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Judicial Redistricting in North Carolina: A Plan for Second Class Justice

Executive Summary

The Southern Coalition for Social Justice’s analysis of the most recent judicial redistricting proposal highlights the significant evidence that these proposals are motivated by improper and illegal racial and partisan biases. The study considers the implications of the most recent judicial redistricting proposal presented at the December 13, 2017 Senate Select Committee on Judicial Reform and Redistricting meeting by analyzing publicly-available data including election results, voter records, and other information made available by the North Carolina General Assembly and the State Board of Elections.

Correcting population deviations in judicial districts is cited as a driving force behind the judicial redistricting effort in North Carolina. However, our analysis finds that concerns over existing population deviations could be solved by simple adjustments to the state’s existing judicial election framework, rather than the full-sale overhaul being considered in the North Carolina General Assembly without the proper study. Further, the most recent judicial redistricting proposal from the state legislature creates new and significant population imbalances in districts throughout the state, suggesting that the legislature’s purported motivation is pretextual.

Using recent election results, the analysis finds that the judicial redistricting proposal represents “a gross political gerrymander of our state’s legal system, designed to ensure that Republican judges will be elected in a disproportionate number of districts statewide.” Republican judges would be expected to win 70 - 72% of Superior Court races and 69.4 – 71 % of the District Court judgeships. Likewise, the pairing of incumbent judges and the strategic placement of open seats both demonstrate an overwhelmingly strong bias toward Republicans.

Additionally, the proposed districts are apparently derivative of racially gerrymandered state legislative districts that federal courts continue to invalidate. Judicial decisions rendered in the North Carolina’s courts must be based upon the law not partisanship. To ensure that, districts must be constitutionally constructed so that voters are guaranteed to have proper influence over the judicial officers dispensing justice to the state’s citizens. Anything less than that basic and necessary level of fairness would amount to second class justice.

Introduction

On December 13, 2017, Chairs of the Senate Select Committee on Judicial Reform and Redistricting introduced a new draft version of a judicial redistricting map, presumably as a committee substitute for H717 (hereinafter, the “December 13 map”), the vehicle by which

Republican legislators have been trying to dramatically reform how the state elects superior court judges, district court judges and prosecutors. This analysis will focus on the district lines for electing superior and district court judges.

The December 13 map unified the district lines for electing district and superior court judges—that is, the districts are the same across each map, but the number of judges elected from the districts varies. The current districts for electing district and superior court judges are not aligned. Legislative leaders proposing a dramatic revision to the state’s judicial districts never before suggested a need for aligning superior and district court district lines. Any number of district reform measures could have a mixed set of effects (some helpful, others not), but it is noteworthy that the particular proposal offered here lacks any compelling justification by its proponents or any accompanying study that outlines either its necessity or its likely effects.

To be clear, the current districts used to elect both superior and district court judges likely do need to be revised. Over time, the population in each of the judicial districts has changed, leaving the districts unevenly populated, meaning that some voters cast votes with more power than other voters when it comes to electing judges. Population inequality amongst electoral districts can lead to constitutional problems. Over the last two decades, the legislature has addressed population changes in a piecemeal way, but it has not made radical changes to the overall structure of how the state elects judges. This means that as the state population changes, some of the variation might lead to inequality of political influence for voters in some parts of the state compared to others. However, fixing these imbalances does not require a complete overhaul of the system, particularly this late in the decade. Any plan to draw new maps in 2018, when North Carolina’s projected population is 10.35 million people,¹ requires using data from the 2010 census, which recorded the state’s population as 9.5 million. Thus, a purported intention to balance population deviations would use demonstrably inaccurate data that reflects almost a million fewer state residents and an obsolete sense of where the shifts have been most notable. The legislature would be better off making only minor changes with an eye toward balancing population and establishing a commission to consider more carefully how best to redraw judicial districts after the 2020 census data is released.

The December 13 map, like the current systems for electing district and superior court judges, utilizes a mixture of single-member districts and multi-member districts. Single-member districts are districts in which just one representative (or in this case, judge) is elected. A multi-member district is a district that elects more than one representative, meaning that voters in those districts get to vote on multiple candidates instead of just one.

When assessing whether every person’s vote carries the same weight within a statewide redistricting plan, it is easiest to compare districts within an all-single-member districting plan. In such a plan, people’s votes carry the same approximate weight if each single member district has roughly the same population. That is, you can determine the ideal population for each

¹ <http://usapopulation2018.com/population-of-north-carolina-2018.html>

district (the total population divided by the number of districts), and then assess how closely a proposed map follows this standard of equal population.

