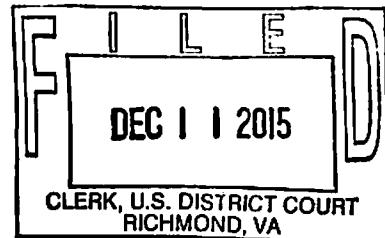


IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division



GLORIA PERSONHUBALLAH,
et al.,

Plaintiffs,

v.

Civil Action No. 3:13cv678

JAMES B. ALCORN,
et al.,

Defendants.

SUPPLEMENTARY COMMENTS TO THE REPORT BY THE SPECIAL MASTER.

December 11, 2015

Bernard Grofman*
Special Master

*Bernard Grofman is Professor of Political Science and Jack W. Peltason Endowed Chair of Democracy Studies at the University of California, Irvine, and former Director of the UCI Center for the Study of Democracy. His research deals with topics such as voting rights, electoral rules, theories of representation, behavioral social choice, and political science methodology. He is co-author of five books (four from Cambridge University Press and one from Yale University Press), and co-editor of 23 other books; with over 300 research articles and book chapters, including ten in the *American Political Science Review*. A member of the American Academy of Arts and Sciences since 2001, he has been a scholar-in-residence at universities and research centers in the U.S., Canada, France, Germany, Italy, Japan, the Netherlands, Spain, and the UK, and he has an honorary Ph.D. from the University of Copenhagen (Denmark) for his research on comparative electoral systems. He has previously been involved as a consultant or expert witness for federal courts, the U.S. Department of Justice, both major political parties at a state or national level, and civil rights groups such as the NAACP Legal Defense and Educational Fund and the Mexican-American Legal Defense and Educational Fund. As a specialist on redistricting, his own research, or chapters in books he has edited, has been cited in more than a dozen U.S. Supreme Court decisions, most recently in *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015) and, perhaps most notably, in *Thornburg v. Gingles*, 478 US 30 (1986).

(1) After reading the various briefs in response to the Report of the Special Master, and the further rejoinders to those responses, I found highly misleading the characterizations in some of the briefs of the criteria I used in drafting a remedial map for the constitutional infirmities of CD3 identified in the majority opinion in *Page*, and of the process of map drawing that I made use of. I will not try to identify and respond directly to these mischaracterizations. Rather, below, I simply provide some further elucidation of points that may have not have been clear in the Report or whose wording may have lent itself to mischaracterization.

(2) In my view, terms such as compactness, racially polarized voting, equal opportunity to elect a candidate of choice, non-retrogressive, and packing, are what are often called “terms of art,” in that they have both an empirical aspect and a legal aspect that need to be separated. Political scientists and other social scientists offer definitions of these terms and evidence about their observed/estimated values. But the legal relevance of those definitions and the legal relevance of the empirical evidence offered by experts is always a matter for final judgment by the courts. For example, in my Report, as a political scientist, I use *packing* as purely a descriptive term, involving a factual claim, referring to a minority population in the current CD3 that, in my judgment as a political science expert who has looked at demographic and electoral facts in Virginia, is well above what is needed to assure the minority community an equal opportunity to elect a candidate of choice, and

well above what is needed to avoid retrogression.¹ It is a legal question, outside my purview, whether this level of packing was unconstitutional in the context of the tortuous way in which the boundaries of current CD3 had been crafted and the extent to which the process by which it had adopted may have been tainted by racial considerations.

(3) My initial exploration of possibilities of geography and demography in central and eastern Virginia indicated that there were two distinct concentrations of minority population in the state that had been combined into current CD3 so as to have the effect of packing minority voters into that district, where packing is used in the specific way in which I defined that term in paragraph (2) above.

(4) In understanding the map drawing process I used, it is critical to emphasize that I saw the task set before me by this court as falling in two phases. Phase I was to craft one or more potential remedies for CD3 that were narrowly tailored to achieve constitutionality; Phase II, which could only be approached after Phase I had been completed, was to consider the remaining congressional districts in the state in the light of the way the boundaries of CD3 had been redrawn.

