Senate Judiciary Committee Hearing
"From Selma to Shelby County:
Working Together to Restore the Protections of the Voting Rights Act"
Questions for the Record Submitted by Senator Al Franken for Michael Carvin

Question 1: In your written testimony, you stated the following:

> These Amendments [i.e., the Fourteenth and Fifteenth Amendments] prohibit only *intentional* discrimination in voting; i.e., disparate treatment of voters based on their race. *Mobile v. Bolden*, 446 U.S. 55 (1980); *Washington v. Davis*, 426 U.S. 229 (1976). Accordingly, while Congress has very broad power to "enforce" these nondiscrimination commands, it can only enact laws with some nexus to eradicating or remedying such purposeful discrimination – it cannot enact laws not fairly described as enforcing purposeful discrimination prohibitions, simply because the laws "help" minorities. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

7/17/13 Judic. Cmte. Hrg., M. Carvin Written Testimony at 2 (emphasis in original).

(a) Do you believe that the Fifteenth Amendment gives Congress the authority to enact legislation that prohibits facially neutral voting practices that have discriminatory effects?

(b) If your answer to question (a) is in the negative, please cite legal authority to support your position. (Neither *Bolden* nor *Davis* addresses this issue; *Bolden* involved the application of the Voting Rights Act, not its constitutionality, and *Davis* had nothing to do with the Voting Rights Act or the Fifteenth Amendment.)

(c) If your answer to question (a) is in the negative, please explain why you believe that your position is consistent with the Supreme Court's decision in *City of Rome v. U.S.*, in which the Court addressed this precise issue and stated the following:

> Congress passed the [Voting Rights] Act under the authority accorded it by the Fifteenth Amendment. The appellants contend that the Act is unconstitutional because it exceeds Congress' power to enforce that Amendment. They claim that § 1 of the Amendment prohibits only purposeful racial discrimination in voting, and that in enforcing that provision pursuant to § 2, Congress may not prohibit voting practices lacking discriminatory intent even if they are discriminatory in effect. We hold that, even if § 1 of the Amendment prohibits only purposeful discrimination, *the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment], outlaw voting practices that are discriminatory in effect.*

City of Rome v. United States, 446 U.S. 156, 173 (1980) (emphasis added) (internal footnote providing Amendment text omitted).

Question 3. In *Shelby County*, the Court stated that "voting discrimination still exists; no one doubts that." *Shelby County v. Holder*, 133 S. Ct. at 2619. It also said that "there is no denying that, due to the Voting Rights Act, our Nation has made great strides." *Id.* at 2626. Similarly, in *Northwest Austin*, the Court stated that "[t]he historic accomplishments of the Voting Rights Act are undeniable," *Nw. Austin Mun. Utility Dist. No. One v. Holder*, 557 U.S. 193, 201 (2009), and that improvements in voter turnout, registration, and other metrics "are no doubt due in significant part to the Voting Rights Act itself, and stand as a monument to its success," *id.* at 202. Do you disagree with any of these statements by the Supreme Court?

Question 4. In *Northwest Austin*, the Court said the following:

> The first century of congressional enforcement of the [Fifteenth] Amendment, however, can only be regarded as a failure. Early enforcement Acts were inconsistently applied and repealed with the rise of Jim Crow. Another series of enforcement statutes in the 1950s and 1960s depended on individual lawsuits filed by the Department of Justice. But litigation is slow and expensive, and the States were creative in contriving new rules to continue violating the Fifteenth Amendment in the face of adverse federal court decrees.

Nw. Austin, 557 U.S. at 197–98 (internal citations and quotation marks omitted). In your view, was the Supreme Court wrong in this assessment? If so, how?

My answers are attached.

ANSWERS FOR
SENATOR FRANKEN

Answer 1(a): Yes. As the testimony you quoted clearly states, "Congress has very broad power to 'enforce'" the Constitution's "nondiscrimination commands," so it can go beyond the Constitution's purposeful discrimination prohibition so long as the statutes can be "fairly described" as prophylactic measures to redress purposeful discrimination. *See City of Boerne v. Flores*, 521 U.S. 507 (1997). Thus, the extra-constitutional "results" standard in Section 2, as interpreted by the Supreme Court, is permissible enforcement legislation, for the reasons described in my Nix amicus brief in *Shelby County* (p. 23-26). Of course, if an effects prohibition, like the "ability to elect" standard added to Section 5 in 2006, acts as a quota floor for predicted electoral success of minority-supported candidates, then it is impermissible enforcement legislation because it both violates the Constitution's nondiscrimination commands and cannot be fairly described as an effort to enforce them. (*See* Nix amicus brief in *Shelby County*, p. 29-34.)

