



The Our American States podcast—produced by the National Conference of State Legislatures—is where you hear compelling conversations that tell the story of America’s state legislatures, the people in them, and the policies, process and politics that shape them.

You can subscribe through iTunes, Google Play, Stitcher or Spotify.

Left, Right Perspectives on Redistricting | April 3, 2022 | OAS Episode 155

Ed: Hello and welcome to “Our American ” A podcast from the National Conference of State Legislatures. This podcast is all about legislatures, the people in them, the policies, process, and politics that shape them. I am your host, Ed Smith.

KWB: “I think what you are seeing now that we are nearing the end of the redistricting process is some of the most fair maps that we’ve seen in this country certainly as compared to last decade.”

AK: “The process this decade has been significantly different than what we experienced 10 years ago, 20 years ago, 30 years ago.”

Ed: That was Kelly Ward Burton, executive director of the National Democratic Redistricting Committee and Adam Kincaid, executive director of the National Republican Redistricting Trust. They are my guests on the podcast.

The 2020 redistricting cycle presented a significant challenge to the Data from the census was delayed by the pandemic and States had less time than usual to draw their maps for legislative and congressional Districts as well. The court challenges that inevitably followed the maps also were delayed and some are still in process even as primaries start. Burton and Kincaid share their perspectives of their parties on how the process has gone so far, the roles of the courts in this cycle and how they expect the 2022 mid-term elections to play out. Here is our discussion.

(TM): 01:35

Ed: Kelly, Adam, welcome to the podcast.

KWB: Thanks for having us. It’s good to be here.

AK: Yeah, thanks for having us.

Ed: I think this is a real good moment to discuss redistricting and the upcoming mid-term election. Many of the maps are drawn. We can talk a little bit more about that later. We’ve seen some litigation and Texas already had its primary. It was an interesting one at that. So, to start, I

wonder if each of you would give me your take on this redistricting cycle. It was affected by late data to the states. There are other issues and anything else you would like to highlight. So, Kelly, why don't you tackle that one first?

KWB: Sure, absolutely. Well, like you said, we are nearing the finish line here and there is about 92% of the congressional districts are done. There is pending litigation as you noted. But, I think, you know, we have enough data and enough in the queue to tell us the overall outcomes of what's happened. I think what you are seeing now that we are nearing the end of the redistricting process is some of the most fair maps that we've seen in this country certainly as compared to last decade. But also compared to where a lot of people thought this redistricting process would land given the Republican control of a lot of states, given the stated republican goals at the beginning of the redistricting process to you know in their words "secure a decade of power through the redistricting process." I think there was a sense that we would come through redistricting seeing similar outcomes of what we saw last decade where you know there were just a lot of gerrymandered maps in Republicans' favor. And it is very clear at this point that we are not seeing that. We are seeing much more fair maps. The New York Times just did a big report on how these are going to be some of the most fair congressional and state legislative maps that we've seen in recent history. So, we are very excited about that overall. You know there is still a lot of work to do. There are still some gerrymandered maps certainly. We think that the representation among communities of color is not where it should be in this country yet. There has been a decrease in the overall number of competitive seats which we think is unfortunate, but overall on that, I think there is widespread agreement at this point that the maps are more fair than folks kind of came into the redistricting process thinking that they would be. And we consider that an exciting victory.

Ed: Great. Adam, what's your take on it?

AK: I think there is a lot of different things to kind of talk through with the redistricting cycle overall. First off, as you noted at the beginning, the process this decade has been significantly different than what we experienced 10 years ago, 20 years ago, 30 years ago. And the big reason for that is because of the census delay. You know not having data we were usually accustomed to having the data meant that drawing the lines waited until later in the year than usual. The litigation that follows that drawing of the lines waited until later than usual. And so now what you are seeing is the court cases are going later than usual. And so, the timeline that I think all of us have gotten accustomed to in our district you know over the last several decades has been cut in half. You know work that typically lasted 18 to 20 months is now over in nine functionally. So, I think that's been a big difference. It's also been a big part of why different states have dealt with this in different ways.