(5) For Phase I, by a *narrowly tailored* remedy for CD3, I meant one that (a) satisfied constitutional criteria such as one person, one vote; (b) drew on good government criteria such a minimizing disruption of locality boundaries and drawing a compact district, rather than, as in current CD3, picking up isolated

¹ This is also the conclusion reached by Dr. Handley in her Report appended to the Brief of the Governor filed pursuant to the Court's September 18 deadline.

pockets of African-population in a tortuous fashion and unnecessarily splitting localities; (c) did not pack minority population in a fashion unnecessary for crafting a district with an equal opportunity for the minority community to elect a candidate of choice; (d) did not use race as a predominant factor; and (e) was non-retrogressive. In addition, because contiguity issues had figured so prominently in Page, while recognizing that there were potential alternative ways to achieve contiguity, for CD3 I required that contiguity be established in the most straightforward way, i.e., by land, bridge, or tunnel. Also, I took as given that any reconfigured CD3 should be built around geography found in current CD3 to the extent feasible, where a judgment about feasibility took as first priority the constitutional imperative to create a narrowly tailored remedy using the criteria enumerated above.

(6) In drawing a narrowly crafted remedy using good government criteria of districting in Phase I, I chose to base the reconfigured CD3 on four cities in the southeastern portion of the state, all of which been contained in whole or in part in current CD3, and then to add additional population in immediately proximate geography so as to create a compact and contiguous district. Doing so allowed me to begin crafting the remedy with a compact and contiguous district population that was already close to what was needed for an ideally sized congressional district. Such a good government configuration significantly reduced the African-American population share in the district, which required me to verify, from a political science

perspective, that this reduction in black voting age population in the reconfigured versions of CD3 did not generate equal protection issues. For the reconfigured versions of CD3, through careful data analysis (see Report of the Special Master), I verified that both versions of a reconfigured CD3 continued to provide the minority community a realistic equal opportunity to elect candidates of choice in a non-retrogressive fashion, while being narrowly tailored to do so. Because of their primary reliance on good government criteria such as minimizing disruption of locality boundaries and compactness, as well as satisfying the one person, one vote standard, these reconfigurations of CD3 achieved these goals in a fashion in which race was clearly not the predominant motive.

(7) From a political science standpoint, Phase I of the map drawing process was the most critical one. Once a judgment has been reached about what constitutes a narrowly tailored redrawing of current CD3, the answer to the next question, i.e., "How should the remaining districts in the state be configured?" follows to a large extent from the answer to the question, "How much did the redrawing of CD3 to provide a narrowly tailored remedy have impact on other districts?"

(8) Phase II of the line drawing process, how to draw the rest of the state, can in turn be divided into two questions. The first of these questions is "How many districts need to be redrawn?" Once I drew both illustrative maps placing CD3 in the Hampton-Newport News-Norfolk-Portsmouth area, which was the obvious place to center the new CD3 given the high total populations in those four contiguous

cities, by considering the geography of the state I was able to establish that the implications for other districts of drawing a narrowly tailored remedy for CD3 could be contained within the four congressional districts immediately adjacent to current CD3. Thus, the decision to limit changes to CD3, CD1, CD2, CD4, and CD7 follows almost automatically from the decision as to how to craft CD3 given my interpretation of what constitutes narrow tailoring vis-à-vis the districts affected by the redrawing of CD3.

(9) If we take the issue of how many districts need to be redrawn as settled, with changes needed in only five of eleven, as I did, the second question in Phase II of the line-drawing process is “How should current districts CD1, CD2, CD4, and CD7 be redrawn to reflect the changes in CD3?”

(10) I saw the question, “How should current districts CD1, CD2, CD4, and CD7 be redrawn to reflect the changes in CD3?” as largely hinging on the geography and demography of the state, its locality boundaries, and the configuration of previous districts. In particular, once you draw a narrowly tailored CD3 remedy in the sense specified above, the current CD3 has, in effect, been separated into two portions, each with a population center in different parts of the state: one that forms the basis for the new CD3, in the Hampton-Newport News-Portsmouth-Norfolk area, and one that is residual, in the Richmond-Petersburg area. An obvious question that needed to be answered at this point is “What you do with the residual portion of current CD3 located in the Richmond-Petersburg area?” While there could be different ways to answer that question, given the geography, the most obvious way

