

**IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION**

GONZALO BARRIENTOS,)
 RODNEY ELLIS, MARIO GALLEGOS, JR.,)
 JUAN "CHUY" HINOJOSA, EDDIE LUCIO, JR.,)
 FRANK L. MADLA, ELIOT SHAPLEIGH,)
 LETICIA VAN DE PUTTE, ROYCE WEST,)
 JOHN WHITMIRE, and JUDITH ZAFFIRINI,)

Plaintiffs,)

v.)

STATE OF TEXAS;)
 RICK PERRY, In His Official Capacity)
 As Governor Of The State of Texas;)
 DAVID DEWHURST, In His Official Capacity)
 As Lieutenant Governor and Presiding Officer)
 Of the Texas Senate,)

Defendants.)

CIVIL ACTION NO. L-03-113

03-41528 Filed 11/17
 U.S. COURTS

**PLAINTIFFS' SUPPLEMENT TO APPLICATION FOR
TEMPORARY RESTRAINING ORDER**

Plaintiffs Gonzalo Barrientos, *et al.* ("Eleven Senators"), respectfully submit this supplement to the application for temporary restraining order they filed on August 27, 2003:

At yesterday's hearing, counsel for the Eleven Senators suggested that it would be in the best interests of all concerned – especially in the interim, until the three-judge Court's disposition of the issues before it – if the senators could return to Texas without fear of arrest or entrapment; the senators moved for entry of a temporary restraining order for that purpose. (Attachment A to this Supplement is the relevant excerpt from the legal memorandum in support of the temporary restraining order, addressing the threat of arrest

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faced by the Eleven Senators.) A related suggestion was made that it would be reasonable for the Governor to provide advance notice of 72 hours before another special session is called.

The Court encouraged counsel for the state defendants to take this suggestion back to the Governor and Lieutenant Governor. The Court expressed the view that all sides could benefit from a “chilling out” period, which would have the potential to bring some semblance of civility back into the current process, at least pending disposition of this case.

The Governor and Lieutenant Governor’s press statements of yesterday afternoon, however, suggest that they have categorically rejected the suggestions of a “cool-down” period. Attachment B to this supplement is a transcript of yesterday’s post-hearing news conference by the Lieutenant Governor, and Attachment C is a press report in which a spokesperson for the Governor said he would call a special session “at the appropriate time.” These statements not only reflect an unwillingness to step back from the process for a week or so, but, even more importantly, they set the stage for another attempted entrapment of the Eleven Senators by the defendants if the senators return from New Mexico, including a return to attend any hearings by this Court. The Eleven Senators should be free to attend this Court’s hearings without being subjected to any entrapment or arrest by these defendants or their agents.

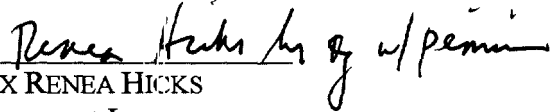
The Labor Day weekend is upon us and the 11 senators who left the state over a month ago continue to be absent from the State at great personal sacrifice. They have been absent from the families, homes, and jobs during this period. An upcoming event in the Dallas Fort Worth area will honor one of the absent senators, Senator Royce West.

While it is true that these senators made the choice to leave thirty two days ago, they did so out of a conviction that there was no other option to protect their constituents and their voting rights. There is no current session of the Legislature that has been called and yet they are being threatened with arrest by the defendants for simply returning to the State. This is akin to seizing and arresting any Texan citizen, who has committed no criminal offense, for merely being in the State. That is precisely why an interim order from this Court in the form of a temporary restraining order would preserve the status quo until the recently-convened three-judge court can hear and determine this cause. This Court has the power and, in these circumstances, the duty to enter this relief under the All Writs Act, 28 U.S.C. § 1651(a). A temporary seventy-two hour advance notice requirement would be "in aid of" the Court's jurisdiction, among other things, by permitting the plaintiffs in this case to attend court proceedings without threat of arrest by state officials. The effect of such an arrest, of course, would be to effectively moot the very case the Court is hearing and the senators seek to attend.

