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The Issue of Voting Rights

In spite of economic woes and other pressing budget matters, the question that now rises above all others for many Americans is the future of the Voting Rights Act, centerpiece of minority progress and unquestionably the most important piece of civil rights legislation of the year, probably the decade.

Immediately, the question is whether the Senate Judiciary Committee now studying the issue will support the House version of extension backed by civil rights activists and passed by a vote of 389-24 or the Senate version favored by the Reagan administration.

Standing in a pivotal position is Sen. Bob Dole, seen by many as the key vote on the 18-member Judiciary where nine members are co-sponsoring the House bill. Mr. Dole has not yet taken a position on either version though he does support extension of the act.

In what has become one vehicle for legislators and others who do not want to see the law extended, the Senate version would have alleged victims prove that local or state officials *intended* to discriminate in order to seek relief under the Voting Rights Act. The House measure requires only that the result of state or local action be discriminatory. That wrangle over intent vs. effect now overshadows other controversial elements of the extension proposal.

Mr. Dole reportedly is working on a compromise of the two positions that would be substituted for the explosive section. With understanding for his delicate position — voting for the House version would place him squarely in opposition to his administration and the powerful head of the Judiciary Committee, Sen. Strom Thurmond — we would urge extreme caution in any kind of compromise wording.

Ensuring the effectiveness of this signal law must be the prime consideration of Congress. Any tinkering that would weaken it is not only a cruel rebuff to minorities but dangerous to all of society. In House debate, considerable compromise already has occurred in the areas of the pre-clearance provisions, a bail-out clause and on the question of the results test. Further conciliatory "adjustments" could well topple the entire structure; at the least, they threaten to drag debate on dangerously close to the late summer deadline for extension.

By taking a firm and courageous stand behind the strong, bipartisan House measure, Mr. Dole can assume a positive leadership role for the right to vote and for law and order. He would be doing the country a patriotic service. And incidentally, a favor to the Republican Party, too.

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Speaking

Something so basic

I wonder why the U.S. Senate is so hesitant to pass a strong extension of the Voting Rights Act, key provisions of which are soon due to expire unless renewed.

The House was not so timid, and gave a decisive majority of 389-24 to a meaningful extension last October.

Yet a subcommittee of the Senate Judiciary Committee partially ducked the issue by recommending a simple extension of the present law in March.

Let's hope the Judiciary Committee and the Senate as a whole will return to S-1992, the Senate version of the law the House passed.

What could be less controversial than the right of every U.S. citizen to vote? Who could argue with a straight face against it?

Mission
Ray Miller

PROTECT YOUR RIGHT TO VOTE

Open Letter To Citizens Of Iowa:

The Senate of the United States soon will decide the fate of the most important modern civil rights law—the 1965 Voting Rights Act. Millions of minority citizens can now vote and have their vote fully count, because of this Act. But, unless extended, its basic protection expires this August. The House of Representatives has already passed a strong, fair bill by a vote of 389-24. All of Iowa's Representatives voted for it.

Now, the same bill, S. 1992, is before the Senate Judiciary Committee. Even though 65 Republican and Democratic Senators (out of 100) including Iowa's Senator Jepsen and Senators from South Dakota, Minnesota, Wisconsin, Illinois, and Missouri have co-sponsored it, a small band of opponents still are fighting this bill. They have misstated what the law has been and what this bill would do. *All of these objections have been refuted* in committee hearings by legal experts such as the American Bar Association; Archibald Cox, the Watergate Special Prosecutor and a leading constitutional scholar; the Chairman of the U.S. Commission on Civil Rights; and attorneys who have argued most of the voting cases since 1965. They have pointed out the inaccuracies in the opposition's claims.

The time has come to reject crippling amendments and to pass a strong extension of this historic Act.

Iowa's Senator Charles Grassley is in a crucial position to help or hinder this vital measure. He sits on the Constitution Subcommittee which will vote on the bill in a few days. The hundreds of thousands of Iowans we represent are urging Senator Grassley to support S. 1992 without amendments.

We believe *all* Iowans support a strong voting rights law which will permit remaining pockets of discrimination to be eradicated.

Urgent: Contact Senator Grassley (202-224-3744) and urge his support for this bill in the committee. Urge both Senators Grassley and Jepsen (202-224-3254) to oppose all weakening amendments to S. 1992 on the floor of the Senate. Wire or write immediately to:

Senator (Grassley or Jepsen)
U.S. Senate
Washington, D.C. 20510

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Grassley holds the key

Senator Charles Grassley (Rep., Ia.) soon will cast the most important civil-rights vote of his Senate career. The Senate's Constitution subcommittee is considering bills to extend the Voting Rights Act, and Grassley appears to hold the deciding vote. So far, he has not announced his position.

Last October, the House of Representatives approved by 389-24 a strong extension of the act. Every member of the Iowa delegation voted for it. The same bill, introduced in the Senate, has attracted 65 sponsors, including 10 Republican committee chairmen.

The Constitution subcommittee, which must consider all voting-rights legislation, includes the two leading Senate opponents of the House bill, Orrin Hatch (Rep., Utah) and Strom Thurmond (Rep., S.C.). The two Democrats on the subcommittee are expected to support the bill. This leaves Grassley with the fifth and deciding vote.

Debate has focused on two sections of the act. Section 5 requires areas with past histories of discrimination to submit proposed changes in their election laws to the Justice Department for advance approval. The House bill would extend this section permanently (it expires next August), but would give any affected jurisdiction a chance to "bail out" of it, beginning in 1984, by demonstrating a clean record on voting rights over the previous 10 years.

Critics claim Section 5 is so tough that almost no jurisdiction could escape it, but the Leadership Conference on Civil Rights estimates that one-fourth of the affected counties might qualify for release in 1984, and even more later on.

The second major area of debate is Section 2, which prohibits practices that deny or abridge the right to vote because

affects only nine states and parts of 13 others, Section 2 is national in scope.

Under the House bill, it would be possible to prove that an election procedure violates this section if the procedure "results in the denial or abridgement of the right to vote." The Reagan administration and other critics support instead an "intent standard," under which proof would be required that an election procedure was enacted with discriminatory intent.

Hatch and other critics say that, under the "results test," a violation could be proved whenever the elected representatives of a state, county or city did not reflect the racial make-up of that jurisdiction. The claim is nonsense. The House bill specifies that racially disproportionate representation is not in itself a violation.

Moreover, the "intent" test favored by Hatch would make it very difficult to prove discrimination, because, when laws have been on the books for decades, the intentions of those who enacted them are hard to determine.

Grassley will be under heavy pressure from the Reagan administration, Hatch and Thurmond to support their efforts to weaken the Voting Rights Act, but he ought to be aware that they represent a minority viewpoint.

Not only has the House bill commanded overwhelming bipartisan support in Congress, it has been endorsed by the American Bar Association, the League of Women Voters, Common Cause, the National Farmers Union and the AFL-CIO, among others.

A strong Voting Rights Act is not a partisan issue, but an American issue. The right to vote is the most fundamental right of a democracy. If Grassley shares this view, he will support the House-passed bill

'No weakening of Voting Rights Act'

By WILLIAM BRADFORD REYNOLDS

IN AN EDITORIAL entitled "Grassley Holds the Key" (March 18), The Register urges Senator Charles Grassley (Rep., Ia.) to resist "heavy pressure from the Reagan administration ... to support [its] efforts to weaken the Voting Rights Act." To correct this mischaracterization of the administration's position, as well as other errors in the editorial, I am impelled to respond.

Contrary to The Register's view, we in the administration do not favor "weakening" the Voting Rights Act. Rather, we have repeatedly stressed

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that the right to vote is the crown jewel of American liberties and that the protections of the Voting Rights Act should be extended for an additional 10-year period — longer than any previous extension.

The bill passed by the House, however, would not simply extend the act; it would dramatically alter Section 2, which contains the act's permanent, nationwide prohibition against any denial or abridgement of the right to vote on account of race, color, or membership in a language minority.

William Bradford Reynolds is assistant attorney general, Civil Rights Division, U.S. Department of Justice.

The current law, passed in 1965, requires proof of an intent to discriminate. The House-passed bill would eliminate this long-standing requirement and replace it with an "effects" test — one that measures a violation based on election results. The act would be triggered whenever election results failed to mirror the racial or language makeup of the electorate.

Our concern is that such an "effects" test in the act would likely lead to federal courts' throughout the nation, including Iowa, striking down any electoral system, no matter how long in place, that is not neatly designed to achieve proportional electoral representation along racial lines. In other words, an effects test in the act could well lead to a quota system in electoral politics.

