

Redistricting and North Carolina Elections Law

The past three years have been the hottest period in redistricting litigation in the history of North Carolina. And that says a lot. North Carolina has been a center of redistricting litigation for decades. Further, this fever of redistricting litigation has burned in the context of elections litigation on other fronts.

In this outline, we will look at the current state of redistricting, and at the broader context.

Voting changes. In a case dealing with major changes to voting laws enacted in 2013, the U.S. Supreme Court in May 2017 denied certiorari, apparently dooming the imposition of a photo ID requirement, the elimination of same day registration and voting, the elimination of out-of-precinct provisional voting, and the shortening of the early voting period. Of course, a provision for photo ID is on the ballot as a proposed amendment to the state constitution.

Elections administration changes. In a case challenging fundamental legislative changes to the methods of administering elections at the state and county levels in North Carolina, the N.C. Supreme Court in 2018 ruled a major element of the changes unconstitutional. The General Assembly responded with further changes, but now a state three-judge panel has ruled all the changes unconstitutional. And the whole matter is on the ballot in the form of a constitutional amendment!

Redistricting. In legislative and congressional redistricting, four cases remained active into 2018, and one is still very active. All of the cases have been to the United States Supreme Court and in two of them the Supreme Court ruled that the North Carolina General Assembly engaged in unconstitutional racial gerrymandering. One case—a landmark, groundbreaking partisan gerrymandering decision—is at the Supreme Court now. And a fifth case, in state court, has been found by a three-judge panel to have a high likelihood of success on the merits.

2013 Voting Changes Case

In 2013, the North Carolina General Assembly enacted the Voter Information Verification Act (SL 2013-381). Four of its principal changes were challenged in lawsuits. Those four were:

- Required voter photo ID at the polls
- End of same-day registration and voting
- Shortening of the early voting period
- Eliminated out-of-precinct voting

The lawsuits challenging these changes went forward as *NAACP v. McCrory*. The federal district court denied preliminary injunctions as to these changes, but the Fourth Circuit granted preliminary injunctions as to the end of same-day registration and voting and the elimination of out-of-precinct voting. The US Supreme Court then stayed those injunctions.

On the merits, the federal district court upheld all the changes, but the Fourth Circuit permanently enjoined them all and, in May 2017, the US Supreme Court denied cert. The result is that all four are enjoined.

NAACP v. McCrory

At issue: Enacting photo ID at polls, eliminating same-day registration and voting, shortening the early voting period, eliminating out-of-precinct voting

Current status: Voting changes are enjoined

August 2014, US District Court hears challenges to photo ID, elimination of same-day registration and voting, elimination of out-of-precinct voting, and shortening the early voting period. It finds that plaintiffs have stated plausible claims and therefore denied defendants' motion for judgment on the pleadings. It denies plaintiffs' request for injunctions, however, finding as to some insufficient likelihood of success on the merits and as to others lack of irreparable harm.

October 2014, Fourth Circuit orders injunctions as to the elimination of same-day registration and voting and the elimination of out-of-precinct voting.

October 2014, US Supreme Court stays the injunctions.

January 2016, US District Court denies injunction on photo ID requirement.

April 2016, US District Court, ruling on the merits, upholds all the 2013 changes to the law.

July 29, 2016, Fourth Circuit reverses, finding that the changes were enacted with discriminatory intent and permanently enjoined all four—photo ID, elimination of same-day

registration and voting, elimination of out-of-precinct voting, and shortening the early voting period.

August 2016, US Supreme Court denies application for stay.

May 2017, US Supreme Court denies cert. “Given the blizzard of filings over who is and who is not authorized to seek review in this Court under North Carolina law, it is important to recall our frequent admonition that “[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case.”

2016 Election Administration Changes Case

In the Fourth Extra Session of 2016, the General Assembly enacted SL 2016-125. That statute worked significant changes in the administration of elections in North Carolina. In its two major changes it (1) combined the old state elections board, ethics board, and lobbying branch of the Secretary of State’s office into one State Bipartisan Board of Elections and Ethics Enforcement and (2) changed the number of members and party alignment of the state elections board and each county elections board. As a result of the changes, the state and county elections governing bodies would each be composed of even numbers of members, evenly divided between Democrats and Republicans. Governor-elect Cooper sued in North Carolina state court, arguing chiefly that the even split amounted to such a deprivation to him that it constituted a violation of the separation of powers provisions of the state constitution.

