The Constitutionalist

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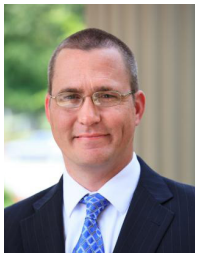
The Chair's Comments



Trey Allen

I am proud to serve as this year's chair of the Constitutional Rights & Responsibilities Section. As you know, our section endeavors to promote awareness and understanding of the profoundly important role that the United States Constitution and North Carolina Constitution play in our society. I would like to share five ways in which you can help the section further its mission over the next few months.

First, you can join other section members at the Bar Center in Cary on Friday, Jan. 22, 2016, for the section's annual CLE program. As noted in this newsletter's CLE advertisement, the program is entitled "North Carolina Election Law and Voting Rights." Distinguished judges, scholars, and practicing attorneys will examine a range of elections-related topics, including the current state of North Carolina's voting laws, the impact of recent decisions by the U.S. Supreme Court on redistricting, and the implementation of retention elections for members of the North Carolina Supreme Court. You will not want to miss this terrific educational opportunity.

Second, you can nominate deserving candidates for the John McNeill Smith Jr. Constitutional Rights & Responsibilities Section Award. Each year the award honors an individual who has demonstrated extraordinary devotion to the ideals embodied in our federal and state constitutions. Past recipients include John C. "Jack" Boger, John L. Sanders, James G. Exum, Jr., Bertha "B" Merrill Holt, Willis P. Whichard, Paul M. Newby, Robert N. Hunter Jr., Robert F. Orr, and Hugh Stevens. Nominations are due no later than Jan. 6, 2016, and may be submitted to ***ABradford@ncbar.org***.

Third, you can participate in the section's annual meeting at the Bar Center in Cary on Friday, Jan. 22, 2016, which as usual will coincide with our annual CLE program. We anticipate that the annual meeting will

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Navigating North Carolina's New Three-Judge Panel Provision for Facial Challenges to State Statutes

By Andrew Kasper

In August 2014, the North Carolina General Assembly enacted legislation requiring that a panel of three superior court judges decide civil actions facially challenging actions of the General Assembly. 2014 N.C. Session Law 100, § 18B.16.(a) (codified at N.C. Gen. Stat. § 1-267.1). Prior to 2014, Section 1-267.1 limited the use of three-judge panels to challenges to redistricting and apportionment statutes. The revised statute, which the legislature adopted largely without debate, provides limited guidance regarding numerous procedural and substantive questions unique to the facial challenge context. One year into the new regime, many of these questions remain unanswered

Between 1908 and 1976 federal law included a similar mechanism, requiring certain constitutional challenges to state and federal statutes proceed before panels of three federal judges. 28 U.S.C. §§ 2281-82 (repealed by Pub. L. 94-381, § 2, Aug. 12, 1976, 90 Stat. 1119). Congress, at the behest of the Supreme Court and numerous commentators, abandoned the use of three-judge panels for constitutional challenges in 1976. *See generally* Charles Allen Wright, Arthur R. Miller, et al., 17A Fed. Prac. & Proc. § 4234 (3d ed. 2015); Honorable Leland C. Nelson, *Three-Judge Courts: A Comprensive Study*, 66 F.R.D. 495 (1975); *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 596-99 (1972). The federal three-judge panel provision had spawned a

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NORTH CAROLINA BAR ASSOCIATION
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The Chair's Comments, *continued from the front page*

begin at 1:15 p.m. The recipient of the John McNeill Smith Jr. Constitutional Rights & Responsibilities Section Award will be announced at the annual meeting.

Fourth, you can encourage students to apply to the section's Constitutional Rights and Responsibilities Scholarship Program. The program offers small need-based scholarships to students at all levels who wish to take part in law-related educational programming or competitions, such as the Bar Association Foundations' annual Middle School Mock Trial Tournament. More information about the scholarship program is available on our section's webpage at ***http://www.ncbar.org/members/sections/constitutional-law/***.

