lawsuits have filed such appeals challenging the House, Senate, and congressional districts. If it chooses, the Legislature may change the district lines when it meets in regular session starting in January 2003. In the meantime, the 2002 election will proceed using the federal court-approved districts.

Because Texas has one of the nation's earliest primary elections and candidate filing deadlines (only California has an earlier primary, on March 5), Texas officials had relatively little time to settle redistricting issues before the election season began. The candidate filing period began December 3 and ended January 2 for the March 12, 2002, primary. Despite delays that left district lines uncertain until late in the year, federal court panels completed action on the SBOE plan on November 2, on the congressional districts on November 14, and on House and Senate districts on November 28.

Because the House and Senate district boundaries were not settled until shortly before filing began, the federal court panel postponed the residency requirement date for those districts, normally one year from the date of the November election, effectively allowing candidates to move into new districts before the January 2 filing deadline.

Redistricting rules

U.S. Constitution, Art. 1, sec. 2 requires an "actual enumeration" or census every 10 years to apportion the number of representatives each state receives in the U.S. House of Representatives. Release of the census population figures also triggers

redistricting of the state's legislative, SBOE, and congressional districts.

Deadlines and procedures.

Texas Constitution, Art. 3, sec. 28 requires the Legislature to redistrict legislative seats "at its first regular session following publication of a United States decennial census." If the Legislature does not enact a valid House or Senate plan during the regular session, then the LRB, comprising the lieutenant governor, House speaker, attorney general, comptroller, and land commissioner, must draw the lines. If required, the board must meet within 90 days of adjournment of the regular session and must adopt a redistricting plan within 60 days after it meets. Upon adoption by the board and after being filed with the secretary of state, the plan becomes law and is to be used in the next general election. The LRB drew both House and Senate districts in 1971, 1981, and 2001.

No constitutional deadline exists for lawmakers to draw congressional or SBOE districts during a regular session. Gov. Rick Perry could have called the Legislature into special session to draw those districts, but he chose not to do so, citing a lack of consensus.

If the Legislature or LRB fails to draw new districts following the census, or if the district lines are

invalidated for failure to meet one of the many legal requirements discussed below, then the task falls to a court. In *Growe v. Emison*, 507 U.S. 25 (1993), the U.S. Supreme Court said that federal courts should defer to legislative bodies and state courts during redistricting, as long as the state acts in a timely manner. During the recent redistricting process, when the Texas Supreme Court invalidated a congressional redistricting plan drawn by a state district court in mid-October, a federal court took over rather than delay the process further.

Under federal law (42 U.S.C., sec. 2284), a three-judge court hears any actions challenging the apportionment of congressional districts or statewide legislative bodies. The chief judge of the federal circuit appoints the three judges, who must include at least one circuit-court judge. Any party may appeal directly to the U.S. Supreme Court an action by a three-judge federal court panel (28 U.S.C., sec. 1253).

Population equality. The U.S. Supreme Court, in a line of cases beginning with *Baker v. Carr*, 369 U.S. 186 (1962), has required that political districts have approximately equal population: the “one person, one vote” standard. For congressional districts, the court has held that “absolute population equality [is] the paramount standard” unless a legitimate justification exists for deviating from exact equality (*Karcher v. Daggett*, 462 U.S. 725 (1983)). The standard used for determining population deviation is to divide the state’s total population by the number of districts. Texas’ 32-district congressional plan adopted by the federal court has 0.00 percent population deviation — no district deviates from exact equality by more than one person.

States and localities have more flexibility in meeting the population-equality requirement for legislative and other districts. The range of deviation is measured by determining the percentage by which the largest populated district exceeds the ideal district and the percentage by which the smallest district falls short of the ideal. The U.S. Supreme Court has characterized as “minor” overall

deviations totaling 9.9 percent or less (*White v. Regester*, 412 U.S. 755 (1973)). The total deviation for Texas’ 150-member House redistricting plan adopted by the

LRB and modified by the federal court is 9.74 percent. The total deviation for the 31-district Senate redistricting plan adopted by the LRB and upheld by the federal court is 9.71 percent. The 15-district SBOE plan drawn by the federal court has a deviation of 0.86 percent.

