SUBJECT: Redistricting the Texas House of Representatives

COMMITTEE: Redistricting — committee substitute recommended

VOTE: 8 ayes — D. Jones, Glaze, Bosse, Counts, Dunnam, McClendon, P. Moreno, Sadler

4 nays — Grusendorf, Keel, Marchant, Wilson

3 present, not voting — Hunter, Luna, Pitts

WITNESSES: For — Lori C. Renteria; Walter Hinojosa, Texas AFL-CIO; (*Registering, but did not testify):* Myrtle L. Captain, Texas State Chapter of NAACP; Bill Owens

Against — Roger Collins, City of Angleton; Mayor Kelly Couch, City of Vernon; Judge Bob Doonan, Burleson County Commissioners Court; Beatrice Gallegos; Ro'Vin Garrett; Jack Harris, Brazoria County; J. Patrick Henry and Gerald Roberts, Citizens of Angleton; Raymond McNeel, Montgomery County Democratic Party; Pat O'Grady, Free Market Committee; Warren Pierce; Frank Summers, Milam County Commissioners Court; Karen Taylor, Brazoria County Chamber of Commerce; John Willy, Brazoria County; Jeri Yenne, Brazoria County and Brazoria County Commissioners Court; Nina Perales, Mexican American Legal Defense and Educational Fund, Inc.; *Registered, but did not testify:* John Blankenship, Jon Burrows, Bell County; James D. Clawson, Donald Payne, Larry Stanley, and Jim Wiginton, Brazoria County; Tom Haughey, Texas Republican County Chairmen's Association; Joseph A. Martinez; Mayor Loyd Neal, City of Corpus Christi; Morris L. Overstreet, Texas Coalition of Black Democrats; Donald Payne, J. Herman Smith, Angleton Independent School District; Chad Williams, Lynda Woolbert; David Almager, Mexican American Legal Defense and Educational Fund, Inc.

On — David Hanna, Texas Legislative Council

BACKGROUND: The U.S. Constitution, Art. 1, sec. 2 requires an "actual enumeration" or census every 10 years to apportion the number of representatives each state will receive in the U.S. House of Representatives. The release of the population figures from the Census also triggers redistricting — or redrawing of political boundaries — of the state's legislative and State Board of Education districts as well as congressional districts. The 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."

The legal standards for Texas House redistricting fall into three general areas:

- state and federal constitutional standards, such as the county-line rule; one-person, one-vote and allowable deviations; and the functions of the Legislative Redistricting board;
- application of the federal Voting Rights Act requirements for challenging discriminatory plans under sec. 2 and the requirements for advance federal approval ("preclearance") under sec. 5;
- U.S. Supreme Court decisions during the 1990s prohibiting "racial gerrymandering," beginning with *Shaw v. Reno,* 509 U.S. 630 (1993).

Each standard must be considered in conjunction with the other requirements. The interaction can be complex and contradictory, especially in applying Voting Rights Act protections to avoid diluting minority voting strength and adhering to the *Shaw* standard that race cannot be the predominant factor in redistricting. For the Legislature, the challenge will be how to navigate what the 5th U.S. Circuit Court of Appeals recently called the "difficult passage through the Scylla of the Voting Rights Act and the Charybdis of *Shaw*." (*Chen v. City of Houston*,__ F.3d__ (CA5 2000).)

Crossing county lines. A key limit on House redistricting is Art. 3, sec. 26 of the Texas Constitution. This provision requires that House districts be apportioned among the counties based on their population, according to a ratio obtained by dividing the state population, as ascertained by the most recent U.S. census, by the 150 House members. Based on the census data for the 2000 federal census received on March 12, Texas has a population of

20,851,820 as of April 1, 2000. The ideal population of a Texas House district is 139,012.

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. When two or more counties form a district, they also must be contiguous.

The Texas Supreme Court has ruled that the rule prohibiting the unnecessary division of counties must be followed to the greatest extent possible without violating the 14th Amendment's requirement of population equality. In *Smith v. Craddick*, 471 S.W.2d 375 (1971), the Texas Supreme Court invalidated the Legislature's 1971 House redistricting plan, ruling that the plan had divided counties in violation of the state constitution and that the state had failed to present evidence that the divisions were necessary in order to meet the federal population-equality requirement.

