

SUBJECT: Senate redistricting

COMMITTEE: Redistricting: favorable, without amendment

VOTE: 8 ayes — Uher, Jones, Earley, Finnell, Grusendorf, McCollough, Russell, Seidlits

6 nays — Blair, Craddick, Marchant, Martinez, Rodriguez, Wilson

1 absent — Moreno

SENATE VOTE: On final passage, May 15 — voice vote (11 members recorded nay — Bivins, Brown, C. Harris, O.H. Harris, Henderson, Krier, Leedom, Ratliff, Sibley, Sims, Truan)

BACKGROUND: To avoid legal pitfalls, legislative redistricting plans must adhere to certain standards and procedures. For additional background on redistricting, see House Research Organization Special Legislative Report Number 167, *Redistricting, Part Two: Procedures and Pitfalls*, March 15, 1991, and Special Legislative Report Number 169, *Redistricting, Part Three: The Voting Rights Act*, April 22, 1991.

Population equality. The U.S. Supreme Court, in a line of cases beginning with *Baker v. Carr*, 369 U.S. 186 in 1962, has required that legislative districts must have approximately equal population: the "one person, one vote" standard. The court has applied the equal-population doctrine to state legislative districts under the 14th Amendment, which guarantees that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The court generally has allowed the population of legislative districts to deviate up to 9.9 percent from the ideal district population, without being required to justify any variations within that range. (The ideal population for a Texas Senate district, based on the 1990 census, is 547,952, based on the state's population of 16,986,510 divided by 31 districts.) The "deviation range" is the sum of the percentages by which districts deviate the most above and below the ideal. Legislative district plans with ranges of population deviation greater than 9.9 percent generally will be held

unconstitutional unless the state can show a rational state policy justifying the population deviation. The highest population deviation range ever upheld by the court was a 16.4 percent deviation from the ideal district, based on special circumstances involving Wyoming.

The court has held that legislatures legitimately may seek to preserve the boundaries of political subdivisions. The observation of geographical and historical boundaries and the maintenance of compact and contiguous districts also have been found to be legitimate justifications.

Political gerrymandering. The U.S. Supreme Court has ruled that redistricting plans with partisan "gerrymandering," or the drawing of oddly shaped districts to benefit a particular political party, are open to legal challenge even if the disputed districts meet the population-equality test. In *Davis v. Bandemer*, 478 U.S. 109 (1986), the court established a two-pronged test for invalidating a gerrymandered plan under the equal protection clause: (1) a showing of intentional discrimination against an identifiable political group and (2) a showing of consistent discriminatory dilution of that group's voting power.

Some experts say the *Bandemer* decision created a high hurdle for invalidating a redistricting plan on the basis of partisan gerrymandering, making it the most difficult of all redistricting challenges to make. They say evidence of skewed results from several elections would be required before the Supreme Court would invalidate a plan. However, the court in 1988 was only one vote short of hearing arguments of a lower court decision that upheld a California congressional redistricting plan that had been challenged for gerrymandering.

New terms of office. Senators normally serve four-year staggered terms, with half of the senators elected every two years. Art. 3, sec. 3 of the Texas Constitution requires that *all* Senate seats come up for election after redistricting, since Senate-district boundaries invariably change during redistricting. To continue the staggered-term cycle, 15 of the senators elected after redistricting will serve two-year terms, while 16 will serve four-year terms. The Constitution requires that a drawing be held to determine which of the newly elected senators will serve the two-year

terms and which get four-year terms. Subsequently, Senate terms run for four years, until the next redistricting period.

The constitutional requirement that a new Senate be elected after redistricting also will force senators elected in 1990 — the year prior to redistricting — to serve two-year terms.

