Coates' Canons Blog: Normal Pattern: Census, Redistricting, Lawsuits

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UPDATE February 2017: Six years after the posting of the discussion below and just three years before the next 10-year census, several lawsuits challenging the redistricting of North Carolina's legislative and Congressional districts remain in active litigation. The pattern has held.

Here's the first step: every ten years the U.S. Census Bureau counts everybody it can find and reports the numbers to the states.

Here's the second step: the North Carolina General Assembly draws new district lines for the state House of Representatives, the state Senate, and the U.S. House of Representatives.

And here is the inevitable, unavoidable, written-in-stone, hell-or-high-water third step: somebody (or a bunch of people or the federal government) puts up legal challenge to the new districting plan and much of the new decade is taken up with reviewing it (and redrawing it, time and again).

It wasn't always this way. If you go back a few decades, the new census did not stir nearly as much redistricting excitement as it does today. In fact, after the census of 1930 and again after the 1950 census, the General Assembly simply did not draw new lines at all. Sure, the state Constitution required redistricting, but who was to make it happen? Courts in those days saw the drawing of electoral district lines as inherently a political question over which they had no jurisdiction. It was completely up to the legislature, constrained only by a few requirements found in the state constitution—state senators were to be elected from districts of roughly equal population, counties were not to be split in the drawing of district lines, and each of the 100 counties was to have one state representative, with the extra 20 spread among the more populous counties.

One-person-one-vote. The first great shift occurred after the 1960 census. The U.S. Supreme Court, early in the decade, ruled in a case arising in Tennessee that variations in population from district to district that are too large violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. Unless populations of districts are more or less the same, some people's votes count more than others. In 1965, a federal court, reviewing a North Carolina redistricting plan under this new court authority, held that the population variations in the 1961 state Senate and state House plans were too great. The legislature enacted new plans, and the precedent was set: census, lawsuit, new plans. In 1968, the voters of the state approved amendments to the state constitution (which were carried over into the adoption of a new state constitution in 1971), doing away with the every-county-gets-a-representative provision and incorporating the one-person-one-vote principle.

Race and the drawing of districts. Redistricting under the new constitutional provisions went smoothly enough in 1971, but problems arose quickly after the 1981 plans were put into place. Those problems stemmed from the application of Section 5 of the Voting Rights Act of 1965. Section 5 requires that in some states just about any kind of change affecting voting must be approved (through a process known as "preclearance") by the U.S. Department of Justice or the federal district court in the District of Columbia. Preclearance is intended to prevent changes that make it more difficult for African-Americans to elect candidates. The state submitted the 1981 plans, and Justice would not preclear the state House and state Senate plans. So, in April 1982 the legislature came into a special session to draw new plans. Those new plans were then challenged not under Sec. 5 of the VRA, but under Sec. 2, a section that in broad terms bars racial discrimination in elections anywhere in the country. Early in 1984 a federal district court held that the use of multi-member legislative districts so undermined the voting strength of minority voters as to violate the law. So, the legislature came back into session, adopted its third state House and Senate plans of the decade (adding a number of new single-member black-majority districts), and delayed the primaries in 1984 from May until later in the summer. The U.S. Supreme Court, in the 1986 decision *Thornburg v. Gingles*, 478 U.S. 30 (1986), affirmed the lower court ruling and the 1984 plans were

used for the remainder of the decade.

The blooming of challenges. The era of challenge to redistricting plans came into its own in the 1990s. The 1991 plan for North Carolina's congressional districts (plan number 1) drew an objection from the U.S. Justice Department under Sec. 5 of the Voting Rights Act. While the plan did contain one district with an African-American majority, it would have been possible, the Justice Department said, to create two such districts. So, in 1992 the General Assembly redrew the lines (plan number 2), creating two districts with African-American majorities, both with very odd, strung-out shapes. That plan was challenged by some white voters, who asserted that it took race too much into account and ignored traditional districting principles such as compactness. In 1996, the U.S. Supreme Court, in *Shaw v. Hunt*, 517 U.S. 899, agreed with those white voters, holding that the districting plan did in fact violate the Equal Protection Clause of the Fourteenth Amendment. As a result, in 1997, the General Assembly redrew the lines (plan number 3), with one majority African-American district and one district nearly evenly split but majority white. The Justice Department approved the new plan, but, in early 1998 a federal district court struck it down as violating the Equal Protection Clause, ordering the General Assembly to redraw the lines once again (plan number 4). Under this last plan, the 1998 primaries for U.S. House seats were conducted in September rather than the usual May.

A new wrinkle. In 2001, the General Assembly was once again back to the familiar task—take the census numbers and draw new districts (plan number 1). And once again, the familiar pattern held—a legal challenge. Only this time, the challenge was not one-person-one-vote, as it had been in the 1960s, nor was it directly race, as it had been in the 1980s and 1990s. Instead, it was a challenge to the state House and state Senate districts based on the provision in the state Constitution that counties may not be divided in the drawing of districts. The state Supreme Court, in April 2002, in *Stephenson v. Bartlett*, 355 N.C. 354, held that counties can be divided only to the extent necessary to comply with federal law, such as the Voting Rights Act, and that the 2001 plan divided too many districts. In May 2002, the General Assembly enacted new districts (plan number 2), but the superior court judge presiding in the on-going litigation rejected that plan and issued his own (plan number 3). The 2002 elections went forward on the judge's plan, with primaries in September. In 2003, the General Assembly enacted new districts (plan number 4). But in 2007, the state Supreme Court ruled that the 2003 plan still violated the no-divided-counties provision. It allowed the 2008 elections to go forward under the 2003 plan, but required a modification for 2010, which the General Assembly enacted in 2009 (plan number 5), eight years after enacting the first plan.

Here we go again. The General Assembly takes the 2010 census data (step one) and draws new plans for districts for the state House, the state Senate, and the U.S. House (step two). Who will come forward with the step three legal challenge?