Fifth, you can urge law students and attorneys to join our section. To state the obvious, a robust membership is essential if our section is to survive and thrive. Individuals can join our section at the following web address: ***https://www.ncbar.org/join-ncba/joinrenew/***.

Thank you for the honor of serving as section chair. I invite your questions and suggestions for our section.

North Carolina Election Law and Voting Rights (2016 Constitutional Rights & Responsibilities Section Annual Meeting)

Friday, January 22, 2016, NC Bar Center, Cary
Register: tinyurl.com/CLE449CRM

Join the Constitutional Rights and Responsibilities Section on the eve of the March 2016 primary election to learn about North Carolina election law and voting rights issues. This program explores questions raised by recent judicial decisions and state legislation regarding:

- Ballot security and access, including out of precinct voting, voter identification, and same day registration
- Voter redistricting after Alabama Legislative Black Caucus v. Alabama, Arizona State Legislatives v. Arizona, and Evenwel v. Abbott
- Judicial retention elections

This program is designed for interested participants with a range of experience including attorneys developing their understanding of election law, seasoned practitioners taking a closer look at the constitutional and statutory arguments in current debates, and voters planning to exercise their right to vote in the 2016 primary and general elections.

vast, complicated, and sometimes contradictory body of procedural and substantive law, and posed significant burdens on both the Supreme Court and lower federal courts. Through the lens of the federal experience, this article examines one category of the myriad substantive and procedural issues likely to arise under North Carolina's three-judge panel statute: the determination regarding whether a three-judge panel must decide a constitutional challenge and appellate review of that determination.

I. Background

Section 1-267.1(a1) of the North Carolina General Statutes provides that "any facial challenge to the validity of an act of the General Assembly shall be transferred . . . to the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County." The statute limits the use of three-judge panels to civil proceedings. § 1-267.1(d). The Chief Justice appoints the three-judge panel, and must appoint one judge from each of the eastern, central and western regions of the State. § 1-267.1(b2). Only "resident superior court judges"—as opposed to special superior court judges—may serve on three judge panels convened pursuant to Section 1-267.1. *Id.* Venue now lies exclusively in Wake County for civil actions that, in whole or in part, lodge a facial challenge to a legislative action. § 1-81.1(a1).

A new subsection to Rule 42 of the North Carolina Rules of Civil Procedure, which was added as part of the revisions to Section 1-267.1, provides further procedural and substantive guidance:

> Pursuant to G.S. 1-267.1, any facial challenge to the validity of an act of the General Assembly, other than a challenge to plans apportioning or redistricting State legislative or congressional districts, shall be heard by a three-judge panel in the Superior Court of Wake County if a claimant raises such a challenge in the claimant's complaint or amended complaint in any court in this State, or if such a challenge is raised by the defendant in defendant's answer, responsive pleading, or within 30 days of filing the defendant's answer or responsive pleading. In that event, the court shall, on its own motion, transfer that portion of the action challenging the validity of the act of the General Assembly to the Superior Court of Wake County for resolution by a three-judge panel, if, after all other matters in the action have been resolved, a determination as to the facial validity of an act of the General Assembly must be made in order to completely resolve any matters in the case. The court in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity and shall stay all matters that are contingent upon the outcome of the challenge to the act's facial validity pending a ruling on that challenge and until all appeal rights are exhausted. Once the three-judge panel has ruled and all appeal rights have been exhausted, the matter shall be transferred or remanded to the three-judge panel or the trial court in which the action originated for resolution of any outstanding matters as appropriate. N.C. R. Civ. P. 42(b)(4).

The statute further provides for an appeal as of right to the Supreme Court of any decision by a three-judge panel holding that a statute is facially invalid on grounds that the statute violates the North Carolina Constitution or federal law. N.C. Gen. Stat. § 7A-27(a1). By contrast, no appeal as of right lies to the Supreme Court for a three-judge panel decision upholding legislative actions.

