THE WHITE HOUSE
WASHINGTON
November 17, 1981

Voting Rights Memo sent to:

Elizabeth H. Dole
Diana Lozano
Bob D'Agostino
Ken Cribb
Jim Pinkerton
Dave Hoppe
Trent Lott
Paul Weyrich
Howard Phillips
Ron Godwin
Ed Rollins
Ed Feulner
Connie Mackey
Woody Jenkins
Newt Gingrich

THE WHITE HOUSE
WASHINGTON

11/4/81

Morton:

This is meant as a political follow up of what I gave you a few days ago.

-Jim Pinkerton

THE BARON REPORT
1730 M Street, N.W. • Suite 1100 • Washington, D.C. 20036 • 202 659-9470

file Voting Rights Act

TO: Our Subscribers

October 26, 1981

FROM: Alan Baron

OCT 26 5 00 PM '81

No. 136

INSIDE: 1982 Senate Survey: The Eastern States

CONGRESS

Reagan Relations On taking office, a President's often contrasted with his predecessor. That contrast was particularly favorable to Ronald Reagan in Congressional relations. Unlike Carter, he had experience in dealing with a powerful state legislature; his style won warmth and friendship from members of Congress; he appointed experienced White House aides; and he presented a clearcut program.

But as is often the case, there was a tendency to gloss over factors which did not "fit" the trend. These included some basic political realities; that the closer the next election, the more independent Congress acts; that being labeled a "rubber stamp" for the White House is dangerous, even when the President is well-liked; that the Reagan Administration was allowing too many issues to get away from their control or influence and failed to turn much campaign rhetoric into concrete proposals.

These are now "coming home to roost" and criticism of Reagan's handling of Congress is escalating. There are several problem areas:

(1) Voting Rights The Administration sent nothing to Congress before the House extended the current law. To appease Senators Thurmond (R-SC) and Hatch (R-UT), it may propose relaxing the law. But many Republicans agree with Democratic strategists that a continuing battle will do nothing but build black turnout in 1982.

(2) Farm Subsidies Despite David Stockman's opposition to key price programs, the White House did little to shape the battle. That may have been inevitable, due to the local interests involved. And the final budget figures are probably as low as could have been expected. But the White House image for legislative competence has suffered.

(3) Clean Air In proposing a broad set of principles, EPA Administrator Anne Gorsuch hoped to avoid being labeled anti-environmentalist - and leave the "gutting" of Clean Air standards to lobbyists on the Hill. But Gorsuch is drawing much ridicule from environmentalists, businessmen and Republicans on the Hill for lack of a viable program.

(4) Social Security Budget balancing demands cutbacks. Political survival requires the blame be elsewhere. The Administration now realizes that - thus, its proposal for a bipartisan commission to recommend changes. But that realization came only after HHS Secretary Schweiker unveiled his own cutback plan; and the image of RR as a Social Security cutter is still damaging the GOP.

(5) AWACS Even if the Administration prevails (odds look 50/50), its failure to see the problem coming has severely damaged its clout.

Underestimating Reagan's ability to deal with Congress would be as great a mistake, now, as overestimating it was earlier. Reagan has handled social issues (e.g. abortion) as well as could anyone, given the gap between his own true believers and the public. His understanding of the need to move his agenda early is comparable to that of Lyndon Johnson. But comparisons with FDR's first 100 days, so common last Spring, are not heard around Washington much anymore.

Symbols: Every Vote Doesn't Count During the course of this year, the House of Representatives voted - by overwhelming (almost three to one) margins - to:

(1) oppose the Reagan Administration's stand (in the World Health Organization) against restrictions on marketing practices of baby formula manufacturers in Third World countries;

Alan Baron, Editor Richard E. Cohen, Associate Editor

THE WHITE HOUSE
WASHINGTON

30 October 1981

TO: Morton Blackwell

FROM: Jim Pinkerton

RE: Voting Rights Act

Attached are my musings on Reagan and the Voting Rights Act.

Enjoy.

WEAKENING OF VOTING BILL SOUGHT

President Terms Some
Provisions "Pretty Extreme"

This headline appeared in the Washington Post on 19 October, just two weeks after the House voted 389 to 24 to extend the Voting Rights Act of 1965 with no changes. No amendments to the Act got more than 132 votes in the House.

When it was first signed into law in August of 1965, the Voting Rights Act affected election laws in Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and parts of North Carolina. Over the years federal jurisdiction has been extended to Arizona, Alaska, Connecticut, South Dakota, Massachusets, New York, in whole or in part.

Even after a judge suspended the New York primary in September because the New York City Council was held to be in violation of the VRA, it is still fair to say that the controversy surrounding the VRA is hottest in the areas it was originally intended to affect: the deep South.

In the early to mid 1960s, when more than half of all Americans thought that "civil rights" was the most important issue facing the country (as opposed to fewer than 10% by the late 1970s; the number one issue now, according to the polls, is "the economy," while in the late 60s and early 70s "the Vietnam War" was the most critical issue), images of Selma and Klansmen and Freedom Riders were very much on the minds of Americans, images transmitted to America as a whole from the Deep South states of Alabama, Mississippi, Georgia, and South Carolina, among others.

