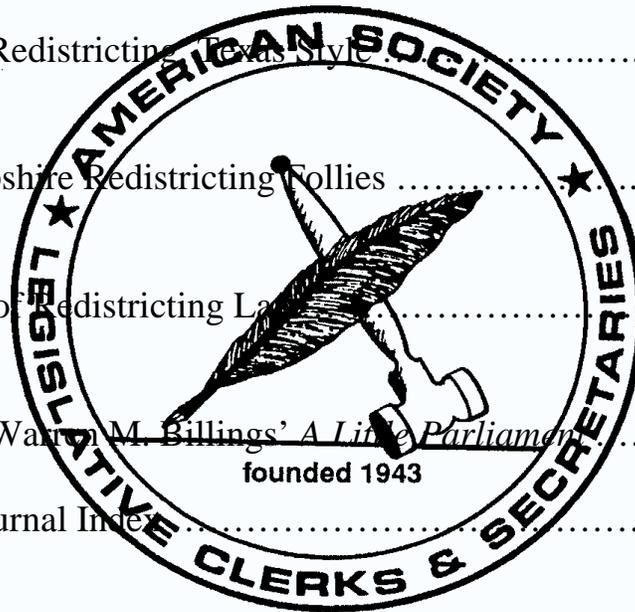


# Journal of the American Society of Legislative Clerks and Secretaries

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## CONGRESSIONAL REDISTRICTING, TEXAS STYLE

By Patsy Spaw,  
Secretary of the Texas Senate

The 2003 Texas redistricting battle received press attention nationwide. While stories of Texas representatives bunking at a Holiday Inn in Ardmore, Oklahoma, and Texas senators setting up a war room at the Albuquerque, New Mexico, Marriott made for great press, less coverage was given to the basis of the dispute: the intersection of politics and parliamentary procedure in the Texas Legislature.

The fight, which was over the reapportionment of the United States House of Representatives districts in Texas, would span four legislative sessions--the regular session and three special sessions called to deal with the issue. Before the redistricting legislation was finally passed in October of 2003, observers of the Texas Legislature would witness historic events, including quorum breaks and unprecedented parliamentary maneuvers. It was a bumpy ride for both political parties.

### ***Background: History and Politics***

When the Texas Legislature assembled for its regular session in January, 2003, Republicans were in control of both houses of the legislature for the first time since Reconstruction. During the previous legislature, which met in regular session from January to May of 2001, the house had a Democratic majority and the senate a Republican majority. Because of this split, that legislature had reached an impasse in its attempts to pass legislation for reapportioning the state into the new state senate and house districts and the new congressional districts following the 2000 census. The task of drawing the new maps for the state senate and house seats fell to a constitutionally created state panel. The congressional district reapportionment was made by a federal court.

The elections held under the state redistricting panel's plans in 2002 resulted in Republican gains in both houses of the state legislature. The Republicans increased their majority in the senate from 16 Republicans to 15 Democrats in 2001 to 19

Republicans to 12 Democrats in 2003. A Republican majority in the house (88 Republicans to 62 Democrats) was finally achieved in 2003 after a 16-seat swing. The party fared less well in congress; because the court-drawn plan for congressional redistricting generally favored incumbents, the Democrats held on to a majority in the house delegation, 17 to 15. Republicans objected to the district alignment implemented by the court because the election results under the plan did not reflect the Republican majority among Texas voters, but it was unclear whether they would have to wait until after the next decennial census in 2010 to have an opportunity to redraw the districts in order to increase their numbers in congress.

### ***Redistricting Resurfaces: Quorum Break in House (Ardmore Adventure)***

There seemed to be little enthusiasm for attempting to tackle redistricting again when the regular session of the 78th Legislature convened in January of 2003. But five weeks into the 140-day regular session, the chair of the house committee on redistricting requested an opinion from the Texas attorney general as to whether the legislature had a "mandated responsibility to enact a permanent map for the electoral period 2003 through 2010" even though a court-drafted alignment was already in place and an election had been held using those districts. In April, 2003, the attorney general issued an opinion that concluded that the legislature had the authority to pass a new plan but could not be compelled to do so until after the next census.<sup>1</sup> In May, with end-of-session deadlines looming, the house redistricting committee approved a house bill for congressional redistricting that favored GOP candidates.

The redistricting bill was set for debate on the house floor on Monday, May 12, 2003. The following Thursday was the last day in the house for house bills to be considered on second reading without a

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<sup>1</sup> Tex. Att'y Gen. Op. No. GA-0063 (2003).

suspension of the rules. When the house convened that Monday, more than 50 Democratic members were absent, denying the house the 100 members necessary to achieve a quorum. Since the days of the Republic of Texas, every Texas constitution has provided that two-thirds of the membership of each house constitutes a quorum.<sup>2</sup>

Without a quorum, no legislative business could be conducted in the house. If the Democrats could maintain the quorum break through the Thursday deadline, the redistricting bill was dead. A call was placed on the house as provided by the house rules and the Texas Constitution. The speaker ordered the sergeant-at-arms, who was assisted by state troopers, to find the missing legislators. The doors to the house chamber were locked, the members who were present were not allowed to leave, and towards evening sleeping cots were brought in.<sup>3</sup> If the house adjourned or recessed, the call would be dissolved. However, the house assumed the posture of standing at ease while the leadership worked to assemble a quorum, and members were then allowed to leave the chamber with the written permission of the speaker.

The quorum break was a coordinated effort by at least 51 Democratic members to stop congressional redistricting. The absent members, who were called both “Killer Ds” and “Chicken Ds,” had left Texas for Ardmore, Oklahoma, beyond the jurisdiction of Texas Department of Public Safety officers (who nevertheless did cross state lines to ask absent members to return voluntarily). The members were determined to stay away until the house leadership agreed to stop the redistricting plan or until the Thursday procedural deadline passed. The senate, continuing to work throughout the crisis, tried to identify critical legislation that might be threatened by the walkout.

On Wednesday, May 14, after a three-day standoff during which the house stood at ease, the call was dissolved, the house adjourned, and the speaker declared redistricting dead for the regular session. The house still did not have a quorum on Thursday, but on Friday, with the time having run out on the critical deadline, the Democrats returned to Texas and the house chamber.

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<sup>2</sup> Article III, Section 10, Texas Constitution. A quorum in the Texas House is 100 members; a quorum in the Texas Senate is 21 members. The quorum requirement for congress, under the United States Constitution, and for most state legislatures is a majority of the membership.

<sup>3</sup> Lou Dubose and Jan Reid, “The Man With the Plan,” *Texas Monthly*, vol. 32, no. 8, at p. 98, August 2004.

### *First Called Session: Stalemate in Senate*

Thwarted by the Democrats’ tactics during the regular session, the congressional redistricting effort was revived just weeks after that session’s close when the governor called a special session for that purpose.<sup>4</sup> The house committee on redistricting held meetings in the interim prior to the first called session, and quick passage in the house seemed inevitable once the session started. House Democrats urged their senate counterparts to take a stand against the Republicans during the special session, and this time redistricting failed because of action in the senate.

Under senate tradition and rules, two-thirds of the members (21) must vote to bring a bill up for consideration, so just 11 of the 31 members of the senate could block any bill from being considered. Called the “two-thirds rule” by journalists and many members, the practice is actually a senate rule combined with a senate tradition that encourages consensus and deal-making. Senate rules require that bills be placed on the calendar and taken up for consideration in the order in which they are reported from committee. A vote of two-thirds of the members present is required to suspend this “regular order of business” and take up a bill out of its regular calendar order.

The practice of placing “dummy” or “blocker” bills at the top of regular calendar order by reporting them out of committee before any other legislation is reported out dates back several decades. In recent sessions, these innocuous bills have had subjects like park beautification and preservation and are never intended to pass. Traditionally, the blocker bills stay at the top of the calendar throughout the session and are never taken up for debate. With the blocker at the top of the regular calendar order, a two-thirds vote to suspend the regular order is required to consider any other bill. This tradition has been followed by the senate under the leadership of both parties, and its use has been credited with making the senate more cordial, since a consensus must be reached in order for legislation to reach the floor for debate.<sup>5</sup> A

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<sup>4</sup> According to the Texas Constitution, Article III, Section 5, and Article III, Section 40, only the governor may call the legislature into special session, and each special session may last no longer than 30 days. There is no limit on the number of special sessions that may be called, and in fact, one may be called immediately upon adjournment of the preceding session. The subjects to be addressed during the session are determined by proclamation of the governor.