II. The Decision to Convene a Three-Judge Panel

As explained above, the statute requires three-judge panels *only* for facial challenges to state statutes; as-applied challenges remain within the province of single superior court judges. The limitation of the three-judge panel provision raises at least two questions: (1) what constitutes a "facial" challenge and (2) who decides whether a challenge is facial? Although the federal statute did not limit the use of three-judge panels to facial challenges, the federal statute did include a number of analogous substantive prerequisites that raised similar questions. Nielsen, 66 F.R.D. at 501-05 (explaining that statute required three-judge panel if challenge (1) raised a substantial federal question, (2) include some basis for granting injunctive relief and (3) statute to be enjoined had statewide application or was alleged to be unconstitutional).

A. Who Determines Whether A Three-Judge Panel Must Decide A Constitutional Challenge?

Taking the latter question first, Rule 42(b)(4) states that the court in which the action originated (i.e. the single superior court judge) "shall, on its own motion, transfer that portion challenging the validity of the act" to the three-judge panel. Thus, the single superior court judge must decide, based on the allegations in the pleadings, whether the challenge is "facial" and requires transfer to a three-judge panel.

A more difficult question is what happens if the single superior court judge improperly determines that a challenge is not "facial" and rules on the merits of the constitutional challenge. Federal courts treated the three-judge panel provision as jurisdictional because the statute used mandatory language. Wright & Miller, 17A Fed. Prac. & Proc. § 4235. Accordingly, if a single judge improperly concluded that a three-judge panel was not required, a court of appeals could not review the trial judge's decision on the merits of the constitutional challenge; rather, it had to remand the case to the trial court for transfer to a three-judge panel for a new hearing of the constitutional challenges. **Goosby v. Osser**, 409 U.S. 512, 522-23 (1973); *see also* **Sardino v. Fed. Reserve Bank of N.Y.**, 361 F.2d 106, 114 (2d Cir. 1996) (Friendly, J.) (characterizing rule as "bizarre," but required by the statute). Because North Carolina's facial challenge requirement also appears to be jurisdictional—it is mandatory—one would expect an identical, if "bizarre," rule to apply.

An equally complex appellate review process also may apply in the event that a superior court judge improperly determines that a three-judge panel is required. Rule 42 provides that "[t]he court in which the action originated shall maintain jurisdiction over all matters other than the challenge to the act's facial validity." The three-judge panels, therefore, appear to be without jurisdiction to decide matters other than facial challenges to a statute's validity, including, for example, as-applied challenges. Accordingly, if the Supreme Court or Court of Appeals concluded on appeal that a three-judge panel improperly decided the merits of what was in

fact an as-applied constitutional challenge, it would likely have to remand the case to the trial court for a new ruling on the non-facial challenge. **Cf. Bd. of Regents of Univ. of Texas Sys. v. New Left Ed. Project**, 404 U.S. 541, 545 (1972) (vacating decision of improperly convened three-judge panel). Due to the complexity of this process, federal courts determined that the three-judge court had "a duty to redetermine jurisdiction," duplicating the work of the single judge. Nielsen, 66 F.R.D at 516 (citing **Jackson v. Choate**, 404 F.2d 910, 913 (5th Cir. 1968)).

Further complicating this analysis is the possibility that the Chief Justice of the Supreme Court, who is statutorily tasked with appointing a three-judge panel, may have an independent obligation to determine whether a three-judge panel is required. Prior to the abolition of the federal three-judge panel statute for constitutional challenges, circuit courts were split regarding whether the Chief Circuit Judge's responsibility for designating panel members was purely ministerial or required the Chief Judge to independently determine whether the single judge properly determined a three-judge panel was required. Compare **Hobson v. Hansen**, 256 F. Supp. 18, 21 (D.C. Cir. 1966) (refusing to certify claims to three judge-panel because such claims were beyond statutory jurisdiction of three-judge court), with **Smith v. Ladner**, 260 F. Supp. 918, 919 (S.D. Miss. 1966) (concluding that designation of three-judge panel was purely ministerial action). Section 1-267.1(b2) provides that "[f]or each challenge to the validity of statutes and acts subject to subsection (a1) of this section, the Chief Justice of the Supreme Court shall appoint" the three-judge panel. It is unclear whether this language contemplates the Chief Justice assuming a purely ministerial or substantive responsibility. If the latter is the case, three separate entities (the single superior court judge, the Chief Justice, and the three-judge panel) may, in certain situations, assess whether a three-judge panel is required.