Thus, for example, a community with an at-large system of government (and most municipalities in the United States have such a system), and having, say, a 30-percent minority population, would be vulnerable to challenge under Section 2 of the House-passed bill if the election did not result in a similar minority representation on the city council.

As with employment-discrimination cases, where an effects test is used, a violation of the House-passed version of Section 2 could well turn solely on a statistical analysis — i.e., has the election met the quota for

minority representation? An amended Section 2 would apply to elections at all levels of government, from the statehouse to local school boards.

The Register labels this concern "nonsense," citing a provision in the House bill stating that a racially disproportionate election result would not, in and of itself, constitute a violation. This so-called disclaimer provides little protection, however.

Its application has been carefully limited to those circumstances in which racially disproportionate election results occur notwithstanding the most conscientious efforts to achieve just the opposite.

Such a case would be presented if an election system had been designed to produce racially proportional representation, but for wholly unrelated reasons, such as having no serious minority candidate run for office, the election results failed to mirror the racial makeup of the electorate. In virtually all other circumstances, however, the consequence of disproportionate representation would not stand alone — "in and of itself" — and the act would be violated under amended Section 2.

Nor is it only the administration that has grave concerns that the House bill would lead to a federal requirement of proportional governmental representation based on race. Law professors and other scholars throughout the country have

expressed this view in hearings before the Senate's Subcommittee on the Constitution. More fundamentally, a system of proportional representation based on race is inconsistent with the democratic traditions of our pluralistic society. The House bill would foster the false and offensive notion that persons can only be represented by members of their own race.

In sum, an effects test in Section 2 threatens to undermine a basic principle of our democratic system of government; namely that no group, whether defined by political interests, party affiliation, racial characteristics, or anything else has a *right* to be represented on elected governmental bodies. Indeed, the framers of our Constitution rejected the proposition that each segment of society should be represented by someone of its choice "in order that their feelings and interests may be the better understood and attended to."

As Alexander Hamilton put it in "The Federalist Papers," "this will never happen under any arrangement that leaves the votes of the people free." The Voting Rights Act in its present form does just that — leaves the votes of the people free from discrimination based on race or membership in a language-minority group. Everyone agrees it has worked extraordinarily well. It is for this reason that the administration firmly supports a 10-year extension of the act in its present form.

Justice Dept. official's view of Voting Rights Act challenged

Des Moines Register 3-25-82

By RALPH G. NEAS

IT IS REGRETTABLE that Assistant Attorney General William Bradford Reynolds' Guest Opinion in the March 24 Register continues to misrepresent the law and distort the facts regarding the effort to extend the Voting Rights Act of 1965. Reynolds' assurance that he regards the right to vote as the "crown jewel of American liberties" is belied by his dismal record of voting-rights enforcement,

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as testified to in the Senate hearings by every major civil-rights organization. And his proposals, if successful, would cripple the effectiveness of the Voting Rights Act.

The country stands at a crossroads. The basic standard for court challenges to discrimination needs to be clarified. We can clarify the law in a way that is fair because it permits remaining pockets of discrimination to be eradicated. Or we can take the path pointed to by Reynolds and adopt a standard that is impossible to prove in most cases and that will leave hundreds of thousands of black and brown Americans without full voting rights.

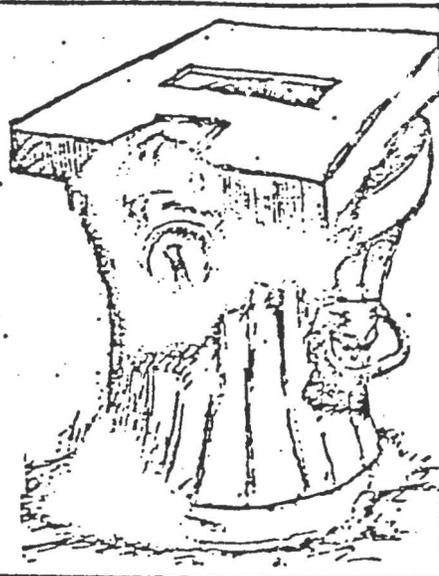
The bill in the Senate Judiciary Committee, S. 1992, was passed overwhelmingly by the House of Representatives. Reynolds claims that it would strike down any electoral system not designed to achieve proportional representation along racial lines. In fact, S. 1992 would reinstate the legal standard that governed such cases throughout the 1970s. That is the test established by the Supreme Court in *White v. Regester* and applied in some two-dozen decisions by courts of appeals across the country.

White and the cases applying it all disavowed any notion of a proportional-representation requirement. Plaintiffs could not win simply with a statistical analysis of election results, as Reynolds suggests. An election

Ralph G. Neas is executive director of the Leadership Conference on Civil Rights.

'Reynolds' assurance on the right to vote is belied by his dismal record on voting-rights enforcement.'

GEOFFREY MOSS,
WASHINGTON POST WRITERS GROUP



practice is vulnerable only if minorities show that they have been shut out of a fair opportunity to participate in the political process.

The House report, the explanatory statements of the Senate sponsors and testimony of supporting witnesses, such as the American Bar Association all make clear that the bill will do nothing more than restore this standard. So will the Senate report. That record will be an unmistakable directive to the courts to follow the case law under *White*.

In many of the cases, blacks and Hispanics showed a lack of minority representation and nevertheless lost their case. For example, the Eighth Circuit Court of Appeals, whose jurisdiction includes Iowa, applied the *White* standard in a challenge to the at-large elections in Pine Bluff, Ark. The 8th Circuit ruled that the touchstone is whether the system is open to minority participation, and not whether there is proportional representation. It affirmed the trial judge's decision for Pine Bluff because blacks there had "full, open and equal access to the city's political processes."

Case after case repeats this repudiation of a proportional requirement. In short, there is an extensive and reassuring track record under the legal standard that the bill would enact. Yet we have searched Reynolds' article in vain for any reference to *White* or to the other

cases that make up this track record. That is not surprising. Reynolds could not assert that the *White* test involves racial quotas. In fact, his lengthy letter cites no case at all to support his grim fairy tale.

Second, Reynolds distorts the meaning of the disclaimer against proportional representation written into the statute itself. He argues that this disclaimer would save an election system only if it provided for proportional representation but members of minority groups simply choose not to run. That bizarre interpretation flies in the face of the clear record.

The sentence was added in the House Judiciary Committee by Representative James Sensenbrenner (Rep., Wis.) in order to assure those concerned about any proportionality test. Reynolds also ignores the fact that the sentence is a paraphrase of the *White* standard under which members of minority groups lost numerous cases even though they ran for office and were defeated. The courts rejected the claim because they had not been shut out of a fair chance to influence the election.

So much for Reynolds' hit-and-run efforts to deal with the explicit language of the statute.

His dire predictions about local government in America are not only woven out of whole cloth; they insult the intelligence and responsible

Judgment of the entire Iowa delegation in the House, which voted for the bill. We are troubled that the government official charged with protecting civil rights should so persistently raise unfounded fears and twist the law in order to defeat an effective extension of the most important modern civil-rights law.

The National Conference of State Legislatures and the National League of Cities have endorsed the House bill, and have rejected Reynolds' claims.

Reynolds' earlier analysis that existing law does not bar federal tax aid to segregated private schools was at odds with the court decisions, with the views of the Nixon, Ford and Carter Justice Departments, and with his own Civil Rights Division staff. His statement of the law on voting rights is similarly discredited by a reading of the cases that he steadfastly ignores.

We believe this issue is too important to the citizens of Iowa and to all Americans to be decided on the basis of Reynolds' shameful scare tactics.

As Senator Roger Jepsen (Rep., Ia.) stated on the Senate floor when he co-sponsored S. 1992: "We must continue to put forth a strong signal to all Americans, black, white, brown, or yellow, and to the world, that freedom in America is still our strongest source of strength, and that we will not hesitate to ensure that every American is guaranteed a right to exercise his or her fundamental freedoms. . . . I am proud to be a co-sponsor of S. 1992, and I am confident that all freedom-loving citizens of my state will join with me in support of this act."

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Alternatives for Amendments to S. 1992

This memorandum is written to set out various options for amending S. 1992 (the House-passed extension and amendment of the Voting Rights Act), so as to alter the bill's proposed amendment to Section 2 of the Act. S. 1992 proposes:

Sec. 2. Section 2 of the Voting Rights Act of 1965 is amended by striking out "to deny or abridge" and inserting in lieu thereof "in a manner which results in a denial or abridgement of" and is further amended by adding at the end of the section the following sentence: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

The primary concern which has been expressed regarding this provision is that it will lead to a requirement of proportional representation. Set out below are six options for amending S. 1992 so as to alleviate the concerns regarding a requirement of proportional representation.