<sup>5</sup> The house has no comparable practice. In contrast, the order of business in the house is essentially controlled by the speaker, who

blocker bill was in place at the top of the calendar for the first special session, so Senate consideration of redistricting could be blocked by the concerted effort of 11 senators.

After the house had passed the redistricting bill and while it was being considered in senate committee, a Republican senator joined 10 Democratic colleagues in opposing redistricting. In addition to political alignment concerns, the map also raised concerns for some Republican members representing rural districts because of the potential dilution of rural voting strength. While eschewing some parliamentary maneuvers that would have circumvented the two-thirds requirement, the lieutenant governor continued to try to reach a compromise that would yield the 21 votes to bring the bill up, but it seemed that redistricting was dead again.

When it became clear that the senate was deadlocked in the first special session because of the coordination of the 11 senators, the lieutenant governor announced that if a second special session were called on redistricting, a blocker bill would not be used and the regular order of business would be followed. The redistricting bill would be the first bill reported out of committee, and a two-thirds vote would not be required to bring the bill up for consideration.

### ***Second Called Session: Quorum Break in Senate (Albuquerque Adventure)***

On July 28, 2003, the 29th day of the 30-day special session, the senate was scheduled to convene at 2:00 p.m. That morning Democratic senators and the lieutenant governor met on the redistricting issue. They could not reach an agreement. While the meeting was going on, rumors were spreading in the Capitol that the special session was going to be adjourned that day, the governor was going to call a second special session to begin immediately, and a call of the senate would be ordered to prevent Democrats from fleeing the Capitol.

When the senate convened that afternoon, it was three members short of a quorum. Eleven of the 12 Democratic senators and two Republican senators were absent. The lieutenant governor adjourned the first called session sine die at 2:30 p.m. The house, having recessed from a morning session until 3:00 p.m., also failed to muster a quorum in its afternoon session. The house adjourned sine die at 3:10 p.m., and the governor issued a proclamation calling a

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appoints a calendars committee that decides the order of business for legislation.

second special session to address congressional redistricting, to commence at 3:15 p.m.

Still lacking a quorum, the remaining senators met in the chamber to start the second called session and passed a motion for a call of the senate. The chamber doors were locked and the sergeant-at-arms was instructed to send for and compel the attendance of any unexcused absent member. After the call was issued, the senate stood at ease and members were allowed to leave with written permission. The house also failed to muster a quorum and adjourned for the day.

The 11 absent Democrats, forewarned of the impending call, had left the Capitol for the Austin airport, where they boarded two private planes bound for Albuquerque, New Mexico (the one Democratic senator who remained said he supported his colleagues' actions but remained to protect his constituents' interests).<sup>6</sup> Senate Democrats knew that if a blocker bill and the two-thirds vote tradition were not going to be used during the new special session, redistricting would pass by a simple majority vote. The Democrats explained breaking the quorum and crossing state lines as their only remaining option. "We're availing ourselves of a tool given to us by our Texas Constitution to break a quorum," said one Democratic senator in Albuquerque.<sup>7</sup> The Republicans countered that the Democrats' failure to attend was a dereliction of their constitutional duty and a violation of their oath of office.

The senate was at a stalemate. The Democratic senators vowed not to return until the leadership declared redistricting dead or until the lieutenant governor agreed to reinstate the use of the blocker bill during the second special session. Lieutenant Governor Dewhurst told reporters that he was disappointed and that "by leaving, our Senate Democrats are putting their party affiliation over what they were elected to do."<sup>8</sup>

Without a quorum in the senate, the main question became how to compel the absent members to return. The Republicans would employ parliamentary rules and enlist the courts in their efforts to get the absent

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<sup>6</sup> Gromer Jeffers, Jr., and Wayne Slater, "Democrats Bolt Again--to New Mexico," *Dallas Morning News*, July 29, 2003; Ken Herman, "Democrats Boycotting Senate," *Austin American-Statesman*, July 29, 2003.

<sup>7</sup> John Moritz, "Democrats Flee Texas, New Session," *Fort Worth Star-Telegram*, July 29, 2003.

<sup>8</sup> *Ibid.*

senators to come back. History was an uncertain guide.<sup>9</sup>

As part of the procedure under the call, the secretary of the senate issued arrest warrants authorizing the senate's sergeant-at-arms to arrest the absent senators and compel them to attend the session. Before it was clear that the senators were out of state, the sergeant-at-arms began the search by calling the absent members' homes and offices and eventually sending his staff to several locations across Texas. It was later learned that the bolters had actually been airborne on their way to New Mexico by the time the senate was being gavelled in for the second special session.

The lieutenant governor requested advice from the Texas attorney general about the senate's authority to compel the senators to return. The attorney general advised that the senate has expressed constitutional authority to compel the attendance of absent members and that the sergeant-at-arms has explicit authority under the senate rules to arrest absent members "wherever they may be found." An assistant attorney general told reporters that he would advise that the Department of Public Safety could be used to pursue the absent senators. But Lieutenant Governor Dewhurst responded that as long as the senators stayed out of state, "from a practical standpoint, there's not much we can do."<sup>10</sup>

During the call on the house in the regular session, the speaker had enlisted Department of Public Safety troopers to track down the missing representatives and, if located in Texas, to arrest them and return them to the Capitol (the troopers did not have the authority to arrest the members in Oklahoma). In response to the move by the speaker, the house Democrats had filed suit in a state court on the question of whether members who broke quorum could be arrested and physically compelled to attend the session. The court had ruled that Department of Public Safety troopers were not authorized to search

for or arrest the missing house members. During the second special session the Democrats were trying to have the court's decision extended to cover the absent senators, and the Texas attorney general was appealing the court's surprising ruling.

On the second day of the second special session, the house leadership capitalized on the absence of many redistricting opponents and quickly voted to suspend the house rules and pass a congressional redistricting bill. It is unusual for the house to achieve the four-fifths vote necessary to suspend its rules. But within 20 minutes of achieving a quorum, the rules were suspended so that the usual committee process and three days of floor action could be avoided, and the redistricting plan was passed. Meanwhile, the senate assembled on the second day just long enough to confirm that none of the absent members had returned, then continued to stand at ease.

### *Courts and Sanctions*

About a week into the second special session, the Democrats and Republicans took their dispute to the courts.<sup>11</sup> The absent senators filed suit in state district court alleging that the governor had no authority to call a special legislative session under the circumstances. The Democrats argued that the governor's power to call a special session is limited to "extraordinary occasions," as stated in the constitution. They asserted that there was no "extraordinary occasion" because a map approved by the United States Supreme Court was in place and it was valid until 2010. The suit also asked that the earlier ruling prohibiting the Department of Public Safety from arresting absent house members be extended to cover the absent senators and to prohibit the senate's sergeant-at-arms from arresting them.

On the same day that the Democrats filed their suit, the governor and lieutenant governor asked the Texas Supreme Court to issue a writ of mandamus compelling the absent senators to return and fining them if they did not. The Republicans' mandamus suit contended that the absent senators had a constitutional duty to attend the session and that the supreme court should order them to perform their

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<sup>9</sup> Before the Ardmore adventure of the "Killer Ds" during the regular session, the most recent significant quorum break had occurred in 1979, when a group of senate Democrats had boycotted the session for about a week. Dubbed the "Killer Bees," the members hid out in a garage apartment in Austin to avoid passage of a bill changing the presidential primary date to favor a Republican candidate from Texas. Department of Public Safety troopers and the Texas Rangers had searched for them and had even mistakenly arrested a representative's brother, but the members were elusive and eventually returned on their own after achieving their objective.

<sup>10</sup> Peggy Fikac and W. Gardner Selby, "Remap Issue Spawns Flight to New Mexico as Perry Calls Another Special Session," *San Antonio Express-News*, July 29, 2003.

