

## DRAWING THE LINE

*Will Tom DeLay's redistricting in Texas cost him his seat?*

BY JEFFREY TOOBIN

For three days in October of 2003, Tom DeLay left his duties as majority leader of the House of Representatives and worked out of the Texas state capitol, in Austin. During the previous year, DeLay had led his Republican colleagues there in an effort to redraw the boundaries of the state's congressional districts. For more than a century, congressional redistricting had taken place once every decade, after the national census, but the Texas Republicans were trying to redraw lines that had been approved just two years earlier. Several times during the long days of negotiating sessions, DeLay personally shuttled proposed maps among House and Senate offices in Austin. Once, when reporters glimpsed DeLay striding through the corridors of the state capitol, they asked him about his role in the negotiations. "I'm a Texan trying to get things done," he said.

Before the end of the month, the Republicans had pushed their plan through both houses, and it paid off in November of 2004. The Texas delegation in the House of Representatives went from seventeen to fifteen in favor of the Democrats, to twenty-one to eleven in favor of the Republicans. Martin Frost was the third-ranking Democrat in the House when the Republicans eliminated the district he had represented for twenty-six years. "I knew what DeLay was doing," Frost told me. "I didn't like it, but he wasn't just trying to get me, he was trying to get as many Dems as possible. I went ahead and ran in one of the other districts. It was almost impossible to win, and I didn't. But I went out with my boots on."

The struggle over redistricting amounted to a Promethean display of political power by DeLay, and his subsequent downfall has been similarly epic. DeLay's recent travails, which include a criminal indictment in Texas last year and his resignation as majority leader,

can be traced to the redistricting fight. Today, his victory in that battle looks fragile. On March 1st, the Supreme Court will hear a challenge to the Texas congressional map, and the outcome is by no means clear. In the first major case to be heard by the two new Justices, John G. Roberts, Jr., and Samuel A. Alito, Jr., the Court will weigh the constitutionality of the Texas plan, which represents just one of the partisan gerrymanders that have transformed Congress in recent years. The Republican majority in Texas and the Bush Justice Department are asking the Court to preserve the Texas plan. But DeLay's political fortunes have changed so much that, paradoxically, the best thing that could happen to him now may be for the Court to strike down the plan he created.

In cases of extreme partisanship in gerrymandering, it is often difficult to identify the original sin. The current controversy in Texas dates to the period just after the 1990 census, when Democrats still controlled both houses of the Texas legislature. Even though Texas was by that time trending strongly Republican in statewide and Presidential races, the Democrats drew district lines that enabled their party to win twenty-one seats in the House in 1992, compared with just nine for the Republicans. By the time of the next census, in 2000, the Republicans were understandably eager to redress the balance. "Republicans had been on the receiving end of what was known as the shrewdest gerrymander of the nineteen-nineties," John Cornyn, a former Texas attorney general who is now a U.S. senator, said. "There are those who thought that what happened next was payback."

By 2000, Republicans controlled the governorship and the State Senate, but Democrats still had a majority in the Texas House. A deadlock between the two legislative bodies prevented Texas

from adopting any redistricting plan, and the conflict ended up in federal court. The following year, a three-judge panel, ill-disposed to take sides in a political fight, ratified a modified version of the 1991 map, with two new seats awarded to high-growth districts. “The court essentially carried forward the 1991 Democratic gerrymander of Texas, which is increasingly problematic, given the over-all Republican tilt of the state,” Samuel Issacharoff, a professor at New York University School of Law, told me. “The status-quo ante looked like a distortion.”

In the 2002 elections, DeLay set out to give the Texas House a Republican majority and thus remove the last obstacle to full Republican control of the state. That year, he created two PACs, which raised and spent \$3.4 million on twenty-two races for the Texas House. The law firm of Jack Abramoff, the lobbyist whom DeLay has described as one of his “closest and dearest friends,” contributed twenty-five thousand dollars to the cause. On October 4, 2002, the DeLay PAC known as Texans for a Republican Majority sent a hundred and ninety thousand dollars to seven candidates for the State House. The following month, all seven were elected, and Republicans became the majority party in the Texas House.