A three-judge court was impaneled and, given that the transition from the old state and county boards to the new ones was imminent, it temporarily enjoined the changes. The General Assembly in early 2017 made revisions to the legislation but the three-judge panel enjoined enforcement of the changes. In June, however, the three-judge panel dismissed the action under Rule 12(b)(1), lack of jurisdiction over the subject matter.

The N.C. Supreme Court granted discretionary review, skipping the Court of Appeals. It ordered that the “status quo be maintained” and that no further implementation of the election administration changes go forward. As a result, the old State Board of Elections had been dissolved but the new Bipartisan State Board of Elections and Ethics enforcement was not appointed. There was no state governing body. At the county level, the new law requiring memberships numbering four individuals, and quorums and majorities numbering three, created stagnation, since no new county board members were appointed to succeed the old three-member boards. As a result, the members of the old boards held over, but action required a unanimous vote of the three, and in some counties membership had dropped to two members because of vacancies, meaning no quorum was possible.

On September 1, 2017, the Supreme Court remanded the matter to the three-judge panel with direction to enter a new order within 60 days that “(a) explains the basis for its earlier determination that it lacked jurisdiction to reach the merits of the claims advanced in plaintiff’s complaint and (b) addresses the issues that plaintiff has raised on the merits.” The order also contains this provision:

“Until this case is resolved by the Court, any county board of elections with a vacancy reducing its membership to two members—such that the board cannot meet quorum requirements [under the amended new act]—may meet and conduct business [under the old statutes], with a quorum and unanimous assent of two members.”

On October 31, 2017, the three-judge panel confirmed that it lacked subject matter jurisdiction because the complaint raises a “nonjusticiable political question.” It explained further that if it in fact did have subject matter jurisdiction, it would rule that the General Assembly’s election administration changes were constitutional.

The matter came back to the N.C. Supreme Court and in January 2018 it ruled that the provisions in the law for composing the eight-member Bipartisan State Board of Elections and Ethics Enforcement violated the North Carolina Constitution’s provisions on separation of powers. By denying the governor a majority on the board, the court said, the governor was denied the necessary wherewithal to meet his constitutional obligation to “faithfully execute the laws.”

The Supreme Court sent the matter back to the three-judge panel to enter an order consistent with its ruling. On March 5, 2018, the three-judge panel ruled that the legislation calling for an eight-member state board was “void and of no effect.”

In the meantime, however, the General Assembly responded to the Supreme Court’s January ruling with new legislation providing that the new state board would not have eight members but would instead have nine. The eight—four Republicans and four Democrats—would meet and together come up with two names to submit to the governor. Those two individuals would be neither Democrats nor Republicans. The governor would pick one of those two and the board would thus consist of four Republicans, four Democrats, and one person who was neither a Republican nor a Democrat.

This new legislation was ratified on February 13, just a couple of weeks after the Supreme Court’s ruling that the old eight-member scheme was unconstitutional. The Governor neither signed it nor vetoed it. Since the legislature immediately adjourned, the ratified bill became law after 30 days, officially taking effect on March 16.

In that 30-day gap, the three-judge panel, on March 5, declared the old eight-member scheme “void and of no effect.” The new nine-member scheme went into effect.

What about county boards? When the Supreme Court ruled that the eight-member scheme for the state board was unconstitutional, it explicitly stated that it was not ruling one way or another on the provisions for four-member county boards of elections. As a result, that portion of the law remained in effect.

So, for the current moment, we have a nine-member state board and 100 four-member county boards. But the story is far from over.

With the nine-member board in place, Governor Cooper brought a new lawsuit, challenging the structure of the state board, the structure of the county boards, the provision for rotation of chairmanships of the state and county boards so that the same party has the chairmanship in general election years, and the provision for the employment of the state elections director.