to answer the question of what to do with the residual portion of CD3 in the Richmond-Petersburg area is to put that population into a district that includes all of Richmond and all of Petersburg and then builds from there, to the extent that doing so is feasible given geographic and population constraints in the other districts that need to be redrawn. However, my map drawing did not begin with the composition of CD4. While map drawing involves simultaneous consideration of multiple districts, once I had drawn CD3, as a practical matter, I was first attentive to line drawing at the state's corner border involving CD2, where there are both water boundaries and a state border below. Attention to configuration and population balancing in the area of current CD2 was necessary to assure that the remaining districts could also be feasibly drawn while satisfying good government criteria. Or, to put it more simply, I did not want to paint myself into a corner. The end product was to create districts CD1, CD2, and CD7 as districts drawn in the same areas of the state as their current versions and CD4 as a district that consisted of what was left, largely consisting of whole localities, including Richmond and Petersburg, beginning in Richmond and including Petersburg and the Tri-Cities area, and then extending eastward to pick up necessary population.

(11) I stated in my Report that “[t]he current configurations of CD3 and CD4 reflect a combination of packing of minority voting strength . . . in CD3, and fragmentation of minority voting strength . . . in CD4, that can and should be remedied.” However,

this quote must be interpreted in the context of the language that came after it,² and in the context of the simple point that, as I stated in my Report, packing and cracking (i.e., fragmentation and dispersal) are generally two sides of the same coin. In remedying the one, the constitutional violation in CD3, which involved, among other things, packing of minority voting strength in CD3, fragmentation issues elsewhere, to the extent they exist, will also be dealt with. I never set out to create a CD4 which was a minority opportunity district. That consequence fell out naturally and inevitably from the demography and geography of the state. Once the decision to craft a narrowly tailored CD3 by basing it primarily on four cities in the southeastern portion of the state and, in the process, significantly reducing its African-American population, had been made, the population in current CD3 that did not go into new CD3 has to go somewhere, and a non-trivial portion of that residual population was African-American. By choosing to use Richmond, taken whole, as a component of one of the four districts that needed to be reconfigured, and by ending up, given the geography, putting most of the residual population in current CD3 that was not used to craft this reconfigured district, the new CD4, of mathematical necessity, had its black population increased and, in so doing the

² "Once I drew CD3 to address the constitutional violations in the present CD3 and located it in the Newport News-Hampton-Portsmouth-Norfolk area, I found that the geography and demography of the remaining portions of central and southeastern Virginia were such that the fragmentation of minority voting strength in the southeastern and central part of the state existing in the current CD4 was remedied simply by including whole in the reconfigured CD4 the cities of Richmond and Petersburg that previously had been contained in whole or in part in current CD3, and then naturally extending CD4 south and east for population purposes until it reached the border of the newly reconfigured CD3." (text located after footnote 32)

fragmentation of black population in the central and southeastern portion of the state was remedied.

(12) When I characterize CD3 as drawn in either of my maps as *non-retrogressive* I obviously do not mean that it has the same black voting age population as in current CD3, since in each version it has considerably lower black voting age population. At least as far back as my North Carolina Law Review article in 2001,³ I have emphasized the importance of viewing elections as a two-step (primary and general) process. My own analyses, and my review of empirical investigations of election outcomes in Virginia conducted by Dr. Handley, showed, on the one hand, a high level of white crossover support for black candidates in the general election who won the Democratic nomination (with that support presumably coming largely from white voters with Democratic leanings), and a much lower white proportion of voters in the Democratic primary than the proportion of white voters found in the general election. Thus, as the Report of the Special Master demonstrates, it is possible in Virginia for a candidate of choice of the minority community to win in a district that has a black voting age population that is less than majority BVAP. Indeed, under some circumstances, it is possible, or even highly probable, for candidate of choice of the minority community to win in a district that has a black voting age population that is considerably less than majority BVAP. However, examining whether a district is a minority opportunity district requires an intense

³ Bernard Grofman, Lisa Handley & David Lublin, Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence, 79 N.C. L. Rev. 1383 (2001).

appraisal of local circumstances. I have done this appraisal in the case of CD3, and I assess the probability of success for a minority candidate of choice in the reconfigured versions of CD3 as virtually identical to that in the current CD3, even though I expect that the likely vote share in the general election will be lower in the reconfigured CD3 than in current CD3 because, in the current CD3, the African-American incumbent won the general election in 2012 with 81.2% of the vote, and won the general election in 2012 with 94.4% of the vote -- vote shares far above what is needed to win election.