“After the 2000 census, we never had a chance to vote on a congressional redistricting plan, because the court did it,” Tom Craddick, a close ally of DeLay’s, who became Speaker of the Texas House after the 2002 election, told me. “When we took over, we decided that we ought to do congressional redistricting. If we hadn’t taken control, we wouldn’t have gone ahead with it. Tom pushed to do it.” It was true that a court, and not the legislature, had drawn the congressional maps after the 2000 census, but that had also occurred in several other states where the political branches couldn’t agree on a plan. De-

Lay’s and Craddick’s idea—to redistrict in the middle of a census cycle—had never been attempted in any state. As Cornyn put it, “Everybody who knows Tom knows that he’s a fighter and a competitor, and he saw an opportunity to help the Republicans stay in power in Washington.”

In the spring of 2003, Texas Republicans, who were now dominant in both

changed hands, they could have redistricted, every two years if they wanted to, and we didn’t think it was right.” Texas law required that two-thirds of the hundred-and-fifty-member body be present in order to conduct legislative business; the Democrats, who numbered sixty-two, could stop the legislation simply by not showing up. So most of them took off for Oklahoma.

There was some precedent for this kind of action in Texas. In 1979, a group of liberal state senators, known as the Killer Bees, fled the state to deprive the majority of a quorum in a dispute over the date of the Texas Presidential primary. This time, in 2003, the House Democrats were dubbed the Killer D’s.

Laney was on his cotton farm, in the Texas panhandle, on May 11th when he and his Democratic colleagues decided to leave the state for the Oklahoma town of Ardmore, just across the border. Most of the legislators travelled from Austin by bus, but Laney flew in his private plane, a seven-seat Piper Cheyenne. The following day, the clerk of the Texas House issued arrest warrants for the missing politicians, and DeLay’s staff decided to find them.

On the afternoon of May 12th, a senior aide to DeLay called an official with the Federal Aviation Administration and asked the agency to track the location of tail number N711RD, Laney’s plane. The staffer didn’t say why he wanted the information, and F.A.A. officials later said that they assumed there was a safety issue involving the plane. According to a subsequent report by the Inspector General of the Department of Homeland Security, a DeLay staffer also contacted D.H.S. “requesting assistance in determining the location of an aircraft believed to be overdue.” By the end of the day, the F.A.A. had told DeLay’s staff that local officials had traced the plane to Ard-



*DeLay’s plan to redistrict mid-decade was unprecedented.*

the State House and Senate, proposed a new congressional map that promised to add between five and seven new Republicans to the Texas delegation. At the time, DeLay said that, with fifty-seven per cent of Texas voters backing Republicans for Congress, it was only fair that the G.O.P. control more than fifteen of the thirty-two seats in the U.S. House. If a mid-census redistricting was necessary to align the seats with the popular vote, the Republicans argued, so be it.

Pete Laney, the Democrat who preceded Craddick as Speaker, helped lead the opposition to the DeLay plan. “We couldn’t believe what they were trying to pull,” he told me. “They were looking to create chaos. Every time the legislature





*"Did you ever have that baby you wanted so much?"*

more. (The same day, DeLay's staff also contacted a senior official at the Justice Department, asking whether federal law-enforcement authorities would assist in arresting the missing legislators. The Department's Inspector General later issued a report saying that another Justice official had decided that the request was "wacko," and the Department refused to get involved.)

"It didn't bother me that the F.A.A. was looking for me, because I want them to know where I am when I'm in the air," Laney said. "The chance of me surviving if I put one of those things down at three hundred miles per hour is a lot better if they can find me fast. The problem was that they misled the F.A.A. about why they were looking for me. And what really bothers me is that they had Homeland Security, the F.A.A., and the whole federal government looking for me, but it was a reporter for the *Dallas Morning News* who found us first anyway."

The Killer D's remained at the Ardmore Holiday Inn, dining at the adjoining Denny's, through May 15th, the last day that new bills could be considered. But on June 30th Governor Rick Perry convened a special session on redistricting, and, with the Democrats back in the state, DeLay's plan finally passed the House. However, eleven Democrats in the Senate, determined to deprive that body of a quorum, also decided to flee

the state, this time to Albuquerque. "We considered every nearby state except Louisiana," one Texas Democratic legislator said. "They've got legalized gambling there, and riverboat casinos, and we didn't want anybody who wasn't paying attention to what they were doing."

