Informal Transcript: Michael Crowell

Senate Select Committee on Judicial Reform and Redistricting

11/08/17

(2:47:24) Thank you, one thing I like to tell folks is that I was Gerry Cohen before Gerry Cohen. I was director of Bill Drafting for one session before Gerry took over and ran with it from there. And let me make clear, I don't speak for anybody today, except myself. What I was asked to do and what I'm going to do is talk briefly about the history of judicial districts. The one point I want to leave with you is the purpose of judicial districts is court administration – that's the overwhelming purpose – to say that the districts are created so cases can be decided efficiently, so that we have uniformity throughout the state. And what our history since the uniform court system was established in 1965 shows that when districts are rearranged for political purposes it doesn't serve that court uniformity and efficiency very well.

(2:48:39) As you know, the current uniform general court of justice was created in the mid 1960's as a result of the Burle Commission and others and I will talk about that in just a second. The districts that they started with - the 30 districts that they started with were the existing superior court districts. North Carolina has had superior court districts since the 1770's – it varied from 6-12 into the mid-19th century set by the constitution in 1875. The constitution was amended to allow the legislature to decide the number of districts – superior court districts to jump to 9. It was 9 in 1875, jumped to 16 in 1901, to 21 in1937, and then was up to 30 in 1955. Those districts were created – keep in mind that there was one judge per district, and so the districts were created and new districts were created as workload demanded – as this state grew and workload demanded. And also keep in mind that there weren't contested judicial elections at that time, we didn't have contested judicial elections until, what, the 1980's? Before that it was very common, particularly for superior court, for a judge to be appointed to fill a vacancy - maybe had some opposition first election and then none after that. But in 1955 the districts that existed then were 30 superior court districts, one judge in each district. The constitution had recently been amended to say for the first time that the legislature could put more than one judge in a district and by 1955 Guilford and Mecklenburg counties had two judges. There were also four special judges. At that time there were six single county districts – out of the 30 - Wake, Durham, Guilford, Forsyth, Mecklenburg, and Buncombe. There were 21 solicitorial, those were the predecessors to the district attorneys – solicitors. And as Gerry is going to describe in more detail later, there wasn't any district court. Before the district court was created in the mid 1960's the state had a hodgepodge of local courts – recorders courts, mayor's courts, county courts. They had different jurisdictions, they had different jurisdictions, they had different rules, and they had different ways that judges were selected. Some were paid based on fees, some got a salary, some were part-time, some were full time, some were lawyers, and some were not. And the main accomplishment of the Bell commission was to have that system of local courts replaced with a uniform statewide district court.

(2:52:03) The Bell commission was created in 1955 by Governor Hodges, it reported in 1958. There principle theme was uniformity in the courts throughout the state and that's the creation

of the district court. But also there other principle theme was judicial independence and that led to their view on judicial districts. There ideas about judicial independence included, for example, that the Supreme Court would decide the jurisdiction between the district courts and the superior courts. That the supreme court, not the legislature would adopt the rules of procedure for the courts, that the chief justice would be empowered to assign superior court judges to district court for temporary service. The (inaudible **2:52:58**) commissions view about districts – district court lines, was that they should be set by the Supreme Court. That was the Bell commission's recommendation that the Supreme Court would decide what the district court line would be and could change them when they thought appropriate. They also thought that district judges should be appointed by the chief justice from nominations for the senior resident superior court judge. Now the Bell commission was the beginning of the court reform in the 50's and 60's but not the end. The Bell commission made its recommendations, the 1959 session of the legislature didn't buy them. The Governor created another committee, chaired by Spencer Love. There was a Bar Committee – North Carolina Bar Association Committee on legislation that came back in 1961, constitutional amendments were passed in 1962, but many of the details had not been solved, including what district court districts would be. By 1965 no decisions had been made, the constitutional amendments had passed to create the new district court system which was going to be implemented in stages starting in 1967. The courts commission was created for the purpose of figuring out how to implement the legislation. And it was the courts commission in 1967 that decided that the best way to go would be to have coterminous districts for district court, superior court, and district attorneys. The decision about district attorneys actually wasn't made for a couple more years, but the idea – it was the courts commission that decided that the – to recommend that the districts be the same, and they simply followed the superior court districts in existence at that time.