Thus whenever the Voting Rights Act comes up in the media, attention focuses immediately on the 6 states covered in their entirety by the VRA. One of the most popular and widely understood measures of the effect of the VRA is registration among voting age blacks. As the table below shows, the change in black registration before and after the act is dramatic:

	1964	1976
Alabama	23.1%	58.1%
Georgia	44.0	56.3
Louisiana	32.0	63.9
Mississippi	6.7	67.4
South Carolina	38.8	60.6
Virginia	45.7	60.7

Given the remarkable change in the political status of blacks in the South, and given how much of the time and energy of progressive whites was devoted to advancing civil rights in the South in the 60s, it is easy to see that even the hint of changing the VRA, especially when it is being pushed by such bete noires of the white liberal establishment as Strom Thurmond, brings a strong and vociferous reaction not only from blacks, but from the media and other opinion makers as well.

Thus the actual nature of the proposed changes in the VRA which Fred Fielding alluded to in the 19 October Post story, which have nothing to do with disenfranchising Southern blacks, but are rather technical changes in the VRA, is immaterial. The hint of change sends the alarm bells ringing in the ears of the progressive coalition that got the VRA passed in the first place, a coalition that includes most Northern Republicans.

When Coretta Scott King told the annual convention of Operation PUSH, meeting in Chicago last summer, that "the number one priority right now is extending the Voting Rights Act," she did not pause to qualify her statement or make distinctions.

One can be sure that Vernon Jordan, President of the Urban League was not taking into account possible fine tuning of the VRA when he said "The Voting Rights Act is virtually the only protection black and Hispanic citizens have to ensure their right to vote is not hampered. Take it away and we are sure to return to a system of persistent discrimination in which, by a series of overt and covert local measures, blacks are deprived of their voting rights and of representation."

This is relatively restrained rhetoric. This is not what the average black is probably hearing from local political and community leaders. The proverbial bloody shirt is no doubt being waved in black and liberal communities across the US.

Benjamin Hooks told AG William French Smith that the NAACP views the threats to the VRA, as is, as the deepest threat to American blacks. Smith is charged by President Reagan with proposing possible changes in the VRA, which expires in August, 1982.

The media have picked up on the story, pregnant as it is with memories of the civil rights struggle, rich as it is in conflict; between whites and blacks, Northerners and Southerners, the ancien regime and the New Politics, between Reagan Federalism and the Great Society.

The New York Times has called it the "most effective of all civil rights laws." It has further editorialized that "extension of the law remains crucial for the right to vote--and the other rights it ensures." The Post has supported its extension, intact, as has the Christian Science Monitor and a host of other newspapers.

In an article revealingly titled "Blacks tag voting rights as key issue," the Monitor squarely addressed the political situation in 1981:

> "Blacks can accept cuts in government spending, but not cuts in voting rights.
>
> This is the message black leaders are sending to President Reagan in meetings with administration officials, from conference halls, and from scholarly think tanks.
>
> Clearly, blacks are unhappy with federal budget cuts, which they expect will impose disproportionate sacrifices on minorities. Although they believe budget cuts will hurt them more than whites, blacks say they may be more able to cope because they are accustomed to hardships...Black leaders are not concentrating their fire on reduced federal spending for welfare programs. Instead... they say the Voting Rights Act (extension of) is a key to future progress."

Another vocal black supporter of full extension of the VRA is Rev. Ralph David Abernathy, who was a Reagan backer in 1980.

Policy should never be made on the basis of political popularity. Principle is more important, and adherence to principle was what got Ronald Reagan elected to the Presidency in 1980. However, in cases where a policy determination is a close call, politics becomes an important ancillary determining factor.

We have seen that the politics of the North, of the blacks, and of the progressive wing of the Establishment are clearly lined up behing extension of an intact VRA. Any changes in the VRA will surely cost the administration points with these groups.

But what are the political advantages of modifying the VRA? In my opinion, there are virtually no reasons of expedience for tinkering with the VRA.

The following paragraph appeared in the Post last June:

> "Opponents of extending the law's key provisions, such as Senator Strom Thurmond and many conservative Democrats in the South, object to preclearance (one of the aforementioned 'key provisions') as an insult to the South."

In my opinion that description of the VRA's opponents takes into account the depth and breadth of opposition to a simple extension of the VRA.

Conservative Southern Democrats have controlled Southern politics for a century precisely because things like the VRA did not exist for most of that period. The good ole boy Southern Democrats recognize that their control has started to unravel, and that the VRA has had a lot to do with that. Strom Thurmond, a former conservative Southern Democrat, and now a conservative Southern Republican, is correctly lumped in with his former party brethren in the aforementioned Post story. His mindset is still very much similar to that of the party he was a member of for the first 63 years of his life, at least when it comes to the political structure of race in the Deep South.

When the average person thinks of the impact of the VRA, he surely thinks of the feds coming in and eliminating poll taxes, stopping intimidation and coercion, etc. The Justice Dept. has effectively ended those sort of practices, and nothing in the changes floated publicly by Fielding two days ago in the Post would allow the nightriders to return.