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<sup>11</sup> Many of the court documents for the cases mentioned here can be found at websites maintained by the Texas Legislative Reference Library and the Texas Legislative Council. See Congressional Redistricting 2003, Legislative Reference Library of Texas, at <http://www.lrl.state.tx.us/citizenResources/redistrictDocs.cfm> (updated January 15, 2004); Texas Redistricting, Texas Legislative Council, at <http://www.tlc.state.tx.us/research/redist/redist.htm> (last revised February 13, 2004).

legislative duties. The suit also asked that the Democrats be subject to fines and jail time if the court ordered them back to the Capitol and they refused to return. The supreme court refused to get involved in the legislative dispute, rejecting the Republicans' request for a writ of mandamus without commenting on the suit.<sup>12</sup>

After the supreme court's decision, the remaining senators voted to sanction their absent colleagues. On the 16th day of the session, a motion was made to impose monetary sanctions on the 11 absent Democrats if they did not return to the Capitol within 48 hours. Although one Republican senator joined with the remaining Democratic senator in voting against the monetary sanctions, the motion easily passed.

Under the terms of the motion, each absent senator would be fined \$1,000 the first day he or she was absent, \$2,000 the second day, and \$4,000 on the third day; beginning with the fourth day, the fine would accrue at the rate of \$5,000 per day for each day the member was absent until the end of the special session. The fines would total \$57,000 for each senator who stayed away until the end of the special session. The motion provided that the fine could not be paid from the senator's campaign funds and that, if collected, the money would go into the state's general revenue fund. The Democrats argued that the sanctions were like a "poll tax" and that they were being penalized for representing their constituents.<sup>13</sup>

The attorney general was consulted on the issue of imposing fines. He advised that the constitution authorized the use of fines to penalize the absent members. Article III, Section 10, Texas Constitution, provides for the two-thirds quorum requirement and states that when a quorum is not present, the remaining members may "compel the attendance of absent members in such manner and under such penalties as each House may provide." Senate rules also contain this provision.

A few days after imposing monetary fines, the senate Republicans increased the sanctions on the still-absent Democrats, voting to cut off cell phone access, travel allowances, supply purchases, and funding for newsletters and subscriptions. The absent members' parking spaces were taken away, as were the floor

passes of their staff. Payment for postage was reduced and the members were banned from using meeting rooms in the Capitol. The Democrats responded that fines and sanctions would not bring them back to the session.

While these actions were being taken at the Capitol, the fight continued in the courts. The Democrats filed a lawsuit in federal district court in Laredo and dropped their earlier filing in state court, consolidating their claims in the federal court. The lawsuit alleged that breaking quorum is a political statement covered under the First Amendment's protection of free speech. "This is a political statement by these senators. That is a core First Amendment right," the Democrats' lawyer said.<sup>14</sup> In addition, the suit asserted that the senate leadership was violating the Voting Rights Act and the due process and equal protection provisions of the United States Constitution.

The Democrats maintained that the lieutenant governor's decision not to use a blocker bill and the two-thirds vote rule was a violation of the federal Voting Rights Act. Because the Democrats represented heavily minority districts, the voting strength of their constituents would be diluted without the protection of the blocker bill and the two-thirds vote requirement, they argued. Any such dilution of minority voting rights, they said, would be subject to a preclearance review by the United States Department of Justice as provided in the Voting Rights Act.

A spokesman for the lieutenant governor scoffed at the suit, telling the press that "the Democrats' strategy is clearly to stall by filing novel lawsuits."<sup>15</sup> However, the Republican leadership did write to the justice department to rebut the Democrats' arguments. The Republicans argued that the two-thirds rule was only a senate tradition, that it had been disregarded many times by the senate over the years, and that its use was not subject to review by the federal government.

Despite the sanctions, the court filings, and all the angst and journalists' ink, the second special session, which ran its full 30-day course, ended with the 11 Democrats still in New Mexico and no new redistricting map. On the same day the legislature adjourned sine die, Republicans received a response letter from the United States Department of Justice.

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<sup>12</sup> *In re: Rick Perry et al.*, No. 03-0726 (Tex. S. Ct. Aug. 11, 2003).

<sup>13</sup> John Moritz, "Senators Vote to Fine Texas 11," *Fort Worth Star-Telegram*, August 13, 2003.

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<sup>14</sup> Gary Scharrer, "'Texas 11' Sues State GOP," *El Paso Times*, August 21, 2003.

<sup>15</sup> *Ibid.*

The letter agreed with the Republicans' position: the senate did not need the permission of the Department of Justice before dispensing with the use of a blocker bill and the so-called two-thirds rule. The letter said that the practice is a matter of "internal legislative parliamentary rule[s] of practice--not a change affecting voting--and therefore is not subject to the preclearance requirement."<sup>16</sup> The Democrats, of course, disagreed with the opinion and vowed to continue their fight against redistricting.

That fight would soon become much harder. The Laredo federal court case ended when the district judge refused to rule and instead sent the case to a three-judge federal court panel for review. The judge expressed his skepticism about all of the Democrats' arguments and said that "the idea that the mere thought of passing a redistricting bill is a violation of the Voting Rights Act is odd," but that the "issue is at least fairly debatable, which means that I shouldn't be making a ruling."<sup>17</sup>

### ***Third Called Session: Redistricting Bill Passes***

When the second special session ended on August 26, 2003, the governor was expected to call another special session after the Labor Day weekend. The dean of the senate, who had been in New Mexico with the other 10 Democrats since the beginning of the second special session, returned to Texas during the holiday weekend vowing his continued opposition to redistricting but stating that his Democratic colleagues appeared to have no "out" planned to end their walkout and that he had committed to stay out of the state only for the 30-day period of the second special session. Unlike the quorum break in the house during the regular session that needed to last just four days in order to kill the bill, it was unclear how long the Democratic senators would need to remain outside the state, as the governor was sure to keep calling 30-day special sessions. With the senator's return, a quorum could be reached and the logjam broken. The governor soon called a third special session on congressional redistricting, to begin on September 15, 2003.

Two days before the third special session began, the federal judicial panel dismissed most of the Democratic senators' claims.<sup>18</sup> The panel ruled

unanimously that the application of the Voting Rights Act does not extend to internal senate procedural matters and that the congressional redistricting effort did not otherwise violate the federal constitution or federal law. The court stated that the suit was premature: a new bill would be subject to preclearance requirements, but without a bill the court could not act. The panel did not rule on the issue of the legality of the monetary fines, leaving the issue for the senate to resolve.

In addition to redistricting, the governor's proclamation calling the third special session allowed consideration of legislation for postponing the scheduled March 2 primary to give sufficient time for the map to be approved by the legislature and to be "precleared" under the Voting Rights Act by the United States Department of Justice. Government reorganization was also among the subjects included for consideration under the governor's call. Deprived of their essential 11-member boycott, the Democrats agreed to return but promised to use all of the legislative tactics available to them short of again leaving the state.

The fines and sanctions remained in place as the third special session began in an environment of palpable distrust, anger, and resentment. The enviable and almost unique Senate working relationship seemed doomed. Senators soon voted along party lines to suspend the penalties and put the Democrats on probation through January, 2005. The fines would be reinstated if the members subject to the penalties were absent for more than 72 hours during a quorum call in the senate. The senate rules were amended to clearly state that senators have a duty under their oath of office to attend sessions. The rule changes also provided for a loss of seniority privileges for senators who are absent without permission for more than 72 hours (seniority privileges include selection of office location, chamber seating, and parking spaces). Another proposed rule change that would have authorized fining a senator \$1,000 per day for unexcused absences did not pass. Republicans believed their actions to be conciliatory while maintaining the seriousness of the walk out, and Democrats viewed Republican actions as punitive and mean-spirited.

While the Democrats and Republicans sparred over the sanctions and rule changes, the senate and house passed separate versions of the redistricting plan. A conference committee was appointed to reach a compromise between the two maps, but the house and senate had very different ideas about how the new congressional district map should be drawn.

<sup>16</sup> Alma Walzer, "Laredo Court Becomes Stage for Remap Fight," *McAllen Monitor*, August 27, 2003.

<sup>17</sup> Gary Susswein, Laylan Copelin, and Ken Herman, "Lawsuit Fighting Remap is Kept Alive," *Austin American-Statesman*, August 28, 2003.