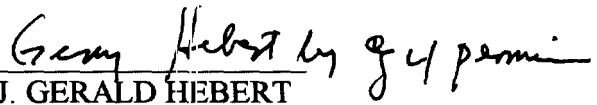
Of course, if even one of the 11 senators is arrested and brought back to the Senate, a quorum could then be established and a congressional redistricting bill can be rammed through the Texas Senate without the protections of the longstanding supermajority 2/3 Rule. A decision to arrest any of the senators and force them back into the Senate to create a quorum is tantamount to forcing these senators to cast a vote against their constituents, as well as their own interests and desires. A simple order forbidding their arrest and requiring advance notice of 72 hours before a special session preserves their rights and maintains the status quo. We have submitted a proposed order for the Court's consideration.

This alternative request for emergency relief is modest in nature and would last only long enough for the newly appointed three-judge court to render its decision on the Section 5 voting rights claims in the senators' complaint and proposed amended complaint.*

Respectfully submitted,


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* Attorneys for the Senators, of course, stand ready to confer by telephone with the Court and other parties in connection with this request for emergency, temporary relief.

Exhibit A

D. Pursuant to a Call on the Senate, in order to Compel the Plaintiffs' Attendance to Form a Quorum of the Senate During a Special Session of the Legislature Violates the Plaintiffs' First Amendment right to freedom of speech.

The current actions of the Plaintiffs in refusing to attend special sessions of the legislature – called by the Governor for the purpose of congressional redistricting and administered by the Lieutenant Governor without observance of the traditional two-thirds rule only insofar as congressional redistricting is concerned – plainly constitute the most fundamental kind of political speech. Under the current circumstances, any action compelling the attendance of the Plaintiffs is tantamount to forcing a vote *for* a redistricting plan the Plaintiffs oppose – and have opposed from the inception of this unprecedented mid-decade undertaking. An arrest by the Sergeant-at-Arms, therefore, is state action compelling the Plaintiffs to act directly contrary to their political beliefs. Political speech lying at the very core of the First Amendment is what is at stake.

Thus, *as applied to the specific facts present in this unique circumstance*, deployment of Senate Rules 5.02 and 5.04 to effectuate the arrest of the Plaintiffs flies directly in the face of their First Amendment rights under the United States Constitution. This would violate fundamental understandings of the rights and privileges of legislators reaching back four centuries. *See, e.g., Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (legislative immunity case noting that the “privilege of legislators to be free from arrest ... for what they do ... in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries”). As Justice Frankfurter pointedly observed in his opinion for the Court in *Tenney v. Brandhove*, “[f]reedom of speech and

action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation.” *Id.* at 372.

It is no answer to the Plaintiffs’ assertions of First Amendment rights that they are legislators, with less protection than citizens who follow other pursuits. In *Bond v. Floyd*, a unanimous Supreme Court overturned the Georgia Legislature’s expulsion of State Representative Julian Bond because of his public opposition to the war in Vietnam. 385 U.S. 116 (1966). The Court held that the expulsion violated Representative Bond’s First Amendment rights. It made no difference that the expulsion was painted as simply an internal matter that the Georgia Legislature could handle for itself. The Court flatly rejected Georgia’s argument that, even though punishing a citizen for such speech would violate the First Amendment, “the State may nonetheless apply a stricter standard to its legislators.” 385 U.S. at 132-33 (“We do not agree”).¹ The Court explained what should be obvious to all: “The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators.” 385 U.S. at 136. Bond was reinstated in the legislature.