Most of the litigation surrounding the VRA, not to mention the controversy, concerns federal examination of election laws and redistricting. A typical situation is a city in a Deep South state with, say, 40% blacks. This city has five city council slots. If the city were broken down into five districts, presumably two would encompass the black sections of the city, and would almost certainly elect 2 blacks to the city council. Politics being politics, the whites, with 60% of the population of the city, would elect 3 whites. In a situation like this, though, whoever gets to draw the district lines can determine who will get elected. Instead of creating 2 districts that are all or nearly all black, and three districts that are all or nearly all white, the linedrawers can draw the lines so that there are white majorities in all five districts. Thus a city with 40% blacks will have no black representatives. This is the way the Democratic Party has kept control in those areas where the blacks could even vote.

A very common tactic is the at large election. If the blacks can vote and they are not distributed conveniently in the city so as to allow the creation of 5 white majority districts, then the linedrawers can simply abolish the lines. The city, which is 60% white, becomes in effect one big district with 5 representatives, all of whom, given the nature of Southern politics, will be white.

Much is made in the papers about the tremendous growth in the

number of black elected officials in the US. There are now more than 4500 across the US, with 60% of them in the South. While it is indeed striking that the number of black elected officials in the South has gone from near zero prior to the VRA to 2768 in 1979, it is also striking that this figure of 2768 represents about 5% of the total elected officials in the South, where blacks compose about 25% of the population.

In other words, the VRA really hasn't gone very far in terms of giving blacks equal representation in the South. To be sure, it should be noted that blacks are no better represented in other regions in the country, relative to their numbers. The problem the blacks have is that they are too spread out, geographically, to be a force in national politics. There are 110 Congressional districts in the country with 15% or more blacks, but only a couple of dozen with black majorites. Even of these districts, blacks only control 18. If Congressional representation were in lockstep with their numbers, the blacks would have more than 50 seats in Congress, and a dozen Senate seats. As it stands, blacks constitute a paltry 3% of the Congress.

If the VRA were enforced with an iron hand in the South, it would be a while before blacks composed 25% of elected officials up and down the line, but there would be an explosion in the number of black elected officials, and most of the losers in this process would be the Democrats that have dominated Southern politics since Reconstruction.

I say this with confidence, not only because most people in office in the South are Democrats, but because most whites in the South are closer to the Republicans than the Democrats, in terms of national party allegiance. Even if they are nominal Democrats, white southerners share the view s of the Republicans on defense, the economy, and most social issues. A century of Democratic gerrymandering has muzzled the ~~trend among whites~~ toward the Republicans in national politics, so that Democratic Congressmen go to Washington and support the national party on issues that won't fly at all back home in Georgia or Alabama. If the VRA were enforced, the blacks would get their own districts, which they very much want, and the remaining white districts would start trending heavily Republican.

The point is that the VRA has the effect of helping all minorities, assuming it is enforced. The Republicans are still very much a minority in the South, just like the blacks. Thus the same process which would lead to sending a host of blacks, who unfortunately would all still be Democrats, from the South to Washington, would also lead to the election of a host of white Republicans.

As evidence for this assertion I offer the opening paragraphs of an article that appeared in the Post last 20 May, under the headline "A New Map of Texas, Voting Rights Act Is Helping GOP In Battle Over Redistricting Plan"

> "Austin--The Voting Rights Act may die in Congress next year at Republican hands, but in the redistricting battle here the act has become the party's ally in its bid to take control of Congress.
>
> The act assures minorities of the opportunity of proportional representation, if possible, and because of the demographics of Texas, what may be good for blacks and Mexican-Americans may also be good for Republicans.
>
> 'We didn't know it would turn out this way when they passed the Voting Rights Act, but it sure helps us now,' one Republican strategist said.
>
> This is because, by carving out predominantly black or Hispanic districts, Republicans would have a better chance to win the adjacent, heavily Anglo districts...
>
> The political climate is changing so rapidly that people joke about Anglo Democrats, who have controlled politics here since Reconstruction, as an endangered species...
>
> 'The law is the law,' one Republican said. 'It guarantees the rights of political minorities. We think the same principles ought to apply to the Republican Party."

The current political estimate is that Texas, whose Congressional delegation consists of 19 Democrats and 5 Republicans, could have as many as 13 Republicans after the '82 election, and at least 8. The blacks, however will be happy, because they will have a black district in Dallas next year, assuring not only that a second black Texan goes to Washington, but also that white Democrats Mattox and Frost are doomed.

Goldwater swept the Deep South in 1964, the last Presidential election held before passage of the VRA, but Republicans won only 7 of the 37 seats in the House from the 5 Deep South states. Of these, 4 were lost back to the Democrats in 1966, which was a banner year for Republicans everywhere else. The only gain was Albert Watson of SC, who switched from being an entrenched Democrat to an entrenched Republican, along with Thurmond. At the local

level, the same Democrats, who happily voted for Goldwater even as they voted for each other for all the local offices, remained in charge. Although the Republicans have carried South Carolina in four out of the last five Presidential elections, and Mississippi has gone Democratic only once in the last 16 years, the situation at the state level has hardly changed. Below is the Republican percentage of representation in the combined upper and lower houses of SC and Miss.:

	South Carolina	Mississippi
1980	12.7	4.7
1978	11.2	4.7
1976	8.9	2.9
1974	11.2	2.7
1972	14.1	2.3
1970	7.7	2.3

It is hard to see any progress taking place in either state. Such grotesque majorities for Democrats are common throughout the South, which, as I have to keep emphasizing, is still a one-party region at the state and local level.