<sup>18</sup> *Barrientos v. Texas*, 290 F. Supp. 2d 740 (S.D. Tex. 2003) aff'd, 124 S. Ct. 2014 (2004). Appeal to Supreme Court still pending.

After many days of intense negotiations, the conference committee approved a plan that met most of the requirements of the house leadership. The house moved quickly to finally pass the bill, adopting the conference committee report by a vote of 76 yeas, 58 nays, three present not voting. When the conference committee report was brought up in the senate, the vote on approval was postponed--the senate was waiting until the house passed the government reorganization bill. House members protested that redistricting was being "held hostage" by the senate and that the reorganization bill was being "crammed ... right down our throat."<sup>19</sup> The lieutenant governor responded that the speaker had agreed to get the reorganization bill passed in return for senate passage of redistricting legislation.

The house had passed the conference committee report on redistricting on Friday, October 10, 2003, and the dispute came to a head that night. While the senate delayed the vote on redistricting, the house was waiting for the hour to arrive when the reorganization measure would be eligible for consideration (house rules require a 24-hour layout of a conference committee report before action on the floor can occur). Before the time came, the house lost its quorum to a football game--members were leaving for Dallas that evening to attend the football game between the University of Texas and the University of Oklahoma on Saturday. The following Sunday, after fiery debate on the house floor about the process, the government reorganization bill was passed. Then, five months after the house Democrats left for Ardmore, Oklahoma, redistricting finally passed with the senate voting 17 yeas to 14 nays and headed to the governor's desk for his signature.

### *Aftermath*

The delays in redrawing the congressional districts led the legislature to move the date of the 2004 primaries back a week, from March 2 to March 9, to give the Department of Justice time to examine and preclear the plan as well as to provide time for the anticipated court challenges. The new plan was predicted to give as many as seven more congressional seats to Republicans, potentially giving them a majority of 22 to 10 in the state's delegation in the United States House of Representatives.

In December of 2003, the Department of Justice approved the new districts, deciding that the plan did not violate the Voting Rights Act. In January, a

three-judge federal court panel agreed, clearing the way for the March primaries to be held based on the new congressional district maps.<sup>20</sup> The court found that the legislature did have the authority to redraw the districts more than once during the 10-year period between the censuses. They also ruled that the map was constitutional and did not violate the Voting Rights Act. The state petitioned the United States Supreme Court to uphold the lower court's ruling and find the congressional districts constitutional. On October 18, 2004, the supreme court remanded the case to the lower court for review of its earlier finding, but the order did not affect the November elections.

The struggle over parliamentary procedure caused by the supermajority quorum requirement resulted in efforts to amend the state constitution during the third special session. Companion senate and house joint resolutions proposed amending the constitution to change the quorum requirement for the legislature to a simple majority of the members elected. No action was taken on these resolutions. A second house joint resolution proposed that the quorum be two-thirds of the membership, excluding the members the presiding officer determined to be absent from the state. This proposal received committee approval but was not taken up by the full house.

A proposal for the creation of a bipartisan commission to reapportion districts and redraw lines received renewed attention throughout the summer, with many editorial pages across the state speaking in support of its provisions. If enacted, the measure would create a system intended to take the redistricting battle out of the hands of those with direct personal and political interest in the outcome and avoid the costly partisan fight that typically accompanies redistricting. The proposal was reintroduced during the fourth special session but did not pass.

The long-range effects of the rancorous 2003 redistricting battle on the legislature are not clear. Some observers question the viability of the vaunted collegiality and bipartisanship of the Texas Senate. The November elections will show how effective the redistricting effort was in electing more Republicans to congress. And the next regular session, scheduled for January of 2005, will perhaps show whether the legislature and the senate in particular, weathered the storm or has become a more fractious and fractured institution.

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<sup>19</sup> John Moritz and R.A. Dyer, "Senate Passes Remap, Ends Legislative Battle," *Fort Worth Star-Telegram*, October 13, 2003.

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<sup>20</sup> *Walter Session, et al. v. Rick Perry, et al.*, 298 F. Supp. 2d 451 (D. Tex. 2004).



## THE NEW HAMPSHIRE REDISTRICTING FOLLIES

By Steve Winter  
Chief Clerk of the New Hampshire Senate

The General Court, the name for the combined legislative branch of New Hampshire's government, spent the better part of four years working toward a satisfactory solution to a convoluted redistricting effort which drew upon the efforts of all three branches of state government – executive, legislative, and judicial. Before we look at redistricting, however, it is necessary to review a little New Hampshire history in order to understand our structure.

### *The Evolution of the New Hampshire General Court*

The original New Hampshire Constitution in 1784 specified that each town that had 150 voting males could have a member in the House of Representatives. Each additional 300 voting males would qualify the town for another House member. That provision lasted for nearly 100 years.

In 1877, the qualification was changed to 600 "inhabitants" in order to have a member of the House. Each 1200 additional inhabitants would qualify the town for an additional representative. That lasted for nearly 75 more years, since a number of towns decided not to send a representative at all.

By the early 1940s, the House membership had reached 443 members. A constitutional amendment was passed to limit the size of the House to between 375 and 400. It has stayed at 400 or slightly less ever since. Another constitutional amendment was passed in 1964 to provide for equal representation.

The New Hampshire Senate, on the other hand, had a more simplified evolution. Our original constitution of 1784 limited the number of Senators to twelve, divided by single member districts constructed by proportional taxes paid. The size of the Senate was increased in 1877 to twenty-four, still on the basis of taxes paid. In 1964 the districts were reconstructed based on equal population.

Why does New Hampshire maintain such a large House of Representatives? The most obvious reason

is that both the members and the voters like it that way. Each member represents only 3089 people. That makes them very close to their constituents and results in campaigns that are inexpensive and relatively painless. They know many of their "flock" personally and meet the others at the post office, the town dump, home social events, and knocking on doors. They don't do television ads and few even do radio or newspaper ads.

They do "retail politics," a phrase that originated here, by talking to as many folks as they can. As most ASLCS Journal readers already know, New Hampshire has virtually a volunteer legislature. The 400 members of the House earn \$40,000 per year – all of them put together. Each one earns \$100. The same is true for the Senators. The Senate President and the House Speaker, due to their lofty positions and grave responsibilities, earn considerably more. Each of them earns \$125 per year. With virtually everyone in state government from the governor down elected every two years, we also have a built-in recall system. If you don't like what you have, it's not long before you can throw them out.

### *We Do It Our Way*

Part First of the New Hampshire Constitution is our Bill of Rights. Written three years before the federal constitution, it contained 38 articles. Four articles have been added: 2-a, 28-a, 36-a, and 39. (The U.S. Constitution, of course, has only ten articles in its Bill of Rights.) My favorite New Hampshire right is in Article 10 – The Right to Revolution.

Part Second is the Form of Government and it has 101 numbered Articles, a few of which have been repealed. How do we maintain the House at 400 and the Senate at 24? The salient constitutional provision for each of the two bodies is similar. Part Second, Article 9 says that "... the legislature shall make an apportionment of representatives according to the last general census of the inhabitants of the state taken by authority of the United States or of this state. ...". Similarly, Article 26 of the same part says for the Senate, "The legislature shall form the single-

member (Senate) districts ... at its next session following each decennial federal census.” The mechanics are quite simple – divide the total inhabitants by the number of seats in each body and that is the ideal that each member should represent.

But of course this mathematical exercise is never that simple because there are other political restrictions. The first is that no town, city ward, or unincorporated place may be divided. Towns in each district must not only be kept whole but must also be contiguous. With towns varying so greatly in size, how can this be done? New Hampshire has over the years come up with ingenious devices to comply with its constitution.

One way is to combine towns in multi-member districts in the House (not allowed in the Senate). For instance, if one town has a population of 4500 and is located next to a town of 1500, we combine the two towns into one district of 6000 having two representatives. We also create “floterial” districts. Would you say that again, please? Floterial districts – where one member “floats.” Say you have three towns, each of which has a population of 4000. Each town would get one representative representing 3000 for the town (three districts equaling three representatives) and all inhabitants of all three towns would get to vote on a second representative who would represent the extra 1000 per town, 3000 total in the three towns, in a fourth district. (See more on floterial districts later.)