(2:55:16) I have two handouts and I'm going to briefly refer to them. You don't need to worry about finding the one I'm talking about. One is entitled Legislative Acts to Defining Judicial and Prosecutorial Districts from 1965-2014. I didn't update it after 2014, I changed jobs and I never found more than three people who were much interested in it anyway. But that has a list of legislative actions by years changing – effecting judicial districts. As I said the system was implement district court fully with the 1971 elections. So we've just celebrated the – '67 was the first year, then it was fully implemented by 1970. The first division of districts was in 1975, when the district attorney for district 27, which was Gaston, Cleveland, and Lincoln counties, was split into two DA's. The first time that all three parts of the court system – district court, superior court, and district attorney were split – all split – was in 1977. District 15, which is Judge Buckner's home district and my home district, was split into 15a and 15b. He can tell you the reasons for that. District 27 was fully divided into 27a and 27b with Gaston becoming a district by itself – just as Alamance had become. The first time that any districts were subdivided for election purposes – that is that the district that was going to elect the judge would be less than the full judicial district was in 1987, and that was the result of a voting rights lawsuit claiming that under section 2 of the voting rights act claiming that the method of electing superior court judges in effect at the time had the effect of keeping African American candidates – African American voters from being to elect candidates. And to solve that, among other things, an agreement was reached and enacted in legislation passed in 1987, which

featured among other things, creating about a dozen or so – I think it was about a dozen majority or effectively minority districts for electing superior court judges. So that's where the first division of into sub districts came.

(2:58:22) 1987 was the first time that the legislature chose to move one county entirely from one district to another. 1995 was the first time districts were subdivided for election purposes for district court involving Granville, Franklin, and Vance counties – and Warren. In 2001 was the first time that a residency requirement was imposed on elections for district court – that although the district remain the same, not everybody in the district in district 11 got to vote for all the judges. Some judges had to live in one county and some in another county. Sometimes – sometimes, occasionally those changes were made for purposes of court administration – sometimes. More often than not they were made for political purposes. A senior resident superior court judge couldn't get along with the DA – somebody had been appointed to fill a vacancy and there whether that person could get elected in the district as it existed when time came up for reelection. So for one reason or another districts were split, and if you got somebody who had been around a long time and (inaudible **3:00:06**) the stories you could go through that list and identify the particular politics that resulted in each of those changes in districts.

(3:00:15) There were also three court cases that effected judicial districts. As I said until 1987 the districts for election purposes and for judicial administration were the same. One had been subdivided it was a result of that voting rights case that the superior court districts were subdivided for the first time. There was a state lawsuit that followed from that – Martin v. Preston; because in reconfiguring the districts the legislature as part of the agreement had decided it could not cut short the terms of any existing judges. There were districts in which to settle the case – the judges who were up for election had to be put on concurrent terms. For example, let's say in Forsyth County there were three judges - three superior court judges elected at different times. To increase the chances of minority voters being able to elect one of those – those judges were put on the same – on concurrent election schedules, and they were elected as a group so that all three would stand for election at the same time. You got to vote for three, and through single-shot voting, minority voters had a better chance of electing candidates. Gerry Cohen I think is going to talk in more detail about Martin v. Preston.

(3:02:01) The other two cases – one has been mentioned and one has not. There was a 1993 decision in a case the Republican Party brought over the election of superior court judges. This is what happened to statewide elections. The Republican Party – at that time has been true for since reconstruction. Superior court judges were nominated in party primaries held in their district and then the general election was statewide. Well, low and behold, given the politics of the state at the time – if there was a statewide election, no matter who was nominated in the party primaries, the democrat was going to win the statewide election, and the Republican Party successfully sued to say this was that was a in effect a partisan gerrymander**.** That is the only case in the country until this current year in which the Supreme Court decision about partisan gerrymandering, where a case has been successful and involved the election of superior court judges in North Carolina. So, the state had to abandon statewide election – superior court judges then became elected by district in both the primary and the general

election, and as a result there was much more interest in the configuration of those districts and how they were made up, and that affected some of the decisions about redrawing judicial districts later.