But the Democrats are running scared. The VRA scares them, because they know that black Democrats and white Republicans will replace the George Wallace types still in charge across the South. Below are the figures for the number of proposed election law changes submitted from jurisdictions in each state to the Justice Dept. for review as per the VRA.

	# of changes submitted between 1965-1970	# of changes 1971-1975	# of change 1976-80
Alabama	16	614	1085
Georgia	158	935	1998
Louisiana	5	882	1709
Mississippi	32	503	654
South Carolina	308	834	1208
Virginia	57	1093	1780
North Carolina	2	485	711
	578	5336	9145

Clearly the good ole boy network in the South has started to comprehend what the VRA portends for the Democratic party in the South if it is not revamped. Just as the Texas Republican took a long time to understand that the VRA helped his cause in the above Post article, the mayors and state reps from Catahoula County, La. and Hoke County, NC understand that the VRA dooms the white-controlled Democratic party.

Pinkerton

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For all the talk about the Boll Weevils and how they helped the President on the budget and tax cut votes, they are not our friends. First of all, they voted the way they did because that's what their districts demanded, which means that there should be Republicans in there in the first place. Secondly, they can be counted on by the Democratic leadership for most votes, especially procedure votes, setting rules, committees, etc. Thirdly, the will still support the national Democratic ticket, unless the presidential nominee is a real fluke, such as McGovern. I don't know of a single Southern Democrat, in office, who supported Ronald Reagan last year. Fourthly, Democrats, because they are Democrats, will continue to try and stick it to us in things like redistricting, pork barreling, etc. Finally, Southern Democrats always tend towards populism, which, while it may be congruent with this administration on some social issues, stands just as surely athwart Republican policy on taxes and many spending issues. Recall that Wayne Dowdy, who just got elected to Congress from Mississippi as a Democrat last July to take Hinson's seat, said that he was running against "the White House, the Chamber of Commerce, and every oil company in the world."

The limitation of the VRA will keep the above type Democrats in power. They will still be whites, and probably fairly conservative at heart, but they will have to trend liberal to keep the blacks happy (recall that Hinson only won in '78 and '80 in Mississippi because the blacks in the Mississippi 4th district, dissatisfied with the white Democrat, ran a black independent).

For the administration to oppose any part of the VRA plays into the hands of the white Democratic party. When Jamie Whitten votes to keep the VRA intact, it is clear that even the most venerable man in Congress is scared to alienate the black vote (30%, by pop. in his district). Their strategy is to let the Republicans be the heavies. Hopefully this administration will take out the onerous provisions, or enforce them half-heartedly at Justice, and thus the Democrats in power in the South will continue to gerrymander themselves into perpetual power, while the blacks heap their obloquy on Ronald Reagan.

Let the last word on this particular point be said by Harry Dent, a Republican operative from South Carolina, who was quoted in the Post last July as follows:

> "The whole question is kind of passe in the South. But the question of voting rights is not passe for black people."

Pinkerton

~~10 10 10~~
9 9 9

Dent went on to say that most white southerners have "learned to live with it (the VRA)," meaning there is not much to be gained among them by an attempt to kill the act or seriously weaken it. But blacks do care deeply about the law, which in 15 years has greatly enhanced their political power throughout the South.

For all the consideration we have give to the VRA and its effect on Southern politics, some thought must be given to the impact any change in the VRA instituted by this administration would have on a marginal Republican constituency, the moderates and liberals.

Ronald Reagan got only a negligible number of black votes in the 1980 election, but that was not for lack of trying. The President worked hard to get his message across to blacks and other minorities, unfortunately with only limited success. However, the fact that he did try was widely noted and approved of by the media, which in turn communicated this image to the voters. Here is part of an article that appeared in the NY Times on 5 October.

> "Similarly, well advertised Republican Party appeals to blacks and black endorsements of Mr. Reagan were important to the party, according to Senate Majority Leader Howard H. Baker Jr. of Tenn. They may have won only a few votes, he said, but they 'made Republicans decent and acceptable to a lot of whites.' It erased 'that remnant of racism in the Republican image,' he added."

In my opinion the VRA is a key symbol to John Anderson-type voters, who are socioculturally of Republican stock. "Andersonism" has its roots in precisely the places where the Republican party took root 125 years ago--in Wisconsin, Illinois, Massachusets, Vermont, and Connecticut. I like to think of them as "post-industrial liberals;" that is, they are relatively conservative on economics, but liberal on social issues.

Most government programs that help blacks have a price tag, and the Andersonites flinch at the cost. But the VRA is essentially free, at least in the short run, and I'd be willing to bet that Andersonites support the VRA in numbers greater than even Northern Democrats.