The second holdout lasted for forty-five days, but the Democrats' unanimity cracked when Senator John Whitmire, of Houston, decided that the effort had become futile, and returned to Texas for the Labor Day weekend. That gave Republicans a quorum in the Senate, and a few weeks later DeLay went to Austin. Under his guidance, and with the upcoming Texas-Oklahoma football game in Dallas as an incentive to wrap up business, the Senate ratified the new congressional districts on October 13th. ("DELAY, LOOMING FOOTBALL WEEKEND PUT PRESSURE ON PARTY," read a headline in the *Austin American-Statesman*.)

Since the passage of the Voting Rights Act, in 1965, most legal fights about redistricting have concerned the rights of racial minorities. DeLay expected such a challenge to the 2003 Texas map, and he was ready with a preemptive defense. "Minority rights have been protected," he said at a press conference after the plan was ratified. He asserted that the number of Hispanic representatives could grow from

six to eight, and the number of African-Americans from two to three. (These predictions were, for the most part, accurate.)

From the beginning, it was evident that the agenda of the Republican map-makers in Texas was more political than racial. Shortly after the redistricting plan passed, Joby Fortson, an aide to Representative Joe Barton, a Texas Republican, sent a candid e-mail to a group of colleagues that makes this point more clearly than any public statement issued by the participants. The memo, which was disclosed in the course of subsequent litigation, offers a "quick rundown" on each of the seats in the delegation. Fortson begins his description of the district where Martin Frost, the senior Democrat in the state, would have to run with the words "Ha ha ha ha ha ha ha ha ha. . . . His district disappeared." As for another Democratic incumbent, Nick Lampson, Fortson says, he and a G.O.P. incumbent "are drawn together in a Republican district." (Lampson lost, too.) "This is the most aggressive map I have ever seen," Fortson concludes. "This has a real national impact that should assure that Republicans keep the House no matter the national mood." (Fortson, who now works for Apple Computer, declined to comment.)

On October 14, 2003, Texas Democrats challenged the new congressional districts under the Voting Rights Act, but three months later a three-judge panel ruled that the rejiggering of the lines had not diluted the voting power of African-Americans or Hispanics. Then, in a major surprise, the Supreme Court issued an opinion that may have changed the rules of the redistricting game for good.

The Constitution established the House of Representatives as the branch of government most closely attuned to changes in the national mood. James Madison, in "The Federalist Papers," wrote that the House was conceived as a "numerous and changeable body," where smaller districts and two-year terms were sure to generate regular turnover, especially compared with the Senate. Of course, the framers also understood the rough-and-tumble of politics; even in Madison's day, the practice of gerrymandering for partisan advan-

tage was familiar. In the late seventeenth-eighties, there were claims that Patrick Henry had tried to gerrymander Madison himself out of the First Congress. The term was coined during Madison's Presidency, to mock Elbridge Gerry, the governor of Massachusetts, who in 1811 approved an election district that was said to look like a salamander. But the frequency and boldness of contemporary partisan gerrymandering make its nineteenth-century antecedents look genteel.

As a practical matter, Madison's conception of the House is now obsolete. Partisan gerrymandering has become a precise science, where mapmakers use computer data from census and election returns to design the political makeup of each congressional district. "It used to be that the idea was, once every two years voters elected their representatives, and now, instead, it's every ten years the representatives choose their constituents," Pamela Karlan, a professor at Stanford Law School, told me. Republicans currently hold a 231 to 201 advantage in the House, which means that Democrats would need to win only seventeen new seats—or about four per cent of the Congress—in order to regain the majority. But the extreme gerrymandering in most states makes the Democrats' challenge nearly impossible, even in a year when national political trends may favor them. Outside Texas, only two incumbents lost in the 2004 congressional elections, and only in twenty-one seats did the winner have less than fifty-five per cent of the vote. "Congressmen are more likely to die or be indicted than they are to lose a seat," Karlan said.