(13) When I characterize CD4 as drawn in either of my maps as a *minority opportunity district*, I do not mean that it is district in which the election of a minority candidate of choice is guaranteed. I do not equate "equal opportunity" with certainty. As noted above, examining whether a district is a minority opportunity district requires an intense appraisal of local circumstances, and I have done this appraisal in the case of the reconfigured versions of CD4. As discussed in my Report, the new versions of CD4 have an increased minority population, and we know from previous elections that a minority candidate of choice won the Democratic primary in one of the two elections in current redistricting cycle even in current CD4, a district with a lower minority population in the district.⁴ Thus, I

⁴ There was a mistake in the Report in my characterization of the general election in 2014 in that district; I wrongly listed it as uncontested by Democrats in 2014. However, the fact that the Republican incumbent won overwhelmingly in the 2014 election in the current CD4 does not change my assessment that the reconfigured CD4s are competitive seats, since that previous assessment was based on my belief

believe a minority candidate of choice will have an equal opportunity to nominate a candidate of choice in the reconfigured versions of CD4. Turning to the general election, as discussed in my Report, I assess the reconfigured CD4 districts as ones which are competitive districts in the general election, even though, based on 2012 and 2014 election results, the present CD4 is a safe seat for the Republican incumbent. Although that Republican incumbent still has his home located in the proposed versions of CD4, which provides an incumbency advantage, it is important to note that, as well as having a considerably higher black voting age population as a result of remedying the packing in current CD3, the new CD4 versions each include just barely over half of the population found in the previous CD4. While the incumbent may be expected to gain a majority of the vote in a general election in the old portion of the district, the outcome in the new portion of the district is going to be considerably more favorable to a minority candidate of choice, since much of that new territory was previously in current CD3, in an area which had very high levels of support for the minority candidate of choice in previous elections.

(14) Re least change. In my Report I offer the most comprehensive discussion of the concept of *least change* of which I am aware. I laid out five possible definitions/aspects of *least change* in the context of the particular case facts in *Personhubballah*: (1) confine changes in the map to the four districts that are contiguous to the district found unconstitutional, (2) make only minimal changes in

that the Democrats in 2014 had done even worse in current CD4 in 2014 than was actually the case, i.e., not even bothering to run a candidate.

CD3, (3) draw districts other than CD3 in a way that maintains their geographic and population base, (4) place all incumbent homes in districts which have the same number as their present district, and (5) drawn plans that guarantee that 8 Republicans and 3 Democrats will be elected.

(15) I stated that my two plans fully satisfied definitions (1) and (4) of least change, and that following definition (2) was not feasible, since the priority was to craft a remedy for the constitutional violation in CD3 in a narrowly tailored fashion, and I concluded that doing so required rather substantial changes in CD3. Nonetheless, the reconfigured CD3 in each plan does satisfy that criterion to the extent that constitutional constraints made that possible, in that the new versions of CD3 are based largely on four cities in the southeastern portion of the state, all of which are located in whole or in part in current CD3, and which together make up the vast bulk of the new CD3's population, with additional population from immediately proximate geography so as to create a compact and contiguous district.

(16) I stated in my Report that I rejected definition (5) of least change. Despite Intervenor-Defendants' continued insistence in their most recent briefs that this partisan political criterion of preserving Republican control of the state's congressional delegation should be of overriding legal importance, I have not changed my views as to its irrelevance to a plan court drawn remedial plan, especially since my proposed remedial plans do take into account key aspects of

least change in the fashion described in my Report to the extent feasible given the reconfiguration of CD3, most notably limiting changes to those congressional districts directly contiguous to the changed CD3, and preserving homes of incumbents in districts of the same number, and drawing plans for the remaining district in similar geographic areas to their present configuration.

(17) I stated in my Report that definition (3) of least change needed to be understood in the context of the priority to draw a narrowly tailored constitutional remedy, and the changes in other districts that became inevitable once CD3 had been substantially reconfigured to achieve this end, because the four other districts needed to fit with the new boundaries of CD3. However, I also indicated that, subject to this constraint, I drew Districts 1, 2, and 7 in essentially the same geographic location as in the current map, while reconfigured CD4 was a residual district, consisting of portions of current CD4 and a large part of the component of current CD3 that fell outside the Hampton-Newport News-Portsmouth-Norfolk area.