A federal court in Tyler issued a congressional redistricting plan after the Texas Supreme Court invalidated a plan drawn by a state district court.

Crossing county lines. Texas Constitution, Art. 3, sec. 26 requires that House districts be apportioned among the counties on the basis of population, according to a ratio obtained by dividing the state population, as ascertained by the most recent U.S. census, by the 150 House districts. Counties with larger populations are entitled to have within their boundaries the number of whole districts to which they are entitled based on their population, plus a partial district if any surplus is left over. Any surplus population must be joined with a contiguous county or counties.

The LRB House plan, as modified by the federal court, split only one county (Orange) with a population too small to include a whole district. No surplus population area for any larger county was included in more than one district.

Voting Rights Act. Sec. 5 of the federal Voting Rights Act (VRA, 42 U.S.C., sec. 1973c) applies only to certain states and their political subdivisions, including Texas, that have a history of low turnout and discrimination against certain racial and ethnic minorities. These jurisdictions must submit all proposed policy changes affecting voting and elections to the Voting Rights Section of the Civil Rights Division of the U.S. Department of Justice (DOJ) or to the U.S. District Court for the District of Columbia for “preclearance.”

Under sec. 5, state and local governments bear the burden of proving that any proposed change in voting or elections is neither intended, nor has the effect, of denying or abridging voting rights on account of race, color, or membership in a language-minority group. No

state or local voting or election change may take effect without preclearance.

A proposed plan is “retrogressive” under sec. 5 if its net effect would be to reduce minority voters’ “effective exercise of the electoral franchise” (as defined by *Beer v. United States*, 425 U.S. 130 (1976)), when compared to a benchmark plan. Generally, the most recent plan to have received sec. 5 preclearance (or to have been drawn by a federal court) is the benchmark plan. DOJ will object to a proposed redistricting plan if it reduces minority voting strength relative to the benchmark plan and if a fairly drawn alternative plan could ameliorate or prevent that retrogression. In *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), the U.S. Supreme Court ruled that DOJ must preclear redistricting plans that are not retrogressive in purpose or effect when compared with the jurisdiction’s benchmark plan, even if the plans violate other provisions of the VRA or the Constitution.

During the most recent redistricting, DOJ objected to the LRB House plan for having a net three fewer districts with a majority of Spanish-surname registered voters compared to the House plan used in the most recent elections. Any DOJ objection to part of a redistricting plan invalidates the entire plan. However, the federal court panel reviewing other legal challenges to the LRB House plan made changes that addressed the objections raised by DOJ and upheld the rest of the plan. DOJ raised no objection to the LRB Senate plan, which the federal court later upheld against other challenges. Neither the congressional nor the SBOE plans were submitted to DOJ for sec. 5 preclearance because they were drawn by federal courts.

However, any plan drawn by a state court would have been subject to preclearance review.

Sec. 2 of the VRA became a major factor in redistricting in 1982, when Congress amended it to make clear that *results*, not intent, are the primary test in deciding whether discrimination against minority voters exists, based on the “totality of the circumstances.” Unlike sec. 5, sec. 2 applies nationwide. Plans precleared under sec. 5 still can be challenged under sec. 2 of the VRA or on federal

constitutional grounds. However, the burden of proof shifts from the jurisdiction creating the plan to those challenging the proposed redistricting.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the U.S. Supreme Court established a three-part test that plaintiffs must meet when charging minority vote dilution under sec. 2:

- the protected group is “sufficiently large and geographically compact to constitute a majority in a single-member district”;
- the group is politically cohesive; and
- the majority votes in a bloc to the extent that the minority’s preferred candidate is defeated in most circumstances.

The federal court panel considering sec. 2 and constitutional challenges to the LRB House and Senate plans and the drawing of the congressional plan determined that creation of additional minority “opportunity” or “influence” districts ran the risk of diluting minority voter influence in other districts. It also determined that adding new minority districts in the congressional plan may have been allowable as a matter of political judgment if the Legislature were drawing the districts, but because adding such districts was not required by federal law, it was beyond the discretion of a federal court.