In 2004, Democrats in Pennsylvania presented the Supreme Court with a direct challenge to the practice of partisan gerrymandering. Following the 2000 census, Republicans controlled the governorship and both houses of the state legislature, so they essentially had a free hand in shaping congressional districts to their liking. The commonwealth has become more Democratic in recent years, but the G.O.P. gerrymander showed the power of creative line-drawing. In 2002, the first election to reflect district lines, Republicans won twelve of the nineteen congressional seats—even though a Democrat, Ed Rendell, was elected governor. So a

group of Democratic voters filed a lawsuit, claiming that such pervasive distortions of the popular will amounted to a violation of the Constitution's guarantee of equal protection of the laws.

The case, *Vieth v. Jubelirer*, reached the Supreme Court, which responded with one of its most significant, and most baffling, decisions in recent history. On April 28, 2004, the Court ruled five to four that the Pennsylvania plan could stand. But in more than a hundred pages of opinions, written by five Justices, there is neither a majority opinion for the Court nor an agreement on the larger issues in the case. As a lower-court judge in the Texas case later wrote of the ruling, "The light offered by *Vieth* is dim, and the search for a core holding is elusive."

The lead opinion in the case, by Justice Antonin Scalia, at least has the advantage of clarity. Writing for himself, Chief Justice William H. Rehnquist, and Justices Sandra Day O'Connor and Clarence Thomas, Scalia acknowledged that the Pennsylvania plan came about because "prominent national figures in the Republican Party pressured the General Assembly to adopt a partisan redistricting plan as a punitive measure against Democrats for having enacted pro-Democrat redistricting plans elsewhere." But Scalia said that partisan gerrymandering was not a subject that belonged in federal court; rather, he wrote, the Constitution entrusts the issue to the political branches of government and "involves no judicially enforceable rights." In other words, the Scalia quartet advised the Pennsylvania Democrats to try harder to win elections instead of running to the courts with their complaints.

Four other Justices dissented, arguing that the Pennsylvania Democrats deserved their day in court. John Paul Stevens, David Souter, Ruth B. Ginsburg, and Stephen G. Breyer said, in effect, that partisan gerrymandering had got so out of hand that it was up to the courts to restore a measure of fairness. In Stevens's view, the courts should weigh in because "when partisanship is the legislature's sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially."

And the problem, Souter wrote in his dissent, keeps getting worse: "The increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine."

One Justice, Anthony M. Kennedy, tried to split the difference. Kennedy joined the result of Scalia's opinion but not his reasoning. Unlike Scalia, Kennedy wrote, "I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." Kennedy made clear his disdain for the way that redistricting had become a partisan slugfest, noting the words of a North Carolina legislator in the midst of one such fight: "We are in the business of rigging elections." But Kennedy also identified the main problem facing those who would have the courts get involved in the redistricting process. "Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards," he wrote.

Kennedy's temporizing drew a mocking rejoinder from Scalia, who wrote, "Justice Kennedy's opinion boils down to this: 'As presently advised, I know of no discernible and manageable standard that can render this claim justiciable. I am unhappy about that, and hope that I will be able to change my opinion in the future.'" But Kennedy may yet have the last word, because the Texas case gives him, and the four dissenting Justices in *Vieth*, an opportunity to rein in partisan gerrymanders once and for all.

DeLay's problems began to accumulate even before he could savor the Republican gains in the 2004 elections in Texas. On October 6, 2004, the House Ethics Committee, in a unanimous vote of its five Republicans and five Democrats, admonished DeLay for asking the F.A.A. to track Laney's airplane during the redistricting fight the previous year. The committee's report on the incident cited House rules that prohibit members from taking "any official action on the basis of the partisan affiliation . . . of the individuals involved." DeLay's role in the matter

“raises serious concerns under these standards of conduct,” the report said. (It was the third time that the committee had reprimanded DeLay for breaking House rules.) DeLay was defiant, declaring in response that the complaint “should have been thrown out immediately.” He went on, “For years Democrats have hurled relentless personal attacks against me, hoping to tie my hands and smear my name. All have fallen short, not because of insufficient venom, but because of insufficient merit.”