Contiguous, single-member districts. Art. 3, sec 25 of the state Constitution requires that state senators be elected from single-member districts that consist of contiguous territory. A 1961 attorney general opinion found that a district was contiguous if all the territory in it could be enclosed in a common boundary line without including any other territory (WW-1041). A 1981 attorney general opinion held that the "contiguous territory" provision did not prohibit a Senate redistricting plan from crossing county lines (MW-350).

Qualified electors or population? Art. 3, sec. 25 requires that Senate districts be based on the number of "qualified electors" in each district, which excludes aliens — both legal and illegal — persons under age 18, wards of the state and others, such as convicted felons who have not had their voting rights restored.

A 1981 attorney general opinion (MW-350) determined that the qualified voters standard had been struck down as unconstitutional by the federal courts in prior "one person, one vote" cases. But in 1981, when the Legislature used total population in enacting a Senate redistricting plan, then-Governor Bill Clements vetoed the bill, citing violation of the qualified voters requirement as one of his reasons. In January 1982 Dist. Judge Herman Jones of Austin rejected a challenge by the Texas Republican Party of a Senate redistricting plan drawn by the Legislative Redistricting Board based on total population — Judge Jones did not rule directly on the constitutional validity of the provision but noted that (unlike the 1991 redistricting process) detailed census figures for voting-age population were not available when the board approved its plan.

Census controversy. Controversy still clouds the release of the census data that is to be used in redistricting. The census has been attacked for undercounting, leading to pressure to adjust the count for errors. Figures

already released by the U.S. Bureau of the Census include a statement that the numbers may be adjusted later. The detailed figures to be used in redistricting were released on Feb. 5, but the settlement of a federal lawsuit gives the census bureau until July 15, 1991 to decide whether to adjust these figures for errors. On April 18 the census bureau conceded that it had failed to count 236,490 to 632,490 Texans in the 1990 census.

On Feb. 7, 1991, lawyers from the Texas Civil Rights Project and the Mexican American Legal Defense and Educational Fund (MALDEF) filed two lawsuits in Texas — one in state court and one in federal court — seeking adjustment of the census figures for use in redistricting. The lawsuits seek to prevent government officials from using or releasing the unadjusted 1990 census count without compensating for the undercount of minorities.

In the state suit, *Mena v. Richards*, Civ. Action No. C-454-91-F, District Judge Mario Ramirez on May 8, 1991 rejected a motion by the state defendants to dismiss the lawsuit. A hearing is scheduled for June 10, 1991 to consider a request by the plaintiffs for a temporary injunction to force any legislative plan adopted to be readjusted for undercounts of minorities.

In the federal suit, *Mena v. Mosbacher*, Civ. Action No. B-91-018, two motions are pending — a motion to dismiss the lawsuit filed by the defendant and a motion filed by the plaintiffs for a temporary injunction forcing legislative plans to be readjusted.

The federal Voting Rights Act. In 1975, Texas came under the provisions of the federal Voting Rights Act, enacted by Congress in 1965 to protect the rights of minority voters to participate in the electoral process in Southern states. Two sections of the act — Sec. 2 and Sec. 5 — affect Texas redistricting. Sec. 2 prohibits any practice that dilutes minority voting rights in any state and sets out how such a violation may be proved. Sec. 5 requires advance federal approval (preclearance) of changes affecting voting rights in Texas and other states in which minority voting rights have been denied in the past.

Under Sec. 5, Texas redistricting plans must be "precleared" by the U.S. Department of Justice or the U.S. District Court for the District of Columbia. The state bears the burden of proving that a proposed change is neither intended to deny or abridge voting rights on account of race, color or membership in a language-minority group nor has that effect. To be precleared a redistricting plan must be drawn so that it will not reduce the opportunities of minority voters to participate and influence elections. No plan will be precleared if it is found to be retrogressive and dilutes minority voting strength compared to existing policies. The no-retrogression standard set by the U.S. Supreme Court is that the electoral position of minority voters at least cannot be worse than under the current districts. Retrogression is most apparent when a district is "packed" with more minority voters than necessary for them to elect a representative of their choice or when minorities are "fragmented" among several districts, diluting their vote in any single district.