The Plaintiffs in the case before the Court are engaged in First Amendment activity of the same sort exercised by Julian Bond. Their presence in Albuquerque, and their absence from the special session of the legislature, is a statement that the effort now underway to force congressional redistricting through the process is diametrically opposed to their political position and the interests of the constituents who elected them. The only purpose for arresting them is to complete passage of the redistricting bill and override their opposition to it. Using the Senate Rules to effectuate arrests is, as applied

¹ A court from the Southern District of Texas, in fact, has recognized that private citizens have a right not to vote. “[T]here is also a right not to vote.” *Beare v. Smith*, 321 F.Supp. 1100 (S.D. Tex. 1971). Under the Supreme Court’s rationale in *Bond*, the plaintiffs have no less of a right.

to the facts here, barred by the First Amendment's protection of the core political speech now being voiced by the Plaintiffs.

**Transcript of Dewhurst Press Conference
08/27/2003**

“I am very pleased today with the ruling by federal judge George Kazen. It looks like we can all see a light at the end of the tunnel on redistricting—being able to address the people’s business and moving forward. I think today’s decision in federal court is an important step in ending the impasse over redistricting. It’s clear from my conversations with the lawyers from the attorney general’s office that Judge Kazen was extremely skeptical about virtually all the democrat senators’ claims. And we are pleased that he referred on an expedited basis these claims to a 3 judge panel of the 5th circuit so that this matter can be resolved and put behind us. I think the judge’s comments in which he called some of the claims the arguments bazaar and he asked the democrat lawyer at one point ‘are you serious’ indicate part of our frustration that we’ve had with some of these claims and our interest in moving this forward. Judge Kazen’s refusal to grant the relief that was asked for by our democrat colleagues and instead referring this to a 3 judge panel of which I think he will likely be a member will hopefully move this so that this matter can hopefully be taken care of in the next week or two. The attorney general and his lawyers have indicated that the judge was skeptical of each and every one of the senator’s arguments and again it’s our hope that there’s light at the end of the tunnel and we’re looking for an expedited decision by the 3 judge panel of the 5th circuit. This is in keeping with the decision by Judge Byrne here in Travis County on Monday in which she decided on virtually very similar arguments that she lacked subject matter jurisdiction. And as you recall the supreme court in essence decided that over a week and a half ago. So I think it’s time that our colleagues in Albuquerque come home. Let’s go back to work just like millions of our fellow Texans did this morning. Let’s address the people’s business and move forward. Questions?”

“There was no plan. I discussed it with my staff before we decided not to go forward on it.

“The staff discussed it with me. They were gonna be in Texas and to see whether or not it would be feasible and whether or not I would be willing to recommend to the governor that he call a special session. We decided not to do such.

“No one was sent down to Laredo. We’ve discussed it among ourselves and a decision was made not to go forward.

“No I didn’t ask the senators to stay behind. I had a couple senators come into today as I do everyday and we talked on different matters. We were talking on sunset this morning.

“First of all I think the democrats need to come home. They need to assure us that they’re going to be back here in Texas. I think the people of Texas are tired of this matter. Enough’s enough and we need to move forward. As far as any advance word on a special session that’s going to be a decision by the governor.

"Well, my recommendation if he asked me would be that under the circumstances its time for them to come home. That unless we have the assurance that they will be here at the end of whether its 36 or 72 hours then it would not be my recommendation that he consider it.

"Well I don't want to go into detail. I will say that I laid out what I thought was a very workable compromise that involved a fair redistricting map and addressed in a global settlement the different issues in front of us. But again I don't want to talk about my efforts in reaching an agreement with the democrats.

"A fair redistricting map has as a West Texas map solved between Speaker Craddick and Senator Duncan in which they're working on at the present time.

"It would look as I've said earlier very much like the Texas Senate.

"I've been asked that several times indirectly by our colleagues out in Albuquerque and there are a number of ways in which I can make sure that all of our colleagues, democrat, republican, are comfortable that the map we agree on in the senate will be the map that will come out of the legislature.

"Well I've suggested and again I don't want to break any confidences but what I did suggest was something that I thought would a fair redistricting map that looked very similar to what we have at the Texas senate and was a global settlement not only to lawsuits, fines and other issues in front of us.

