Coates' Canons Blog: Did the Legislature Redistrict in the Wrong Year?

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North Carolina has a proud 30-year history of almost continuous litigation over legislative and congressional redistricting, described here. The lawsuits for our new decade have started and previous roles have been reversed. Republicans used to complain about maps drawn by Democrats. Now Democrats are objecting to Republican plans.

The Democrats and other plaintiffs in their 2011 lawsuits have not asked a fundamental question — a question that also was not asked by the Republicans and other litigants back in 2001 or 1991 or any time before — Should the General Assembly have redistricted at all? Or put another way: Did the state constitution tell the legislature to redraw its House and Senate districts in 2011 or were legislators supposed to wait until 2013? The point is moot for this round of redistricting, but it is an intriguing, longstanding and long ignored question of constitutional interpretation that deserves to be answered clearly before the next census.

And the answer depends on what you think “return” means.

What the constitution says

The North Carolina Constitution is specific about the timing of redistricting. Article II, Section 3 says of Senate districts: “The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the senate districts and the apportionment of Senators among those districts, subject to the following requirements . . . .” Section 5 says the same thing about House districts.

Well, what is the first regular session of the General Assembly convening after the return of the 2010 census? We know the 2011 session convened on January 26,2011. The issue is whether the 2010 census had been returned by that date.

How the census works

Census day was April 1, 2010. Well before then, though, census forms had been sent to all households in the country. Most households mailed in the form by April, but for those who did not census employees made home visits in May of 2010. The Census Bureau then began tabulating results. As required by 13 United States Code § 141, the Secretary of Commerce had to report to the president within nine months (i.e., by the end of 2010), the total population of each state, determining how many seats in Congress each state would have. Accordingly, just before the end of 2010 North Carolina learned that its total population had jumped from 8 million in 2000 to 9.5 million in 2010, and that the state would still have 13 members of the U.S. House of Representatives. But the December 2010 report contained only the statewide population; the county-by-county numbers and other breakdowns would not come for several more months.

Another part of the federal statute requires that population by county, city, precinct and block ? the so-called “P.L. 94-171 data”, named for the 1975 act requiring its reporting ? be reported to governors and state legislative redistricting bodies within one year of the census, that is, by April 1, 2011. In fact, the 2010 P.L. 94-171 data for North Carolina came a little early, the first week in March 2011. Those numbers, not the statewide total released in December, were the information needed to determine the current population of legislative districts and to draw new lines.

So when was the 2010 census “returned”?

What does “return” of the census mean?

North Carolina’s Constitution of 1868 was the first to refer to the “return” of the census, requiring reapportionment “at the first session after the return of every enumeration.” (Nowadays we usually say “census” instead of “enumeration.”) Not

surprisingly, the journal of the 1868 constitutional convention has no discussion of what the drafters meant by “return.”

The federal census law in effect in 1868 was the census act passed in 1850. It required U. S. marshals to count all inhabitants in their districts and to “return” their enumerations to the Secretary of the Interior by November 1st. If that is the meaning of “return,” then the 2010 census was completed sometime in the summer of 2010 when all the completed surveys and the forms from household visits were returned to the Census Bureau for tabulation.

Since the middle of the 20th century, however, the language about return of the enumeration has not appeared in the federal statutes. Instead, 13 U.S.C. § 141 directs the Secretary of Commerce to take a census of population every ten years and sets out the two dates discussed above for reporting the results, the end-of-December date for reporting the statewide numbers and the within-one-year deadline for P.L. 94-171 data.

Other states have constitutional provisions similar to North Carolina’s, requiring redistricting within a certain time “after the next decennial census of the United States shall have been taken” or “at each such session following official publication of each federal enumeration” or “after the completion of the next census” or some other operative language tied to the taking or reporting of the census. In the few instances of litigation over the meaning of those requirements the courts generally have settled on the date on which the data needed for redistricting became available — that is, the reporting of what is now known as P.L. 94-171 data.

The most prominent case is from Connecticut, *Cahill v. Leopold*, 141 Conn. 1, 10-11(1954). The Connecticut Supreme Court said this about the meaning of “completion of the next census” in the 31st amendment to that state’s constitution:

> In ordinary parlance, the completion of a census refers to the time when an official counting of the people has been finished. But, as used in the thirty-first amendment the phrase means something more than that. The ‘census’ mentioned in the amendment must of necessity be one showing the figures which are essential for intelligent action on the part of the General Assembly. The mere enumeration of the entire state, without more, is of no help in the enactment of redistricting legislation. The Assembly needs other data if, as provided, it is to make the senatorial districts as nearly equal in population as possible, under the limitations prescribed in the amendment. A census, then, within the thirty-first amendment, is one showing the population figures broken down into counties, towns and wards; and the census is completed only when those figures have been released to the public by an official authorized by law to make such publication or when those figures are available for the use of the General Assembly.

