Testimony of

Mr. Michael A. Carvin

July 13, 2006

TESTIMONY OF
MICHAEL A. CARVIN
BEFORE THE
SENATE JUDICIARY COMMITTEE
REGARDING THE
REAUTHORIZATION OF THE VOTING RIGHTS ACT

July 13, 2006

STATEMENT OF MICHAEL A. CARVIN

Good afternoon, Mr. Chairman and members of the Committee. Thank you for the opportunity to testify concerning the Supreme Court's recent decision in LULAC v. Perry, and its potential effect on legislation to renew Section 5 of the Voting Rights Act. I have been involved in a substantial number of redistricting and voting rights cases, and filed a brief on behalf of the Texas Republican Party in LULAC.

I will focus my comments on LULAC's resolution of the Section 2 challenge to the so-called "dismantling" of old District 24, previously represented by Democratic incumbent Martin Frost. Texas' District 24 had a black citizen voting age population of 25.7% and thus the question was whether the failure to create or maintain such an "influence" or "coalition" district stated a viable cause of action under Section 2. More specifically, the plaintiffs' claim was that, although African-Americans were not a possible majority in the district, they could form a winning "coalition" with Anglo voters to elect their preferred candidate, and therefore the district could not be altered.

The Supreme Court, as it has done in the past, reserved the question of whether a minority constituting less than a potential majority could ever state a claim under Section 2. Three Justices, in an opinion authored by Justice Kennedy, found that, even assuming that "it is possible to state a § 2 claim for a racial group that makes up less than 50% of the population," the challenge to District 24 failed because African-American voters had not shown that they could constitute "a sufficiently large minority to elect their candidate of choice with the assistance of [non-minority] cross-over votes." LULAC, Slip Op. at 37-38. (Two Justices, Justices Scalia and Thomas, rejected the claim because, as they had previously opined, Section 2 does not provide minority voters with any basis for challenging redistricting plans that are not motivated by discriminatory purpose. Justice Scalia, concurring, Slip Op. at 2.)

In this regard, the Kennedy plurality noted that the district court had found that "African-Americans could not elect their candidate of choice in the [Democratic] primary" and that, in fact, "Anglo Democrats control this district." Slip Op. at 38. The Court determined that the district court's findings were not clearly erroneous because they were supported by substantial testimony and, indeed, even by the minority voters' own expert's testimony. Id. at 38-39.

Accordingly, given that the plaintiffs could not establish that African-Americans could elect their candidate of choice, even in a coalition with non-minority voters, it did not definitively reach the question of whether such "influence" or "coalition" districts are required under Section 2.

The Kennedy plurality opinion nevertheless casts serious doubt on the viability of such claims under Section 2. Specifically, it found that while such influence districts are "relevant to the § 5 analysis" under Georgia v. Ashcroft, 539 U.S. 461 (2003), the "lack of such districts cannot establish a § 2 violation." Slip Op. at 40 (emphasis added). Indeed, the Court noted that, "[i]f § 2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." Id.

Thus, in my opinion, the LULAC decision, although not definitive, foreshadows the Supreme Court's future explicit rejection of influence or coalition district claims under Section 2. Indeed, virtually every lower federal court has rejected such claims and, in my view, acceptance of these claims would be contrary to the plain language and explicit purpose of the Voting Rights Act. Simply put, the "influence" district theory seeks to convert the Voting Rights Act's mandate of equal opportunity for minority voters into a statutory mandate for partisan preferences. Throughout the 2000 redistricting cycle (and, to a lesser extent, the 1990's), Democratic partisans brought numerous challenges across the country arguing that, because African-Americans and most Hispanic groups tend to vote Democratic, the Voting Rights Act requires legislatures to draw districts that maximize the electoral fortunes of the Democratic party. Thus, it was argued, even in districts where minorities cannot constitute a majority, influence districts had to be created, so that minorities could elect their "representatives of choice." Fortunately, virtually every lower court rejected this theory as a transparent effort to conscript the federal judiciary into rearranging districts that tend to favor Democrats, including white Democrats. As numerous courts noted, the federal judiciary is not required or permitted to arrange districts "to make the congressional races competitive for [D]emocratic candidates" because the "Voting Rights Act does not guarantee that nominees of the Democratic party will be elected, even if black voters are likely to favor that party's candidates." Smith v. Clark, 189 F. Supp. 2d 529, 537 (S.D. Miss. 2002) (three-judge court); Baird v. City of Indianapolis, 976 F.2d 357, 361 (7th Cir. 1992); see also Hall v. Virginia, 385 F.3d 421, 430-32 & n.13 (4th Cir. 2004), cert. denied, 544 U.S. 421 (2005); Nixon v. Kent County, 76 F.3d 1386, 1392 (6th Cir. 1996); Colleton County Council v. McConnell, 201 F. Supp. 2d 618, 643-44 (D.S.C. 2002) (three-judge court).