"Well I think what I read in the newspaper was that there were no new ideas (inaudible) this is different, very much of a new idea.

"What I heard you say is that the comptroller had made a statement that there were 2.7 billion dollars of fines and fees but that included cuts. Again we'd have to take a look at the numbers and see what they are. As I remember several days our budget deficit in December went from 5 billion to 10 billion dollars. I think the short answer to your question is it sounds like the republican primary started early this year. And I would remind the comptroller that whereas in January most members of the legislature were apprehensive about how to solve a 10 billion dollar revenue shortfall. We can all hold our heads high in that we balanced the budget without any new taxes and in my strong judgment a cutback in any essential services.

"The only time I've ever heard the term bounty hunters was from our friend Sen. John Whitmire. The only time I've heard this is from you all. **We did between the staff and myself discuss last night whether we should consider the possibility of arresting the democrats when they came into Laredo and if so whether or not we would make that recommendation to the governor.** We decided not to go forward with that. And therefore there has been absolutely no one else who was hired or deputized nor has anyone, no one left Austin for Laredo to the best of my knowledge other than the

attorneys from the attorney general's office who were down to argue the case and one attorney out of our office to monitor the proceedings.

"Without going into details of what I've discussed with the staff we decided it was not the time to look at that option and we felt very comfortable that our legal position in court today was strong.

"It looks as if the federal judge sees not only federal but state law the same way the attorney general has been advising us for several months and so I'm very pleased about that. **Again on whether there is a 72 hour notification before there's a special session I don't know why you'd ever consider that unless you had the commitment of the senators that they would not break state law they would not break a quorum and they'd be here. If that was on the table then of course that's a decision for the governor.**

"First of all we don't have a 72 hour—again what I'm interest in the commitment from our senators to come back to work just like millions of our fellow Texans did this morning.

"Thanks very much."

Panel will hear concerns of Texas 11

By Karen Brooks, John Moritz and Jay Root
Star-Telegram Staff Writers

A panel of three federal judges was named Wednesday to hear the Texas Democrats' complaint that civil rights are under assault in the bitter redistricting squabble.

Meanwhile, in Albuquerque, N.M., one of the boycotting "Texas 11" senators opened up a rare crack in the united front Democrats have presented since skipping town a month ago. State Sen. John Whitmire, D-Houston, told The Associated Press there was "something irrational" about being holed up in a New Mexico hotel for weeks on end, and he ruminated openly about returning home.

The remarks caused a firestorm in the senators' war room in Albuquerque. A single defection could give Republicans the quorum they need to pass a redistricting plan. After huddling behind closed doors with some of his colleagues, Whitmire moved to douse the political prairie fire.

"I'd like to say that I got spanked in there, but I won't," Whitmire said. "I am very much a part of the Texas 11. There is no split in our solidarity."

On the legal front, both sides claimed victory after U.S. District Judge George Kazen ruled that the Democrats' voting rights lawsuit should be heard by a three-judge panel. Composed of two Republicans and one Democrat, it was formed shortly after the hearing Wednesday morning in Laredo. The absence of any immediate court order means there's still no end in sight to the standoff. The 11 senators are vowing to stay away from Texas and the Republicans continue to promise another special legislative session on redistricting.

Republicans quickly seized on Kazen's skepticism about the merits of the Democrats' argument that their voting rights, and those of their constituents, are being violated.

"We can all see light at the end of the tunnel on redistricting," said Lt. Gov. David Dewhurst, a Republican. "Judge Kazen was extremely skeptical about virtually all of the Democratic senators' claims."

Democrats, vowing to keep resisting, said they were encouraged that their lawsuit is at least still moving through the court system.

