Testimony of Ronald Keith Gaddie, Ph.D.[1]

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1. Background

Section 5 of the Voting Right Act was renewed in 2006, for a period of 25 years. Seven years ago, prior to renewal, I testified to this commission that "the nature of Section 5 [had] become so blurred by recent litigation that the provision is emerging as a vehicle for the pursuit of partisan advantage rather than ensuring access to the political process." At that time, I also observed that "the political nature of Section 5 should be frankly and openly discussed," that "we need to revisit the need to continue Section 5 in all covered jurisdictions."

The coverage formula (the Section 4 'trigger') is left unchanged. Congress did not create new mechanisms to facilitate the ability of compliant jurisdictions to bail out from preclearance coverage. The most significant major change in the Act corrects the retrogression baseline from the decision in *Georgia v. Ashcroft*,[2] to ensure that any new law affecting elections neither has the purpose nor will have the effect of denying or abridging voting rights on account of race, color or language-minority status. Other potential revisions to the VRA were sidelined.

In NAMUDNO, the Court expanded bailout eligibility, while also strongly hinting at potential constitutional vulnerabilities in the coverage formula trigger. Multiple jurisdictions continue to challenge the constitutionality of Section 5 coverage.[3] In the meantime, another

[1] Professor of Political Science, The University of Oklahoma, Norman, OK 73072; 405/ 325-4989; rkgaddie@ou.edu.

[2] 539 U.S. 461 (2003).

[3] See, for example, *Arizona v. Holder*, No. 1:11-cv-01559 (D.D.C.) 2011.

round of redistricting is underway. How is section 5 working?

2. Looking at Post-VRA Extension Implementation

After examining preclearance objections in redistricting cases since the renewal of the Act, it is my conclusion that Section 5 is applied apolitically and fairly in this cycle. Unlike controversial preclearance decisions under both Bush Administrations, the Justice Department preclearance decisions under the Obama Administration strike me as consistent in the application of a non-retrogression standard. Recent redistricting objections bear out this conclusion:

2.1 November 2009, Lowndes County, Georgia commission redistricting plan (November 2009). The county's revised commission plan added two floterial 'superdistricts' to the commission, each encompassing half of the county; one is 49% black, the other is 19.3% black. County indicated a goal to increase minority access and voting power, but this is not the effect in the opinion of the DOJ. The baseline map has three seats, including one majority-minority district that does perform for minority voters (the estimated county population in 2008 was 33.4% African-American). A five-member SMD district plans might not have been retrogressive, were it used.

2.2 August 2010: Fairfield County, South Carolina, School Board. The Fairfield County board consisted of five members, elected from single-member districts. Due to financial exigency, the state took action to temporarily transfer financial control of the district and also add two, at-large board members to the existing board. Because this action was taken on an ad hoc basis, without general purpose legislation to guide it, and the at-large seats failed to provide an equal opportunity to elect for minority voters and reduced the proportion of minority opportunities, DOJ refused to preclear the change.

2.3 October 2011: Amite County, Mississippi, redistricting plan for the board of supervisors and the county commission. Total population is 41.2% African American; the voting age population is 39.6% African-American. The board of supervisors and county commissioners are elected from five coterminous districts (the school board used the same districts, though it is not required to do so by law). In the benchmark plan, two districts allow minority voters to elect candidates of choice. Both are majority-minority districts (55.3% and 53.9% black). The remap increases the opportunity to elect in one district, but lowers it to less than an equal opportunity in the other district. District 5 is proposed as an offset, but DOJ analysis did not support the belief that the district would perform. County considered an alternative plan that was not retrogressive, but did not adopt it. The DOJ also cites evidence of deliberate intent in the action of the county.

2.4 October 2011, East Feliciana Parish, Louisiana redistricting. The parish is 45.1% African American by population, 43.7% by VAP. The benchmark plan contained four districts where minority voters had an equal opportunity to elect; in the new plan, this is reduced to three, according to DOJ analysis. The map also failed to meet the minimum standard for one-person, one-vote, mooting the parish's explanation that complying with 1P1V was the rationale for the reduction in the number of opportunities.

Looking over these cases, what strikes me is that in three of them, there is movement in the number of districts that will be used in determining the baseline. Jurisdictions are expanding legislative bodies, without expanding the number of minority opportunities. As a consequence, the proportion of opportunities is reduced, leading DOJ to argue that the change retrogresses. This is generally consistent with the conclusions in the Texas case, where the denominator is

changing, and the numerator of opportunities is unchanged or increases while lagging previous proportionality in the map.[4]

3. The Simultaneous Submission Approach

As of January 28, of the sixteen states covered in whole or in part by section 5, eight have pursued simultaneous judicial and administrative preclearance for congressional or legislative maps or both: Alabama (Congress)[5]; Arizona (House, Senate, Congress); Georgia ((House, Senate, Congress); Louisiana (House, Senate, Congress); North Carolina (House, Senate, Congress); South Carolina (House, Senate, Congress); Texas (House, Senate, Congress); and Virginia (House, Senate).[6] Texas was denied preclearance by the Federal District Court for the District of Columbia. Arizona's districts only recently entered preclearance. (The remaining plans were successfully precleared by DOJ.)

Among the remaining states, Alaska and Michigan successfully pursued administrative preclearance. South Dakota is awaiting preclearance approval on state legislative maps. California, New York, and New Hampshire have yet to complete and submit plans to DOJ. Florida had yet to complete and submit maps, which must first undergo review by the state Supreme Court to determine compliance with 2012's Amendments 5 and 6 to the state

[4] *Texas v. Holder*, No. 1:11-cv-01303 (D.D.C.); also, the Department of Justice indicated that the state Senate districts should be precleared, but this cannot happen absent a court order, since Texas pursued preclearance through the courts.

[5] Congress only. The state has yet to complete and submit state legislative maps.

[6] Virginia has not yet completed a congressional district map.

constitution.[7] Mississippi's congressional map was crafted by the Federal District Court,[8] and the state legislative maps do not have to be redrawn until the end of 2012.[9]

Simultaneous submission is working for the states pursuing it. Seven of eight states have successfully submitted eighteen maps; three have been rejected; and three await preclearance. Among the successful states, Louisiana for the first time successfully precleared a state house map on the initial effort, and Georgia for the first time successfully precleared *all* of her maps on initial submission.

[7] Florida Constitution, Art. III, §§ 20 & 21, amended 2010.

[8] *Smith v. Hosemann*, No. 3:01-cv-00855 (S.D. Miss.) 2011.

[9] *Mississippi NAACP v. Barbour*, No. 3:11-cv-00159 (S.D. Miss.) 2011.