I think you saw early on there was a big crush of states that got their work done in the fall of last year. That work specifically was I think a big part of that was because the states didn't have time to really tinker around. They had to get their maps done before the primaries and so they just got them out of the door. And I think people were really surprised early on how smoothly the process was going in a lot of states and it was simply because you didn't have as many people in as many places manipulating the lines for themselves and doing the sorts of things that typically happen on the side. Going forward to now what you are seeing is these last few states are a lot more complicated and difficult because they have had longer. And so, people are getting more, you know, rolling their sleeves up and kind of getting into it a little bit more than some of the states

early on. So, we've got four states left at this point: New Hampshire, Louisiana, Missouri and Florida. So, I'm sure we will talk more about those four in just a little bit. But I think overall as far as the redistricting cycle has played out, it's really come down to just about where we expected it to be at this point in time.

And Kelly likes to say this is how Republicans were going to gerrymander their way into power for a decade. That was never a stated goal of the RNC or any other Republican that I know of. Republicans stated goal was to put ourselves in a position to take back the House this fall and be able to hold it in future cycles and that's exactly what we've done. What we said from the beginning was that we were not going to take back the House through redistricting alone. And so, the idea that somehow Republicans have not done what they said they were going to do by gerrymandering their way into permanent majorities would be true if we ever said that was our goal and it was never our goal. So, I think we've pretty much hit exactly what we were planning to hit at this point in time. Go through the maps. I agree with Kelly. I think there is going to be fewer competitive seats, but at the same time, I think there are a few more competitive seats than we originally expected maybe a year ago. But, overall, both parties have picked up seats you know where they had control. Some of the conditioned states played out a little bit differently, but I think overall what you have seen is Republicans and Democrats have both raised their floor. I think Republicans have raised their floor more than Democrats have. And the number of competitive seats has gone down as expected.

Ed: Now, I probably listen to too many podcasts and watch too much cable television. I listen to too many so called experts talk about politics. But a year ago, the pundits were all over the fact as Adam suggests that the Republicans were going to gerrymander their way into a majority. I mean I heard a number of people say Republicans would win the House before any elections because the gerrymandering would give them the seats they needed. Adam, let me stick with you for a minute. Were they just wrong or did things not work out maybe quite as well as the Republicans had hoped?

(TM): 07:46

AK: No, I think that they were wrong from the beginning. I mean the problem is when you have the same people that were saying five years ago that democrats were never going to take back the House again because of the maps that were in place. Coming five years forward saying Republicans were going to gerrymander their way into permanent majorities. Those same people were wrong twice right. I mean these are ... this was never something that was on the table. It was I think I saw one person write up that it was a gerrymandering apocalypse that Republicans were about to bring on Democrats. Well, like most prophecies of impending apocalypses, it did not come to be because it was never going to happen to begin with.

So, Republicans had control of 187 seats for the U.S. House this fall. It was impossible to draw 187 red seats in those states No. 1. No. 2, 187 is significantly less than 218. So even if you know somehow, we were able to draw those maps in a way that maximized the number of Republicans and created safe seats even where we could, that was still well short of the 218 we would need for a permanent majority in the House. So, people who talk about permanent majorities are people who generally don't know what they are talking about. Permanent majorities do not exist in American politics whether you are talking about coalitions; whether you are talking about the Senate, whether you are talking about the House, governorships, legislators. Our politics change:

they shift. The way people vote changes and shifts and so the idea of permanent majorities was just not on the table. So, I think you know the pundits from the beginning were painting a picture of something that wasn't reality.

Ed: Kelly how about your take? Did you think that--I guess one did you accept the premise a year ago from some of the pundits that the Democrats were going to be in a horrible, horrible position at the end of the cycle or did you think from the beginning that things were probably going to be a little bit more mixed than that?