1. As we have previously proposed to the subcommittee, Section 2 of S. 1992 could be dropped, thereby restoring the current language of Section 2. This change would continue the intent test as defined in the Mobile decision and would eliminate concerns regarding a requirement of proportional representation. On the other hand, there presently appear to be a number of Congressmen who believe that the Mobile standard is unclear or that it is unnecessarily difficult and therefore not an appropriate legal standard for resolving claims of invidiously discriminatory vote dilution. Our sense is that this attitude is based in large part on a misunderstanding of Mobile and of the many cases recognizing that "intent" may be proved by both direct and circumstantial evidence.

2. S. 1992 could be amended to eliminate the ambiguity caused by the Mobile decision and at the same time specifically retain a requirement that discriminatory purpose be established to prove a violation. The amendment would return to the existing language of Section 2 and make specific reference to the Arlington Heights criteria for addressing discriminatory intent in the following terms:

In determining whether a state or political subdivision has violated this provision, the court should consider both direct and indirect evidence of discriminatory intent, including but not limited to evidence of the legislative and administrative history of the challenged action, departures from ordinary practice, the effects or consequences of the action, its historical background, and the sequence of events leading to the action.

An amendment along these lines would meet the concerns which we have expressed but, even though it clarifies that there is no "smoking gun requirement", it is unlikely that such an amendment would be acceptable to the proponents of S. 1992. The concern of the proponents is that vote dilution lawsuits generally challenge election plans adopted long ago (e.g., the at-large system at issue in Mobile was adopted in 1871) and the proponents have opposed any legal standard which would focus the inquiry on the intent of the original legislators. Of course, under the Mobile standard an election plan would violate Section 2 if "maintained" for discriminatory reasons; the argument on the other side is that the "maintenance" issue usually involves proof of the reasons behind "inaction" (e.g., failure to change an at-large election system) and such a burden of proof is comparably difficult to the "adoption" proof. For these reasons, proponents of S. 1992 would argue that any standard which focused on the legislators' intent in adopting or maintaining an election system should be rejected.

3. Section 2 of S. 1992 could be amended to clarify that the White v. Regester standard should be applied in lawsuits brought pursuant to Section 2. It is suggested that this change be made in the following manner:

Sec. 2. Section 2 of the Voting Rights Act of 1965 is amended by striking out "to deny or abridge" and inserting in lieu thereof "in a

manner which results in a denial or abridgement of" and is further amended by adding at the end of the section the following sentences: "An election system results in such a denial or abridgement when used invidiously to cancel out or minimize the voting strength of racial or language minority groups. The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section." */

Much of the testimony which has been presented to Congress by the proponents has criticized the Mobile standard as being significantly more difficult to satisfy than the White v. Regester standard; and the proponents have testified that the intent of Section 2 of S. 1992 is to legislatively adopt the White standard. Although we have been concerned that the language of Section 2 as proposed by S. 1992 may bring about results which reach far beyond an adoption of the White standard, a specific legislative adoption of the White standard would eliminate

*/ See White v. Regester, 412 U.S. 755, 765 (1973). The Court further described the legal standard as follows:

To sustain [challenges to at-large, multi-member district, or other election procedures], it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

412 U.S. at 765-766. The en banc Court of Appeals for the Fifth Circuit applied this legal standard in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) and in the numerous vote dilution lawsuits which followed Zimmer.

those concerns. It would be necessary under this option to reflect clearly in the legislative history that the added sentence explicitly adopts the White standard. Politics aside, we believe that the White standard would be acceptable to civil rights groups (in fact, it is the standard which such groups have advocated). Of course, hearings in the House and Senate have indicated that any amendment to S. 1992 may receive opposition even if such amendment furthers the design of the proponents.

4. Another alternative amendment to S. 1992 is the one that is being circulated by members of Senator Dole's staff. That amendment would alter Section 2 to define a violation based not on election results but on equal access to the political process, and would look to "an aggregate of factors" as the standard of proof. This proposal reads as follows:

(b)(1) A violation of this section is established when, based on an aggregate of factors, it is shown that such voting qualification or prerequisite to voting, or standard, practice or procedure has been imposed or applied in such a manner that the political processes leading to nomination and election in the state or political subdivision are not equally open to participation by a minority group protected by subsection (a). "Factors" to be considered by the court in determining whether a violation has been established shall include, but not be limited to:

(A) Whether there is a history of official discrimination in the State or political subdivision which touched the right of the members of the minority group to register, vote, or otherwise participate in the democratic process;

(B) Whether there is a lack of responsiveness on the part of elected officials in the state or political subdivision to the needs of the members of the minority group;

(C) Whether there is a tenuous policy underlying the state's or political subdivision's use of such voting qualification or prerequisite to voting, or standard, practice, or procedure;

(D) The extent to which the state or political subdivision used or has used at-large election districts, majority vote requirement, anti-single shot provisions, or other voting practices or procedures which may enhance the opportunity for discrimination against the minority group;

(E) Whether the members of the minority group in the state or political subdivision have been denied access to the process of slating candidates;

(F) Whether voting in the elections of the state or political subdivision is racially polarized;

(G) Whether the members of the minority group in the state or political subdivision suffer from the effects of invidious discrimination in such areas as education, employment, economics, health, and politics; and

(H) The extent to which members of the minority group have been elected to office in the state or political subdivision, provided that, nothing in this subsection shall be construed to require that members of the minority group must be elected in numbers equal to their proportion in the population."

The Dole amendment would return the focus of Section 2 to "access" to the electoral process, but, contrary to the Fifteenth Amendment, it would measure access in terms of group rights rather than individual rights. The thrust of the amendment is to incorporate into the legislation most of the Zimmer factors, which is apparently a nod in the direction of those arguing for a departure from Mobile and a return to the pre-Mobile

standard. On the other hand the proponents of S. 1992 will read this proposal as requiring some evidence (albeit circumstantial) of intentional discrimination in order to establish a violation. They will also take exception to factor (B), which was singled out in the Report accompanying the House bill as being an unacceptable criterion. As a compromise, this proposal has the virtue of pleasing nobody, and, even if accepted in the Senate, there is every likelihood that it would undergo drastic revision in Conference.

5. Congressman Butler unsuccessfully suggested a compromise in the House providing that Section 2 would not be a pure "effects" test but that the intent requirement be satisfied by demonstrating that the discriminatory results were "foreseeable" (i.e., a tort-type intent test). This proposal would alter the Mobile standard, since the plurality opinion rejected the idea that the foreseeability of a discriminatory effect is sufficient proof of discriminatory intent. It is unclear, however, how this proposal would differ, in any significant degree, from the currently proposed S. 1992 and how the proposal would work if enacted. If an at-large election system operates to exclude blacks from selecting candidates of their choice to public office, few would question the foreseeability of that result. It may be, however, that Congress would clarify a foreseeability standard through legislative history, and if that approach is followed a legal standard approaching White-Zimmer may result.

6. Another suggestion is to alter the proviso of S. 1992 which currently reads:

The fact that members of a minority group have not been elected in numbers equal to that group's proportion of the population shall not, in and of itself, constitute a violation of this section.

That proviso is designed to eliminate a requirement of proportional representation; but the proviso has been criticized on the grounds that it does not dispel the the prospect of proportional representation but merely indicates that some element of proof is required in addition to a showing that minorities are not elected to public office. The proviso could be strengthened by dropping the phrase in and of itself, since that phrase seems to place undue reliance on the failure of minority candidates to gain election.

The proviso might also be amended to provide that "the fact that members of the minority group have not elected candidates of their choice to office in numbers equal to the group's proportion of the population shall not . . ." The Voting Rights Act was designed to protect the rights of voters, not candidates; and the suggested amendment would eliminate concerns expressed at the hearings that the present proviso suggests that minority candidates must be elected in order for minority groups to have effective representation. Once again, the intent of any such amendment could be clarified through legislative history.

* * * *

Quite clearly, the preferred alternative is the first one, but the best chance of maintaining the current Section 2 language is through a straight extension of the Act for ten years, rather than through an amendment to S. 1992.

The second alternative is perhaps the most sensible, since it serves to remove the confusion that currently exists due to the use of vague and imprecise language. Even with clarity to recommend it, however, it is doubtful that this alternative can be "sold" to the proponents of S. 1992.