Racial gerrymandering. While the VRA makes protection of minority voting rights an important feature of the redistricting process, a narrowly divided U.S. Supreme Court in a series of decisions in the 1990s

struck down as unconstitutional redistricting plans in which racial considerations were a dominant purpose. In the original *Shaw v. Reno* opinion (509 U.S. 630 (1993)), the court rejected a redistricting plan that was “so bizarre on its face” that it was unexplainable on grounds other

than race. Subsequent decisions in *Miller v. Johnson*, 515 U.S. 900 (1995), and later *Shaw* cases established that the existence of bizarrely shaped districts alone is not sufficient to prove racial gerrymandering.

A federal court panel changed the LRB’s House redistricting plan to address objections raised by the U.S. Department of Justice.

In *Bush v. Vera*, 517 U.S. 952 (1996), a case challenging the Texas congressional redistricting plan, the Supreme Court recognized that the state could consider race as a factor, but the Texas congressional plan was unconstitutional because “race was ‘the predominant factor’ motivating the drawing of district lines and traditional, race neutral districting principles were subordinated to race.” In the most recent racial gerrymandering decision, *Hunt v. Cromartie*, 121 S.Ct. 1452 (2001), the Supreme Court, ruling for the fourth time regarding North Carolina congressional districts originally challenged in *Shaw*, upheld the districts on the ground that political affiliation, rather than race, was the determining factor in drawing the new districts.

Census challenge. Controversy lingers over the census data to be used in redistricting. Despite an apparent improvement in accuracy, the census still undercounts segments of the population, leading to calls to adjust the raw “headcount” by means of statistical sampling. (See House Research Organization Focus Report No. 76-20, *Redistricting by the Numbers: Issues for Census 2000*, February 28, 2000.) On the advice of the U.S. Bureau of the Census, Secretary of Commerce Don Evans opted to release only the unadjusted headcount numbers. A California federal district court rejected a challenge to Evans’ decision filed by the City of Los Angeles, joined by San Antonio and others, and an appeal is pending before the 9th U.S. Circuit Court of Appeals.

Redistricting Chronology

The Texas Legislative Council (TLC) redistricting web page, <http://redweb01/redist.htm>, includes a list of the various proposed redistricting plans considered by the Legislature, the Legislative Redistricting Board (LRB), and the courts. The most commonly requested plans are available on the TLC web site and have been assigned code numbers (for example, 1151C), cited below. The TLC web site also includes maps of the finally adopted plans and the text of the final court opinions and letters from the U.S. Department of Justice.

1997

August-September

Federal court panels allow legislative and congressional districts used in the 1996 elections (with small modifications in the House plan) to be used for the remainder of the decade, effectively ending legal challenges to districts drawn using the 1990 census. Three-judge panel in Houston reviewing congressional districts retains jurisdiction over existing districts (*Vera v. Bush*, 980 F. Supp. 251 (S.D. Tex. 1997)) but later determines that its jurisdiction does not also cover districts drawn using 2000 census numbers.

2000

February-September

House and Senate redistricting committees hold joint regional hearings on 2001 redistricting issues.

April

2000 census count begins.

December 27

First lawsuits are filed in state and federal court challenging existing Texas legislative and congressional district lines drawn using now-outdated census data.

December 28

U.S. Census Bureau announces statewide, unadjusted population totals. Based on the new population apportionment, Texas gains two additional seats in U.S. House of Representatives, for a total of 32 out of 435.

2001

January 9

77th Texas Legislature convenes in regular session.

March 6

U.S. Commerce Secretary Don Evans announces that the Census Bureau will release to the states for redistricting purposes only actual headcount numbers, not numbers adjusted by sampling to account for people who may have been missed. On February 21, the City of Los Angeles, joined by San Antonio and several other cities, had filed suit in federal district court (*City of Los Angeles v. Evans*, No. CV01-1671 (C.D. Cal.)) to force the U.S. Department of Commerce to release detailed census data adjusted to account for those not counted. On April 26, U.S. District Judge Gary A. Feess dismisses the lawsuit, ruling that Evans acted within his legal discretion. Plaintiffs appeal to the 9th U.S. Circuit Court of Appeals.