The Texas Supreme Court ruled in *Clements v. Valles*, 620 S.W.2d 112 (1981), that the 1981 House redistricting plan adopted by the Legislature again violated Art. 3, sec. 26, because it crossed county lines unnecessarily. The 1981 House plan cut 34 of the state's 254 counties, only 24 of which had a surplus population.

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 must have approximately equal population: the “one person, one vote” standard. States have more flexibility in meeting the population-equality requirement for state legislative redistricting plans. The court has characterized as "minor" overall deviations of under 10 percent, and the court has accepted deviations of up to 16.4 percent, if justified.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), the court noted that legislative plans invariably involve more districts than congressional plans. Consequently the court generally has allowed populations of legislative districts to deviate up to 9.9 percent from the ideal district population. In *White v. Regester*, 412 U.S. 755 (1973), the court upheld the 1970 Texas House district plan, which had a deviation range of 9.9 percent from the ideal

district population. The most populated district in the plan was 5.8 percent over the ideal size and the least populated district was 4.1 percent under the ideal size. In *Voinovich v. Quilter*, 507 U.S. 146 (1993), involving an Ohio legislative plan, the Supreme Court held that preserving the boundaries of political subdivisions was a "rational state policy" that could justify significant population deviations.

Redistricting deadlines. The Legislature has until the end of the regular session to redraw legislative districts. The Texas Constitution sets no deadline for the Legislature to complete redistricting of congressional or State Board of Education seats. The Texas Supreme Court has interpreted the "first regular session" as meaning the regular session during which the census is published, even if this gave the Legislature only a few days to adopt a plan (See *Mauzy v. Legislative Redistricting Board*, 471 S.W.2d 570 (1971).

If the Legislature fails to adopt new House or Senate districts by the end of the regular session, or if a plan is vetoed by the governor or invalidated by a court or the U.S. Department of Justice under the federal Voting Rights Act, Art. 3, sec. 28 of the Constitution turns redistricting over to the Legislative Redistricting Board (LRB). The LRB consists of the lieutenant governor, House speaker, attorney general, comptroller, and land commissioner. 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 and 1981.

Voting Rights Act. Texas' redistricting plans will be subject to the federal Voting Rights Act (VRA), which Congress enacted in 1965 to protect the rights of minority voters to participate in the electoral process in southern states. Sec. 5 of the act was broadened to apply to Texas and certain other jurisdictions in 1975. Amendments enacted in 1982 expanded the remedies available to those challenging discriminatory voting practices anywhere in the nation.

Sec. 5 of the VRA (42 U.S.C. 1973c) requires certain states and their political subdivisions with a history of low turnout and discrimination against

certain racial and ethnic minorities to 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." The judicial preclearance process requires the jurisdiction covered by the VRA to file for a declaratory judgment action with the U.S. Justice Department serving as the opposing party. The administrative preclearance process is considered less costly and burdensome, and the Justice Department reports that well more than 99 percent of all preclearance requests follow the administrative procedure.

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. In effect, changes in election practices and procedures in the covered jurisdictions are frozen until preclearance is granted.

Retrogression. A proposed plan is retrogressive under the sec. 5 "effect" prong 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 have been drawn by a federal court) is the last legally enforceable redistricting plan. The effective exercise of the electoral franchise is assessed in redistricting submissions in terms of the opportunity for minority voters to elect candidates of their choice. The presence of racially polarized voting is an important factor considered by the DOJ in assessing minority voting strength. The DOJ will object to a proposed redistricting plan when it reduces minority voting strength relative to the benchmark plan and a fairly-drawn alternative plan could ameliorate or prevent that retrogression.

In *Reno v. Bossier Parish School Board*, 528 U.S. 320 (2000), the Supreme Court ruled that redistricting plans that are not retrogressive in purpose or effect when compared with the jurisdiction's benchmark plan must be precleared even if they violate other provisions of the VRA or the Constitution. However, plans precleared under sec. 5 still can be challenged

under sec. 2 of the VRA or on 14th Amendment grounds, even by the DOJ that had granted sec. 5 preclearance. However, the burden of proof shifts from the jurisdiction creating the plan to those challenging the proposed redistricting.