(3:03:46) The third case was the Blankenship case which has been mentioned before – the one person, one vote case. Until Blankenship the standard thinking was that one person, one vote did not apply to the election of judges because judges were not representatives – they were not elected to represent people**.** They had a different function all together, so their districts did not have to be equal. The North Carolina Supreme Court said well that's true up to a point, but they can't be as bad as they are in Wake County where there is a 4 to 1 discrepancy in population. In effect, the court said we're not going to say like with legislative districts exactly what the ruler is. Whether they have to be in ten percent – no more than 10 percent deviation, but we can tell you if it as bad as this then it is unconstitutional.

(3:04:45) The second handout is a sideways version. It says Changes in Judicial and Prosecutorial Districts and what that does is it shows the original 30 districts from the 1960's – the counties in those districts, and then it shows the current districts. This is not something you can just glance at casually, but if you get interested in it, you would see for example that districts one and two haven't changed. The counties are the same; they are the same for district court, superior court, and for DA's. And there the exception, you go to district 3 and you see that it initially consisted of Carteret, Craven, Pamlico, and Pitt. But that Pitt became district 3a and now 3b is now Carteret, Craven and Pamlico. Then as you go down you will see some of the complications where it was split for DA purposes or it was split for district court purposes but not superior court, and so forth. What you will see if you spent some time with that is that only five districts remain unchanged since they were created since the mid 1960's. In many instances you now have a different configuration for district court, superior court, and district attorneys. As of a couple of years ago, from the original 30 superior court districts there were 50 for the court administration purposes and 70 for election purposes. And for district court there were 41 for administrative purposes and 44 for election.

(3:06:51) Here's the point I want to make. When districts are split it affects uniformity. It's not the only factor affecting it, and what has happened to the court system in the last 50 years, but it's an important factor. We have gone from six districts consisting of a single county to 24, and you can pick out from these documents which counties are now single county districts and you can ask yourself whether Nash County should be a superior court district by itself – whether Alamance should be, whether Stanly should be. You can look at the list and see what you think about that. When the districts were first established, the population disparity between the largest and the smallest district was about 4 to 1. As of several years ago it was 16 to 1 – that's the result both of course of uneven population growth around the state and the splitting of districts. When I looked at it several years ago there was one district that had a total of 20 felony jury trials in the district in a year and another with 250 – one that had disposed of 260 child support cases, and another that disposed of 2,600 child support cases**.**

(3:08:36) The other factor, now I'm getting off base here, so shut me down if you want. The other factor that has contributed to lack of uniformity is (inaudible) in 1999 the legislature

started allowing local funding of the courts. One factor in uniformity (inaudible) was to create a uniform state court system – everything paid for by the state. Beginning in 1999 the legislature started authorizing counties and cities to pay for judicial secretaries, then for assistant DA's, assistant public defenders, for assistant deputy clerks, for emergency judges, for legal assistants, and now if a city of county is over 300,000, it can also supplement salaries, for some judicial officials. The last time I looked about five years ago the AOC had (inaudible **3:09:34**) contracts worth about 8 million dollar, allowing local governments to provide personnel under those statutes. The actual amount local government spends is much higher. The AOC contacts for Mecklenburg County for example were 4 million dollars, but the county also on its own payroll hires investigators for the sheriff's department that they have been assigned to the court system, and so on. We now have as a result of these factors different court systems in different parts of the state. We had back in 2014 we had 33 drug courts in 19 districts, but not in the rest of the state. We had family courts in 22 counties but not in the rest of the state. As a result of the great recession in 2008 a lot of those costs had been shifted to counties that are able and willing to pick it up.

