

Redistricting Battle in Texas Courts Has Only Just Begun

By Mary Alice Robbins
Texas Lawyer

The legal maneuvering has begun as Democrats and Republicans vie for the advantage in congressional redistricting battles being waged in Texas courts. "It's like chess," says Austin attorney Renea Hicks, who represents Democratic plaintiffs in *Del Rio, et al. v. Perry, et al.* and *Cotera v. Perry*, two redistricting suits consolidated in 353rd District Judge Paul Davis' court in Austin.

Congressional redistricting was punted to the courts after Gov. Rick Perry announced that he wouldn't call the Legislature into special session to draw new districts. Moves and counter-moves by plaintiffs and their attorneys are aimed at getting redistricting before courts that might be sympathetic.

"There's got to be a lot of litigation about where we're going to litigate," says Baker Botts partner Sam Cooper of Houston, one of the attorneys representing GOP plaintiffs in two suits -- *Associated Republicans of Texas v. Cuellar, et al.* and *Rivas v. Cuellar, et al.* -- filed in Harris County. Typically, the court given the first chance to draw new district lines is the one that has jurisdiction over the first suit that is properly filed.

"Our position is that the Austin court case [Del Rio] is the first filed case and therefore, under law, should be the first case to go to trial," says Houston lawyer Richard Mithoff, a Mithoff & Jacks partner who represents Texas Democrats in Congress.

Hicks filed Del Rio on Dec. 27, 2000. Republicans say that was too early because lawmakers hadn't had a chance to address redistricting by that date.

On Aug. 1, the Texas Supreme Court dashed Republicans' hopes that it would move quickly to block Davis from considering Del Rio. The high court dismissed *In Re Susan Weddington*, a petition filed by Weddington, the Republi-

can Party of Texas chairwoman, and three GOP congressmen. According to the court's opinion, the mandamus must first go through the 3rd Court of Appeals in Austin.

"We're disappointed they didn't rule in our favor," says J.D. Pauerstein, a partner in San Antonio's Loeffler Jonas & Tuggey and one of the attorneys representing Weddington. He alleges the Democrats went "forum-shopping" to get a court they believe would be favorable to their interests, the same thing Hicks claims of Perry.

Hicks alleges in pleadings filed on July 30 in Davis' court that Perry conspired with the attorneys who filed Rivas to get the issue before a court they believe would draw districts favorable to Republicans. The pleadings allege that Rivas was filed at 3:01 p.m. on July 3.

Copies of Perry's letter announcing that he wouldn't call a special session were delivered to House Speaker Pete Laney's office at 2:55 p.m. and to Lt. Gov. Bill Ratliff's office after 3:15 p.m., according to declarations signed by staff members in those offices.

Andy Taylor, a Locke Liddell & Sapp partner who represents the state in redistricting, says Perry announced on June 29 that he was getting "negative vibes" about whether lawmakers could agree on a plan if he called a special session. On June 30, the Fort Worth Star-Telegram quoted Perry as saying that he wasn't interested in bringing legislators to Austin "for an exercise in futility." Taylor says the state wants to ensure that the congressional redistricting plan ordered by a state court won't be reversed on appeal because the court lacked jurisdiction.

Baker Botts partner Irvin Terrell of Houston, lead counsel on the Republican suits filed in Harris County, says Del Rio is not "ripe" for consideration because it was filed before lawmakers had a chance to act on redistricting.

"There is no jurisdiction if a suit is filed prematurely," says Terrell, who represented then-Gov. George W. Bush in the *Bush v. Gore* litigation last year over the Florida vote recounts in the presidential race.

In May 2000, the Texas Supreme Court ruled 6-3 in *Waco Independent School District v. Gibson* that a case is not ripe if the determination that the plaintiff has been injured depends on events that have not occurred.

Mithoff argues in an amicus brief filed in the Texas Supreme Court that a case may ripen over time under state and federal law. "Because this case involves federal constitutional claims, the ripeness inquiry is governed by federal law," according to the brief.

Republican Judge Jane Bland, of Houston's 281st District Court, set a Sept. 10 trial date for the ART and Rivas cases. Davis, a Democrat, has set the trial in Del Rio and Cotera for Sept. 17. A three-judge federal panel in Tyler has set an Oct. 1 deadline for it to receive congressional redistricting plans from state courts. On that panel are 5th U.S. Circuit Court of Appeals Judge Patrick Higginbotham, a Republican appointee, and U.S. District Judges John Hannah Jr. and John Ward of the Eastern District of Texas, both Democratic appointees.

Congressional redistricting cases also are pending before three-judge federal panels in Waco and Houston. Higginbotham, Ward and U.S. District Judge Walter Smith of the Western District, a Republican appointee, are on the Waco panel. Edith Jones of the 5th Circuit and U.S. District Judges David Hittner and Melinda Harmon of the Southern District, all Republican appointees, are on the Houston panel, which drew the current congressional lines in 1996.