These voters can be turned out for the right kind of Republican, such as Sen. Percy or Governor Thompson of Illinois. Both of them did very well in the black areas of Chicago, which enhanced

1. No votes

2. Demo must not be Leftist monolithic - pendulum swing

3. ~~[illegible]~~ Bad Policy to aggrandize Fed. Justice Dept

4. Grinnels back fire

5. ~~Law will remain on books~~

6. Why encourage radicals?

7. ~~Back door Proportional Representation~~

8. ~~Quotas in legislative assemblies~~

9. Many Ron Dellums's

10. → Advance GOP in South

Moral

~~[illegible]~~ Further retreat will convince friends to stop coming to go into opposition

Procedural Issue

Political Reasons

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release November 6, 1981

STATEMENT BY THE PRESIDENT

Several months ago in a speech, I said that voting was the most sacred right of free men and women. I pledged that as long as I am in a position to uphold the Constitution no barrier would ever come between a secret ballot and the citizen's right to cast one. Today I am reaffirming that commitment.

For this Nation to remain true to its principles, we cannot allow any American's vote to be denied, diluted or defiled. The right to vote is the crown jewel of American liberties, and we will not see its luster diminished.

To protect all our citizens, I believe the Voting Rights Act should and must be extended. It should be extended for ten years -- either through a direct extension of the Act or through a modified version of the new bill recently passed by the House of Representatives. At the same time, the bilingual ballot provision currently in the law should be extended so that it is concurrent with the other special provisions of the Act.

As a matter of fairness, I believe that states and localities which have respected the right to vote and have fully complied with the Act should be afforded an opportunity to "bail-out" from the special provisions of the Act. Toward that end, I will support amendments which incorporate reasonable "bail-out" provisions for States and other political subdivisions.

Further, I believe that the Act should retain the "intent" test under existing law, rather than changing to a new and untested "effects" standard.

There are aspects of this law, then, over which reasonable men may wish to engage in further dialogue in coming weeks. As this dialogue goes forward, however, let us do so in a spirit of full and total commitment to the basic rights of every citizen.

The Voting Rights Act is important to the sense of trust many Americans place in their Government's commitment to equal rights. Every American must know he or she can count on an equal chance and an equal vote. The decision we are announcing today benefits all of our citizens by making our democracy stronger and more available to everyone.

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Red
Diana Lozano
Thelma Duggin

Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: 1/22/82 ACTION/CONCURRENCE/COMMENT DUE BY: _____

SUBJECT: VOTING RIGHTS

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	GERGEN	☑	☐
MEESE	☑	☐	HARPER	☑	☐
BAKER	☑	☐	JAMES	☐	☐
DEAVER	☑	☐	JENKINS	☐	☐
STOCKMAN	☐	☐	MURPHY/GARRETT	☑	☐
ANDERSON	☑	☐	ROLLINS	☑	☐
CANZERI	☐	☐	WILLIAMSON	☑	☐
CLARK	☐	☐	WEIDENBAUM	☐	☐
DARMAN	☐P	☑SS	BRADY/SPEAKES	☐	☐
DOLE	☑	☐	ROGERS	☐	☐
DUBERSTEIN	☑	☐	BRADLEY	☑	☐
FIELDING	☑	☐	_____	☐	☐
FULLER	☐	☑	_____	☐	☐

Remarks:

Testimony is to be delivered Wednesday. Q. and A. will be circulated later today. Please review both for discussion at a meeting that Ed Meese will be setting up. Thank you.

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

I am grateful for the opportunity to appear before this Subcommittee to present the Administration's views regarding proposed amendments to the Voting Rights Act of 1965.

There is perhaps no more important piece of legislation to come before this Congress than the one now being considered. As President Reagan has so often emphasized, the right to vote is "the most sacred right of free men and women." It rightfully claims this lofty status because it is, in point of fact, preservative of all other rights. The people of America recognized as much in 1870 by their adoption of the Fifteenth Amendment to the Constitution. Since then, they have supported efforts to expand the franchise and to secure its exercise free from force, fraud and unlawful discrimination. By means of constitutional amendment, legislative enactment and judicial rulings over many decades, the country has demonstrated its continuing commitment to the truths that all men are created equal and that governments derive their just powers from the consent of the governed. It is these ideals that must guide the deliberations of this Subcommittee and the full Senate today and in the weeks ahead as they carefully consider the matter at hand.

The Voting Rights Act unmistakably stands as the centerpiece of those legal protections that guard against denials or abridgements of the right to vote. Enacted in 1965 because some states and localities sought to prevent blacks from exercising this most precious right, the Act opened a new

chapter in the struggle to achieve real equality for racial minorities. The Act's principal purpose was to provide badly needed enforcement tools for carrying into effect the guarantee of the Fifteenth Amendment that no one shall be deprived of the right to vote on account of race.

The present Act contains both permanent and temporary provisions. The permanent provisions, which apply nationwide, include Section 2 of the statute which generally forbids electoral devices and procedures that deny or abridge the right to vote because of race, color, or (since 1975) membership in a language minority group.

The temporary or special provisions of the Act, which include Sections 4 and 5, are directed against only a small number of States (and somer subdivisions in other states). Located primarily in the South, these jurisdictions were historically associated with efforts to deny full political equality to blacks. The special provisions required these covered jurisdictions to submit for preclearance by the United States Attorney General or the U.S. District Court for the District of Columbia all changes in electoral practices or procedures. Such changes are allowed to go into effect only after the submitting jurisdiction satisfies the Attorney General or the district court that the revisions have neither the purpose nor the effect of denying or abridging the right to vote on account of race or membership in a language minority group.