The final restriction is that no House district may cross county lines because of another New Hampshire oddity. All of the members of the House who come from one county form what is known as the County Delegation. The County Delegation, having the same members but acting separately from the state legislature, forms the legislative branch of each of the ten counties. It is the County Delegations, meeting at county seats across the state, which pass the county budgets and do all other things a legislative branch of that level of government would do. All for \$100 a year.

### ***Setting Up the Conflict***

With that background, we now delve into what happened in 2001, 2002, 2003, and 2004. I will mention here that for the first two years of the following scenario, I was a member of the House of Representatives. I was elected Clerk of the New Hampshire Senate in December of 2002.

The first year of the 157<sup>th</sup> General Court, 2001, opened with very straight-forward proposals from each body. HB 420 was introduced in the House of Representatives in January to redistrict the House while SB 1 was introduced in the Senate on the first day of February to redistrict the Senate. The bills divided the state into districts which followed the constraints of the constitution for their respective bodies.

Introduced as bills, each of the proposals had to satisfy the rules of both bodies of the General Court. That is, each needed a public hearing in both houses and, if passed by both, had to go to the governor for signature. This is how New Hampshire had redistricted for years and this time it would be no different. But we all know that redistricting is more a political act than anything else. Power is exercised by the party with the votes and the minority should expect no less. But they did. This time state government was split between the two parties. While both houses of the legislature were controlled by one party, the governor was from the other and she held the power to veto.

The legislature assembles “annually on the first Wednesday following the first Tuesday in January” and is supposed to finish its work by the end of June each year. The bills were both quite contentious. Charges of “unfair” or “unconstitutional” flew from one side to the other. The governor weighed in, saying that in her opinion the two plans were blatantly both unfair and unconstitutional. The Senate plan was reported out of Senate committee with a recommendation to re-refer back to committee for more work. The House plan never made it out of committee. The House has the option to “retain” the bill in committee until the second year and that is what it did. Neither plan moved out of its original body in 2001.

As the new 2002 session opened, the posturing reduced enough so that both bodies reported the bills out of committee with a recommendation of Ought to Pass with Amendment and those motions passed. Each bill was amended and forwarded to the other body to begin hearings. By the third week of March, it seemed that progress would be made. While not to everyone’s liking (what legislation is?), both bills were passed and enrolled on March 21, 2002.

At the same time the above bills were progressing, the Senate introduced a bill which was designed to reapportion the districts – in the House! Not popular in the House at its inception, it was soon recognized

that it might be a good idea to have a backup plan, just in case.

### ***The Veto Gun is Fired – Three Times***

On March 29, 2002 the governor vetoed the Senate bill which reapportioned the Senate districts and on April 3, she vetoed the House bill which reapportioned the House districts. Then the fun began. The filing period for candidates running for seats in both bodies of the General Court was to begin on July 5. The process had already taken fifteen months and we were back to square one. The entire process needed to start over unless the vetoes could be overridden.

The House options were to (1) override the governor, (2) rely on the Senate plan redistricting the House, or (3) bring in a new bill. They attempted all three. At the same time, the minority party filed suit in the Supreme Court to “review the entire redistricting mess.”

After a few visits to the table for deserved rest, various amendments in both bodies, and considerable parliamentary maneuvering, SB 336, the Senate bill to redistrict the House, passed both bodies and was enrolled in late April. The governor, however, had her own view of the plan. She exercised her third veto of a redistricting plan a week later. With three plans down in flames, the next move was an attempt to override the governor in late May. The Senate, being almost evenly divided, seemed at an impasse and the Supreme Court was now breathing down the neck of the General Court, looking for some resolution.

All three plans were brought up in late May for a motion to override (constitutionally, to “pass the bill, notwithstanding the governor’s veto”), which would require a 2/3 majority. At that point, it seemed impossible to get a 2/3 agreement on whether the sun would rise in the morning and, as predicted, all efforts to override crashed and burned. At this point, there was no redistricting plan and – no plan.

### ***The Bypass Plan***

With a month left in our session, we had nothing on the books and nothing in the wings. I, as a member of the House, poured over Mason’s, looking for options. What could we try that had not yet been tried? No matter what plan we passed, the governor was intent on vetoing that plan. Why was that tolerated? The constitution clearly said that, in the case of both bodies, the legislature was to form the

districts. Why did the governor have the power to thwart the will of the legislature? It was because of the vehicle used. We had always redistricted by using a bill. All bills need to be signed by the governor. How could we avoid that?

Mason’s provided a possible answer – a legislative order. I gathered five other members and we began our research. Mason’s said that an order could be used to “lay down policies” or “direct action” and that they were subject to the same rules as resolutions. In New Hampshire, resolutions of the legislature are not signed by the governor. So we figured, why not? Why should the governor have the power to interfere in a constitutional duty of the legislature? We would draw up an order directing the Secretary of State to implement the districts contained in the order. Our research indicated that a legislative order had not been attempted in the New Hampshire General Court in many years (50 – 75 years, I believe). But we had a suspicion that the “SecState” would be happy to comply and get his filing period started on the correct date.

We also found that a legislative order did not thrill many of the members. Most did not like the idea of foisting a “legislative trick” on the body in order to reach our goals. We had an uphill battle and expected about as much success as building a homemade rocket to the moon. Nonetheless, I had the legislation drawn up as a House Concurrent Order. It started in the House but had to be passed by both bodies to satisfy the constitutional provision that the “legislature” was to do the redistricting.

### ***The Tactical Mistake (or – Learn to Count)***

The Speaker had another idea. With a cross-section of members with different viewpoints as sponsors, a new bill for House redistricting, HB 2002, was introduced in the last week of June. But the bill was stymied before it began. It required a 2/3 vote to suspend the rules for introduction past the deadline. The vote failed. All hell broke loose and the arguments became virulent and nasty. It got so bad that the minority leader decided to remove the minority from the chamber, thus causing it to shut down for lack of a quorum. That was an unfortunate mistake. A quorum is 201 members and we did not have full attendance at the session. But after the minority left, there were still 203 members remaining.

With the minority gone, a motion was immediately made to reconsider the vote suspending the rules. It passed 169-34 on roll call. Suspension of the rules,

introduction, a corrective floor amendment, and the bill itself all then passed by overwhelming voice votes. For good measure, we introduced and passed House Concurrent Order 1, also by overwhelming voice votes. Both items went to the Senate.

### ***The Unexpected Bomb***

The Senate, still in a closely split lock, failed to get the necessary 2/3 vote to introduce either measure. The whole effort merely resulted in an untimely death. The only place it would be resurrected was in the New Hampshire Supreme Court. Most assumed that the Supreme Court would limit its review of the attempt by the legislature to enact redistricting to the question of whether the enacted plans were constitutional or not. If constitutional, as we were fully convinced they were, we could re-introduce the same legislation and strip the governor of her excuse for vetoing the bills. But the “Supremes” shocked us all.

They decided that “since the legislature could not decide the issues,” the Supreme Court itself would draw the redistricting lines, contrary to the clear language of the constitution. Draw them they did and what a mess they made of it. Besides, it was untrue that the “legislature could not decide.” We did decide. Three times. But we could not get that decision past the governor who had chosen to interfere in the legislature’s clear constitutional mandate.

### ***The Lords of the Dance***

As a bit of an aside, I will mention that the Chief Justice of the NH Supreme Court was the same chief justice who had been impeached by the House of Representatives in 2000. The Senate did not convict when the case moved to that chamber for trial, but the scars were still evident. Three or four of us in the House had been vocal and persistent critics of the Supreme Court. It did not come as a huge shock to us that the new districts forged by the court put each of us in districts where we could not (and did not) win re-election. Was it coincidence or had the court gone out of its way to exact revenge? (Nah! – They wouldn’t do that, would they?)

The result of that judicial waltz in the woods of legislation was so badly constructed that new legislation was filed in 2003 to redistrict again. The argument was presented that we could do nothing. Many interpreted the constitution to say that districts could only be changed every 10 years. The response

was, as we had said all through the interim period between session years, that the constitution said that the “legislature could do it every ten years.” Obviously, the legislature did not do it. The court did it.