Sec. 2 challenges. Sec. 2 of the VRA offers a legal avenue for those who wish to challenge existing voting practices on the grounds that they are discriminatory. Sec. 2 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 exists, based on the "totality of the circumstances."

In 1986, the U.S. Supreme Court issued its first opinion interpreting the 1982 amendments to Sec. 2. In *Thornburg v. Gingles* (478 U.S. 30), the court, in upholding a Sec. 2 claim against multi-member legislative districts in North Carolina, established a three-part test that plaintiffs must meet when charging vote dilution. The three standards are:

- 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.

In *Growe v. Emison* 507 U.S. 25 (1993), the Supreme Court applied the *Gingles* standards to Sec. 2 challenges of single-member districts. The court held that the three *Gingles* standards are as necessary to establish a sec. 2 claim of minority vote fragmentation concerning a single-member district as it is for establishing minority vote dilution in a multi-member plan. The court in *Growe* also said that federal courts should defer to both state legislatures and state courts when they are addressing redistricting and not act until the state entities have had an opportunity to perform their duties in a timely fashion.

Maximizing minority-controlled districts. The Supreme Court's analysis in *Johnson v. De Grandy*, 507 U.S. 25, (1993) addressed the key sec. 2 issue of proportionality or the ratio of minority-controlled districts and the minority's share of the state's population. The *De Grandy* plaintiffs objected to a Florida redistricting plan because it was possible to draw additional Hispanic majority districts in Dade County. Even though the Supreme Court seemed to accept the contention that the *Gingles* prerequisites were satisfied, it rejected claims that additional majority-minority districts were required to meet sec. 2 claims. According to the court: "Failure to maximize cannot be the measure of Section 2." In other words, the court seemed to reject the contention previously raised in sec. 2 challenges, and adopted by the DOJ in sec. 5 preclearance reviews in the early 1990s, that if a majority-minority district can be drawn, then it must be drawn, assuming the *Gingles* criteria are met.

Racial gerrymandering. In a series of redistricting challenges during the 1990s, the U.S. Supreme Court grappled with guidelines on how to resolve the tension between the race-conscious VRA requirements and the constitutional restraints against race-based official actions under the Fourteenth Amendment. In the original *Shaw v. Reno* opinion, decided 5-4 as have most subsequent decisions based on the same reasoning, the Supreme Court rejected "redistricting legislation that is alleged to be so bizarre on its face that it is unexplainable on other grounds other than race."

Subsequent Supreme Court decisions in *Miller v. Johnson,*515 U.S. 900 (1995) and later *Shaw* cases established that the existence of bizarrely shaped districts is not sufficient to prevail in a claim of racial gerrymandering. 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."

The plurality opinion in *Bush v. Vera* focused on the use of the REDAPPL program and its then-unprecedented ability to provide racial and socioeconomic data down to the census block level. Before the 1990 redistricting process, racial and socioeconomic information only was

available on the basis of the larger census tract unit. REDAPPL displayed updated racial and socioeconomic data down to the census block level whenever new configurations of districts were drawn. The Court noted that the program enabled those drawing the districts to make more intricate refinements based on race than on any other demographic information. "In numerous instances, the correlation between race and district boundaries is nearly perfect . . . The borders of Districts 18, 29 and 30 change from block to block, from one side of the street to the other, and traverse streets, bodies of water and commercially developed areas in a seemingly arbitrary fashion until one realizes that those corridors connect minority populations." The court also found that use of REDAPPL contributed to a redistricting plan that not only neglected traditional districting principles such as compactness and contiguity but also offered a way to ignore traditional political boundaries by splitting voting precincts as well as cities and counties.

The most recent application of the *Shaw* doctrine to a Texas redistricting case came in March 2000 when the 5th U.S. Circuit of Appeals upheld a district courts summary judgment in favor of the City of Houston after its 1997 city council redistricting plan was challenged as a racial gerrymander impermissible under *Shaw*.