KWB: Well, we knew that we weren't going to be in a bad position certainly as dire as the pundits thought at the beginning because we knew that we had a plan, and we had a strategy to combat the Republican goals of gerrymandering their way to a House majority. And you know we can mince words, but Adam said himself just a minute ago that their goal was to redistrict such that they could take the House back this cycle and then hold it for the decade. He just said that. So I agree that you know nothing is guaranteed in American politics, but the gerrymandering of the last decade is a statement of fact. And I spent a lot of years in a lot of cycles trying to win races on those gerrymandered maps and it took the sequential threat of a potentially autocratic president in 2018 to overcome the structural barrier that the Republican gerrymandering created. And let's not forget that in 2018, I think it was the AP that did a story that even with the House ... the Democrats taking back the House and Democrats you know winning a lot of seats as a direct result of Donald Trump, Democrats still underperformed by 16 districts in the House, which they should have won had it not been for the gerrymandering if the total congressional vote was commensurate with the seat. So, there is no question that the map of last decade was skewed in the Republican favor and that that was a result of Republican gerrymandering across the country last time around, which is why Eric Holder, and the DNC launched a strategy almost six years ago to be ready for that this time around. And we came in you know starting in 2017 with a very intentional strategy to prepare for that and it was three things. One, it was shifting the balance of power through you know electing Democrats, through reforms like commissions. Other things besides just Republican trifecta of control so that we had a shot at their maps. And as Adam said, we were victorious in that. We didn't ... they didn't have the complete control that they had last decade. We decreased it by over 20% in fact on the congressional map so that was the first step was to decrease that Republican trifecta of control from last decade and to put fairer, more equal seats at the table for the redistricting process.

The other thing that made this different and the other piece of our strategy was getting the public involved. I think as Adam noted you know this was a redistricting cycle where there was a higher number of people engaged. A lot of people paying attention. We saw real local grassroots energy and participation in the redistricting process which has not been the case and I think that was because people saw the impact of gerrymandering. They want fair maps and they wanted to participate and there were more commissions. There were more processes that were transparent that they could participate in. So that was a really important piece of our strategy was getting the public involved and I think we saw that in spades around the country.

And then finally the litigation and them making sure that there was real awareness from the courts when the Republicans broke the law and when these maps were illegal and there has been a lot of Republican illegal maps that we are seeing overturned by Republican courts. Let's not forget that the litigation is the courts of all stripes are holding up fair maps and they are overturning Republican gerrymandered maps, which is you know an important unfortunate development, but I

think the court's piece of this, and I know we are going to talk about that is also part of the dynamic of redistricting and has been an important piece of the puzzle here.

(TM): 13:19

Ed: We will come around the courts later and I expect Adam may have some thoughts on your comments. But before we get to that, let me ask you about the process the States went through and Adam you mentioned this that some states were able to get maps up very quickly. Was it advances in technology that allowed them to do that? Adam, what are your thoughts on that?

AK: I really don't think the software is significantly different than it was 10 years ago. You know whether it's Maptitude or you know ESRI's online tool or something else. I mean they are all great tools. They are all various iterations of what we used 10 years ago. Computing power is probably the thing that's the biggest difference for the, but even then, I think the maps are ... the speed of the maps that came out in the fall I think had a lot more to do with just necessity than technological advancement. And one thing that Kelly mentioned earlier that I think has played a bigger role are some of these online platforms that people use for redistricting because I think it gave more people an ability to draw maps that have access to the ability to draw maps than necessarily would have happened in the past. And I think that's been the larger technological change.

Ed: I'm sorry. Go ahead Kelly.

KWB: Yeah, I agree with that. I think and I'm sorry to interrupt there, but I agree that it's less about the technology and more about the choices that these legislators and map drawers make about how they want to do the process. I think you have seen some States that came together in a very fair and bipartisan transparent way and draw maps relatively quickly with community input and with the you know proper engagement and with fair maps as the outcome. And then you have also seen the opposite of that where you know people play politics and their redistricting process gets caught up in other political goals or in other interests. I mean if you look at New Hampshire for example, New Hampshire has to draw one line to draw their congressional map. It's one line and they are likely going to be the last state in the country to draw their map and that's a choice that they are making. You know similarly in Ohio, the process took so long because of the choices made by the Republican leadership on the commission and in the legislature, they didn't need to payout that way. They didn't need to draw it out as they have done and so I think it is more about the choices that the map drawers are making than it is about the technology or the data. And the states that move fast are an indication that states could move quickly and diligently. You know the states that haven't done that, I think made a choice not to do that.

Ed: Well, speaking of that, is it four states that still don't have maps? Is that where we are Adam?

AK: That's right. Four States that have that we are still waiting on: New Hampshire, Louisiana, Missouri, and Florida. I mean filing deadlines are coming up in one of those States in Missouri. Sessions are wrapping up I think in Florida by the end of the month. You know New Hampshire could go on for awhile as Kelly noted. And Louisiana, they can't override a governor's veto until March 31st so at the earliest based off of their own rules in state. So, we don't really know when the last four states will be wrapped up. They could be wrapped up next week. They could be wrapped up in two months and I think we just have to wait and see how this plays out.