The third alternative would appear to be the one most likely to succeed. It leaves intact most of the language of amended Section 2, which is probably important politically. At the same time, it adds a sentence from the White case that describes the very standard to which the proponents of S. 1992 insist they are "returning." In light of their endorsement of White in both the House and Senate hearings, they will be hard pressed to disavow the suggested change. While the argument can still be made that inclusion of the White standard places too heavy a burden on the plaintiff, that contention can be met, particularly in light of the acknowledged relationship between White and Zimmer. If we cannot get a pure intent test, this change provides needed protection against the prospect of "proportional representation."

The fourth alternative could perhaps gain support from a number of senators as a concept, but many different coalitions will undoubtedly argue for their own sets of criteria once the proposal is made to incorporate an evidentiary rule into the statute. Even if agreement could be reached in the Senate on the appropriate factors to be considered in measuring liability, another round of editorializing would likely result in Conference. The end product would doubtless leave open the question whether the Section 2 test depends on "intent" or "effects", inviting an extended period of confusion and ambiguity while the matter is decided by the courts. All indications from the Hill, where we understand that this alternative has now been widely circulated, are that it stands very little (if any) chance of being accepted as a satisfactory compromise.

As for the fifth and sixth alternatives, they are unlikely to receive Senate endorsement, principally because they will be read by the opposition as too great a "retreat" from S. 1992. Any effort to change the language in the disclaimer clause directly will likely be interpreted as a frontal -- and intolerable -- attack on the legislation.

"b) A violation of this section may be established on the basis of consideration of such circumstantial and direct evidence as may be available to the trier of fact. Such evidence may include, but not be limited to, such factors as:

"(1) the historical and legislative background of an alleged discriminatory action and the extent to which such background suggests official actions wrongfully taken;

"(2) the existence of any departures from normal procedures or policies that suggest discrimination on the basis of race, color, or membership in a language minority;

"(3) statements by members of relevant decision-making bodies with respect to the alleged discriminatory action;

"(4) statements by individuals presented to members of relevant decision-making bodies, or any other data presented to such members, with respect to the alleged discriminatory action, or with respect to any other legislative decision that may have a bearing on the alleged discriminatory action;

"(5) the existence of alternative policies that could have been adopted by a decision-making body that would accomplish similar goals to that of the alleged discriminatory action with significantly less racially disproportionate impact;

"(6) the existence of some history of persistent official discrimination within the jurisdiction undertaking the alleged discriminatory action;

"(7) the existence of social, political, or other circumstances within the jurisdiction undertaking the alleged discriminatory action that are suggestive of prejudice on the basis of race, color, or membership in a language minority;

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"(8) the existence of significant impediments to equal access to voter registration or the polling place existing within the jurisdiction undertaking the alleged discriminatory action on the basis of race, color, or membership in a language minority;

"(9) the fact that an alleged discriminatory action bears substantially more heavily upon individuals of one race, color, or language minority than upon individuals of another;

"(10) the existence of objectives underlying an allegedly discriminatory action that are purportedly neutral with respect to race, color, or membership in a language minority, but are sufficiently contextually peculiar to warrant disbelief of their neutrality; and

"(11) the totality of other circumstances that raise an inference that a violation of this section has occurred.



Leadership Conference on Civil Rights

2027 Massachusetts Ave., N.W.,
Washington, D.C. 20036
202/667-1780

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Dear Senator

Last Thursday, April 15, 1982, a Federal District Court in Mobile, Alabama decided the Bolden case on remand. It held that the method of elections for the City Council and School Board in Mobile are illegal because they were adopted for the purpose of racial discrimination. The decision is based upon the detailed findings that the election procedures were devised in the 19th Century with a discriminatory purpose and redesigned in 1919 in part for the same reason.

The decisions are gratifying; if they are sustained on appeal, then Black voters will no longer be subjected to voting discrimination. An examination of the decision also underscores the importance of the "results" amendment to Section 2 of the Voting Rights Act. This critical amendment is now before the Senate in the Mathias-Kennedy bill, the same measure passed 389-24 by the House of Representatives and co-sponsored by 65 Senators.

Some opponents of the House-passed bill will try to claim that the new decisions in Mobile show the results test is unneeded and the intent test is adequate. On the contrary, an examination of the circumstances in these cases vindicates the judgment of the House of Representatives that the "results test" is the necessary and proper standard. Nothing could better demonstrate the wastefulness and unfairness of requiring proof of discriminatory intent in such situations than these decisions.

The court reached the best conclusions that it could about the motives behind events more than 100 years old. But if an electoral system operates today to deny minorities even a fair chance to participate in the process--if they are frozen out because they are Blacks or Hispanics--why should their right to a fair system turn upon what was in the mind of a local official in 1876? Why should they not enjoy equal access to the most basic right--the opportunity to try to influence the selection of their elected representatives. The standard under White v. Regester is whether minorities have equal access to that process. If the system does

"Equality In a Free, Plural, Democratic Society"

32nd ANNUAL MEETING • FEBRUARY 22-23, 1982 • WASHINGTON, D.C.

2)

discriminate against them and, because of their race, their efforts to play a meaningful role are an exercise in futility, the system should be remedied. That is a matter of fundamental fairness.

Second, the legal and judicial resources expended just in the retrial of the cases (after the Supreme Court decision imposing the new intent standard) were enormous. The best estimate of the preparation and actual trial effort by the parties is that it took over 6,000 hours of lawyers' time, 4,000 hours of expert witnesses and paralegal time, and the very large costs associated with such complex litigation. There was a protracted trial. The case was then under advisement for a year while the court studied the evidence and then generated 127 pages of legal opinion.

What did this expenditure of resources accomplish? The court was required by the prior Supreme Court decision to do a minute exhaustive analysis of each development in the city council and school board election systems from 1814 to the present. For each critical juncture in that period, it had to try to recreate the political, economic and social fabric of the decision making process and determine the motivation of the political actors.

The irony of this near futile exercise is that after these two years of Herculean effort and delay, we are back at the point we were after the first decision--the conclusion that Mobile's system of election is unfair and should be changed.

As one of the lawyers has written about the trial:

"I believe it is safe to say that virtually everyone in the courtroom felt we were trying history, groping for the gossamer and indulging in some sort of never-never land inquiry when attempting to fathom such discrete, particulars and personal decisions that occurred more than one hundred years ago."

This case, like the handful of others in which plaintiffs have prevailed in the lower courts after the Supreme Court's decision, does not change the basic flaws of the "intent" requirement. It has been, and remains extraordinarily difficult to prove. Any of these cases may be overturned by the Supreme Court. Moreover, the availability of the kind of historical records which the judge pieced together in the recent Mobile cases will vary considerably.

3)

What this case and the others does show is that even where discriminatory intent concerning long passed events may be proved to a court's satisfaction, it will require monumental effort by the court and the parties.

Assistant Attorney General for Legislative Affairs, Robert McConnell wrote Senators on April 16, that the Mobile decisions show there is no basis for the amendment to Section 2. He mentions three cases in which plaintiffs have won, but fails to mention that civil rights groups virtually stopped filing any new suits after the Supreme Court's decision because the test was so exhausting to meet. Moreover, his citation of Sanchez v. King (D.C. N.M.) is absolutely incorrect. The decision did not involve a finding of discriminatory intent behind the structure of the election system. Rather, the court simply found the gross discrepancies in population among reapportioned districts which has always presented an easy case for plaintiffs without any need to prove intent.

Finally, there is the destructive impact of the purpose test. Proponents of the purpose test have said they do not think people should lightly be called racists. We could not agree more. One of the principal virtues of the "results" test is precisely that it allows an examination of the realities of the system without calling names, whereas, under the "purpose" test the names have to be called. In both Mobile cases, the judge was required to make findings that certain people were bent on discriminating and carried out blatantly illegal and unconstitutional schemes to do so. We all know that is part of our history, but the unnecessary dragging of names through the mud is inflammatory and inflicts needless wounds. This is bad enough when those people are long dead, but in this case it was necessary to analyze the motives of legislators and other officials concerning actions as recent as six years ago. Many of those people are now not only alive but still serving in office. Yet the court was forced to accuse these people of bad faith, deception, and even had to indicate that lawyers had lied to the court--all under the requirement of proving what the purpose of these people was.

Congress has been studying this issue for the past twelve months. The House held nine weeks of comprehensive hearings. And the Senate has held five. The Mobile opinions confirm the worst features of what the proponents of a strong and effective Voting Rights Act have been saying all along about the requirement of purpose. It is time for the overwhelmingly bipartisan consensus that has emerged in the Congress to enact the objective "result" amendment and to focus the attention of the courts on the real issues.

4)

For your information we have also enclosed a recent Leadership Conference analysis of some of the allegations the Justice Department has raised about the discriminatory result standard.