B. Distinguishing Facial from As-Applied Challenges

The complexity of the jurisdictional determination appeal process makes it all the more important that the trial court correctly determine, in the first instance, whether a challenge is "facial" and thus must be decided by a three-judge panel. Unfortunately, the statute does not provide any guidance regarding what constitutes a "facial" challenge. North Carolina courts have not adopted a clear test for distinguishing between facial and as-applied challenges. To date, North Carolina courts have held that a party lodges a facial challenge to a legislative act when it seeks to establish that there are "no set of circumstances under which the act would be valid." **State v. Thompson**, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998); **State v. Lovette**, 758 S.E.2d 399, 406 (N.C. App. 2014) (concluding defendant's challenge to sentencing statute on grounds that statute gave trial court "unbridled" discretion in sentencing was facial, rather than applied because "no matter what the trial court's determination was, the new sentencing statute is unconstitutional because of the amount of discretion given to the trial court in making its determination"). There is, however, only limited case law applying this test, which arguably conflates the definition of a facial challenge with the standard for invalidating a statute as unconstitutional on its face. *Cf.* Scott A Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes In Toto*, 98 Va. L. Rev. 301, 312 (2012) (noting that "no set of circumstances" articulation "seems to raise more questions than answers").

The "no set of circumstances" test is drawn from language in the Supreme Court of United States' decision in **United States v. Salerno**, 481 U.S. 739, 745 (1987). The Fourth Circuit has recognized that "[i]n the years since *Salerno*, some members of the Court have expressed reservations about the applicability of this stringent standard," and suggested an alternative "plainly legitimate sweep" test. **United States v. Comstock**, 627 F.3d 513, 518-19 (4th Cir. 2010). Indeed, the Supreme Court recently noted that "the distinction between facial and as-applied challenges is not so well defined . . . ," **Citizens United v. Fed. Election Comm'n**, 558 U.S. 310, 331 (2010), and has recognized that single actions can display characteristics of both facial and as-applied challenges, **John Doe No. 1 v. Reed**, 561 U.S. 186, 194 (2010). Courts' rethinking of the facial/as-applied dichotomy stems from scholarship calling into question courts treatment of facial and as-applied challenges as categorically distinct. *See, e.g.*, Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1324 (2000) ("[I]t is more misleading than informative to suggest that 'facial challenges' constitute a distinct category of constitutional litigation. Rather, facial challenges and invalidations are best conceptualized as incidents or outgrowths of as-applied litigation."). The appropriate test for distinguishing between facial and as-applied challenges is beyond the scope of this Article. Suffice it to say, however, Section 1-267.1 will force North Carolina courts to wade into—and ultimately resolve—this debate.

III. Conclusion

In sum, the substantive uncertainty regarding the distinction between facial and as-applied challenges magnifies the procedural issues associated with determining whether Section 1-267.1 requires transfer of an action to a three-judge panel. It is important to emphasize that the outstanding procedural and substantive questions regarding the expanded three-judge panel regime are not limited to the decision regarding whether a three-judge panel is required. To name a few, other issues include: (1) whether, and to what extent, decisions of three judge panels have precedential effect; (2) the potential for inconsistent opinions between three-judge panels and single judges in civil and criminal challenges to the constitutionality of the same statute; (3) what satisfies Rule 42(b)(4)'s exhaustion requirement, and (4) the procedure for appealing pendent issues in cases in which there is an appeal as of right to the Supreme Court of a three-judge panel decision invalidating a state statute. North Carolina courts should have ample opportunity to address and resolve these issues in the coming years.