Eleven bills dealing with redistricting emerged. One was to set up an advisory board, three others suggested new redistricting procedures or criteria, another wanted to set up an independent commission, five wanted the legislature to redistrict one body, the other, or both, and one inexplicably attempted to increase the size of the Senate while reducing the size of the House.

All but two met an uneventful demise and after holding a brief memorial service for each, the General Court (the legislature) pressed on. Both bills addressing House and the Senate redistricting were House bills (HB 1292 and HB 264) this time around. Interestingly, House flatorial districts, mentioned earlier in this paper, were not enacted in either the court’s redistricting plan or in the current plans. There now is some question as to whether they will ever be allowed to be used again.

The House again studied and debated redistricting for over a year. In the dead of winter, 2004, both bills passed the House and proceeded to the Senate. The House redistricting bill passed the Senate in March and was signed by the new governor. Senate redistricting passed the Senate in May and it, too, was signed by the new governor. Finally the entire ordeal was mercifully brought to a close, right? Wrong. The final act was yet to take place.

### ***The Constitution Ultimately Wins***

The minority party did not give up the hunt. They immediately returned to the Supreme Court, asking if the General Court had the authority to amend the Supreme Court’s redistricting plan. The impeached but not convicted chief justice had retired from the Supreme Court and a new chief justice was sworn in on June 4, 2004. Arguments on the case were heard on June 10<sup>th</sup> and, on June 22<sup>nd</sup> of this year, the court issued its opinion of whether the General Court had that authority. According to the Supreme Court, since the legislature had not previously fulfilled its constitutional obligation, “We conclude that it did have the authority to enact HB 1292 and HB 264.”

And that, my fellow Clerks and Secretaries, ends the story ..... until 2011.



## SHIFTING SANDS OF REDISTRICTING LAW

By Tim Storey

Senior Fellow, National Conference of State Legislatures (NCSL)

The 2000 redistricting cycle began unofficially in early 2001 when the United States Census Bureau began delivering what is known as the PL 94-171 data to state legislatures. The primary reason for taking the census is to comply with the U.S. Constitutional mandate for data needed to reapportion the 435 seats in the U.S. House of Representatives. With the PL 94-171 data in hand, states swiftly began to draw a seemingly infinite number of state legislative and congressional district plans to use in the first elections of the new decade. Eventually, state legislators adopted plans that were carefully crafted to satisfy a wide range of criteria including compliance with “one-person, one-vote,” the federal Voting Rights Act and traditional redistricting principles such as compact and contiguous districts. In addition, legislators meticulously designed plans to further political goals without violating federal and state statutes. A couple of states, New Jersey and Virginia, had to draw plans for 2001 elections and almost all states had plans in place for the 2002 elections with the exception of Maine and Montana where redistricting is done prior to the 2004 election.

It is hard to declare that the 2000 redistricting cycle is over when there are still a handful of legal challenges pending, but all states have now held elections using new district lines for both congressional and legislative boundaries. However, a few lawsuits are still active. Following the 1990 census, successful court challenges to redistricting resulted in states redrawing lines well into the later part of the decade. There were even still cases pending against 1990s redistricting plans in the year 2000 when the new census was already underway. Barring additional surprises, it appears that the litigation of the 2000 redistricting is now winding down.

In this round of redistricting, well over 150 lawsuits were filed in at least 40 states challenging new plans adopted. Most of those challenges proved unsuccessful, and courts generally upheld legislative or commission plans. In a few cases, legislatures deadlocked, leaving the line drawing to courts, but

for the most part, states accomplished their constitutional duty to adopt new plans.

It should be noted that there are 12 states that give first and final authority for legislative redistricting to an entity other than the legislature. Idaho and Arizona were the last states to join this group - using a commission for the first time in the 2000 round of redistricting. There are pros and cons to removing the process from the traditional legislative process. And the record of accomplishment by commissions is inconsistent. The commissions vary greatly from state to state in terms of their make-up. Most of them include appointments made by legislative leaders. Six states employ a board or commission to draw and adopt a congressional plan.

Iowa conducts redistricting unlike any other state. Iowa does not put the task of drawing district boundaries in the hands of either a commission or the elected legislators. Instead nonpartisan legislative staff develops the plans which are then approved or rejected by the legislature. Furthermore, Iowa is unique in that the plans for the Iowa House and Senate as well as U.S. House districts are drawn without any political data or information such as the addresses of incumbents.

At a recent NCSL meeting in Savannah, Georgia, several redistricting attorneys and scholars reflected on the legal developments from the 2000 round of redistricting. The experts agreed that this round has not produced the same blockbuster Supreme Court opinions that were handed down in the 1990s. Primarily under the federal Voting Rights Act, numerous challenges resulted in a series of decisions from the high court throughout the 1990s.

That is not to imply that this cycle has been devoid of developments that may well affect the 2010 round of redistricting—only 5 years away. There have been a few significant developments in redistricting law stemming from legislative and court actions since 2000—including two U.S. Supreme Court decisions. A series of excerpts from the NCSL redistricting web

publication, *Redistricting Cases: The 2000s* (graciously hosted by the Minnesota Senate and maintained by Minnesota Senate Counsel Peter Wattson), follows. These case summaries cover three key areas of redistricting law that have evolved in the past couple of years:

- Proving Discrimination **within** the 10 Percent Range
- Redistricting More than Once a Decade
- Partisan Gerrymandering

The web address for the full list of 2000 redistricting case summaries is --  
<http://maps.commissions.leg.state.mn.us/website/CaseSum03/viewer.htm>.

### **Proving Discrimination Within the 10 Percent Range**

Despite the fact that some counselors were warning states that the assumed “safe harbor” of an overall plan deviation of less than 10% might not hold up, many states enacted legislative plans that were right at the 10% overall deviation. This passage appeared in NCSL’s pre-redistricting publication *Redistricting Law 2000*.

States should not assume that any legislative districting plan having less than a 10 percent overall range is safe from successful challenge. Even if the Court is prepared to allow the states some leeway from redistricting perfection, now that the basic law of population equality is well established, it is unlikely that the justices would be unduly hesitant to strike down a plan having an overall range of less than 10 percent if a challenger were to succeed in raising a suspicion that the plan was not a good faith effort overall or that there was something suspect about the districts involved.<sup>1</sup>

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<sup>1</sup>In *Marylanders v. Schaefer*, 849 F. Supp. 1022 (D. Md. 1994), the District Court stated its belief that “a plan with a maximum deviation below 10 percent could still be successfully challenged, with appropriate proof ... of an unconstitutional or irrational purpose.” The Court rejected the argument that the 10 percent rule forecloses challenges to a plan and stated that there should be a remedy available for those whose votes are diluted by a lower than 10 percent plan that is adopted for

A relatively high mean deviation, even within the context of an overall range of less than 10 percent, may make it easier for a challenger to meet the burden of establishing an equal protection violation.<sup>2</sup>

Plaintiffs filed several cases on this front including prominent ones in New York and Georgia. In Georgia, the federal court overturned the state’s legislative plans.

### **New York**

*Rodriguez v. Pataki*, No. 02 Civ. 0618; *Allen v. Pataki*, No. 02 Civ. 3239 (S.D. N.Y. Mar. 15, 2004), *aff’d* 543 U.S. \_\_\_\_ (Nov. 29, 2004) (No. 04-218) (mem.)

Plaintiffs challenged various New York State Senate districts enacted in 2002, some as violations of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and some as violations of § 2 of the Voting Rights Act of 1965. One group of plaintiff-interveners challenged a Senate district and another challenged the 17<sup>th</sup> Congressional District as violating § 2 of the Voting Rights Act. A three-judge district court dismissed all the challenges.

Plaintiffs alleged that the 2002 Senate plan violated the “one person, one-vote” principle by overpopulating a contiguous cluster of 29 Senate districts in New York City and its northern suburbs and underpopulating all 24 districts to the north. (The nine Long Island districts all have populations nearly equal to the statewide mean.) Plaintiffs alleged that the cumulative effect was to give the “downstate” region approximately two-thirds of a district less than its share of the state’s population warranted, while giving the “upstate” region two-thirds of a district more, thus depriving “downstate” residents of their fair share of representation. A three-judge district court ruled that the alleged malapportionment did not constitute invidious discrimination, because the 2002 Senate plan took account of legitimate districting principles, such as preserving the cores of existing districts and avoiding the pairing of incumbents.