The special provisions also included a so-called "bail-out" mechanism, whereby a covered jurisdiction could after a certain number of years apply to remove itself from special coverage on a showing that no prohibited test or device had been used during a set period. At the time of its original enactment, the Act set this period at five years.

In 1970, Congress reviewed the then five-year history of the Act and found sufficient evidence of continued racial discrimination in voting in the selected jurisdictions to warrant an extension of the preclearance provisions for another five years.

In 1975, Congress again revisited the issue, extended the preclearance provisions for another seven years (until August, 1982), and brought within their coverage for ten years additional jurisdictions -- in both the North and the South -- having sizeable language minorities.

Today, the question is once again before Congress: Should these special provisions be extended yet a third time? In the Administration's view, that question must be answered affirmatively.

Measured by almost any yardstick, the results of the Act are impressive. Literacy tests, poll taxes, and similar devices which led to the original Voting Rights Act have been effectively eliminated. Minorities, especially blacks in the South, have made dramatic gains in voter registration and election to public office.

For example, the U.S. Commission on Civil Rights estimated in

1965 that only 6.4 percent of eligible blacks were registered to vote in Mississippi. By 1976, that figure has reached 67.4 percent. Similarly, in South Carolina, minority voter registration since 1965 has increased from 34.3 percent at the time the Act was passed to 55.8 percent in 1980. In the South as a whole, black voter registration in 1976 was estimated to be nearly 60 percent. Moreover, the number of black elected officials in the South has increased dramatically, from less than 100 in 1965 to more than 2,000 in 1980. Louisiana and Mississippi, for example, rank among the top four states in the nation in the number of black elected officials, and the Georgia State Assembly has the highest number of black members in the country.

Notable gains have also been achieved in a number of covered jurisdictions having sizeable Hispanic populations. In Texas, voter registration among Hispanics has increased by two-thirds in recent years, and the number elected to public office has increased by 30 percent since 1976. Even more dramatic is the case of Arizona, where Hispanics constitute 16.2 percent of the population and 13.2 percent of all elected officials.

These encouraging statistics are but a quantitative measure of a significant qualitative change for the better, especially in the South, since the Voting Rights Act became law almost 17 years ago. There is no doubt whatsoever that the Act has contributed greatly toward the creation of a truly non-discriminatory political and social environment.

Heartening as this news is, it is offset by the sad truth that racial discrimination in the electoral process still exists in certain covered jurisdictions. The Justice Department's enforcement experience in this area still demonstrates that some political jurisdictions in the country have made insufficient progress and that continued federal oversight of those jurisdictions is necessary. There is thus no question that the special provisions of the Voting Rights Act should be extended for an additional period.

As the Senate considers the merits of the various legislative proposals before it, its deliberations should, in my view, be guided by four fundamental principles.

The first and plainly most important consideration is that (1) the right to vote not be denied or abridged on account of race or membership in a language minority group. That principle is sacrosanct and must not be compromised in any way.

Second, it is imperative that we not lose sight of the fact that, while the Voting Rights Act was enacted in part as a prophylactic safeguard against racial discrimination in certain jurisdictions having a history of discrimination in voting, it had another and more critical purpose as well, which was forward-looking and constructive in nature. That purpose was to encourage states and localities to bring

blacks and other racial minorities into the mainstream of American political life. In revisiting the statute in 1982, (1) the emphasis should be placed on the positive objectives of the legislation rather than dwelling on the chapter that led to passage of the Act 17 years ago.

Third, even while deliberating on an extension of the Act's special provisions, due recognition must be given to (2) the very real progress made since the Voting Rights Act was enacted. This is not 1965, and the racial problems of that year are not, thankfully, those of 1982. The march toward full equality in the electoral process continues. While we cannot disregard the distance yet to be traveled, we should also credit the milestones that have been met, not the least of which are the impressive gains in minority registration and representation to which I just referred. Americans of all races can take pride in the fact that many jurisdictions against whom the Act's special provisions are directed have made dramatic and lasting strides to correct past abuses.

(4) Fourth, in the same breath that we speak of an extension of the Act, we must also underscore its exceptional character. It vests extraordinary powers in the National Government over matters that, consistent with the principles of Federalism, have traditionally rested within the province of state and local control. Moreover, it establishes a dual pattern of enforcement, whereby some parts of the country are subjected

to more stringent legal obligations than other areas. Based on the evidentiary record before it, Congress felt in 1965 that there was good and sufficient reason -- which indeed there was -- for differential treatment. Even so, the Supreme Court, in sustaining the constitutionality of the Act, took care to note the temporary nature of the special provisions, the fact that particular jurisdictions had been found by Congress to have violated their constitutional obligations, and the fact that these jurisdictions would be given an opportunity to get out from under the Act's special burdens.

With these principles in mind, we at the Department of Justice, in response to a request that President Reagan made of me on June 15, 1981, undertook a comprehensive assessment of the Act's history to date; extant or likely abuses of voting rights that may require special scrutiny; the adequacy of the Department's powers under the Act; the desirability of making any changes in the existing legislation; and the feasibility of extending the Act's coverage to voting rights infringements not now covered by the Act. As one element of this review, I and members of my staff met personally with a number of civil rights groups and other organizations, members of Congress and their staffs, Governors and other state and local representatives.