(3:10:41) One reason I'm here is I spent a couple of years as director of the Commission of the Future of Justice of the Courts in North Carolina in the 1990's, also known as the Medlin Commission, which resulted in this extensive and well neglected report as to the most comprehensive report on court reform in North Carolina since the Bell Commission. The Futures Commission was concerned during much of that loss of uniformity, and in fact it – justice wasn't the same from one district to another. Several of their proposals addressed it. One was that they would combine district and superior court into a single level trial court, so judges could be shifted back and forth as needed. If Representative Burr thinks that there was – he's gotten bad reaction to a proposal from sitting judicial officials, you should try that one. The only thing less popular was the idea was electing clerks of court. But what the commission also proposed was reducing the number of districts to 12 to 18. They called them circuits, but they were districts – to reduce it to 12 to 18, and they would have had the – like the Burle commission would have had the supreme court decide what the district lines were rather than the legislature. In underlying that was the notion that to copy Senator Blue's phrase, a critical mask was needed so that you could have the same services in each district. That a family court doesn't just consist of a judge, it consists of various other personnel and you have to have a certain caseload to justify employing the people to operate a family court efficiently. And if you have (inaudible **3:12:53)** might take this personally, but if you have Halifax County as a judicial district by itself, you are not going to have that critical mass to justify that, and so the Futures Commission actually looked at a number of different districting options – came up with some maps. Things they looked at, and it was all based on court administration and workload. They looked at the population; they looked at caseloads in different areas. My wife practices family law and the world of family law in Wake County, in Durham, in Orange, is like night and day – they do not resemble each other in the way they handle cases at all. So, the commission looked at caseload, different kinds of cases, family law cases, felonies, so forth, because they differ a great bit in part from one part of the state to another. They looked at travel distances – how far people have to travel to the courthouse, how far lawyers would have to travel. They came up with a number of options, and you can do it any number of ways depending on what you think

is most important. If you think it's most important to keep urban areas together than you draw the maps one way. If you think it's most important to have the shortest travel distance you draw the maps another way – and that's what the commission did. But the baseline was always the workload in the court of administration. And the election angle didn't matter because the Futures Commission, like every other commission that has studied these issues was for the appointment of judges rather than the election.

(3:14:40) So, thank you for your time, I hope I haven't spoken too long. Again, I will repeat that the purpose of districts – the reason we have districts is the administration of the courts, and that is what ought to be uppermost in your minds in deciding how to redraw them. And we should have learned from the last 50 years of picking them apart that doing it based on politics doesn't help much with the court administration.

(3:15:30) Michael Crowell Takes Questions from Senators

Senator Newton: Mr. Crowell, thank you for that presentation, I'm in my mind sort of distilling it, and we are looking at three options. One is what is embodied here and the changes that you reflect in this landscape document in terms of here we are today. The other was the Futures Commission, and their proposal, and now we have 717. And I heard you say you can do this any number of ways, depending on what you believe is most important. Do you have any specific recommendations on how to make 717 better than it is today?

Mr. Crowell: No, I wouldn't touch that with a 10ft pole.

Senator Newton: Do you know what fatal flaws, would you caution us of any fatal flaws associated with 717?

Mr. Crowell: I'm sorry; I tend to be flippant at times. I have not bored down into the details of the bills maps, and I haven't seen any statistics related to workload. I assume there are some – the only ones I have seen are related to elections. So I do not have the detailed knowledge to say, oh well you all move this county here, and you all combine these counties. The other thing I know from having done a lot of election work, a lot of redistricting and voting rights work, and helping county commissioners and city councils and others redraw their election plans. What I also know is there is geography that you have to take into account. (inaudible **3:17:18**) have natural, or historical relationships that you have to take into account. I know, you know, going to redistrict a board of county commissioners – the people on this side of the river are different than the people on this side of the river and they do not want to be together. There are counties like that as well. So I have talked for a good while to say I don't have an answer.

Senator Newton: You talked a little about the administration of the court should be sort of the bedrock and that would be workload. For several years in North Carolina we have had the judicial branch workload formulas that have been talked about throughout the day today. Does North Carolina have a better measure of workload than that?

Mr. Crowell: Despite Brad Fowler's efforts, I have never understood the workload formulas well enough to know whether there is a better one. I'm sure in some world there is a better one,

whether it is better, better enough to worry about it, I sort of doubt it. From the discussion you have already had about workload, I think it is self-evident that there is always going to be subjective aspects to how you measure and to make some people happy and others unhappy.

Senator Newton: Thank you, Mr. Crowell. Mr. Chairman, thank you.

Senator Bishop: Thank you, Mr. Chairman. Mr. Crowell I think I counted 29 enactments that make what you described as politically motivated districting changes.

Mr. Crowell: Well they weren't all politically motivated, that's dominant.

Senator Bishop: So a bunch of enactments since you started off with 30 superior court districts, 6 single counties only. And I sort of sense that you are point is that you ought to go back to that Bell Commission situation with the 30 districts, 6 whole counties, leave it at that and not ever touch it. Is that sort of what you're driving at?