On October 16, 2018, a three-judge panel of the state superior court held:

- The nine-member structure violates the constitutional requirement of separation of powers by interfering with the governor’s responsibility to faithfully execute the laws
- The provision for the employment of the state elections director unconstitutionally vests executive power in the legislature
- The provisions for rotation of the chairmanships of the state and county boards of elections are unconstitutional interference with the governor’s responsibility to faithfully execute the laws
- The 2017 and 2018 acts of the General Assembly are unconstitutional on the whole and are enjoined

Nonetheless, the injunction is suspended so that the current state and county boards can move forward with the conduct of the November 2018 election.

And, of course, at that election, the voters will decide whether to amend the constitution of the state to put the eight-member board structure into the constitution. That would have the effect, seemingly, of shielding the structure from a challenge to its constitutionality.

Cooper v. Berger (Round One)

At issue: restructuring of the State Board of Elections and county boards of elections
Current status: 9-member state board and 4-member county boards are in effect because of suspension of an injunction issued in Cooper v. Berger (Round Two) (see below), and an 8-member board is on the ballot as a constitutional amendment in the November 2018 election.

December 2016, Governor-elect challenges the 2016 changes to the administration of elections that changed the number of members (from 5 to 3) and party alignment (from a majority of the governor's party to an even split) of the state elections board and each county elections board.

December 2016, NC superior court grants a temporary restraining order against the changes.

January 2017, NC Chief Justice appoints 3-judge panel. 3-judge panel grants preliminary injunction.

February 2017, NC Supreme Court grants temporary stay

March 2017, NC 3-judge panel grants summary judgment to plaintiffs on challenges to the elections administration changes.

April 2017, General Assembly enacts revised version of the changes. The 3-judge panel enjoins the elections administration changes in the revised version.

June 2017, NC 3-judge panel grants motion to dismiss for want of subject matter jurisdiction.

July 2017, NC Supreme Court grants motion for discretionary review skipping the Court of Appeals. Supreme Court enters order that the "status quo as of the date of this order is to be maintained. Therefore, until further order of this Court, the parties are prohibited from taking further action regarding the unimplemented portions of the [administrative changes act]. Likewise, the parties should not seek further enforcement" of the three-judge panel order of dismissal. The parties are ordered to take no further action with regard to the reorganization of the state boards.

September 2017, NC Supreme Court remands the matter to the 3-judge panel to enter a new order "within 60 days that (a) explains the basis for its earlier determination that it lacked jurisdiction to reach the merits of the claims advanced in plaintiff's complaint and (b) addresses the issues that plaintiff has raised on the merits." The order also contains this provision: "Until this case is resolved by the Court, any county board of elections with a vacancy reducing its membership to two members—such that the board cannot meet quorum requirements [under the amended new act]—may meet and conduct business [under the old statutes], with a quorum and unanimous assent of two members."

October 2017, 3-judge panel reaffirms that it lacks subject matter jurisdiction; says it would uphold constitutionality if it had jurisdiction

January 2018, NC Supreme Court declares provision for an 8-member state board unconstitutional.

February 13, 2018, General Assembly ratifies new legislation, providing for a 9-member state board.

March 5, 2018, 3-judge panel orders the 8-member provision "void and of no effect."

March 13, 2018, NC Supreme Court denies motion to have entirety of the 2017 act declared unconstitutional.

March 16, 2018, new enactment by General Assembly for 9-member state board becomes law after governor neither signs nor vetoes it.

Cooper v. Berger (Round Two)

At issue: restructuring the state and county boards of elections; provisions for employment of the state elections director; and provisions for one party always to be the party of the chair of the state and county boards in general election years.

March 13, 2018, governor files complaint challenging the constitutionality of both the 2017 and 2018 enactments.

October 16, 2018, 3-judge superior court panel declares numerous aspects of the 2017 and 2018 enactments unconstitutional (see discussion in text above) and enjoins their enforcement; the court suspends the injunction until the results of the November 2018 election have been certified.

Redistricting Cases

In 2011, after the most recent census, the North Carolina General Assembly redrew, as it was required to do, the districts for elections to the North Carolina House of Representatives, the North Carolina Senate, and the United States House of Representatives. A set of lawsuits challenged all the districting enactments as *racial* gerrymanders. Two cases resulted in rulings by the United States Supreme Court that the 2011 legislative districting and Congressional districting plans included unconstitutional racial gerrymanders. Another case, a straightforward *partisan* gerrymander claim, has yielded a precedent-setting ruling that is now before the U.S. Supreme Court.