1(b): Not applicable

1(c): Not applicable

[No Question 2]

Answer 3: No. Section 2 of the Voting Rights Act, along with the Act's prohibition against discriminatory tests and devices, played a very valuable role in securing the historic advances identified by the Supreme Court. These provisions both provided minorities with equal access to the ballot and, after the "results" test was added to Section 2 in 1982, effectively eliminated "second generation," minority "vote dilution" problems caused by gerrymandered districts and at-large electoral systems. While Section 5 played a much less significant role in the "improvements" to the status quo described by the Supreme Court, it nonetheless supplemented these other VRA provisions by freezing the status quo where "case-by-case litigation was inadequate to combat wide-spread and persistent discrimination in voting" because of "obstructionist tactics." *See South Carolina v. Katzenbach*, 383 U.S. 301, 328, 334-35 (1966). That role was necessarily supplementary because Section 5 had the "limited substantive goal" of "preventing nothing but backsliding" and permitted discriminatory voting changes "no matter how unconstitutional [they] may be." *See Georgia v. Ashcroft*, 539 U.S. 461, 477 (2003); *Reno v. Bossier Parrish Sch. Bd.*, 528 U.S. 320, 335-336 (2000). In short, Section 5 could not have meaningfully contributed to the status quo improvements referenced by the Supreme Court since Section 5 did not *reach* the existing discriminatory voting practices established in the South—such as at-large systems—because it only reached "*changes*" and only prohibited *retrogressive* changes.

Answer 4: No. The Supreme Court quotation you provide is a quite correct and concise explanation of the limited role that Section 5 was always designed to play—supplementing Section 2's case-by-case litigation to insure that recalcitrant jurisdictions could not evade or avoid "federal court decrees." Consequently, the question in 2013 is whether such supplementation of Section 2 is needed because Section 2, even as amended in 1982, somehow is inadequate to deal with voting discrimination. It will be quite difficult to make such a showing because it is conceded that evasion of federal court decrees is quite rare in the covered jurisdictions and because the new Section 2 does effectively redress discrimination in the non-covered jurisdictions—which are not meaningfully different from the covered jurisdictions.

QUESTIONS FOR THE RECORD FROM SENATOR CHARLES E. GRASSLEY "FROM SELMA TO SHELBY COUNTY: WORKING TOGETHER TO RESTORE THE PROECTIONS OF THE VOTING RIGHTS ACT"

SENATE JUDICIARY COMMITTEE, JULY 17, 2013

Question for Mr. Carvin:

Congress failed to heed the Supreme Court's 2009 warning that the 2006 preclearance formula might be unconstitutional on Tenth Amendment grounds. In Shelby County, the Court indicated that federalism concerns could render unconstitutional Section 5's prohibition of laws that could have favored minority groups but did not do so for a discriminatory purpose, and not only those redistricting plans that actually harmed minority groups. It also commented that racial considerations that might doom a redistricting plan because of Section 2 of the Act or because of the Fourteenth Amendment are potentially required because of Section 5.

How should we take into account the Supreme Court's warnings of potential problems with Section 5 in any legislation that we might consider?

Answer:

In light of the *Shelby County* language you cite, any effort to perpetuate or revive Section 5 must eliminate the 2006 substantive amendments to that statute, which expand Section 5 to reach non-retrogressive changes and also alter the retrogression standard to prohibit any diminution in minorities' "ability to elect." As *Shelby County* and other numerous Supreme Court cases have noted, the former amendment was used by the Justice Department to impose grossly unconstitutional racially gerrymanders in the covered jurisdictions and the latter amendment, as noted, is a quota floor requiring preferential treatment of candidates supported by minority voters. These are the enhanced federalism burdens and unconstitutionally race-conscious aspects of Section 5 referred to in *Shelby County* and the cases it cited.