The LULAC decision is therefore relevant to the Section 5 reauthorization legislation currently being considered by Congress. This is because S.2703, like its House counterpart, H.R.9, would clearly require the partisan "influence" districts that have been soundly rejected under Section 2. Specifically, Section 5(b) of the bill would prohibit any redistricting change with the "effect of diminishing the ability [of minority voters] to elect their preferred candidates of choice." As noted, Democrats are almost always minorities' preferred candidates of choice and, therefore, a federal statute would prohibit diminishing the ability to elect Democratic candidates, whether they are minority or non-minority.

Needless to say, minorities have the ability to elect their preferred candidates in districts where they do not constitute a majority, so long as they can form a winning coalition with like-minded non-minority voters. This undisputed reality was confirmed in Georgia v. Ashcroft itself, which

stated that there are "communities in which minority citizens are able to form coalitions with voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice." 539 U.S. at 481. Accordingly, it is quite clear that Section 5(b) of the bill would not only prohibit elimination of majority-minority districts, but also those "influence" districts where minorities are able to coalesce with non-minority voters to elect their preferred candidates. Indeed, the House Committee Report for H.R.9 confirms that the bill requires preservation of influence or coalition districts, as well as majority-minority districts. Page 71 of the Report unequivocally says that, "[v]oting changes that leave a minority group less able to elect a preferred candidate of choice, either directly or when coalesced with other voters, cannot be precleared under Section 5."

Moreover, contrary to what some apparently believe, this provision would prohibit altering not only districts where minorities and non-minorities come together to elect minority Democratic candidates, but also where the coalition elects non-minority Democratic candidates. Obviously, non-minority candidates can be the preferred candidates of minority voters. Again, the legislative history in the House confirms this truism. See, e.g., House Report at 70 ("minority voters [must be able to] elect their preferred candidates, including candidates of their own race").

The LULAC opinion also further supports the conclusion that the candidate of choice inquiry does not turn on the race of the candidate, but whether the candidate, regardless of race or ethnicity, is preferred by minority voters. Thus, for example, Representative Bonilla, a Latino Republican, was not the Hispanic voters' candidate of choice, even though they were of the same ethnicity. Similarly, in its discussion of whether African-American voters in District 24 had a sufficient presence to elect their preferred candidate, the opinion by Justice Kennedy nowhere hinted that Anglo Democrats, such as Representative Frost, could not be the minorities' candidate of choice. Rather, it simply made the point that there was not sufficient evidence to show that African-Americans had sufficient numbers in the district to elect candidates of choice of all races, including an African-American Democrat, if they so chose. And even this seemingly incontrovertible point, based on the express findings of a district court which had to be upheld unless clearly erroneous, was not accepted by four Justices. See Opinion of Justice Stevens; Opinion of Justice Souter. In this regard, it is also important to realize that a submitting political jurisdiction has the burden of proof under Section 5, while the burden under Section 2 is on the minority voters challenging the redistricting plan. That being so, it would be the state or local government's burden to demonstrate that the non-minority Democrat elected in the influence district is not the minorities' candidate of choice. This will be difficult, if not impossible, in districts, like District 24, where minority candidates have rarely, if ever, run and/or have achieved mixed success.