Sincerely,

Benjamin L. Hooks
Chairperson

Ralph G. Neas
Executive Director

Justice Dept. official's view of Voting Rights Act challenged

Des Moines Register

3-25-82

By RALPH G. NEAS

IT IS REGRETTABLE that Assistant Attorney General William Bradford Reynolds' Guest Opinion in the March 24 Register continues to misrepresent the law and distort the facts regarding the effort to extend the Voting Rights Act of 1965. Reynolds' assurance that he regards the right to vote as the "crown jewel of American liberties" is belied by his dismal record of voting-rights enforcement,

Guest Opinion

as testified to in the Senate hearings by every major civil-rights organization. And his proposals, if successful, would cripple the effectiveness of the Voting Rights Act.

The country stands at a crossroads. The basic standard for court challenges to discrimination needs to be clarified. We can clarify the law in a way that is fair because it permits remaining pockets of discrimination to be eradicated. Or we can take the path pointed to by Reynolds and adopt a standard that is impossible to prove in most cases and that will leave hundreds of thousands of black and brown Americans without full voting rights.

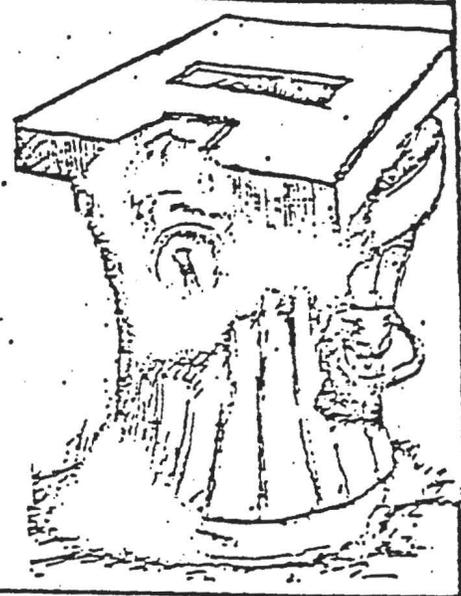
The bill in the Senate Judiciary Committee, S. 1992, was passed overwhelmingly by the House of Representatives. Reynolds claims that it would strike down any electoral system not designed to achieve proportional representation along racial lines. In fact, S. 1992 would reinstate the legal standard that governed such cases throughout the 1970s. That is the test established by the Supreme Court in *White v. Register* and applied in some two-dozen decisions by courts of appeals across the country.

White and the cases applying it all disavowed any notion of a proportional-representation requirement. Plaintiffs could not win simply with a statistical analysis of election results, as Reynolds suggests. An election

Ralph G. Neas is executive director of the Leadership Conference on Civil

'Reynolds' assurance on the right to vote is belied by his dismal record on voting-rights enforcement.'

GEOFFREY MOSS,
WASHINGTON POST WRITERS GROUP



practice is vulnerable only if minorities show that they have been shut out of a fair opportunity to participate in the political process.

The House report, the explanatory statements of the Senate sponsors and testimony of supporting witnesses, such as the American Bar Association all make clear that the bill will do nothing more than restore this standard. So will the Senate report. That record will be an unmistakable directive to the courts to follow the case law under *White*.

In many of the cases, blacks and Hispanics showed a lack of minority representation and nevertheless lost their case. For example, the Eighth Circuit Court of Appeals, whose jurisdiction includes Iowa, applied the *White* standard in a challenge to the at-large elections in Pine Bluff, Ark. The 8th Circuit ruled that the touchstone is whether the system is open to minority participation, and not whether there is proportional representation. It affirmed the trial judge's decision for Pine Bluff because blacks there had "full, open and equal access to the city's political processes."

Case after case repeats this repudiation of a proportional requirement. In short, there is an extensive and reassuring track record under the legal standard that the bill would enact. Yet we have searched Reynolds' article in vain for any

cases that make up this track record. That is not surprising. Reynolds could not assert that the *White* test involves racial quotas. In fact, his lengthy letter cites no case at all to support his grim fairy tale.

Second, Reynolds distorts the meaning of the disclaimer against proportional representation written into the statute itself. He argues that this disclaimer would save an election system only if it provided for proportional representation but members of minority groups simply choose not to run. That bizarre interpretation flies in the face of the clear record.

The sentence was added in the House Judiciary Committee by Representative James Sensenbrenner (Rep., Wis.) in order to assure those concerned about any proportionality test. Reynolds also ignores the fact that the sentence is a paraphrase of the *White* standard under which members of minority groups lost numerous cases even though they ran for office and were defeated. The courts rejected the claim because they had not been shut out of a fair chance to influence the election.

So much for Reynolds' hit-and-run efforts to deal with the explicit language of the statute.

His dire predictions about local government in America are not only woven out of whole cloth; they result

judgment of the entire Iowa delegation in the House, which voted for the bill. We are troubled that the government official charged with protecting civil rights should so persistently raise unfounded fears and twist the law in order to defeat an effective extension of the most important modern civil-rights law.

The National Conference of State Legislatures and the National League of Cities have endorsed the House bill and have rejected Reynolds' claims.

Reynolds' earlier analysis that existing law does not bar federal tax aid to segregated private schools was at odds with the court decisions, with the views of the Nixon, Ford and Carter Justice Departments, and with his own Civil Rights Division staff. His statement of the law on voting rights is similarly discredited by a reading of the cases that he steadfastly ignores.

We believe this issue is too important to the citizens of Iowa and to all Americans to be decided on the basis of Reynolds' shameful scare tactics.

As Senator Roger Jepsen (Rep., Ia.) stated on the Senate floor when he co-sponsored S. 1992: "We must continue to put forth a strong signal to all Americans, black, white, brown, or yellow, and to the world, that freedom in America is still our strongest source of strength, and that we will not hesitate to ensure that every American is guaranteed a right to exercise his or her fundamental freedoms. . . . I am proud to be a co-sponsor of S. 1992, and I am confident that all freedom-loving citizens of my state will join with me in support of this act."

Des Moines Register and Tribune Company

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WHITE HOUSE STAFFING MEMORANDUMDATE: 2/26/82 ACTION/CONCURRENCE/COMMENT DUE BY: 11:00 A.M. TODAYSUBJECT: LEGISLATIVE REFERRAL: TESTIMONY BY BRADFORD REYNOLDS ON VOTING RIGHTS

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	<input type="checkbox"/>	<input type="checkbox"/>	GERGEN	<input checked="" type="checkbox"/>	<input type="checkbox"/>
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BAKER →	<input checked="" type="checkbox"/>	<input type="checkbox"/>	JAMES	<input type="checkbox"/>	<input type="checkbox"/>
DEAVER	<input type="checkbox"/>	<input type="checkbox"/>	JENKINS	<input type="checkbox"/>	<input type="checkbox"/>
STOCKMAN	<input type="checkbox"/>	<input type="checkbox"/>	MURPHY	<input checked="" type="checkbox"/>	<input type="checkbox"/>
ANDERSON	<input checked="" type="checkbox"/>	<input type="checkbox"/>	ROLLINS	<input checked="" type="checkbox"/>	<input type="checkbox"/>
CANZERI	<input type="checkbox"/>	<input type="checkbox"/>	WILLIAMSON	<input type="checkbox"/>	<input type="checkbox"/>
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DARMAN	<input type="checkbox"/>	<input checked="" type="checkbox"/>	BRADY/SPEAKES	<input type="checkbox"/>	<input type="checkbox"/>
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FULLER	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

Remarks:

Attached is a draft of Voting Rights Testimony that will be given next week. Please submit your comments by ~~_____~~ TODAY.

11:00 A.M.

Thanks.

Richard G. Darman
Assistant to the President
and
Deputy to the Chief of Staff
(x-2702)

DRAFT

FEB 24 1962

4:05 pm

Mr. Chairman and members of the Committee.

In America, the sovereign power belongs not to the Government, but rather, as established in the first sentence of the Constitution, to "we the people." In a Nation founded on this democratic principal, the right to vote is the most cherished of all individual rights. The American people underscored their recognition of this fundamental truth through adoption of the Fifteenth, Eighteenth, and Twenty-sixth Amendments to the Constitution and enactment of legislation by their chosen representatives. As a consequence, the laws of this country now ensure that no American eligible to vote can be deprived of an equal opportunity to participate in the affairs of Government.

The Voting Rights Act stands as the centerpiece of the protections that guard against the denial or abridgement of the right of every qualified citizen to participate equally in the electoral process. This treasured piece of legislation was enacted by Congress in 1965 in response to the use by some state and local governments of literacy tests, poll taxes, and similar devices designed to prevent blacks from exercising their right to vote.