Andrew Kasper is a litigation associate with Robinson, Bradshaw & Hinson, P.A. in Charlotte. Mr. Kasper served as trial and Supreme Court counsel to Governor Patrick L. McCrory, and former Governors James B. Hunt and James G. Martin, in **State ex rel. McCrory v. Berger**, No. 2015 WL 1324855 (N.C. Super. March 16, 2015), *the first three-judge panel decision to reach the North Carolina Supreme Court.*

Piecing Together the Puzzle of North Carolina's Redistricting Litigation

By Colin Shive

Redistricting often invites litigation. Since the General Assembly began redrawing legislative and congressional districts every ten years following the 1970 census, there has only been one set of maps that has not been subject to challenge—the maps drawn in 1971.[1] The redistricting process following the 2010 census has proven to be no exception. To date there have been four separate actions brought in state and federal court regarding the redistricting plans enacted by the General Assembly in July 2011. If history is a guide, the litigation may not end before the next census in 2020. Because the cases have overlapping claims, and because of their complex procedural histories, it can be difficult to keep them organized. Below is a brief summary of each of the cases, three of which are still ongoing.

1. **North Carolina v. Holder**

This case was the most straightforward and short-lived of the four. The state filed a declaratory judgment action in the District of Columbia on Sept. 2, 2011, asking the court to declare the legislative and congressional maps to be compliant with Section 5 of the Voting Rights Act. Section 5 requires covered jurisdictions to seek a declaratory judgment or preclearance from the United States Department of Justice before instituting changes to voting procedures. Although North Carolina was not itself a covered jurisdiction, 40 counties within the state were subject to the preclearance requirement. The case was voluntarily dismissed after the Justice Department precleared the plans in November 2011. Because of the United States Supreme Court's decision in **Shelby County v. Holder** striking down the coverage formula of the Voting Rights Act, the state will not need to seek preclearance in the next round of redistricting unless Congress enacts a new coverage formula in the interim.

2. **Harris v. McCrory**

Three individual plaintiffs residing in Congressional districts 1 and 12 brought an action on Oct. 24, 2013, in the Middle District of North Carolina seeking a declaration that the districts violate the Equal Protection Clause of the United States Constitution. Plaintiffs allege that the districts constitute illegal racial gerrymanders because the district boundaries "pack African-American citizens into" the districts, thereby diluting their voting power. Congressional district 1 contains portions of 24 counties, but only five whole counties, and has a perimeter of 1,319 miles. Congressional district 12 winds from Charlotte to Winston-Salem and Greensboro roughly along Interstate 85. It is 120 miles long, but only 20 miles wide at its widest point. The districts have majority-black voting age populations of 53 percent in district 1 and 51 percent in district 12.

In an order issued in July 2014, Chief United States District Judge William L. Osteen, Jr.,[2] denied the parties' cross motions for summary judgment and stayed further proceedings pending the United States Supreme Court's decision in **Alabama Legislative Black Caucus v. Alabama** (hereinafter ***A.L.B.C.***). That decision, issued on March 25, 2015, provided clarification regarding the legal standard to be applied by the **Harris** court, holding in part that section 5 does not require—and can therefore not be used to justify—packing African-American voters into a district in order to maintain previous majority-minority percentages. After the Supreme Court's decision was issued, the stay in the **Harris** litigation was lifted and a three judge panel was convened from Oct. 13 through Oct. 15 to hear the merits of the case.[3] A decision has not yet been rendered.