March 12

Census Bureau releases detailed 2000 census data for Texas, allowing the redistricting process to begin.

April 26

Three-judge federal court panel in Marshall dismisses two lawsuits challenging existing congressional and legislative districts (*Mayfield v. Texas*, No. 2:00-CV-268 (E.D. Tex., filed Dec. 28, 2000, and *Lee v. Texas*, No. 6:01-CV-98 (E.D. Tex., filed March 5, 2001)) for lack of ripeness, since the Legislature had not yet had an opportunity to adopt a redistricting plan. On May 8, a federal

court panel in Waco dismisses a third suit (*Associated Republicans of Texas v. Texas*, No. W01-CA-083 (W.D. Tex., filed March 9, 2001)) for the same reason.

- April 30** House Redistricting Committee by a vote of 8-3-3 reports favorably, as substituted, HB 150 by D. Jones, et al., the House redistricting bill.
- May 8** House passes HB 150 on third reading by a nonrecord vote after having passed the bill on second reading the previous day by 76-71-2.
- May 9** Senate Redistricting Committee by 7-1 reports favorably, as substituted, SB 499 by Wentworth, the Senate redistricting bill. The bill dies when the full Senate does not consider the bill.
- May 11** Senate Redistricting Committee by 8-0 reports HB 150, the House redistricting bill, favorably, without amendment. The bill dies when the full Senate does not consider the bill.
- May 27** House Redistricting Committee by 9-6 reports favorably, as substituted, HB 722 by D. Jones, a congressional redistricting bill. The bill dies when the full House does not consider the bill.
- May 31** Regular session of the 77th Legislature adjourns *sine die* without enacting a House, Senate, congressional, or State Board of Education (SBOE) redistricting plan. On May 26, Gov. Rick Perry had sent a letter to Speaker Pete Laney and Lt. Gov. Bill Ratliff discussing the possibility of calling a special session to enact congressional and SBOE plans.
- June 6** LRB, composed of Attorney General John Cornyn, Land Commissioner David Dewhurst, Speaker Laney, Lt. Gov. Ratliff, and Comptroller Carole Keeton Rylander, convenes, as required by Texas Constitution, Art. 3, sec. 28. Cornyn is elected chair, Rylander vice chair.
- July 3** Gov. Perry informs Speaker Laney and Lt. Gov. Ratliff of his decision not to call a special session, citing Legislature's inability to reach consensus on a congressional redistricting plan.
- July 23** Three-judge (5th U.S. Circuit Judge Patrick E. Higginbotham and U.S. District Judges John Hannah, Jr., and T. John Ward) federal court panel in Tyler sets an October 1 deadline for state courts to consider congressional redistricting, with trial set for October 15. The panel earlier had consolidated several lawsuits into *Balderas v. Texas*, Civil No. 6:01-CV-158 (E.D. Tex.).
- July 24** After a series of hearings, LRB adopts House and Senate redistricting plans, each by three ayes (Cornyn, Dewhurst, Rylander) to two nays (Laney, Ratliff). When LRB formally approves the plans the following day, Speaker Laney files a minority report on the House plan.
- August 16** Secretary of State Henry Cuellar submits LRB House and Senate plans to the U.S. Department of Justice (DOJ) for preclearance review under sec. 5 of the federal Voting Rights Act and requests expedited consideration.
- September 12** Texas Supreme Court decides a state district court jurisdictional issue over congressional redistricting in favor of Democratic plaintiffs who had filed in Travis County over Republican plaintiffs who had filed in Harris County. Court determines that the issue became "ripe" for consideration as of May 31, when the Legislature adjourned *sine die* without approving a plan. Plaintiffs in *Del Rio v. Perry*, No. GN-003665 (353rd Dist. Ct., Travis County), originally had filed suit on December 27, 2000, but amended it on May 31, 2001, the same day that another suit, *Cotera v. Perry*, No. GN-101660, was filed in the same court and later consolidated with *Del Rio (Perry v. Del Rio)*, No. 01-0728).