With the new congressional districts in place, Republicans gained five seats in Texas the following month. The net increase was actually six seats, because one incumbent Democrat, Ralph Hall, switched parties. But in the days immediately after the election the district attorney in Austin, a veteran Democrat named Ronnie Earle, stepped up his investigation of DeLay’s fund-raising activities before the 2002 elections to the Texas legislature.

On September 28, 2005, DeLay and two close associates were indicted on charges of conspiracy and money-laundering in connection with the last-minute contribution of a hundred and ninety thousand dollars from the Texans for a Republican Majority PAC to House candidates before the 2002 elections. Texas law prohibits corporate contributions to state political campaigns, and the indictment charges that DeLay steered money that he knew was from corporations to the local candidates. His co-defendants are James W. Ellis, who runs DeLay’s main national fund-raising PAC—Americans for a Republican Majority—and John Colyandro, the former director of Texans for a Republican Majority. All three defendants pleaded not guilty, and DeLay denounced Earle, the prosecutor, as “an unabashed partisan zealot.” Still, under House rules the indictment meant that DeLay was required to step down as majority leader. (That blow was softened somewhat last month when House Republicans awarded DeLay a coveted seat on the Appropriations Committee, which was left vacant last November when Randy “Duke” Cunningham, a California Republican, resigned after pleading guilty to taking \$2.4 million in bribes from military and other government contractors.)

DeLay will probably go to trial on Earle’s charges sometime early next year, but he also remains under the scrutiny of Justice Department prosecutors in the investigation that led to the guilty plea in January by Jack Abramoff, the Republican fund-raiser and lobbyist. (The Appropriations Subcommittee, of which DeLay is also a member, sets the budget of the Justice Department.) Earle, too, has issued subpoenas in order to examine Abramoff’s role in the 2002 Texas legislative elections. Yet the greatest threat to DeLay may be political, not legal.

The 2003 redistricting plan was implemented at a time when DeLay still looked invincible in Texas, so in redrawing his own congressional district in the Houston suburbs he was magnanimous toward his Republican colleagues. As the Hill aide Joby Fortson put it in his e-mail analysis of the new district lines, DeLay “gives away enough R’s” to help his neighboring Republican congressman Ron Paul. As a result of his generosity, DeLay won in 2004 with only fifty-five per cent of the vote, against an underfunded and obscure Democratic opponent.

But DeLay has a serious Democratic opponent in 2006, Nick Lampson. As a congressman from 1997 to 2005, Lampson represented an adjacent district, which was eliminated in DeLay’s 2003 gerrymander. Lampson has capitalized on DeLay’s notoriety in his fund-raising efforts; in February, Lampson had \$1.29 million on hand, DeLay \$1.44 million. (DeLay told George Will that he expects the race will be the most expensive in congressional history.) To further compound DeLay’s problems, a former Republican congressman, Steve Stockman, may run as an independent in the district. A recent poll shows Lampson leading DeLay by eight points, with a large number of voters undecided. “I have the luxury of being able to concentrate on issues like health care, immigration, and refinery safety,” Lampson told me. “I can say I’m going to be making headlines for

the right reasons. I don’t have to concentrate on what he did wrong, because that’s showing up in the headlines in story after story after story.”

The question remains, though, whether the Supreme Court will approve the current district lines, and whether DeLay and Lampson will wind up facing each other in November. The Court has already signalled a special interest in the case: the Justices have allowed two hours for the oral arguments on March 1st, the first time the Roberts court has set aside so much time for a case. (One hour is customary.)

The Democrats, in addition to challenging the gerrymander on the ground that it is excessively partisan, have asserted that the new lines of a congressional district in the Dallas–Fort Worth area dilute African-American voting strength, in violation of the Voting Rights Act. (In his e-mail, Fortson says of this district, “This is the D’s best legal challenge, as inner-city Ft. Worth will now be outnumbered in a Republican suburban district.”) Still, the core of the case remains the Democrats’ claim that the systematic use of redistricting to deny them a viable chance of victory violates the Constitution.