3. **Dickson v. Rucho**[4]

This is the broadest challenge of the group, challenging the legislative and congressional maps based on both state and federal grounds. The complaint was filed on Nov. 3, 2011, two days after the Department of Justice announced its preclearance of the plans. Plaintiffs are individual voters from throughout the state in challenged districts. The Plaintiffs' state law claims include an argument that the legislative districts violate the North Carolina constitution by unnecessarily splitting counties into separate districts. Under the state constitution and state Supreme Court precedent, legislative districts may only divide counties to the extent needed to comply with federal law. The complaint also alleges that the state legislative districts "isolate[] the State's Black citizens in a small number of districts" by concentrating "about half the state's 2.2 million Black residents in 10 Senate districts and in 25 House districts." With regard to the congressional maps, the Complaint claims that the General Assembly similarly packed "approximately one-half of the State's Black citizens to just three (3) of the State's 13 Congressional Districts without regard for traditional redistricting standards." Plaintiffs seek to have the maps declared unconstitutional under the Equal Protection Clause of the both the United States and North Carolina Constitutions.

A bench trial was held on July 5 and 6, 2013 before a three-judge panel,[5] and on July 8, 2013 the court issued a 74 page opinion granting judgment for Defendants on each claim. Plaintiffs appealed to the North Carolina Supreme Court, and after oral argument in January 2014, the court issued a 5-2 opinion authored by Justice Edmunds In December 2014, affirming the trial court and holding that the legislative and congressional plans "satisfy state and federal constitutional and statutory requirements."

Plaintiffs filed a petition for certiorari with the U.S. Supreme Court, and on April 20, 2015 the Court issued an order granting

certiorari, vacating the North Carolina Supreme Court's decision, and remanding the case for further consideration in accordance with the Court's decision in **A.L.B.C.** Importantly in light of **A.L.B.C.,** the North Carolina Supreme Court's decision in **Dickson** was based partly on its holding that the state's desire to consider race in drawing districts that comply with the Voting Rights Act is a compelling interest capable of surviving strict scrutiny. Oral argument was held on the remanded case on August 31, 2015. An opinion has not yet been issued.

4. **Covington v. North Carolina**

This is the latest case to be filed and the only case brought after the Supreme Court's decision in **A.L.B.C.** The complaint, filed in May of this year, challenges nine state Senate and sixteen state House districts as unconstitutional racial gerrymanders. Plaintiffs are citizens residing in the challenged districts. The complaint relies on **A.L.B.C.** and alleges that the redistricting plan "employed mechanical racial targets in creating the challenged districts in violation of the Constitution and gave no consideration to minority voters' demonstrated ability to elect their preferred candidates of choice in those districts." A three-judge panel[6] has been appointed to hear the matter, which is still in discovery with summary Judgment motions presently due in February 2016. On Oct. 21, 2015, however, Plaintiffs filed a motion for a preliminary injunction asking the court to issue an order delaying the opening of filing in the challenged districts until a remedial redistricting plan is put in place. The motion argues that immediate action is needed because of recent legislation moving up the primary elections for state legislative districts from May to March 2016. Filing for those races is now set to open on Dec. 1, 2015.[7] A hearing on Plaintiffs' motion has been set for Nov. 23.

Thus far no court has enjoined or struck down any of the legislative or congressional districts.

Colin Shive is an associate in the education law section of Tharrington Smith, LLP.

(Endnotes)

1 See Michael Crowell, *North Carolina Redistricting History Timeline*, UNC School of Government, September 2011.

2 The author served as law clerk for Judge Osteen from October 2011 to October 2012.

3 The members of the panel are Judge Osteen, Judge Roger Gregory of the Fourth Circuit Court of Appeals, and Judge Max Cogburn of the United States District Court of the Western District of North Carolina.

4 A companion case, **NC State Conference of Branches of the NAACP v. North Carolina**, was filed on Nov. 4, 2011 and consolidated with **Dickson v. Rucho** on Dec. 19, 2011.

5 The three members of the panel were Superior Court Judge Paul C. Ridgeway, Superior Court Judge Joseph N. Crosswhite, and Superior Court Judge Alma L. Hinton.

6 The panel consists of Judge James A. Wynn, Jr., of the Fourth Circuit Court of Appeals, Judge Thomas D. Schroeder of the United States District Court for the Middle District of North Carolina, and Judge Catherine C. Eagles, also of the United States District Court for the Middle District of North Carolina.

7 See 2015 N.C. Sess. Laws 258.

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