(TM): 16:28

Ed: Thanks Adam. We will be back after this to discuss the outlook for the 2022 election and how the courts are affecting the process.

Music, advertisement

Ed: I am back with Kelly Ward Burton and Adam Kinkaid discussing redistricting. Let's turn to the 2022 midterms. I'd like each of you to give the listeners your perspective on the congressional elections and state legislative elections. Not in detail of course, but what you think the map will look like once the 2022 election is over. Kelly, why don't you start.

KWB: Well, I'm not in the business of winning House races. I did that for a long time. That's not my job. My job this time around is to you know try to help set the playing field so that the districts themselves are fair, that the structure of our congressional and state legislative maps are fair and that way the voters get to decide the outcome of the elections. And as we discussed, I think we are closer to that than we were at last decade, which is really exciting, and I think we will have a lot of districts where the voters get to decide the outcome. I think the bottom line is that whatever happens in 2022 whether Democrats hold the House or whether Republicans hold you know win the House, it is not a permanent majority. That there are enough competitive seats. That there are enough ... there is what we call a battlefield. There are enough battlefield districts that are winnable by both sides that I think you are going to see a competitive congressional map for the decade which I consider a victory because again we want, as we have always said, the voters to decide the outcome of these elections. And you want the elections to reflect the electorate. And you know I'm not in the business of House polling this cycle as I noted, but I think that you know we will see more districts when the voters get to decide the outcome. And then those districts will also be in play for future cycles as well.

Ed: Well, you know I'm old enough that I grew up when we all thought there was a permanent Democratic majority in the House of Representatives, so I think both of your comments are well taken about the fluidity of American politics. Maybe you just have to read a lot or live a long time to appreciate that. Adam, how about your take on 2022?

AK: I think 2022 should be up to be a great year for Republicans. I think we will win, like we take back the House, I think we are going to pick up significant numbers of state legislative seats if not state legislative chambers. And so, I think that the maps that have been enacted across the country are going to be maps that elect a lot of Republicans to legislative chambers over the next you know few months.

Ed: So, let me switch back to the courts and we talked about that a little bit before, and Adam let me ask you to start off on this. The courts have always played a big role in redistricting. It's a little different this year. The Supreme Court not nearly as involved because of various decisions that were made. So, Adam I wonder what your perspective is on how the litigation has played out so far this year.

(TM): 19:52

AK: Well, I think there is one really important point to make about the redistricting litigation we've seen so far and that's that out of all of the litigation you've seen across the country, which is north of 72 lawsuits I think at this point in time. There is only one state with a map that's been imposed for this fall by a court and that's in North Carolina. Out of all of these lawsuits everywhere in the country and that's only in a state where you had four Democrats and three Republicans on a court that was overseeing a Republican line draw. Kelly likes to talk about somehow these are courts that are holding Republicans accountable for whatever. The reality is that maps in North Carolina have nothing to do with the law and everything to do with politics. This was a Democrat majority court who imposed the Democrat map on you know a state that elected a Republican Legislature. So, I think what you are going to see is this fall a lot of elections in a lot of places are going to go for Republicans. And a lot of that is going to be because voters don't want activist judges applying laws in ways that they have never been applying you know various reads into these state constitutions that have never been read the way they are before like what you are seeing in North Carolina.

I think that what you are seeing nationally is there is so much contradictory litigation in different places all aimed towards a partisan goal; nothing else other than achieving some sort of a partisan end that the U.S. Supreme Court is likely poised at this point to step in and bring clarity to what partisan gerrymandering litigation looks like even in state courts. You know what ... how the VRA does or does not apply to redistricting. What the 14th Amendment looks like when it is applied to redistricting. All of these things are coming about and are likely going to be showing up at the U.S. Supreme Court and other places over the next few months because of the amount of litigation, the amount of contradictory litigation and how confused the process is right now. And the U.S. Supreme Court has even said this in the way that they dealt with the Alabama case. They note that they have made a muddle out of how the VRA is or isn't applied to redistricting and VRA being the Voting Rights Act. And so, I think what you are going to find is the court is going to start looking at that to figure out okay are there bright lines that we can draw? Are there rules that we can clarify so that if a legislator is looking to draw maps, what is the safe harbor right. What should they be doing that makes sure that if you do "X" you are not sued because of "Y" or if you do "Y" you are not sued because of "X." Right now, there is really no safe space to work through. You are going to be sued no matter what you do. And so, I think when you get ... that wasn't the case 20 years ago and the court has slowly kind of muddied that water over the last 20 years to the point now that no matter what happens, you are going to get sued no matter what lines you draw.