"Even if it has [only] a shred of merit, it does get us to the next phase," said state Sen. Royce West, a Dallas lawyer holed up with 10 colleagues in an Albuquerque hotel. Kazen, during a hearing that lasted about 90 minutes, rejected the

Democrats' request for an injunction aimed at stopping the Senate

sergeant-at-arms from arresting them if they return home.

Although he called that prospect "troubling," Kazen referred the motion to the three-judge panel. Its members are Judges Patrick Higginbotham, an appointee of President Reagan, Lee Rosenthal, an appointee of former President George H.W. Bush and Kazen, appointed to the Laredo bench by

President Jimmy Carter.

Presiding over what at times seemed like an informal discussion about

politics, Kazen likened the standoff to the conflict between Palestinians and Israelis in the Middle East.

"You've got these two camps here, and it's either total victory or total surrender," Kazen said.

The Democrats allege that the effort to redraw congressional district lines is a violation of the Voting Rights Act. Their complaint centers on the decision to drop a rule requiring that two-thirds of the senators agree before any legislation is debated.

The Democrats, nine minorities and two Anglos representing heavily

minority-populated districts, say the change removed voting protections they previously enjoyed and has disenfranchised the minorities they represent. They also claim sanctions imposed on them by the Republican senators who stayed in Austin violate their civil rights.

Kazen, while criticizing the redistricting effort, said he has "serious

doubts" that the voting rights law could be applied to the matter before a bill had actually been passed.

"I think it's a bad idea, but the idea that the mere thought of passing the bill is a violation of the Voting Rights Act, to me, is odd," he said. Kazen emphasized that once a new map is drawn and passed, people can sue on the basis that it violates minority voter protections.

Still, he said the argument is "at least fairly debatable" under the

statute, which requires that such cases be referred to a three-judge panel unless deemed "wholly frivolous."

"Your argument," Kazen told Democratic attorney Renae Hicks, "is not wholly frivolous."
Hicks laughed and responded, "That's cold comfort, but thank you."

Kazen said he doubted the federal courts had the authority to dictate how the Senate goes about enforcing rules regarding absent senators but he encouraged attorneys for Perry and Dewhurst to accept an offer by the Democratic lawyer to give senators 72 hours' notice before calling a third session. He also suggested the lawmakers wait for the courts to act. "Let's chill out for a while, quit spending taxpayer money and taxpayer time, and get this thing ruled on," he said.

That idea got a cool reception in Austin. Kathy Walt, a Perry spokeswoman, said the governor had not changed his position of intentional vagueness about when a certain third special session on redistricting will begin. Likewise, Dewhurst, the Senate leader, said he would recommend against agreeing to any advance notification.

"Unless we have the assurance that they will be here," Dewhurst said, "then it would not be my recommendation that he consider it."

Democrats seemed to offer no concessions, either. Despite Whitmire's misgivings, they vowed to remain in Albuquerque as long as the prospect of being taken into custody remains a possibility.

"Certainly, we will not go home and risk trapping our constituents," said Sen. Leticia Van de Putte of San Antonio, chairwoman of the Senate Democratic Caucus. The "trapping" reference relates to the Democrats' decision to scuttle plans by at least five members to return to Texas Wednesday for the first time since the walkout began July 28. The members had hoped to attend the Laredo hearing, but pulled the plug after receiving reports that a trap was being laid.

Sen. Eliot Shapleigh of El Paso said the Democratic senators in Albuquerque instructed Austin staffers to "stake out" the GOP senators' offices and report any clues that a new session was being planned.

Shapleigh said that the flurry of activity in the Senate offices that

continued late into the night convinced them that the Laredo trip should be canceled.

"It was very clear that their was a move afoot to create a new session," he said. "There was a move to have the Senate

convene and there was a move afoot to have folks in Laredo to effect an arrest."

Dewhurst said the idea was discussed, but ultimately discarded.

"A decision was made not to go forward," he said.

One of the Democratic senators, Houston's Mario Gallegos, said he would not have gone quietly. "They're going to have to take me," he said.