The results of our study can be simply stated. The Voting Rights Act of 1965 has worked well, but the need for its special protection continues. The President has therefore endorsed an extension of the Act in its present form for a

period of 10 years. This is longer than any previous extension voted by Congress.

At the same time, the President pointed out, and our analysis of the history of enforcement under the Act confirms that covered states or political subdivisions should have the opportunity to demonstrate that they have indeed removed past practices of racial discrimination from their electoral processes and have been in compliance with the law for many years. Accordingly, if the Senate were to include in the Act a provision allowing such governmental units to bail out prior to the expiration of the 10 year extension we are recommending, the Administration would support such a modification.

not included, would not veto?

In this connection, there are now pending before this Subcommittee two bills that would amend the current bail-out provision in Section 4 of the Act to release jurisdictions from the preclearance requirements upon meeting specified criteria. The Department will readily 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.

*

On another point relevant to extension, let me say a few words about the bilingual election provisions of the Act. The bilingual protections of Sections 4 and 203 were added in 1975, to secure the right to vote for those citizens who are not fluent in the English language. In our meetings with

various groups last summer, we heard numerous expressions of support for the bilingual provisions. Citizens whose first language is not English have been afforded by these provisions the opportunity to participate effectively in the election process. Our limited experience since 1975 indicates that the bilingual procedures have, by and large, worked well. As a result, we believe that Congress should place the bilingual provisions on the same footing as the special coverage provisions, uniformly extending the Section 4 bail-out eligibility date to 1992, and also similarly extending Section 203.

In addressing the question of extending the life of the Act to August, 1992, let me make clear that only the special coverage of Section 4 requires congressional attention, since only that coverage would be subject to termination in August of this year. Section 2 of the Act is permanent legislation, and no action by Congress is needed to continue its protections.

The House has passed legislation that would dramatically change Section 2 of the Voting Rights Act to permit proof of a violation based solely on election "results." This change in the Act's permanent provision runs counter to a Supreme Court ruling handed down in 1980. As the plurality decision in City of Mobile v. Bolden, 466 U.S. 55 (1980), made clear, Section 2 of the Voting Rights Act, like the Fifteenth Amendment, currently prohibits all state and local governments,

both North and South, from employing any voting practice or procedure designed or purposefully maintained to discriminate on the basis of race or color. Proof that the challenged election practice was intended to discriminate against a racial minority is essential to a claim under both the Fifteenth Amendment and Section 2 of the Voting Rights Act.

The proposed replacement of a "results" or "effects" test for the existing "intent" standard in Section 2 effectively imposes upon the entire country a legal test that since 1965 Congress has seen fit to apply only to certain jurisdictions that had been demonstrably derelict in their failure to protect minority voting rights -- and, even then, only as to voting changes adopted by those jurisdictions. No evidence was presented either in testimony before the House committee or in the House floor debates that there have been voting rights' violations throughout the country so as to justify nationwide application of an effects test. So major an amendment should not be endorsed by Congress without compelling and demonstrable reasons for doing so. The inclusion in Section 2 of such a test would call into question the validity of state and local election laws and systems that have long been in existence, not just in the South, but in all of America. Any move by Congress in this direction should not be taken without full appreciation of all its ramifications.

Work

In particular, under a nationwide effects test, any voting law or procedure in the country which produces election results that fail to mirror the population makeup in a particular community would be vulnerable to legal challenge under Section 2. Historic political systems incorporating at-large elections and multi-member districts -- which had never before been questioned under either the Act or the Constitution -- would suddenly be subject to attack. So, too, would be many redistricting and reapportionment plans. Nor would the reach of an amended Section 2 be limited to statewide legislative elections; it would apply as well to local elections, such as those involving school boards and city and county governmental offices. And it would apply to existing voting practices and procedures of longstanding application as readily as to the most recent voting change.

To entertain this kind of amendment to the Act's permanent provisions is inevitably to invite years of extended litigation, leaving in doubt the validity of longstanding state and local election laws in the interim and inviting the federal courts, on no more than a finding of disproportionate election results, to restructure governmental systems that have been in place for decades.

That prospect cannot be lightly dismissed. The Voting Rights Act in its present form has, by all accounts, worked extremely

well. Its provisions have been subjected to the most meticulous judicial scrutiny in almost every context imaginable. Its reach and coverage are now well defined and generally understood. In my meetings last summer with various civil rights groups, they were unwavering in their praise of the existing legislations as one of the most effective statutes ever passed by Congress. They, too, expressed concern that amendments would generate yet another prolonged period of disruptive and unsettling litigation. Their strongly held view at that time was: "If it is not broken, don't fix it." There is much common sense to that admonition.

Mr. Chairman, the Voting Rights Act has opened up access to our political process for millions of minority citizens. It has proven to be impressively effective, but the job is not yet finished. Consequently a straight 10-year extension of the Act is required to ensure continued federal protection of the cherished right to vote, as guaranteed by the Fifteenth Amendment.

The Administration therefore fully supports S. ___, co-sponsored by Senators _____and _____.