Section 2 of the Act codifies the Fifteenth Amendment's ban on voting qualifications and procedures calculated to deny or abridge the franchise on the basis of race, color, or (since 1975) membership in a language minority group. Additionally, Section 5 of the Act placed certain state and local governments, primarily in the South, under a five-year obligation to submit for "preclearance" by the United States Attorney

General or the United States District Court for the District of Columbia any proposed change in voting practices or procedures enacted after the effective date of the Act. Preclearance is to be granted only if the submitting jurisdiction satisfies the Attorney General or the district court that the proposed voting practice or procedure "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or (since 1975) membership in a language minority group.

In 1970, Congress reviewed the progress in minority registration and voting made in jurisdictions covered by the federal preclearance provision of Section 5, and found sufficient evidence of continued racial discrimination in voting to warrant extending Section 5's preclearance requirement for an additional five years. In 1975, Congress revisited the issue, extending Section 5 for another seven years (to 1982) and bringing within its coverage additional jurisdictions having sizeable language minorities.

Today, the question whether to extend again the special provisions of Section 5 is before Congress, and, as in the past, the answer lies essentially in a careful assessment of the results achieved since the Act's passage 17 years ago. By any standard, the achievements have been dramatic. Minorities in the covered jurisdictions have made extraordinary gains in voter registration and election to public office. For example,

black voter registration in Mississippi has increased tenfold, from 6.4 percent to 67.4 percent, which exceeds the national average. The number of black elected officials in the South has increased from less than 100 in 1965 to well over 2,000 today. In Arizona, hispanics constitute 16.2 percent of the population and 13.2 percent of all elected officials.

Progress in the covered jurisdictions can be measured attitudinally as well as statistically. The political environment in the covered jurisdictions has changed markedly over the last decade and a half. Rarely can a serious candidate for elective office afford to ignore minority voters, and incumbent public officials cannot neglect the concerns of minority citizens without jeopardizing their prospects for the election.

Despite these strides, the sad truth is that racial discrimination in the electoral process still plagues blacks and language minorities in some parts of the country. As Attorney General William French Smith earlier testified before this subcommittee, the Justice Department's experience in enforcing the Voting Rights Act demonstrates that federal oversight of electoral changes continues to be necessary for some political jurisdictions.

It is for this reason that the President has come out in favor of extending the present Act without change for another ten years. The protections provided in the 1965 Act,

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and carried forward by Congress in 1970 and 1975, have worked extraordinarily well. This is the piece of legislation that has been referred to by blacks and whites as the "crown jewel" of the civil rights laws. When the Attorney General and I and others in the Justice Department met last summer with the civil rights leadership -- shortly before any action had been taken in the House -- the unanimous plea was for the Administration to support a straight extension of the Act. "If it is not broken, don't fix it," was the message we were given over and over again. The Administration is in full agreement with that position. While we will certainly work with this subcommittee and the Senate on a meaningful and fair bailout provision applicable to covered jurisdictions under Section 5, there has been absolutely no showing of a need for amending the other basic provisions of the Act. A ten year extension without change is therefore recommended.

The purpose of my testimony today is two-fold. First, I will in summary fashion attempt to review our recent experience in enforcing the provisions of the Voting Rights Act. Second, I will address the proposal, passed by the House, to replace the existing "intent" test in Section 2 of the Act with an "effects" test.

JUSTICE DEPARTMENT ENFORCEMENT OF THE VOTING RIGHTS ACT

A. The special provisions

Jurisdictions covered under section 4(b) of the Act are subject to the so-called special provisions: Section 5 preclearance of voting changes, federal examiners, federal observers, and -- for jurisdictions which became covered in 1975 -- bilingual elections. [/] Section 4(a) contains a complex formula of possible bail-out dates, under which states initially covered in 1965 may be able to escape further coverage of the special provisions after August 1982. Some jurisdictions can bail out no earlier than 1991. (See Attachments B-1 and B-2 for coverage and possible bail-out dates.)

A. Section 5

Today the most important of the special provisions is Section 5, which requires preclearance of any change in the

[/] While the jurisdictions covered by Section 4(b) are also subject to a ban on use of literacy tests and similar "tests or devices" designed to deny the right to vote, that ban now also appears in another section of the Act, which applies nationwide.

voting laws of a jurisdiction covered by Section 4(b). A jurisdiction covered by Section 5 is required to submit a proposed change to the Attorney General or to the U.S. District Court for the District of Columbia and to demonstrate that the change does not have the purpose and will not have the effect of denying voting rights on account of race, color, or membership in a language minority group. In the event that a jurisdiction subject to Section 5 attempts to implement a new voting law without obtaining preclearance, the Attorney General or a private person may sue to enjoin implementation of the law.

In 1969, the Supreme Court held that Section 5 reaches not only laws relating to the process of registering or voting, but also practices (e.g., redistricting, annexation) that could involve dilution of a minority group's voting power. In the years just after 1965, the Department gave low priority to Section 5, concentrating instead on registration of minorities. In amending the Act in 1970, Congress endorsed the Supreme Court's

/ Actions of this type by the Attorney General are expressly authorized by Section 12(d), 42 U.S.C. 1973j(d), and are brought in the local federal district court. The issues are limited to whether the practice or procedure is within the scope of Section 5 and, if so, whether preclearance has been obtained. The issue of entitlement to preclearance -- that is, whether lack of discriminatory purpose and effect has been shown -- may be litigated only in the District of Columbia. See Section 5, 42 U.S.C. 1973c, and Section 14(b), 42 U.S.C. 1973l(b).

/ Allen v. State Board of Elections, 393 U.S. 544 (1969).

interpretation of Section 5 and stressed the need for effective enforcement. In 1971, the Department of Justice issued guidelines for the administration of Section 5.[/] Administrative and judicial enforcement of Section 5 became the major priority of the Department's implementation of the Act.

The Department of Justice has gained insight into the operation of Section 5 during the course of reviewing over 39,000 changes (see Attachments C-1 and C-2), defending 25 preclearance suits (see Attachment N-5a), and litigating a similar number of suits to enforce Section 5 (see Attachment N-4a). Most of the activity has occurred since the 1975 extension of the Act. Thus, three-fourths of the changes submitted and three-fourths of the preclearance suits filed since 1965 have occurred since the 1975 extension of the Act. This dramatic increase in the submission of changes cannot be explained as reflecting a corresponding increase in the adoption of new voting practices by covered jurisdictions. Instead, we believe that the explanation lies in part in the increased number of jurisdictions brought under Section 5 coverage in 1975. In addition, our stepped-up enforcement efforts have led to the submission in recent years of many changes which had been adopted and should have been submitted years ago. Also many jurisdictions covered by Section 5 have become better educated

[/] See 42 C.F.R. Part 51. Revised guidelines were published as a proposal in March 1980 and issued in final form in January 1981.

See Attachment B-3.

regarding the preclearance requirements and are, for the first time since the Act was passed, submitting most changes as they are adopted.

In spite of increased compliance with the preclearance requirement of Section 5, we continue to find significant failures to submit covered changes -- which is but one of the reasons suggesting the need for an extension of the Act. For example, over the past six years, more than 50 suits have been brought, by this Department or by private persons, to enjoin implementation of voting changes that had not been precleared. Moreover, during the past two years, this Department sent 223 letters to covered jurisdictions noting an apparent failure to comply with Section 5 and requesting the jurisdiction to seek preclearance of the change in question.

The need to extend Section 5's preclearance requirement is also evidenced by an analysis of objections to submitted changes. Such an objection reflects a determination by the Attorney General that the jurisdiction has failed to show that the submitted change has neither the purpose nor the effect of denying or abridging the right to vote on account of race, color, or language minority status. A change has a discriminatory effect under Section 5 when it can be said to be "retrogressive" -- that is, when it "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Beer v. United States, 425 U.S. 130, 141 (1976).

Since 1965, the Department has objected to 695 changes. (See Attachments D-1, D-2, E-1.) More than 400 of these objections have occurred since the most recent extension of the Act in 1975. While Texas, which came under Section 5 coverage in 1975, accounts for one-third of the post-1975 objections, almost half of the objections to voting changes in states covered by the Act in 1965 have occurred since the 1975 extension of the Act. (See Attachment E-3.) Thus, while the gains made by minority groups in covered jurisdictions have, for the most part, been dramatic, the record demonstrates that there still remains room for improvement. Our experience in 1980 and 1981 reflects continuing program over the preceding six years, but we have not yet arrived at the point where it can confidently be stated that Section 5 is no longer needed.