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unconstitutional or irrational state policy purposes. *Id.* at 1033-1034. The plaintiffs in this case, however, were unable to prove that the plan at issue, with a “maximum deviation” (overall range) of 9.84 percent, was for an illegitimate state purpose or objective.

<sup>2</sup> *Redistricting Law 2000*, 34-35.

## **Georgia**

*Larios v. Cox*, [No. 1:03-CV-693-CAP](#), 300 F. Supp.2d 1320 (N.D. Ga. Feb. 10, 2004), *appeal filed* No. 03-1413 (Apr. 9, 2004)

Plaintiffs challenged the 2001 congressional and House plans and the 2001 and 2002 Senate plans enacted by the Georgia General Assembly on various grounds. A three-judge federal district court upheld the congressional plan but struck down the legislative plans as a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The order regarding the 2001 Senate plan was stayed pending preclearance of the plan. The overall range of both the 2001 House plan and the 2002 Senate plan was 9.98 percent, but the court found that the General Assembly had systematically underpopulated districts in rural south Georgia and inner-city Atlanta and overpopulated districts in the suburban areas north, east, and west of Atlanta in order to favor Democratic candidates and disfavor Republican candidates. The plans also systematically paired Republican incumbents while reducing the number of Democratic incumbents who were paired. The plans tended to ignore the traditional districting principles used in Georgia in previous decades, such as keeping districts compact, not allowing the use of point contiguity, keeping counties whole, and preserving the cores of prior districts.

The court set a deadline of March 1, 2004, for the General Assembly to submit new plans to the court.

*Larios v. Cox*, 306 F. Supp.2d 1212 (Mar. 1, 2004)

When the General Assembly failed to enact new plans by the March 1, 2004, deadline, the three-judge court appointed a Special Master to draw them.

*Larios v. Cox*, 306 F. Supp.2d 1214 (Mar. 2, 2004)

The court directed the Special Master to comply with the U.S. Constitution and §§ 2 and 5 of the Voting Rights Act, and “to apply Georgia’s traditional redistricting principles of compactness, contiguity, minimizing the splits of counties, municipalities, and precincts, and recognizing communities of interest,” but that protecting incumbents had no place in a plan formulated by a court. The court directed the Special Master to create only single-member districts in the Senate plan and to preserve the multi-member districts in the enjoined House plan only “where the multi-member districts are not tainted by the factors which rendered the previous plans unconstitutional, and only so long as their inclusion does not undermine the other guidelines we have already

enumerated.” The court prohibited the Special Master and his experts and assistants from reviewing or analyzing political data.

*Larios v. Cox*, [No. 1:03-CV-693-CAP](#) (N.D. Ga. Mar. 15, 2004)

On March 15, 2004, the Special Master submitted his report and recommendation for two new plans: a Senate plan with an overall range of 1.91 percent and a House plan with an overall range of 1.95 percent, with the deviations randomly scattered across the state. The Special Master reported that his recommended plan had a number of majority-minority districts roughly proportional to minority voters’ share of the voting-age population and more than in the benchmark plans. He reported that the districts were more compact than in the enjoined plans, made less use of water contiguity and touch-point contiguity, and split fewer counties than the enjoined plans. The multi-member House districts in the enjoined plan were all replaced by single-member districts.

*Larios v. Cox*, \_\_\_ F. Supp.2d \_\_\_, 2004 WL 867768 (N.D. Ga. Apr. 15, 2004), *aff’d* 542 U.S. \_\_\_ (June 30, 2004) (No. 03-1413) (mem.)

The three-judge court approved the plan drawn by the Special Master, finding that it met the “one-person, one-vote” requirement of the Equal Protection Clause, the minority protection requirements of the Voting Rights Act, and was faithful to Georgia’s traditional redistricting principles.

## **Redistricting More than Once a Decade**

In several high-profile episodes, state legislatures revisited redistricting plans that had been used for 2002 elections and re-drew them in time for the 2004 elections. The litigation of these efforts resulted in different outcomes, and challenges in Texas are ongoing. In most of these cases, legislatures replaced plans promulgated by courts. The Colorado State Supreme Court struck down the legislature’s attempt under state constitutional language, and the U.S. Supreme Court refused to take the case on appeal.

## **Colorado**

*Salazar v. Davidson*, [No. 03SA133](#) and *Davidson v. Salazar*, No. 03SA147 (Colo. Dec. 1, 2003), *cert. denied*, *Colorado General Assembly v. Salazar*, [No. 03-1082](#) (U.S. June 7, 2004)

The Colorado Attorney General brought an original proceeding in the Colorado Supreme Court to

challenge the constitutionality of Senate Bill 03-352, a congressional redistricting law enacted by the General Assembly to replace the court-ordered congressional districts used in the 2002 general election. The Court held the new law unconstitutional because the Colorado Constitution, [Article V, § 44](#), requires the General Assembly to redistrict after each census and before the ensuing general election and does not allow redistricting at any other time. Because the General Assembly failed to redistrict during this constitutional window, it relinquished its authority to redistrict until after the 2010 census.

*Colorado General Assembly v. Salazar*, [No. 03-1082](#) (U.S. June 7, 2004)

On June 7, 2004, the U.S. Supreme Court declined to grant certiorari, with Chief Justice Rehnquist and Justices Scalia and Thomas dissenting on the ground that Article I, § 4, of the U.S. Constitution may prevent a State from excluding its legislature from drawing congressional districts.

#### ***New Hampshire***

*Petition of Bellow*, [No. 2004-361](#) (N.H. June 22, 2004)

Petitioner alleged that, since the state constitution permits the legislature to redistrict only once every ten years, and since the legislature had failed to do so in time for the 2002 election, and the state Supreme Court had drawn the plan used in the 2002 election, the legislature had exceeded its constitutional authority by amending the court's redistricting plan in 2004. The court disagreed, holding that the legislature's 2004 amended plan was its one plan for the decade. The New Hampshire Supreme Court left the question of whether the amended plan violated "one-person, one-vote" requirements or the Voting Rights Act for further consideration by the trial court.

#### ***Texas***

*Session v. Perry*, [No. 2:03-CV-354](#), 298 F. Supp.2d 451 (E.D. Tex. Jan. 6, 2004), *vacated and remanded for further consideration in light of Vieth v. Jubelirer*, 543 U.S. \_\_\_\_ (Oct. 18, 2004) ([No. 03-1391](#) et al.) (mem.)

The 2002 election for congressional seats was run under the plan adopted by the federal district court in *Balderas v. State*, [No. 6:01-CV-158](#) (E.D. Tex. Nov. 14, 2001). In 2003, the Texas Legislature attempted to pass a new congressional plan during its regular session and two special sessions, and succeeded during its third special session, enacting [H.B. No. 3](#),

Plan 1374C, on October 13, 2003. Plaintiffs alleged that Plan 1374C was invalid because "(1) Texas may not redistrict mid-decade; (2) the Plan unconstitutionally discriminates on the basis of race; (3) the Plan is an unconstitutional partisan gerrymander; and (4) various districts in Plan 1374C dilute the voting strength of minorities in violation of § 2 of the Voting Rights Act." The three-judge court rejected the challenges.

#### **Partisan Gerrymandering**

One of the most-watched cases by every elected lawmaker in the country this cycle came out of Pennsylvania. The U.S. Supreme Court agreed to hear a case alleging that Pennsylvania congressional districts were an unconstitutional *political* gerrymander. The high court eventually ruled in a 5-4 decision that partisan gerrymandering was still permissible.

#### ***Pennsylvania***

*Vieth v. Pennsylvania*, [No. 1:CV-01-2439](#), 241 F. Supp.2d 478 (M.D. Pa. Jan. 24, 2003), *aff'd sub nom. Vieth v. Jubelirer*, [No. 02-1580](#) (U.S. Apr. 28, 2004)

On April 18, 2002, the General Assembly enacted a new congressional plan, [HB 2545](#), Act 34, which reduced the overall range of the plan from 19 persons to one person. On April 23, 2002, the court stayed its order of April 8, allowing Act 1 to be used for the 2002 election. It set a hearing for May 8, 2002, on the question of whether Act 34 should govern elections in 2004 and beyond.