Sec. 2 of the act provides a legal avenue for those who wish to challenge existing voting practices on the grounds that they are discriminatory. Sec. 2 applies to all states and can be enforced at any stage in the redistricting process, even after a plan has been precleared under Sec. 5. Sec. 2 prohibits use of voting qualifications or prerequisites to voting or use of any practice that denies or abridges the right of any citizens to vote on account of race, color or language. The burden of proof in Sec. 2 challenges lies not with the government entity submitting the changes, but with the plaintiff challenging the plan. Sec. 2 is violated if, considering the "totality of the circumstances," protected groups have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

The U.S. Supreme Court, in its 1986 decision *Thornburg v. Gingles*, 478 U.S. 30, established a three-part test that plaintiffs must meet when charging vote dilution: 1) the protected group must be sufficiently large and geographically compact to constitute a majority in a single-member district; 2) the group must be politically cohesive; and 3) the white majority must vote in a bloc to defeat the minority-preferred candidate in most circumstances.

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It is possible that a plan could be precleared under Sec. 5 and still not meet Sec. 2 standards. For example, the retrogression standard set out in Sec. 5 sets *existing* minority voting strength as the benchmark for determining retrogression. Plans that improve the situation of protected minorities only slightly or that leave matters as they were would not be retrogressive, yet could still be held to violate Sec. 2 based on discriminatory results.

ANALYSIS: SB 31 would redraw the boundaries for the 31 Texas Senate districts for the election of the 73rd Legislature.

SENATE DISTRICTS — GREATEST DEVIATIONS FROM IDEAL POPULATION

Existing Districts

Above Ideal			Below Ideal		
District Number	Deviation	Minority Percentage	District Number	Deviation	Minority Percentage
7	+45.90	20.0	13	-24.84	67.5
10	+40.44	14.8	15	-23.30	70.6
22	+21.84	10.5	31	-18.42	24.9
14	+17.17	31.6	4	-15.99	24.7
8	+14.79	17.3	30	-15.90	14.5

Proposed Districts

Above Ideal			Below Ideal		
District Number	Deviation	Minority Percentage	District Number	Deviation	Minority Percentage
7	+4.82	14.8	15	-4.94	71.0
25	+4.73	29.7	26	-4.65	59.6
2	+4.51	30.2	31	-4.28	23.8
10	+4.33	12.3	22	-4.23	15.6
17	+3.87	18.7	19	-4.15	62.9

MINORITY LEGISLATIVE DISTRICTS
Existing Black Majority and Influence Districts (1990 Census)

District Number	Total Population	Voting Age
13	53.3%	50.1%
23	44.9	44.2
6	23.7	22.3
15	22.1	21.7
12	20.5	18.8

Proposed Black Majority and Influence Districts (1990 Census)

District Number	Total Population	Voting Age
13	53.4%	50.4%
23	45.4	44.2
6	23.8	22.0
12	19.7	18.0
1	18.0	16.3

Existing Hispanic Majority Districts (1990 Census)

District Number	Total Population	Voting Age
27	83.4%	78.8%
29	70.9	66.9
21	60.9	56.5
20	60.4	56.0
26	55.4	51.1

Proposed Hispanic Majority Districts (1990 Census)

District Number	Total Population	Voting Age
27	83.0%	78.6%
29	70.9	67.0
21	64.8	60.9
20	62.6	58.0
15	56.6	50.8

Existing Combined Minority Districts (1990 Census)

District Number	Total Population	Voting Age
27	83.6%	79.0
29	73.8	69.9
23	70.6	66.4
15	70.6	64.7
13	67.5	62.8

Proposed Districts (1990 Census)

District Number	Total Population	Voting Age
27	83.2%	78.8
29	73.8	70.0
23	72.3	67.7
15	71.0	65.1
13	67.6	63.1