Kelly wants to say that somehow maps are being thrown out because they are legal or illegal. The only thing that is happening right now are that politics are being read too much into this and not the law itself. And what I think you are going to find is that one, I think we are going to get some clarity from the court one way or the other. I don't know what that's going to look like. No one else really knows what that is going to look like at this point in time. But I also think that you are going to see a backlash from voters this fall in places where they feel like courts are not applying the laws, not interpreting them as written and are reaching for a more activist conclusion.

Ed: Alright. Kelly go ahead.

(TM): 23:14

KWB: To be clear, there is a lot to say there but to the point about things being muddy, let's be really clear that one of the things that the Supreme Court ... ruled [was] that the federal courts shouldn't determine or be the determining body for whether something is a partisan gerrymander. They then said hey Congress you should define that. That is your job and Congress can and should put in place some structures around how to redistrict, what is gerrymandering, how would you define partisan gerrymandering, which the Democrats did. The Democrats and Congress put together a bill that defined partisan gerrymandering that made it illegal that put a framework for legislators and commissioners for how congressional maps should be drawn in this country. And the Republicans similarly dismissed that bill. No Republicans voted for it and in fact, fought actively against it. No. 2, ...in that same bill the structures and the strengths of the Voting Rights Act to reinforce the elements of the Voting Rights Act that do give guidance on how to protect communities of color within redistricting was reinforced within that bill and again the Republicans similarly dismissed it. So, what you see are Democrats trying to put structures and clarity around how maps should be drawn, how the Voting Rights Act should be interpreted, how to make sure that the Voting Rights Act is used to protect the power of voters in this country, particularly voters of color who are-- often the gerrymandering that happens in this country is on the backs of communities of color and that is wrong. And what you see are Democrats trying to put in place structures of partisan gerrymandering and VRA strength to prevent that from happening and the Republicans are the ones that are blocking that. ... In the courts what you have seen is the courts putting in place a standard of fairness and proper map drawing that Republican legislators are in opposition to. So, let's not rewrite history in North Carolina. That North Carolina map there is a history of litigation in North Carolina because you time and time again saw the Republican legislature draw extreme gerrymandered maps that are not commensurate with the voters in North Carolina. And the courts had to step in and did step in to hold the maps against North Carolina law and say by the way these maps do violate North Carolina law and gave the legislature multiple changes to rewrite maps more fairly and they continually decided and made the choice not to do that, which is why ultimately the courts had to do that map.

Also, what you are seeing in the courts is when you have the Republican legislatures that are pushing extreme gerrymanders that are then being vetoed by Democratic governors who are asking for fair maps, the courts are having to step in to as they should deal with that what we call impasse. When you have the redistricting process impasse then who is going to ultimately deal with an impasse within our government ... that is the role of the courts and that is what the courts are doing in multiple states including Pennsylvania and Wisconsin and other So, there is a lot of important roles that the courts are playing, but it's not political. I think what Adam is trying to do is paint a picture of these courts as having a political agenda and that's just fundamentally not true. They don't have a political agenda. They are upholding the law. They are upholding standards of fairness and that's why you are seeing a more equal 50/50 fair map coming out of the courts than what you would have seen out of Republican legislatures and that's an important role that they are playing. And again, it's not Democratic judges or it is across the board Republican judges and Republican majority courts that are making these rulings. That Alabama case that Adam cited was two Trump judges who very openly actively said this map likely violates the VRA and there should be a second majority black district in Alabama. So, I think the courts play a really important role. I think it is not political and you know in a perfect world, you'd have legislators and commissions draw their maps right out of the gate and the courts wouldn't have to get involved, but that's not what we are seeing.