Mr. Crowell: No, no not by any means because the population of the state has shifted so much – changed so much dramatically from that time that I hadn't looked at the numbers of the 30 districts, but I think you would still have the problem that you would have some districts that simply would not have enough population, have enough cases to justify the same kind of court system that exists elsewhere in the state. The Futures Commission in looking at that may have been mistaken in thinking what the critical mass that was needed was, but they came to the conclusion that about 18 was the maximum number of districts.

(3:20:54) Senator Bishop: You said that the population disparities at the time of the reorganization after the Bell Commission was about to 4 to 1 and it has gone to about 16 to 1.

Mr. Crowell: Probably more than that now, that was several years ago.

Senator Bishop: And that's across the state I think you are saying, right?

Mr. Crowell: Yes.

Senator Bishop: Did you ever in the course of your research look at what the Blankenship decision refers to as similarly situated districts. That goes to something Senator Blue said earlier in the hearing about – you got a bunch of sub districts or whatever you want to call them within a county, that's the place where they said you can't have but so much of a disparity, right? Isn't that what Blankenship says?

Mr. Crowell: Yes, I think the questions open as to whether that same rule might later be applied between districts rather than just within a district, but yes, that is true.

Senator Bishop: Now you say that question is open – did the court specifically reserve that issue in that split – I know there was a dissent of three justices in that decision, but is it specifically open or do you think it is just an unresolved question.

Mr. Crowell: I have not looked back recently, and I am pretty sure they did not say that – I do not know for sure. But it has been understood to apply within a district and not between districts. I suspect that if substantial changes are made someone will try to raise that issue.

Senator Bishop: What about – have you looked at within the sub districts are – again forgive me for the terminology, I'm not as hip on that as Senator Blue. But within the sub districts are there substantial disparities now – are there disparities now that exceed the standard that the court articulated.

Mr. Crowell: Yes, that's my understanding that there are.

Senator Bishop: So would that imply to you that the current districts are unconstitutional?

Mr. Crowell: Well you know you've been through this as well. You often have meetings with clients and they say, well isn't that unconstitutional and the answer is until the court says so, no. But the precedent would seem to be there to make that a fairly easy case.

Senator Bishop: Have you looked at H 717 sufficiently to know whether you – so that you have an opinion whether or not that it is constitutional?

Mr. Crowell: As far as the one person one vote issue?

Senator Bishop: Or whatever reason you may know of.

Mr. Crowell: If someone, let's say hypothetically, someone was to come to me and say I don't like what they have done. Can you find a constitutional violation? There are two areas where I would look. One is, first, the one person one vote. Because it is (inaudible **3:24:03**), and whether you can make an argument that following Blankenship that the same principle about equality of population, or whatever it is – more than one disparity – whatever it is. Whether you can make an argument that should apply between districts as well. If you are thinking of judges in a representative capacity sufficiently to apply one person one vote, why should voters in one area vote have three, four times the weight of voters in another part of the state as to how many judges they elected. Particularly on the superior court bench where they do serve statewide, so you are going to be effected as a voter. So, that would be one area I would say one would look at. The other would be whether you can make an argument that judicial district in article four of the constitution means the same for both election and administrative purposes. That is, and you also have provision in article 6 about voters being entitled to vote in all elections. If someone lives in a judicial district and is subject to the jurisdiction of that court, can you say that that person doesn't get to vote for some other judges in that district.

Senator Bishop: So that's the one about this many coming from this county and this from this county – that sort of thing?

Mr. Crowell: Yeah, I mean, if I live in Orange County – if you split Orange County and you had a district court that served all of Orange County, and we have four judges and I only get to vote for two because the part of the county I lived in. Is that an arguable issue on article four of the constitution? (inaudible **3:26:57**) It says create judicial districts is an argument that has to be

the same for election and administrative purposes. It would be an argument that in electing the mayor of the city, you can't allow just a third of the city to vote on the mayor, because the mayor is a citywide office. Now obviously that is an existing issue with a number of districts. The splitting began because of the voting rights case, and those districts are probably excusable under that theory, based on the idea that just like whole county provision for legislative districts, you can violate it to satisfy federal law. So to satisfy federal voting rights law you could split election districts reports.

Senator Bishop: Assuming you have district by district evidence of racially polarized voting, right?