In agreeing with the district court's summary judgment for the city, the appeals court cited the standard set by Justice Sandra Day O'Connor in *Miller v. Johnson* that "To invoke strict scrutiny, a plaintiff must show that the State has relied on race in a *substantial* disregard of customary and traditional districting practices." The court recognized that race was given some consideration in drawing the new city council districts, but noted "the fact that minority-majority districts were intentionally created does not alone suffice in all circumstances to trigger strict scrutiny." The appeals court also cited a need to grant deference to an elected body in making an essentially political decision in redistricting.

On April 18, in *Hunt v. Cromartie,* ___ U.S. ___, (2001), the Supreme Court, ruling for the fourth time regarding North Carolina congressional districts originally challenged in *Shaw*, upheld the districts on the grounds that political affiliation rather than race was the determining factor in drawing the new districts. The majority opinion by Justice Stephen Breyer cited the *Vera* opinion to note that: "If district lines merely correlate with race because

they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify."

Census challenge. Controversy lingers over the census data to be used in the redistricting process. 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. The city of Los Angeles, joined by San Antonio and others, are challenging this decision in a California federal court, but no final decision is likely before the Legislature adjourns.

DIGEST:

CSHB 150 would adopt PLAN01063H as proposed by the House Redistricting Committee. Exact data on district population and other demographic information on PLAN01063H and other proposed amendments are available on http://redweb01/redist.htm.

Deviation. The total deviation of the CSHB 150 plan would be 9.98 percent, with the smallest district (District 85 deviating by 5.37 percent below the ideal population and the largest district (District 104) deviating by 4.61 percent above the ideal.

Pairs. According to the committee analysis of CSHB 150, the current residences of the following incumbent members would be paired in the same districts:

Proposed District 4 —
Rep. Clyde Alexander, D-Athens (Existing District 12)
Rep. Betty Brown, R-Terrell (Existing District 4)

Proposed District 8 —
Rep. Jim McReynolds, D-San Augustine (Existing District 17)
Rep. Paul Sadler, D-Henderson (Existing District 8)

Proposed District 19 —
Rep. Wayne Christian, R-Center (Existing District 9)
Rep. Ron Lewis, D-Mauriceville (Existing District 19)

Proposed District 21—
Rep. Allan B. Ritter, D-Nederland (Existing District 21)
Rep. Zeb Zbranek, D-Winnie (Existing District 20)

Proposed District 32 —
Rep. Ignacio Salinas Jr., D-San Diego (Existing District 44)
Rep. Eugene "Gene" Seaman, R-Corpus Christi (Existing District 32)

Proposed District 84—
Rep. Carl Isett, R-Lubbock (Existing District 84)
Rep. Gary Walker, R-Plains (Existing District 80)

Proposed District 88—
Rep. Warren Chisum, R-Pampa (Existing District 88)
Rep. Rick Hardcastle, R-Vernon (Existing District 68)

Proposed District 123—
Rep. Frank J. Corte, Jr., R-San Antonio (Existing District 123)
Rep. Mike Villarreal, D-San Antonio (Existing District 115)

Proposed District 147—
Rep. Garnett Coleman, D-Houston (Existing District 147)
Rep. Robert E. Talton, R-Pasadena (Existing District 144)

Proposed New Districts (no current incumbent):

District 9 —Angelina, Jasper, Tyler counties
District 17—Bell, Falls, Milam counties
District 20—Hardin, Liberty, Montgomery (part) counties
District 28— Fort Bend (part), Grimes, Waller counties
District 44— La Salle, Live Oak, McMullen, Maverick, Webb (part), Zapata counties
District 52— Travis (part) County
District 54— Lee, Williamson (part) counties

District 68— Collin (part), Rockwall counties
District 69—Collin (part) County

The bill states legislative intent that if any county, tract, block, or other geographic area was erroneously omitted, a court reviewing the bill should include the area in the appropriate district, using any available evidence of the Legislature's intent.

The new districts would not affect the membership or districts of the Texas House for the 77th Legislature and would take effect beginning with the 2002 primary and general elections.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2001.

NOTES

The filed version was a "placeholder" bill that was replaced by the committee substitute.