Because of the potential for redistricting to affect the voting strength of minority groups, Section 5 becomes particularly significant after a decennial census. Reapportionment under the 1980 Census is now in progress. We have thus far received _____ redistricting submissions based on the 1980 Census, fourteen of which have resulted in objections. (See Attachment F.) While accounting for no more than half of the changes submitted since 1965, redistrictings, annexations, and changes in method of election (e.g., a majority-vote

requirement for election to a particular office), have resulted in over 80 percent of the objections interposed by the Department. (See Attachment E-2.) Thus, in considering the question of duration of an extension of the Act, it is particularly important to keep in mind the special need for review of redistricting after the next decennial census. Accordingly, the Administration supports a 10-year extension of the Act's special provisions.[/]

Section 203 of the Act imposes upon counties within its coverage formula a requirement that elections be conducted in the language of pertinent language minority groups, as well as in English. Under its present terms, Section 203 will automatically terminate in August 1985.

In 1976, the Department of Justice issued interpretative guidelines on the Act's language minority provisions.[/] The guidelines state that the basic standard is one of effectiveness -- providing, for example, that a covered jurisdiction may "target"

[/] Under this approach, the coverage period for the 1970-covered states would be increased by five years and the period for the 1975-covered states would be increased by seven years. In this way, for most covered jurisdictions, 1992 would be the year for bail-out eligibility.

[/] 28 C.F.R. Part 55. The guidelines pertain to the bilingual election requirements imposed by Sections 4(f) and 203. See Attachment I.

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bilingual material or oral assistance. In our dealings with covered jurisdictions, we have emphasized that the bilingual requirements should be interpreted in a reasonable way. In 1975, Attorney General Levi assigned primary responsibility for enforcing Section 203 to the United States Attorneys. / The Civil Rights Division, therefore, has not accumulated detailed information on the extent to which bilingual assistance or materials have actually been provided by the jurisdictions or used by voters.

Several enforcement actions have been filed under Section 5 to obtain compliance with the bilingual-election requirements of Section 4(f). Additionally, the Department obtained consent decrees designed to protect the rights of Chinese- and Spanish-speaking voters in a California county and Navajo voters in a New Mexico county. We have defended

/ The Civil Rights Division enforces the language minority provisions with regard to jurisdictions covered by Section 4 (e.g., the States of Arizona and Texas).

nine bail-out suits by jurisdictions covered under the language minority provisions of Section 4 or Section 203.

Our enforcement experience indicates that the language minority protections of Sections 203 and 4(f) have, by and large, worked well. Citizens whose first language is not English have been afforded by these provisions the opportunity to participate in the political process. Accordingly, we believe that the bilingual provisions ought to be placed on the same coverage schedule as Section 5's special provisions and extended in 1992.

In sum then, Mr. Chairman, the work of the special requirements of Section 5 and the language minority provisions is unfortunately not yet completed. The Administration, therefore, urges the Congress to extend these protections for an additional 10 years. The Administration does not support, however, current proposals to amend certain substantive scope

/ Section 203 has its own bail-out procedure: a jurisdiction may end Section 203 coverage, before August 1985, by proving that the illiteracy rate of the pertinent language minority group is equal to or less than the national illiteracy rate. Four such suits have been brought, but only one resulted in a bail-out judgment (partial bail-out for a county in Hawaii). Attachment H lists Section 203(c) bail-out suits.

Five suits to end Section 4 coverage have been brought by jurisdictions covered as a result of the 1975 (language minority) amendments. In two of these cases, the plaintiffs obtained bail-out judgments.

of Section 2 of the Act, and it is on this issue that I will now focus my remarks.

PROPOSED AMENDMENTS TO THE VOTING RIGHTS ACT

Thomas Jefferson, on the occasion of his first inaugural address, reminded an infant Nation still enduring the affront of the Sedition Act that a government based on representative democracy and political freedom need not fear its detractors: "If there be any among us," said the author of the Declaration of Independence, "who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated, where reason is left free to combat it." (Emphasis added.) Mr. Jefferson's plea for reason has contemporary significance in the current debate concerning the wisdom of certain amendments to the Voting Rights Act passed by the House. Congressman Henry Hyde, one of the original sponsors of the House-passed bill, pointed out in testimony before this subcommittee that consideration of this most important issue in the House was, unfortunately, not always left to the free exchange of ideas in the marketplace of reason. Thus, he stated:

[b]y the time [the bill] reached the floor, suggestions that alternate views should be considered were quickly met with harsh charges that any deviation whatsoever from what was pushed through the full Judiciary Committee merely reflected 'code word[s] for not extending the [A]ct.' This intimidating style of lobbying had the ironic affect, though clearly intended, of limiting serious debate and creating a wave of apprehension among those who might have sincerely questioned some of the Bill's language.

Along similar lines, the President's support for a straight ten-year extension of the Act in its present form has been mischaracterized in the press and elsewhere as an attempt to "weaken" the Voting Rights Act. How extending the Act as is can honestly be portrayed as a weakening of the Act still awaits logical explanation.

Regrettably, political rhetoric of this sort has, (perhaps not unwittingly) served largely to cloud the debate rather than clarify the issues. Civil Rights concerns naturally and understandably evoke great emotion. Precisely because of that fact, all participants in the discussion must continuously guard against the temptation of yielding spontaneously to deeply held feelings that cannot withstand the cool eye of reason. In this connection, it is particularly important that the Senate carefully and dispassionately assess the need for and implications of any amendment to the Voting Rights Act.

The most significant and controversial amendment passed in the House concerns Section 2. Much of the debate surrounding this amendment -- which has been recommended to the Senate in the Mathias-Kennedy bill -- has centered on the state of the law prior to the Supreme Court's decision in City of Mobile. This, in itself, is difficult to understand in light of the fact that no pre-Mobile federal court case held Section 2 applicable to claims of voting dilution. In any event, I submit that the critical issue before the Congress is not so much what the law was prior to the City of Mobile decision, but rather what the law will be, and will do, if the House-passed amendment to Section 2 is enacted.

As originally passed in 1965, Section 2 banned voting practices or procedures "imposed or applied by any State or political subdivision to deny or abridge the right of any citizen" to vote on account of race or color. In 1975, the section was amended to include within its prohibition discrimination against members of certain language minority groups. Unlike Section 5 of the Act, Section 2 applies nationwide, applies to existing laws and procedures as well as to changes, and is a permanent provision requiring no congressional action to continue its protections. Noting that the section merely codifies the prohibitions contained in the Fifteenth Amendment, the Supreme Court in City of Mobile

v. Bolden, 446 U.S. 55 (1980), held that a challenged voting practice violates Section 2, as well as the Fifteenth Amendment, only if motivated by a racially discriminatory intent.

The bill recently passed by the House amends Section 2 to prohibit the use of any voting practice or procedure "which results in a denial or abridgement" of voting rights on the basis of race, color, or membership in the language minority, thus eliminating from the permanent provision of the Act the requirement of proving discriminatory intent. As the House Report makes clear, amended Section 2 would focus the inquiry "on the result and consequences of an allegedly discriminatory voting or electoral practice rather than the intent or motivation behind it." House Report at 30.

By measuring the statutory validity of a voting practice or procedure against election "results," the House amendment would place in doubt the validity of any election in which minority candidates were not elected in numbers equal to the group's proportion of the total population. Amended Section 2 would, according to the House Report, invalidate longstanding political systems incorporating at-large elections "which accomplish a discriminatory result." House Report at 30. Equally vulnerable to attack would be redistricting and reapportionment plans, unless carefully drawn to insulate racial and language minorities from electoral defeat. As in equal employment cases under Title VII of the 1964 Civil

Rights Act -- which has been interpreted to contain an effects test -- a violation under amended Section 2 will turn on a statistical inquiry, namely, has the election met the quota for minority representation.

The second sentence of the proposed amendment is frequently cited to counter the proposition that the change to a "results" standard would create a right in racial and language minorities to proportional governmental representation.

That sentence provides: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this Section." (Emphasis supplied.)

It is clear from the terms of this so-called "disclaimer" provision that amended Section 2 would tolerate only those racially disproportional election results that occur in spite of the challenged election procedure or method. Such a case would be presented where the election system at issue was neatly tailored to ensure the complaining racial or language minority group of a full and fair opportunity to achieve proportional electoral success, but for reasons unrelated to discrimination, the minority group collectively did not avail itself of that opportunity.