Further, unlike the Section 2 statute at issue in LULAC, the bill prevents "diminishing the ability" to elect candidates of choice, so it clearly reaches and protects districts where minorities did not have a demonstrable pre-existing power to elect the candidate of choice under the old plan. If minorities had a 40% chance of electing their candidate in the old influence district and the new plan reduces that potential to 20%, then the ability to elect has been "diminished" by the plan. Indeed, Justice Stevens noted in LULAC that whether minorities "control" a district "is not relevant in evaluating whether [the redistricting plan] is retrogressive under § 5," although it is relevant under Section 2. Opinion of Justice Stevens, Slip Op. at 35 n.15. Since old District 24 "was a strong influence district for black voters," the redistricting plan was retrogressive because it caused retrogression "by dismantling . . . District 24." Id. The Section 2 inquiry, in contrast,

was whether minorities controlled or would usually win under the proposed alternative influence district. In addition, many minority Democratic representatives are elected in districts where members of their race are a clear minority. That being so, it will often be easy to show that minorities have some ability to elect even a minority candidate of choice and, as a consequence, that the district cannot be altered under the standards set forth in S.2703.

In short, while the apparent impetus behind this language was to overturn Georgia v. Ashcroft, this section plainly does far more than that. Georgia v. Ashcroft, to be sure, provided states greater latitude to undo prior majority-minority districts. But the bill takes away not only this discretion with respect to majority-minority districts, but with respect to all districts where minority-preferred candidates can be elected. Since all agree that such candidates can be elected in majority white districts, these "influence" districts cannot be altered under the plain language of S.2703.

S.2703 contains another unfortunate change which would require not only preservation of existing influence districts, but creation of new ones that never before existed. Specifically, Section 5(c) overturns Bossier Parish II, 528 U.S. 320 (2000)--a case I argued successfully before the Supreme Court--by restoring the Justice Department's ability to deny Section 5 preclearance even where there is no diminution in minority voting strength, if the Department discerns a so-called "discriminatory purpose." It is well documented, however, that the Justice Department routinely finds discriminatory purpose every time the submitting authority fails to create the maximum number of minority opportunity districts. See, e.g., Miller v. Johnson, 515 U.S. 900 (1995). For example, in the 1980's and (particularly) the 1990's, the Department found "discriminatory purpose" solely because the submitted plan did not create the maximum number of majority-minority districts, leading to the sort of racial gerrymanders struck down in Shaw v. Reno, 509 U.S. 630 (1993). Particularly because the bill treats coalition districts as "protected" minority districts, the Department can and will now similarly require states to create the maximum number of these "coalition" or "influence" districts. The way this will occur is by having a Democratic-leaning or civil rights group simply propose a plan which adds a certain number of "influence" districts, and the Justice Department will deem the rejection of such additions as being motivated by "discriminatory purpose."

As this reflects, an inherent problem in enforcing Section 5 in a neutral manner is that, in the vast majority of cases, Section 5 preclearance decisions are made by the Justice Department's Voting Rights Section, pursuant to decisions that are unreviewable in court. It is therefore especially risky to provide this Section with a statutory mandate that broadly expands their current powers. For example, the career attorneys in the Justice Department unanimously recommended a denial of preclearance in Texas because of the treatment of District 24, even in the face of the same evidence relied on by the district court and Justice Kennedy's opinion.

Consequently, even if I am wrong about how courts might interpret the language in the bill, there is little question that the Justice Department will take its typically aggressive approach, especially since they have sought to require the preservation of such influence districts even under existing law. If this bill becomes law, the career bureaucracy of the Voting Rights Section will have specific authorization to override the neutral decisions of state legislatures, and there can be little doubt as to how that new power will be exercised.

Thank you. I would be happy to answer any questions.