After consolidation of various actions, four independent redistricting cases were active into 2018 and a fifth has emerged.

In one of the four, *Harris v. Cooper*, the U.S. Supreme Court in May 2017 upheld a 2016 ruling by a federal three-judge panel that the 2011 Congressional districting legislation amounted to an unconstitutional *racial* gerrymander.

The second of the four, *Covington v. North Carolina*, was heard in October 2017 by a federal three-judge panel reviewing new State House and State Senate districting legislation enacted by the General Assembly after the U.S. Supreme Court affirmed a finding that the 2011 districts amounted to an unconstitutional *racial* gerrymander. In January 2018 the three-judge panel found that a racial gerrymander remains in new districts drawn by the General Assembly

and has ordered the use of new maps drawn by an agent of the court. In June 2018, the U.S. Supreme Court affirmed the actions of the three-judge panel on the racial gerrymander.

In the third of the four, *Dickson v. Rucho*, the North Carolina Supreme Court heard arguments in August 2017 after the matter was remanded by the U.S. Supreme Court in light of its *Harris v. Cooper* ruling. In this case, the North Carolina Supreme Court had twice upheld as constitutional the 2011 legislation for State House, State Senate, and U.S. House, against *racial* gerrymander claims. The court has now declared the litigation to be at an end.

The fourth of the four, *Common Cause v. Rucho*, was heard in October 2017 by a federal three-judge panel. The lawsuit is a challenge to the Congressional districts drawn by the General Assembly in 2016 as order in the *Harris v. Cooper* case. Those new districts were drawn as a result of the federal three-judge ruling that the 2011 districts amounted to a *racial* gerrymander. The challenge is on the grounds that the new districts amount to a *partisan* gerrymander. It is a novel sort of claim, one of set of such claims emerging around the country. In January 2018 the three-judge panel found that in fact the new districts amount to a partisan gerrymander. It ordered the General Assembly to draw new districts, but the United States Supreme Court has stayed that order.

The fifth case is a new action, brought in April 2018, which asserts that some of the changes in legislative districts put into place by the General Assembly in response to the racial gerrymander finding in *Covington v. North Carolina* violate the state constitutional prohibition on mid-decade redistricting

Here are the five lawsuits:

1.

Harris v. Cooper

At issue: Congressional districts

Current status: U.S. Supreme Court has affirmed a finding of unconstitutional racial gerrymander in the 2011 plan for the state's Congressional districts.

February 2016, a federal 3-judge panel held that Congressional Districts 1 and 12 were unconstitutional *racial* gerrymanders.

That same month, the General Assembly drew new districts, and those districts were used in the 2016 elections. The 3-judge panel ordered the parties to file any objections they had to the new districts. The plaintiffs objected that the new districts were unconstitutional *partisan* gerrymanders.

June 2016, the federal 3-judge panel held that, based on US Supreme Court precedent, it could not give relief on the grounds of *partisan* gerrymander. The plaintiffs appealed.

May 2017, the US Supreme Court upheld the finding that the old districts were unconstitutional *racial* gerrymanders (but of course, those old districts were no longer in use). With respect to the appeal of the plaintiffs on the grounds that the new districts amount to unconstitutional *partisan* gerrymanders, the US Supreme Court asked for briefs on two questions:

- Do the plaintiffs have standing to challenge the new districts as *partisan* gerrymanders, given that their lawsuit began as a *racial* gerrymander case?
- Is the action of the 3-judge panel in denying the objection appealable at all?

June 2018, the US Supreme Court issues its final affirmance of the finding of *racial* gerrymander and holds that the 3-judge panel was correct in not ruling on the *partisan* gerrymander claim.

2.

Covington v. North Carolina

At issue: State House and Senate districts

Current status: Federal 3-judge panel ordered use of new districts drawn by a special master. U.S. Supreme Court affirmed the panel's ruling on cures to the racial gerrymander but rejects the panel's cures to a problem under the NC constitution.