If the interpretation given by the Connecticut court were applied to North Carolina, the census was not returned until March 2011 and it would be the 2013 General Assembly, not the 2011 session, which would be the “first regular session convening after the return.

Cases from other states lead to the same result. The situation most similar to Connecticut is found in the Colorado Supreme Court’s decision *In re Interrogatories by the General Assembly*, 467 P.2d 56 (Colo. 1970). Cases from New Jersey, Arkansas and Alabama, though not as directly on point, tend to support this view as well.

When does the legislature convene?

If the 2010 census was not returned until March 2011, is there any question that the 2013 General Assembly, not the 2011 version, is the first regular session convening after that date? Both common parlance and constitutional history indicate it is 2013.

Before the 1960s the state constitution said that the reapportionment was to occur at the “first session” after the return of the census. In 1962, however, the constitutional provision on State House redistricting was amended to provide that the reapportionment was to occur at the “first regular session of the General Assembly convening after the return” of the census. In a 1968 amendment the new language referring to the “first regular session . . . convening” was used for both the House and the Senate. There is no record of the reason for the insertion of “convening.”

The constitution itself says the General Assembly “shall meet” in regular session every two years, not using the word “convene,” and the standard language in the Senate and House journals is to state that the Senate or House “assembles” at a session. The dictionary definition of “convene” is “meet together” and most people think that the legislature convenes on the first date it meets as required by the Constitution. By common understanding the 2011 General Assembly

convened on January 26, 2011. If the 2010 census was not returned until March 2011 ? the date the P.L. 94-171 data needed for redistricting became available ? the 2013 regular session will be the first session “convening” after the return of the census.

What has been the legislative practice?

The question about the timing of redistricting — and the meaning of “first regular session . . . convening after the return” of the census — has existed since the constitution was amended in the 1960s. Each decade since then the redrawing of legislative districts has taken place in the first session after the census was taken, regardless of when detailed data was reported. Thus redistricting was undertaken by the 1971, 1981, 1991 and 2001 General Assemblies, all controlled by Democrats, even though the census data needed for that purpose was not available until after those sessions had convened. No one seems to have questioned the timing. That history would make it awkward for Democrats to argue this time around that the Republican legislature could not redistrict in 2011. And neither Republicans nor anyone else ever challenged the authority for those earlier redistrictings.

Does the federal constitution make a difference?

The one-person/one-vote requirement that triggers redistricting comes from the Equal Protection Clause of the federal constitution. The U. S. Supreme Court said in *Reynolds v. Sims*, 377 U.S. 533 (1964), that districts should be redrawn after each census. Is there an argument, then, that the federal constitution trumps the schedule set out in the state constitution, that federal constitutional law requires the General Assembly to redistrict before the next legislative election after the census regardless of what the state constitution says about the timing?

It turns out that *Reynolds v. Sims* is less than precise about the timing of redistricting. The 1964 opinion said that because 41 states already provided for redistricting after each census “[d]ecennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. . . .” 377 U.S. at 583. The court then went on to say it did “not intend to indicate that decennial reapportionment is a constitutional requisite” but that doing so “would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation.” *Id.* at 583-84.

Reynolds v. Sims, then, does not clearly say redistricting has to occur immediately after the census, that it would not be permissible to wait until the “first regular session convening after the return” of the census. On the other hand, the longer one waits after the census the staler the numbers become and the shorter the period of time in which new districts will really be nearly equal in population. At some point that becomes an equal protection issue. [For more information on this issue, click **here**.]

So what about the 2011 redistricting plans?

It’s almost certainly too late for anyone to challenge the 2011 redistricting plans based on Article II, Sections 3 and 5. When it comes to lawsuits about elections the courts are quick to apply laches — that is, even if a lawsuit is permissible under the statute of limitations, the court still will not hear it if the case could have been brought sooner, the plaintiffs sat on their rights while the government went ahead in good faith, and the relief the plaintiffs now seek would be highly disruptive. A lawsuit claiming the 2011 General Assembly did not have authority to redistrict could have been brought before the legislature began drawing maps, certainly before plans were finalized, but none was. And the issue has not been raised in the current litigation which focuses on several other constitutional and statutory issues. Everyone would benefit from having the constitutional issue resolved before the convening of the 2021 General Assembly. It appears that a constitutional amendment is necessary, but someone may be able to think of a different approach.

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