On January 24, 2003, a three-judge court held that Act 34 met equal population requirements.

The three-judge court also held that the plan was not an unconstitutional partisan gerrymander, because plaintiffs had not alleged facts "indicating that they have been shut out of the political process." 241 F. Supp.2d at 484. The court noted that, even though the plan met equal population requirements, it "jettisons every other neutral non-discriminatory redistricting criteria that the Supreme Court has endorsed in one person-one vote cases." *Id.* at n.3.

*Vieth v. Jubelirer*, [No. 02-1580](#), 541 U.S. \_\_\_\_ (Apr. 28, 2004)

The U.S. Supreme Court affirmed the judgment of the district court. Justice Scalia, joined by the Chief Justice, Justice O'Connor, and Justice Thomas,

concluded that political gerrymandering claims are nonjusticiable because no judicially discernible and manageable standards for adjudicating these claims exist. They would therefore overrule *Davis v. Bandemer*, [478 U.S. 109](#) (1986), in which the Court held that political gerrymandering claims are justiciable but could not agree on a standard for assessing them.

*Note: Tim Storey is a Senior Fellow at NCSL specializing in elections and redistricting. He is indebted to Peter Wattson, Minnesota Senate Counsel, for his assistance in summarizing redistricting cases and helping with this article.*

Justice Kennedy concurred in the judgment, agreeing that there are currently no manageable standards for measuring whether a political gerrymander burdens the representational rights of a party's voters, but not wanting to foreclose the possibility of finding a limited and precise rationale for correcting a proven constitutional violation. He suggested exploration of the First Amendment as a possible basis for analyzing a partisan gerrymander, looking for whether a redistricting plan burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association.

Writing separately in dissent, Justices Stevens, Souter, and Breyer each proposed a different standard for adjudicating political gerrymandering claims. Justice Breyer suggested that the differing standards did not mean that no constitutional standard could be developed, but rather that they served to stimulate further discussion that might result in a majority agreeing on a standard in some future case.

## **Conclusion**

While it may yet be too early to close the book on the 2000 redistricting cycle, that time is near. A few states including California are beginning to discuss redistricting reform, but major changes in the underlying process are unlikely. One big event that many states will need to follow closely is how Congress reviews Section 5 of the federal Voting Rights Act. Section 5 is the part of the Act that requires all or parts of 16 states to submit their redistricting plans (and all changes in voting laws) to the U.S. Department of Justice (or a federal court in D.C.) for approval before those plans can become law. Section 5 expires in mid-2007, so Congress must revisit the provision, and could mean changes to the sometimes controversial process.

Some of the smart states are actively working with the Census Bureau to prepare for 2010. It's not that far away.



## Book Review: Warren M. Billings' *A LITTLE PARLIAMENT*

Reviewed by Jay Braxton,  
Procurement and Logistics Manager, Virginia House of Delegates

Virginia, on the cusp of its tenth anniversary, was having its share of growing pains. Death and disease still ravaged the colony. Relations with the Native Americans continued to be tenuous at best. Keeping the colony solvent was becoming an ever increasing problem. Martial law, which had governed the settlement since 1607, had yielded no tangible benefits. To save the colony, a new direction was needed. That new direction would come through the formation of a government where the colonists would have a more active role in making the decisions that affected their daily lives. This new approach would become the first representative body in the new world – the General Assembly of Virginia.

*A Little Parliament*, by Warren M. Billings tells the story of the formation and evolution of the General Assembly of Virginia in the seventeenth century. Billings, who has extensively researched the period, lays out the events that necessitated the need for representative government. He also provides fascinating insight on the key figures who shaped not only that first meeting in Jamestown, but also those who laid the groundwork for many of the practices and traditions that remain the cornerstone of legislative procedure. He also shows how the settlers, taking cues from British social and legislative customs, formed their own “little parliament” in the New World.

Billings tells of Sir Edwin Sandys, treasurer of the Virginia Company, who laid out his plans for the total restructuring of the settlement in a series of papers. These papers, one called the “Great Charter,” set the colony on its new course. The Great Charter authorized a governor-general and council of state to handle all the administrative functions of the colony. It also gave the governor the authority to convene a general assembly with “free power to treat, consult and conclude...”

On July 30, 1619, the governor, six councilors, and twenty-two burgesses convened at Jamestown. After organizing, they amended the Great Charter and acted on such issues as tobacco prices, contracts with servants, and Indian affairs. The governor then adjourned this assembly a week into that first session,

due to the intense heat and ill health of some of its members.

Billings' work presents a fascinating history of the General Assembly of Virginia and the development of representative government in the colonies, and for that reason alone is an interesting and informative read. But members of the American Society of Legislative Clerks and Secretaries will enjoy Billings' work for another reason, and that is the special attention he gives to the development of the office of Clerk.

Instrumental in the organization of that first General Assembly was John Pory, a former member of the House of Commons who had been appointed Secretary of the Colony in 1618. Pory, as Billings writes, “...possessed a practical understanding of legislative organization and procedures that he could teach others to use in the fledgling assembly.” In addition to keeping a record of the proceedings, Pory prepared the legislative agenda, drafted bills, and read acts aloud before they became law. It was Pory who brought from Parliament the custom of giving each proposed act three readings before final passage.

Pory was named Speaker, but it remains unclear as to why he was given this title since, according to his journal of the first proceedings, he handled the secretarial and clerical tasks of the assembly. These tasks originated in Parliament and were assigned to “two principal Clerks of the Parliament...who...enroll[ed] all the Pleas and business of the Parliament.”

The role of clerk became one of the most sought after duties in the assembly. Political patronage played a role in being appointed, but the most important qualifications were, according to Billings, “literacy and familiarity with clerical duties.” Some clerks gained the necessary skills by reading a clerk's manual such as William West's *Symboleographie*. Some trained for their role as clerk before leaving England. Others came to the position after having careers in commerce. Once appointed, Clerks were paid in tobacco, given the title “clerk of the Assembly,” and had the ability to influence the

direction of the colony, just by their proximity to the Colony's leadership.

From its earliest days, the office of clerk has epitomized the concept that is today called multi-tasking. Clerks not only served the House of Burgesses, but they also clerked for the Council of State and acted as clerk of the General Court. Clerks did not have to take an oath of allegiance. Without taking an oath, clerks were not sworn to protect the rights and privileges of anybody and had free reign to create mischief or report confidential information.

After political interference and an attempt to undermine the burgesses by the governor, the House of Burgesses determined a need for its own clerk, one that would not sit with the Council of State and who answered only to the House.

The first Clerks of the House of Burgesses referred to themselves as either "clerk of the house," "clerk of the burgesses," or "clerk of the assembly" and patterned themselves after their counterparts in Parliament. Later they would have their own procedural manuals in place, outlining their job duties and the rules and traditions of the body. Billings notes that there were three differences between the Virginia clerks and their English models. The Virginia clerks employed fewer assistants, they were elected by the burgesses and not appointed by the governor, and they were the keepers of all of the legislative documents of the colony.

Billings shares how early clerks were instrumental in the evolution of the legislative process due to their diligence in keeping journals, their institutional memory, and their education of the burgesses in the traditions and privileges of its House.

*A Little Parliament* goes on to outline the evolution of the role of the Speaker and the burgesses and how they were elected and learned to become lawmakers. Billings tells of where they received their inspiration and guidance to lead the colony despite no formal training in law or parliamentary procedure and how the offices paralleled their English counterparts. He sheds light on the Assembly's search for a new Capitol. Finally, Billings writes about "the art and mystery of legislation," where he discusses how bills became laws, a process that remains remarkably similar today to its origins almost 400 years ago.

Billings seems completely enthralled with his subject matter and it comes across in his writing. The interesting anecdotes and background information on the key figures in the founding of the General Assembly make for great character studies. The attention he gives to the importance of the role of the Clerk and the Clerk's duties in the early assemblies provides another interesting facet to the book. One does not have to love history to appreciate Billings' work. Anyone with a love for the legislature and the legislative process will find *A Little Parliament* a fascinating and worthwhile read.

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