Three-judge (5th U.S. Circuit Judge Patrick H. Higginbotham and U.S. District Judges A. Joe Fish and Sam A. Lindsay) federal court panel in Dallas conducts a trial on SBOE districts.

**September
17-28**

Trial on congressional districts is conducted in the Austin state district court of Judge Paul Davis.

October 3

Judge Davis issues a preliminary congressional plan (1065C), subject to revision, based largely on districts proposed by Lt. Gov. Ratliff.

October 10

Judge Davis issues final congressional plan (1089C), with revisions based largely on a plan proposed by Speaker Laney.

October 11

Tyler three-judge federal court panel postpones trial on a congressional plan until October 22.

October 15

DOJ announces no objection to LRB Senate plan under sec. 5 of the Voting Rights Act and a 60-day extension to continue its review of LRB House plan.

October 19

Texas Supreme Court, in *Perry v. Del Rio*, Nos. 01-0988 and 01-1002, invalidates Judge Davis' final congressional plan (1089C) for failing to provide the parties a meaningful hearing. (A majority of the court also determines, but does not rule officially, that incumbency protection is not an appropriate factor to be considered in a court-drawn plan.) Court also rejects Attorney General Cornyn's contention that Judge Davis should have used Cornyn's congressional proposal as the official state plan and the starting point in his deliberations. The ruling leaves no official state congressional plan.

October 22

Texas Supreme Court decides that LRB members and their aides have legislative immunity from being questioned about how they drew up legislative redistricting plans (*In re Perry*, No. 01-0979).

**October 22-
November 2**

Tyler three-judge federal court panel conducts a trial in Austin on a congressional district plan, starting from scratch with no plan as a basis for review. On October 24, Judge Davis declines further state-court jurisdiction.

November 2

Three-judge federal court panel in Dallas adopts a SBOE plan (1018E) proposed by plaintiff Vance C. Miller (*Miller v. Cuellar*, No. 3-01CV1072-G (N.D. Tex.)).

November 6-7

Tyler three-judge federal court panel conducts a trial in Austin on a Senate district plan, using LRB plan as the basis for review.

November 14

Tyler federal court panel issues a congressional redistricting plan (1151C). Panel begins with existing minority-majority districts, adds two new districts in high-growth areas, then uses as criteria historic district locations, emphasizing compactness and contiguity and following city and county boundaries where possible, and protection of incumbents holding major leadership posts, checking the final plan against statewide vote percentage for each party in recent congressional races. Panel determines that additional minority districts are not required by law.

**November
13-15**

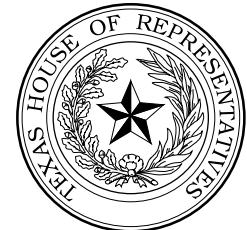
Tyler federal court panel conducts trial in Austin on a House plan, having notified the parties on November 8 that it would not use the LRB plan as the basis for review unless DOJ precleared the plan before or during the trial.

November 16

DOJ's Civil Rights Division objects to LRB House plan for causing a net loss statewide of three districts in which minority voters could have the opportunity to elect candidates of their choice, using Spanish-surname registered voters as the standard of comparison. Decision renders the plan legally unenforceable.

- November 28** Tyler federal court panel upholds LRB Senate plan (1188S) without change and adopts LRB House plan with revisions (1369H) addressing objections raised by Justice Department.
- November 30** U.S. District Judge John Hannah, Jr., a member of the Tyler federal-court panel, issues a concurring opinion decrying political gerrymandering in LRB House and Senate plans, but noting that the plans did not violate federal law.
- December 3** Candidate filing period begins.
- December** Various parties file appeals with U.S. Supreme Court concerning congressional, House, and Senate redistricting plans.
- 2002**
- January 2** Candidate filing period ends.
- March 12** Party primaries.
- April 9** Primary runoffs.
- November 5** General election.

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