For example, regardless of what electoral system is employed, a racial or language minority group will not be represented on a governmental body in proportion to its numbers in the population if no member of that minority group undertaken run for office. Although such a discriminatory

"result" would run afoul of an "effects" test, the second sentence of amended Section 2 makes clear that disproportional governmental representation in such circumstances does not require invalidation of the challenged election method. Likewise, even in governmental systems employing single - member districts, it certainly is not unheard of for a nonminority candidate to win election in a district in which a racial or language minority holds a solid majority of the voting age population. Were disproportional governmental representation alone sufficient to establish a violation of amended Section 2, invalidation of such a single-member district form of government would be required. Thus, in essence, the first sentence of amended Section 2 creates in racial and language minorities a right to elect minority group members in numbers equal to the group's proportion of the total population, and the second sentence provides that an election system neatly tailored to protect that right to proportional governmental representation will not violate the Voting Rights Act solely because that right has not been exercised.

But in the archetypal case -- where minority candidates unsuccessfully seek office under electoral systems, such as at-large systems, that have not been neatly designed to produce proportional representation -- disproportional electoral results would lead to invalidation of the

system under Section 2, and, in turn, to a federal court order restructuring the challenged governmental system.

The far-reaching implications of an effects test in Section 2 are illustrated by the district court's order in the City of Mobile case. In that case, the district court, acting solely on the basis of perceived discriminatory "effects," struck down the City's three-member, at-large commission system of government, which had existed in Mobile for almost 70 years. In its place, the federal judge ordered formation of a mayor-council government, with a nine-member council elected from single-member districts.

That the "effects" test in amended Section 2 would mandate this type of wholesale governmental restructuring would by no means be limited to Mobile and other southern cities. According to the 1979 Municipal Year Book, most municipalities of over 25,000 people conducted at-large elections of their city commissioners or council members as of 1977. In a recent study of 106 cities with at-large systems indicated that blacks are, on the average, underrepresented in city governments in the northeast region of the country more severely than in the south.[/]

For example, [cite specific cities as examples].

Nor would amended Section 2's prohibition be limited to at-large election systems. Single-member district systems produce racially discriminatory results in cities throughout

[/] See Jones, The Impact of Local Election Systems on Black Political Representation, 11 Urban Affairs Quarterly 345, 350-51 (1976).

the country, particularly in the north central states.[/] Indeed, perhaps the most conspicuous single-member district system with consistently discriminatory election results is the United States House of Representatives. Although blacks constitute roughly 11 percent of the Nation's population, there are only 18 black representatives in Congress. The "effects" test in amended Section 2 would require that congressional districts in each state be drawn so that racial and language minorities hold a voting majority in a proportional number of districts.

In sum, an effects test under amended Section 2 would likely lead to the wholesale restructuring by federal courts of electoral procedures and systems at all levels of government -- from the United States House of Representatives to local school boards -- on no more than a finding of disproportionate election results.

Even more troubling than the prospect of federal courts restructuring longstanding state and local systems of government systems is the dubious premise underlying the argument for proportional representation: that racial and other minority groups can be represented effectively

[/] See *id.* See also MacManus, City Council Election Procedures and Minority Representation: Are They Related?, 59 Social Science Quarterly 153 (1978); Taebel, Minority Representation on City Councils: The Impact of Structure on Blacks and Hispanics, 59 Social Science Quarterly 142 (1978); Karnig, Black Representation on City Councils, 12 Urban Affairs Quarterly 223 (1976).

only by group members and that racial discrimination is at work whenever the electoral processes fail to result in proportional representation. The architects of our constitutional form of government rejected this pernicious notion in an analogous context. Writing in the federalist papers, Alexander Hamilton remarked: "It is said to be necessary that all classes of citizens should have some of their own members in the representative body, in order that their feelings and interests may be the better understood and attended to. But . . . this will never happen under any arrangement that leaves the votes of the people free." The Federalist No. 35. To this sobering fact, Hamilton added:

Is it not natural that a man who is a candidate for the favour of the people and who is dependent on the suffrages of his fellow-citizens for the continuance of his public honors should take care to inform himself of their dispositions and inclinations and should be willing to allow them their proper degree of influence upon his conduct? This dependence, and the necessity of being bound himself and his posterity by the laws to which he gives his assent are the true, and they are the strong chords of sympathy between the representatives and the constituent.
Id.

A candidate for public office can afford, of course, to ignore a sizeable voting minority when that minority is prohibited, through literacy tests and other devices, from registering to vote, as was the case with blacks in the covered jurisdictions when the Act was passed in 1965. As I previously noted, however, the Voting Rights Act outlawed such tests and devices,

and registration and voting of racial and language minorities in the covered jurisdictions has increased to the point that the political strength of these groups can no longer be ignored by serious candidates.

The adoption by Congress of an effects test in Section 2, however, would in essence establish a federal legislative expectation of racial bloc voting in electoral politics, and thus lead in the undesired direction of a re-polarization of society along racial lines. Moreover, an effects test in Section 2 would reverse a basic principle of our democratic system of government; namely, that no group, whether defined by political interests, party affiliation, racial characteristics, or anything else, has a right to be represented on elected governmental bodies. As the Supreme Court has stated:

All who participate in [an] election are to have an equal vote -- whatever their race, whatever their sex, whatever their occupation, whatever their income The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basis qualifications." Gray v. Sanders, 372 U.S. 368, 379-80 (1963).

That fundamental principle has been regarded in our democratic form of government as next to sacrosanct. It should not lightly be tampered with.

The difficulty of proving discriminatory intent is often cited in support of the discriminatory effects standard proposed by the House. Frequently voiced by witnesses before this Subcommittee and by the authors of the House Report is the view that the Supreme Court has required evidence of the so-called "smoking gun" to prove purposeful voting discrimination. The Court has done no such thing.

To the contrary, in numerous cases it has made abundantly clear that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266-68 (1977). Indeed, discriminatory effect of official action can alone be sufficient to prove an intent to discriminate when the action is unexplainable on any other basis, as was the case in Gomillion v. Lightfoot, 364 U.S. 339 (1960). Other indicia of discriminatory intent recognized by the Court are (1) the historical background of the challenged decision, particularly if it reveals a series of official actions taken for invidious purposes, (2) the degree to which the action departs from either the normal procedural sequence or normal substantive criteria, and (3) contemporaneous statements of members of the decisionmaking body, minutes of its meetings, reports, or other direct evidence of intent. The Court has made clear that these indicia of intent by no means exhaust the proper subjects of inquiry in determining the existence of racially discriminatory purpose.

Thus, direct evidence of intent -- that is, the so-called "smoking gun" -- is simply not essential to prove discriminatory purpose, but rather is one of the many evidentiary avenues to explore. To be sure, proving discriminatory purpose

is not easy. But neither is it impossible. Indeed, countless successful civil rights claims have been made under the Equal Protection Clause of the Fourteenth Amendment, and each one required proof of discriminatory purpose. Certainly no less should be required to authorize a federal court, that is not answerable to the electorate, court, to restructure the governments of state and local jurisdictions across the country.

Finally, apart from the question whether to amend Section 2, our enforcement history under the Act, as the Attorney General previously testified, shows clearly that some states and political subdivisions currently covered by Section 5's preclearance requirement are now in a position to demonstrate that they have indeed cleansed their electoral processes of racial discrimination and have been in compliance with the law for many years. As the President has noted, continuing to subject reformed jurisdictions to Section 5 coverage is unfair and inappropriate. We must not lose sight of the fact that the preclearance requirement of Section 5 represents a profound federal intrusion into governmental and political questions of purely state and local concern. Indeed, the nature of this type of intrusion is best captured in the Declaration of Independence, which listed as second in the Bill of Particulars against the British Crown the following grievance: "He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their

operation til his Assent should be obtained" Moreover, the Supreme Court in South Carolina v. Katzenbach, 383 U.S. 301 (1966), upheld the constitutionality of Section 5's preclearance requirement on the ground that it was closely tailored to apply only to those jurisdictions about which Congress had amassed detailed evidence of flagrant and pervasive abuses of minority voting rights. Continuing the widespread coverage of Section 5 despite evidence that many jurisdictions have remedied and reformed the abuses of the past would thus raise serious constitutional questions.

Accordingly, the Administration could support an amended bail-out provision that continues Section 5's preclearance provision for those covered jurisdictions which have not cleansed their electoral processes of racial discrimination, but at the same time provides a realistic and fair bail-out mechanism under which a jurisdiction with a proven record of compliance with constitutional and statutory voting safeguards is permitted to remove itself from Section 5's coverage.

In this connection, there are now pending before this Subcommittee several bills that would amend the current bailout provision in Section 4 of the Act to release jurisdictions from preclearance requirements upon meeting specified criteria. As I indicated at the outset, the Department stands ready to work with this Subcommittee in the weeks ahead to seek to devise from the various alternatives under consideration a workable and fair bail-out provision to be included in the Senate Bill.