It is more complicated when a districting plan contains both single- and multi-member districts. There is no single ideal population figure, because the number of judges per district varies. But one can still try to assess the relative fairness across the entire plan by considering the relevant population per judge. For example, if District A has 10,000 people and elects one judge, and District B has 30,000 people and elects three judges, you could say that there is one judge per 10,000 people in each district, and thus the two districts are treated equitably, both from a judicial resources and voting strength perspective. While one cannot determine the ideal population for a district using this method of analysis, one can determine the ideal number of residents per judge by taking the statewide population and dividing it by the number of judges. Districts where the number of “residents per judge” greatly exceeds this ideal “residents per judge” ratio may be deprived of critical judicial resources, and voters in those districts may cast votes that are less effective than in districts where the “residents per judge” number is lower. This is not the only way to analyze the issue, but it is a useful perspective.

Population Deviations

Using the methodology described above to analyze the allocation of judicial resources and voting strength across the state, the proposed plan is deeply troubling. In the proposed December 13 map for superior court judges, there would be 107 superior court judges elected in total across the state. With 9,535,483 residents in the state, that would mean that ideally, each superior court judge would be accountable to 89,117 people. If judicial districts are overpopulated—that is, have dramatically in excess of that ideal 89,117 people per judge, it means the voters in those districts will have relatively less voting power than others, and the judges who preside in those districts will be more likely to be overworked (and the people in the district more likely to be subject to slower, less efficient judicial management).

When it comes to electing superior court judges, the number of voters per judge in the districts proposed in the December 13 map varies wildly, ranging from 55.33% over the ideal “residents per judge” standard to under the ideal ratio by 33.15%. In terms of actual people, District 27, comprised solely of Rowan County, has one judge elected by 138,428 people. In contrast, District 21, comprised of Rockingham and Caswell Counties, elects two judges and has only 117,362 people, meaning “resident per judge ratio” is 58,681:1, compared to 138,428:1 in Rowan County. With fewer people in their electorate, the judges in District 21 would be far more accountable to voters in that district. Beyond the range of residents per judge, one stark pattern is easily observable: in Wake, Mecklenburg, and Guilford Counties, every single judicial district is substantially overpopulated, meaning the voters and judges in the largest and most Democratic counties are subject to overworked and understaffed judicial officers under this plan. In Wake County, each of the superior court districts are between 37.37% and 51.44% overpopulated when compared to the ideal “resident per judge” statewide ratio. Moreover, the districts in these counties are even more overpopulated than the 2010 census data reflects

because these are the counties that have experienced the greatest population growth in North Carolina since 2010.

For electing district court judges, with 288 district court judges elected statewide, ideally each district court judge would serve 33,109 residents. Just as with the proposed superior court revisions, the December 13 map creates a large and unjustifiable range of “residents per judge.” As an example, one district in Durham has 45,007 people per judge, while another judicial district in Buncombe County has only 26,190 people per judge. Looking solely within Buncombe County raises even more concerns. Of the three county’s judicial districts, just one of them is underpopulated in the proposed plan—with only 26,190 people per judge.. This same carefully crafted and underpopulated district, unsurprisingly, is also the only Republican district in Buncombe County. This outcome was no accident, since the remaining election districts (both Democratic districts) are actually overpopulated compared to the “resident per judge” ideal ratio for district court judges.

These significant and unjustified population deviations indicate that this rushed plan is ill-conceived and discriminatory. It will not well serve the people of the state, either from the perspective of ensuring that each voter’s ballot carries equal weight, or making sure that litigants in state court appear before judges who are adequately able to serve the people of their counties. That is not to say the current plans are perfect, but there are two available options that are far more sensible than the radical offering that is proposed: (1) the legislature could, rather simply, equalize the population in the most out of balance districts, or (2) the legislature could create and define fair standards that it means to employ in the design of judicial districts, and invite members of the public to proffer alternative maps for consideration.

Political Gerrymandering

North Carolina is unfortunately a groundbreaking state in partisan gerrymandering. On January 9, 2018, a federal court unanimously invalidated the state’s 2016 congressional redistricting plan as an unconstitutional partisan gerrymander—the first time a federal court has ever invoked that legal theory to strike down a congressional plan. But with the December 13 maps, it is clear that the state intends to compound its wrongdoing with the same sort of unconstitutional behavior. Using recent election results to predict the partisan affiliation of judges who will be elected in each of these proposed districts, the December 13 map represents a gross political gerrymander of our state’s legal system, designed to ensure that Republican judges will be elected in a disproportionate number of districts statewide.