Mr. Crowell: Yes, then you get into the complicated questions of – so much of what has been done with legislative districts and judicial districts is based on election history that dates really form the 1970's. So what can you say today as to whether that is necessary under section two of the voting rights act. But at least those were established for that purpose, and that would seem to be a clear exception to seem to comply with federal law. Otherwise, how does the state justify, if it is not for that purpose, how does the state justify splitting them. The other twist on that would be if it is – if there is evidence that the splitting is done to favor one political party, you mix in a partisan gerrymandering claim. Keeping in mind that North Carolina and the Republican Party case about superior court districts is the most unsuccessful partisan gerrymandering case the country has had.

Senator Bishop: Then the next week they elected a superior court judge of the other part statewide, right? I think that's actually true.

Mr. Crowell: So you put all of that together and that would be the second area I would say to look into. It's all making new law – you understand that. There isn't clear precedent on any of that. You got to be – if you want to challenge it you have to be creative, but there is stuff to work with.

(3:30:11) Senator Daniel: On that point, so I think you were talking about district court districts if it was split in Orange County and you had four judges but you only voted for two, but you could have your case adjudicated by someone you didn't vote for. So with that argument – would that same argument be applied to a superior court circuit, where a superior court judge is elected in two or three counties, but travels 18 counties – would that argument also apply?

Mr. Crowell: This is a much simpler issue to make in district court, because in superior court you have this (inaudible 3:30:44). You have judges elected from districts – I mean have to live in districts, that's a principle jurisdiction. They have statewide jurisdiction – they rotate within the division and they have jurisdictions statewide. I will make one side comment here, which has nothing to do with anything we have been talking about, but had I been prepared I would have brought you a quote from the 1901 North Carolina Bar Association Convention in which the president lambasted judicial rotations of superior court judges as the greatest barrier to efficient and fair courts in North Carolina, but that is another issue.

Senator Bishop: I think my final question would be, what approach would you take to a new districting plan across the state? If you were to undertake that task?

Mr. Crowell: First, for heaven sakes don't ask me undertake that task. I spent two and a half years with the futures commission – I know the burden. I think you start with – you start with the idea that the reason the districts are really there is court administration. You start with the idea that what you need is a uniform court system throughout the state, and you think hard with how big does a district need to be so we can efficiently and economically support everything we want in a court system. A drug treatment court, a family court – Marion Warren can talk about all the other things. Let me start with the idea – what is the minimum that we need, and then you go from there.

(3:33:07) Senator Chaudhuri: Thank you Senator Daniels. Thank you for your presentation. I just wanted to follow up on Senator Bishop's question. Based on your three years of work with the Futures Commission, what would you say should be the charge of this committee? Should it continue to be uniformity and judicial independence, or are there other goals that should be the goal of this committee?

Mr. Crowell: First, it was a lot longer than three years in the end. They all went home and I was left. This is all personal to me. What I have come to believe is that uniformity, as the Bell Commission said, is you want people to get essentially the same court system throughout the state. Keep in mind, the courts have changed dramatically over the years. It is not just judges sitting and deciding cases. We are now all about problem solving courts – family courts, veterans courts, drug courts. And there are services other than adjudicating cases so I think that what you start with is that you want that to be available equally to everybody in the state. You can't quite get there because there is just too many differences in the state. Charlotte is this is huge metropolitan area, Jones County is not, but that is what you start with. So what was the rest of the question?

Senator Chaudhuri: The second goal I inquired about was around judicial independence. You talked about uniformity. What suggestions or recommendations would you have around judicial independence.

Mr. Crowell: Nobody in this room is ever going to buy this, but I'm a strong proponent of judicial independence. That when the Bell Commission, the Futures Commission said let the courts draw the districts – that's a darn good idea. They are the folks that have to run the system, they are the folks that need to be held accountable for them running efficiently or not. They are the folks that can figure out where the caseloads are – where the needs are. Let them do it. I should also disclose that I am a strong proponent of the appointment of judges, rather than elections. So if I were running things, that would be what guides me – I'm not running things.

Senator Chaudhuri: One last follow up. Are there any states in the country where the supreme court actually draws the superior court or the district court for the judicial districts?

Mr. Crowell: I don't know the answer to that. I can't name one that does. **(3:36:30)**