(TM): 27:30

Ed: Go ahead Adam, sure.

AK: I think real quick Ed just two quick points. First off, for North Carolina and Pennsylvania, these are courts with majority Democrat justices on the courts. The lawsuits and the theories that the Democrats are bringing forward in those states weren't theories they were bringing seven or eight years ago and why is that? The courts weren't Democrat majorities back then. So, you flip the court and then you bring the lawsuit right. It's not you bring the lawsuit and then you flip the court, it's the other way around. That's what is happening in North Carolina and it's what happened in Pennsylvania in 2017. But the other thing that Kelly mentioned was H.R.1. Let's talk about H.R.1 for a quick second. Kelly is talking about H.R.1 and she mentions very clearly to her credit Democrats put forward this bill. No Republicans voted for it. As if somehow Republicans should just bless every single bill that Democrats bring forward unilaterally to take over American elections. Like hey, you know what we are going to do. We are going to restructure the entire way America manages elections. And you know what we are going to do with that? We are going to expect Republicans just to come along and vote with us on this. I mean that's ridiculous. If H.R.1 was serious and it was actually a bill written to pass, they would have worked with Republicans to create a bipartisan solution to some of these things. That is not what happened. This was a Democrat bill written by Democrats for Democrats as a talking point and a messaging tool to try to get their voters excited about this election and future elections. It had literally nothing to do with creating law that was going to do anything to pass. It was not meant as a bill pass. It is a messaging tool.

Ed: Well, I'm sure that ...

KWB: That's just factually not true and we would love to work with Republicans on a bill that could get bipartisan support that would reform and protect our election systems. The problem is there aren't any Republicans that are willing to do that right now because they are willing to undermine the structures of our democracy to hold onto their power and that is the reality. We would love, love, and try very hard to get Republicans to work together on a bill and they just weren't willing to unfortunately. Sorry Ed.

Ed: I know that we could debate this for some length, but as we get ready to wrap up here, I did want to ask each of you just briefly so where does it go now once the final maps are drawn, where is the battlefield after that and what do your organizations do in the period between cycles? Adam, why don't you go ahead and start?

AK: NDRC [is] ... likely not going anywhere. I mean nationally, both parties created permanent organizations to focus on redistricting. Not to you know to exist for four or five years and then go away right. Redistricting is with us permanently from now on, right. I think what you've seen over the last 10 years is that maps get redrawn a lot. Lawsuits are filed all the time. For various, you know, data work has to be done constantly over the course of the decade. So, I mean for us, for NRRT, for our affiliates, what we are going to be doing is what we are doing. We are going to continue to build the best redistricting database we've ever had access to. We are going to continue to gather election results. We are going to continue to look for opportunities to bring offensive litigation. We are going to continue helping Republican controlled states defend their maps when they are sued by the left and we are going to continue to engage in these states that

have redistricting commissions to make sure that you know Republicans and conservative voters have their voices heard as well and not just the voices of the left.

Ed: Kelly you get the final word.

KWB: Thank you for having us and thank you for this discussion and I agree with Adam that there is a need for all of us to continue to you know talk about redistricting to make sure that we are protecting fair maps, that we are pushing for fairness and that we are continuing to engage the public so that they understand the importance of the work that their state legislatures do and that the importance of you know how things like seemingly innocuous, nerdy process like redistricting does affect their lives. I think it's a really important piece of the structure of our democracy and you know we talked about the litigation. There is a litigation that will be ongoing that we already know is on a timeline for next cycle, not this cycle. I think the litigation in those cases will continue. I think the need for reforms and to continue to improve the processes of redistricting is certainly on the table and you know to continue to talk about all the ways that we have to stay engaged to help protect the structures of our democracy. So, we are not going anywhere.

Ed: Well thanks to both of you for demonstrating that you can have a spirited, but civil conversation on a topic where you have very different perspectives. For our listeners, you've provided a lot of information on how this redistricting cycle played out. Take care.

(TM): 32:24

Ed: And that concludes this episode of our podcast. We encourage you to review and rate NCSL podcasts on Apple podcasts, Google Play, Pocket Casts, Stitcher or Spotify. We also encourage you to check out our other podcasts: *Legislatures: The Inside Story* and the special series *Building Democracy*. Thanks for listening.