August 2016, a federal 3-judge panel held that 28 state legislative districts were unconstitutional racial gerrymanders. It ruled that the 2016 regularly-scheduled elections were so close that no remedial order could be put into place.

November 2016, the federal 3-judge panel ordered that new districts be drawn and that elections under the new districts be accelerated to 2017, truncating terms in the affected districts by one year.

January 2017, the US Supreme Court stayed the order for new districts and accelerated elections.

June 2017, the US Supreme Court affirmed the finding of racial gerrymander and remanded for further consideration on relief.

July and September 2017, the federal 3-judge panel ordered the General Assembly to enact new districts and denied the plaintiff's request that elections be advanced to March 2018.

September 2017, the General Assembly draws new districts and submits them to the court. Three-judge panel denies plaintiffs' request for accelerated elections.

October 2017, 3-judge panel hears arguments on plaintiffs' objections to the new districts (two kinds of objections: that some of the new districts failed to cure the racial gerrymander and that some of the new districts were unnecessary to cure the racial gerrymander and thus violated the NC constitution's ban on mid-decade redistricting); orders parties to name acceptable map-drawers

November 2017, 3-judge panel appoints special master to draw new districts

December 2017, special master submits his new districts

January 19, 2018, 3-judge panel adopts a plan drawn by its special master, address both of the plaintiff's objections

February 6, 2018, U.S. Supreme Court partially stays the adoption of the special master's plan

June 28, 2018, US Supreme Court affirms the 3-judge panel's holding on cures to the racial gerrymander but rejects the panel's cures to the problem found under the NC constitution (leading to case #5 below, NAACP v. Lewis)

3.

Dickson v. Rucho

At issue: Congressional districts, State House districts, State Senate districts

Current status: Litigation is "declared to be concluded."

June 2013, state 3-judge panel upholds the districts.

December 2014, NC Supreme Court affirms

April 2015, US Supreme Court remands

December 2015, NC Supreme Court again upholds districts

May 2017, US Supreme Court vacates and remands "in light of Cooper v. Harris."

August 2017, matter is heard in NC Supreme Court on remand.

September 2017, NC Supreme Court remands the matter to the 3-judge panel to consider whether a controversy exists or the matter is moot, whether there are other remaining state or federal issues to be resolved, and whether other relief may be proper.

February 2018, 3-judge panel, noting holdings in *Harris* and *Covington*, declares litigation to be concluded. Further claims "ought best be asserted in new litigation."

4.

Common Cause v. Rucho

(Consolidated with League of Women Voters v. Rucho)

At issue: Congressional districts as partisan gerrymanders

Current status: federal 3-judge panel has found an unconstitutional *partisan* gerrymander and has ordered General Assembly to draw new districts after the 2018 election. Appeal has been taken to the US Supreme Court.

March 2017, federal 3-judge panel denies motion to dismiss, holding that "partisan gerrymandering claims are justiciable."

September 2017, federal 3-judge panel denies motion to continue until after decision in US Supreme Court Wisconsin partisan gerrymandering case.

October 2017, hearing before 3-judge panel

January 9, 2018, 3-judge panel finds an unconstitutional partisan gerrymander; sets January 24 deadline for General Assembly to draw new districts; announces intent to appoint a special master

January 16, 2018, 3-judge panel denies request for stay

January 18, 2018, U.S. Supreme Court stays the order

June 25, 2018, US Supreme Court vacates in light of its holding in Wisconsin partisan gerrymandering case

August 27, 2018, 3-judge panel again finds unconstitutional partisan gerrymander

September 4, 2018, 3-judge panel says it's too late for a new districting plan before a new Congress is seated in 2019

October 1, 2018, appeal is taken to the US Supreme Court

5.

NAACP v. Lewis

At issue: status of 4 NC House districts in Wake County drawn in the 2017 General Assembly plan; question is whether the drawing of the districts violated the NC Constitution ban on mid-decade redistricting

Current status: State 3-judge panel found that plaintiffs had a likelihood of success on the merits but that time was too short for a preliminary injunction

April 13, 2018, state 3-judge panel finds that plaintiffs have a likelihood of success on the merits, but denies an injunction to avoid "disrupting Wake County elections already underway."