

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.

SUPPLEMENT II TO THE REPORT OF THE SPECIAL MASTER:

COMMENTS ON THE DECEMBER 14, 2015 HEARING

December 15, 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. I was pleased to be able to attend the December 14, 2015 Hearing held with respect to legal issues in Personhuballah v. Alcorn. At that Hearing, various remarks were made by attorneys purporting to summarize the Report of the Special Master about the process of line drawing used by the Special Master in crafting Congressional District 3 to remedy the constitutional infirmities identified in that district in the Page decision, and purporting to summarize the rationale of decisions made by the Special Master as to how to craft the congressional districts affected by the narrowly tailored constitutional redrawing of CD3. While the statements by two of attorneys generally accurately reflected the content of the Report, statements by another attorney were erroneous in major ways. Below I briefly summarize some key points in my Report in a fashion intended to clarify misstatements that I heard at the Hearing.

2. The material below does not add any points that are not already contained in the Report of the Special Master and the previous Supplement to that Report. For elaboration of the summary below please see the fuller discussion in the Report (and the Supplement).

3. The process of line drawing occurred in two stages.

4. The first stage involved three parts: (a) identifying the district which needed to be changed because it had been found to be unconstitutionally drawn. Here that was CD3. Then (b) a narrowly tailored remedy for the constitutional violations in the current CD3 was constructed by redrawing CD3 using good government criteria (e.g., avoiding unnecessary splits in localities, drawing compact districts to the extent feasible given the geography, preserving contiguity). Then (c) I verified empirically that the redrawn district did not raise issues of equal protection with respect to the equal ability of the minority community to elect a

candidate of choice, or with respect to retrogression, as that term had been used in Section 5 Voting Rights Act jurisprudence. Because my line drawing process relied on good government criteria, quite obviously, race was not the predominant motive.

5. Having identified necessary changes in CD3 to draw a narrowly tailored constitutional remedy, conceptually, the second phase of the line drawing process looked at how to minimize the impact of this constitutionally mandated change on the other congressional districts. This phase could be divided in two parts. (a) I first established the minimum number of districts that had to be redrawn to reflect the changes made to assure the constitutionality of CD3 in a narrowly tailored fashion. Here I concluded that the majority of districts in the plan (6 of 11) could be left unchanged from their current configuration, with the only congressional districts that, for population purposes, needed to be changed, those that were immediately contiguous to the current CD3. Then (b) I drew a plan to construct those four congressional districts (CD1, CD2, CD4 and CD7) in a constitutional fashion reflecting “least change” from the current configurations to the extent feasible given the substantial changes in CD3. The concept of “least change” that I made use of was defined precisely in my Report.

6. Since current CD3 was drawn in a fashion with race as a predominant motive and using a legally inappropriate and factually inaccurate bright line requirement of drawing a 55% black voting age population district, the redrawing of a constitutional and narrowly tailored CD3 required substantial changes in configuration from the current CD3. As a consequence, for population balancing purposes, and subject to constraints based on geography and the location of localities in the State, substantial changes in other districts became mathematically inevitable. The bulk of those changes occurred in CD4, since, for geographic

reasons, this district took on the substantial portion of the current CD3 in the Richmond and Petersburg area that was no longer in CD3 when the tortuous construction of the current CD3 was replaced with a district built in a narrowly tailored fashion on its Hampton-Newport News-Portsmouth-Norfolk eastern component.

7. In examining the question of whether or not a given district provided minorities an equal opportunity to elect candidates of choice, I made use of careful empirical analyses that were district specific, and that took a functional approach and not a bright line approach. In this functional approach, a proposed district could have a lower black voting age population than the current district with the same number but still be found, empirically, to offer the minority community an equal opportunity to elect a candidate of choice and therefore be non-retrogressive, because a functional retrogression test is in terms of probability of success, and not in terms of demographic composition. In my professional judgement, CD3 in each of the plans in the Report of the Special Master provides minorities an equal opportunity to elect candidates of choice and is therefore non-retrogressive.

8. In my professional judgement, CD4 in each of the plans in the Report of the Special Master provides minorities an equal opportunity to elect candidates of choice. To reiterate a point made in my Report, I did not set out to create a CD4 district that was a district in which minorities had a realistic opportunity to elect a candidate of choice, nor did I set out to create a CD4 district with some prespecified minority population. Rather the increase in minority population in CD4 in both plans contained in the Report of the Special Master as compared to black voting age population in current CD4 comes about directly because of the need to reconfigure CD3 in a narrowly tailored constitutional fashion and the concomitant changes dictated by population, geographic constraints and locality boundaries in the districts directly

affected by the reconfiguration of CD3. In particular, as of mathematical necessity, the portion of current CD3 in the Richmond-Petersburg area that was eliminated from CD3 when that district was narrowly tailored had to go somewhere, and given the geography, that population logically became the basis of a district whose population node is Richmond. That population included a substantial number of African-Americans of voting age. The configuration of CD4 in each of the plans of the Special Master results from population, geographic and locality constraints and considerations of least change as defined in my Report and are not based on my judgment as to whether or not these configurations of CD4 offer minorities an equal opportunity to elect candidates of choice.