(18A) "Core preservation" is a term that refers to the degree to which the population contained in newly configured districts overlap with the population of current districts of the same number (see Declaration of Trevor Cox, filed December 1, 2015). Core preservation, with its emphasis on population change, is one of two aspects of definition (3) of least change given above, the other being geographic in

nature. The fact that both CD3 and CD4 have low core preservation population values does not affect my judgment as a political scientist that the plans I offered for the Court's consideration were narrowly tailored to deal with the constitutional infirmities of CD3. The current CD3 was both tortuous and packed, including minority populations from widely separated geography in a fashion that could not be attributed to concerns for one person, one vote, preservation of localities, or compactness. After remedying the constitutional infirmity in current CD3 by creating a compact contiguous district with minimal locality cuts in the Hampton-Newport News-Portsmouth-Norfolk area, and verifying that it provided a minority opportunity district which also was non-retrogressive, it is a mathematical necessity that the very substantial changes in the population included in CD3 in the proposed plans from that included in current CD3 would have consequence for the degree to which CDs 1, 2, 4, and 7 were configured. Thus, the concept of least change must be understood in the context of what is constitutional.

(18B) In order to craft a narrowly tailored constitutional remedy for the previous tortuous and packed configuration, current CD3 was divided into essentially into two pieces that respected the geography of the state, each piece with a population centered in two different parts of the state. Thus, the equivalent of 2 whole districts, over 1.5 million people, at minimum, needed to be moved from one district to another. The populations involved are those to bring up CD3's population to ideal size and those needed to bring up a district created around the residual portion of

CD3 up to ideal size, and these populations need to come from existing districts, thus changing the composition of those districts as well. As a consequence of these constitutionally mandated changes, in total population terms core preservation in both CD3 and CD4 is going to be very limited. Moreover, other changes were needed, to assure contiguity, to balance population levels and, eventually, to assure that each incumbent had a home located in a district whose number corresponded to his current district. These constraints reduced core population preservation percentages in other districts.

(19) Re relative core preservation: There are differences between my NAACP Plan 6 and my Modified Current Plan 16 in terms of level of population “core preservation” of the various districts, with the former, on balance, providing less core preservation than the latter (see Declaration of Trevor Cox, filed December 1, 2015, or the appendices to Report of the Special Master). Those differences can be understood almost entirely from the difference between the two plans in how they treat Norfolk, and the ramifications of that choice. In the current plan, Norfolk is split between CD3 and CD2. This split is perpetuated in Modified Current Plan 16. In contrast, in NAACP Plan 6, as in the original NAACP plan, Norfolk is kept wholly within the reconfigured CD3. Keeping Norfolk whole requires considerably greater changes from the current plan than what you get by largely following the present split of Norfolk between CD2 and CD3, which is what is done in Modified Current Plan 16. The decision to keep Norfolk whole in CD3 has a strong effect in reducing core

preservation in CD2, but also has strong core preservation “ripple” effects on districts other than CD2, because now CD2 needs to gain population, and, given the geography, that population has to come from districts other than the current CD3. Keeping Norfolk whole, however, reduces the number of locality splits needed to draw CD3.

(20) Nothing in the briefs I have read submitted after my Report was filed changed my views that the plans previously submitted by parties and by others were not narrowly tailored remedies. The plans of Intervenor-Defendants (and of Mr. Rapoport) fail to craft a narrowly tailored remedy because they provide a minority population in CD3 well above that needed to provide an “equal opportunity to elect district” or one which is non-retrogressive.⁵ The maps proposed by all others are not narrowly tailored either for this reason or because they make changes in more districts than just CD3 and the four districts contiguous to it. Changes in more than four other districts are not in any way required by the need to correct the constitutional infirmity in CD3. I would also note that the first flaw rules out the Bull Moose plan that I did not comment on in my Report; while the second flaw rules out the at-large plan submitted by Mr. Garrett, a plan that I also did not comment on in my Report.

⁵ Other problematic features of the Intervenor-Defendants’ plans are discussed in my Report.