Using the 2016 U.S. Senate and gubernatorial elections, where the Republican candidates and the Democratic candidates each received close to 50% of the statewide vote (but with the Republican winning the Senate race and the Democrat winning the gubernatorial race), reconstituted elections results by district for each race suggest that 75 of the 107 superior court judges elected would be Republican (i.e., 70% of the seats controlled by Republicans). This is a large partisan asymmetry and one that will likely draw judicial scrutiny on its constitutionality.

Using data from the 2016 Berger-Stephens Court of Appeals race, which was a partisan election, the predicted asymmetry is even greater, with Republicans controlling 72% of the seats in the superior court judgeships.

Likewise, again using the 2016 Senate and gubernatorial races, the district court redistricting plan will also produce a very large partisan asymmetry, with Republican judges likely to win 200 of the 288 district court seats (69.4%). In the Court of Appeals race, the asymmetry is again larger, with Republicans controlling 71% of the judgeships.

The existing structure for electing judges is not a Democratic gerrymander, as some proponents of the new plan have alleged. Applying the same analysis used above (rating a district by its political performance in a recent statewide election), and looking at the 2016 Senate race, Republicans dominate in 58.76% of the current superior court districts and 56.62% of the current district court districts.² The December 2013 plans for district and superior court judges create large and durable partisan asymmetries, are not justified by any other neutral explanation, and seem clearly intended to rig the judiciary in favor of Republicans. The state will only be subject to additional litigation and liability if it persists in this course.

Racial Gerrymandering

The December 13 map contains several problematic configurations that suggest that the mapdrawers are using race in an impermissible way, packing voters of color into as few districts as possible. In parts of the state, the proposed judicial districts appear to be largely derivative of districts that have been struck down by unanimous federal courts, including the United States Supreme Court, as racial gerrymanders. And in some areas, the judicial districts bear an uncanny resemblance to the districts that the legislature enacted in 2017 to “remedy” the 2011 state legislative racial gerrymanders. A federal court currently is reviewing the adequacy of the legislature’s remedial plans, and seems poised to strike them down. (The federal court was so concerned that the legislative plans were inadequate to remedy the harm of racially-segregated districts that it hired an expert to draw new plans for possible use in 2018, and the federal court is expected to issue a final ruling any day).

For example, Senate District 21, in Cumberland and Hoke County, was ruled to be an unconstitutional racial gerrymander. The legislature made only cosmetic changes to the portion of the district that was in Cumberland County, and the district continues to isolate black voters in the county in Senate District 21, and assigns white voters to Senate District 19. Below is a comparison of the Cumberland-portion of Senate District 21 in the state legislative remedial map, under scrutiny by the federal court, and Judicial District 15B in Cumberland County:

² This apples-to-apples comparison of the political performance in the current districts to the proposed districts is more appropriate than just looking at the partisan affiliation of current judges because the sitting judges have not run as partisans.

Within the urban counties, the rate of pairing black incumbent judges is troubling. In Durham County, 50% of the incumbents paired are African American. In Guilford County, 57% of the incumbents paired are African American. Despite being allegedly drawn blind to incumbency, the district court plan shows an incredibly high rate of pairing Democratic and black judges, but not Republican judges. This is highly unlikely to have happened by accident.

Where open seats are created is also politically skewed. Of the 52 open judgeships, 53.85% are in districts where Republicans control the districts, and only 46.15% are in districts where Democrats control districts. It is plain that the effect on incumbents is neither neutral nor blind, and the racial and political discrimination exhibited here will likely subject the state to added litigation.

Conclusion

If judicial districts are manipulated for partisan gain, North Carolina citizens will lose faith in the impartiality of their judiciary. The judicial branch is supposed to be the independent and neutral arbiter in the political system, and that independence relies upon the confidence of the public that they will receive a fair opportunity to be heard regardless of the judge's politics or their own. A patently manipulative and rigged piece of legislation like this mapping proposal threatens to disrupt a core principle of our state's democracy – the rule of law. This legislation will surely be litigated, and the General Assembly will, as it has now dozens of times since 2011, find itself paying huge legal bills for its intentionally discriminatory actions.