The new Justices, Roberts and Alito, have modest public records on voting-rights matters, and neither had much to say on the subject during the confirmation hearings. In Alito’s now famous 1985 application for a promotion at the Justice Department, where he asserted his belief that “the Constitution does not protect a right to an abortion,” he also briefly addressed voting rights. “In college, I developed a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions, particularly in . . . reapportionment,” he wrote. At the confirmation hearings, Alito rebuffed suggestions by Democrats that this statement meant that he opposed the principle of “one man, one vote,” which was at the heart of the Warren-era apportionment decisions. “I do not see any reason why it [‘one man, one vote’] should be reexamined, and I do not know that anybody is asking for that to be done,” Alito testified. “Every legislative district in the country and every congressional district in the country has





been reapportioned, has been redistricted numerous times in reliance on the principle of 'one person, one vote,' and the old ways of organizing state legislatures have long been forgotten." Nevertheless, Roberts's and Alito's conservative orientations suggest that they may vote the way their predecessors, Rehnquist and O'Connor, did on this issue, and the decision will turn on Kennedy's vote.

The Democrats' lawyers hope that they can win over Kennedy by pointing out differences between the Pennsylvania and Texas cases. In Pennsylvania, there was some ambiguity about the legislators' motivations for drawing the district lines where they did. The state had lost two seats because of the 2000 census, so the legislators had no choice but to rework the earlier map, and, inevitably, politics played some role in those decisions. But the Texas case is purely a matter of political gerrymandering; the Court-ordered plan of 2001 had the right number of seats, and had already gone into use, so the only reason for the 2003 reworking was to help the Republican Party. "There is little question but that the single-minded purpose of the Texas legislature in enacting [the 2003 plan] was to gain partisan advantage," the lower court in the Texas case found. "The newly dominant Republicans . . . decided to redraw the state's congressional districts solely for the purpose of seizing between five and seven seats from Democratic incumbents."

In other words, as the Democrats see it, the Texas Republicans punished their opponents solely because of their political views. "It's a well-established idea that the government shouldn't discriminate against people because of their partisanship," Paul M. Smith, the lawyer who will present the oral argument for the Democrats, said. "The government can't refuse to hire someone for a civil-service job because of their partisan view. The government can't refuse to rent out an auditorium because of the speakers' views. Here, we're saying that you have to treat redistricting the same way—that you can't punish Democrats simply because they are Democrats." On the other hand, as Texas Republicans point out, the Court may be reluctant to join in a partisan melee. "You can't take politics out of politics, and

there is nothing more political than redistricting," Senator Cornyn says. Besides, as the lower court found in upholding the 2003 gerrymander, "the history of electoral politics in Texas during the latter half of the twentieth century can be described as the story of the dominance, decline, and eventual eclipse of the Democratic Party as the state's majority party." It seems reasonable for the state's congressional delegation to reflect this reality.

Still, there is one way for the Court to stake out a middle ground. Instead of striking down all partisan gerrymandering, thus sowing chaos in dozens of states shortly before the 2006 congressional elections, the Justices could say that a politically inspired mid-decade redistricting violates the Constitution. "We're simply asking for them to go back to the map the courts approved in 2001, and that Texas used in the 2002 election," Sam Hirsch, another lawyer for the Democrats, says. "It takes care of the worst of the problems, it's neat and simple, and there's no need for the courts themselves to draw district lines."

This option, which would be a major loss for the Texas Republican Party, might mean a win for Tom DeLay. Instead of running against DeLay, Nick Lampson could run in the district where he won as an incumbent in 2002. "That could certainly happen," Lampson told me. "I will have to make that decision when it actually becomes a reality." DeLay, in turn, would lose a well-financed challenger in the new district, and return to his old district, which was more Republican anyway. (DeLay declined to comment.)

Ultimately, DeLay's extremism may turn out to have been a national service, if it compels the Supreme Court to confront the problem of uncompetitive congressional elections. "I think that everybody knows this is a national scandal," says Samuel Issacharoff, of N.Y.U., who has filed a brief in support of the Democrats in the Texas case. "Every Justice has at some point said the situation is deeply wrong. They may disagree about whether the courts can do anything about it, or about how to fix the problem, but not a single member of the Court is willing to say that this is how our democracy is supposed to work." ♦