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

Copies to EHD
Red
Diana
Thelma D
Bill T

[redacted] APR 15 1982

Voting Rights File

DOCUMENT NO. 068002PD

Voting Rights

OFFICE OF POLICY DEVELOPMENT STAFFING MEMORANDUM

DATE: 4/14/82 ACTION/CONCURRENCE/COMMENT DUE BY: FYI

SUBJECT: Dole Bill

	ACTION	FYI		ACTION	FYI
HARPER	☐	☐	SMITH	☐	☐
PORTER	☐	☐	UHLMANN	☐	☐
BANDOW	☐	☐	ADMINISTRATION	☐	☐
BAUER	☐	☐	DRUG POLICY		
BOGGS	☐	☐	TURNER	☐	☐
BRADLEY	☐	☐	D. LEONARD	☐	☐
CARLESON	☐	☐	OFFICE OF POLICY INFORMATION		
FAIRBANKS	☐	☐	GRAY	☐	☐
FRANKUM	☐	☐	HOPKINS	☐	☐
HEMEL	☐	☐	OTHER		
KASS	☐	☐	✓ Elizabeth Dole	☐	X ☐
B. LEONARD	☐	☐	_____	☐	☐
MALOLEY	☐	☐	_____	☐	☐

REMARKS:

Sent copy to M. Wallace

EDWIN L. HARPER
ASSISTANT TO THE PRESIDENT
FOR POLICY DEVELOPMENT
(X6515)

THE WHITE HOUSE
WASHINGTON

April 14, 1982

Elizabeth Dole
Assistant to the President for
Public Liaison

Ed Harper asked that I send the attached to you for your information.

Emily H. Rock
EMILY H. ROCK

MEMORANDUM April 13, 1982

Subject: Dole Bill

This will confirm my original view, following further research, that the Dole proposal is quite acceptable, but needs tightening in two areas indicated to you last night:

- The provision on line 17 of page 1 to the effect that the Voting Rights Act protects "minority groups" protection should be amended. The words "minority groups" should be replaced with "citizens of the United States." The "minority group" language probably comes from a segment of the Supreme Court decision in White v. Register, but that quote immediately modified by references to "its members" — who must continue to be the sole focus of protection under the Voting Rights Act. The shift of focus to group protection could have exceedingly adverse consequences on the development of the law.

- The list of factors set forth from line 20 of page 1 to line 23 of page 2 involves one major addition/revision to the factors cited in the two leading pre-Mobile v. Bolden cases cited in the Dole legislative history. Neither White v. Register nor Zimmer v. McKeithen, addresss the Section "G" factor, (lines 16 - 18 of page 2), and should be deleted. Section "G" invites, indeed mandates the courts to engage in an extraordinarly wide-ranging inquiry into matters extraneous to the voting process — the alleged existence of "invidious discrimination in such areas as education, employment, economics, health, and politics." Such wide-ranging findings could serve as predicates to and proof in massive Title VI and Title VII litigations likely to follow from any Section "G" findings of "invidious discrimination." Section "G" may even permit findings of "invidious discrimination" to be made on an effects test basis, i.e. may permit findings sufficient to authorize Section 2 violations on the basis of merely statistical evidence of "discrimination" in the cited areas. As neither White nor Zimmer list the

Section "G" factors (in any but the most oblique manner), the courts may well treat the Section "G" inquiry as particularly mandated. I believe that Dole can and should be persuaded to drop the provision and believe that such change is our most significant need in the Dole bill.

- There are other problems with the Dole version of Section 2, but, as noted, we can clearly live it -- it is a genuine compromise between two dug-in Senate positions on the Voting Rights bill, and a significant contribution to ending the current impasse.

Purpose: ---

IN THE SENATE OF THE UNITED STATES— ------- Cong., ------- Sess.

S. 1992

H.R. ---------- (or Treaty ----------)

SHORT TITLE

(title) To amend the Voting Rights Act of 1965 to extend the effect of certain provisions, and for other purposes.

( ) Referred to the Committee on ----------
and ordered to be printed

( ) Ordered to lie on the table and to be printed

INTENDED to be proposed by Mr. DOLE

Viz: Strike all after the enacting clause and insert in lieu thereof the following:

SEC. 1. That this Act may be cited as the "Voting Rights Act Amendments of 1981".

SEC. 2. Section 4(a) of the Voting Rights Act of 1965 is amended by:

(1) striking out "seventeen" each time it appears and inserting in lieu thereof "twenty-seven"; and

(2) striking out "ten" each time it appears and inserting in lieu thereof "seventeen".

SEC. 3. Section 2 of the Voting Rights Act of 1965 is amended by -

(1) inserting "(a)" after "2.", and

(2) by adding at the end thereof a new subsection 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 be established shall include, but not be limited to:

(A) Whether there is a history of official discrimination or political subdivision which touched the right of the membe

democratic process;

(B) Whether there is ~~a lack of~~ responsiveness on the part of elected officials in the state or political subdivision to the particularized ~~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 uses or has used large election districts, majority vote reuqirements, 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."

SEC. 4. Section 203(b) of the Voting Rights Act of 1965 is amended by striking out "August 6, 1985" and inserting in lieu thereof "August 6, 1992".

KANSAS CITIES WITH AT-LARGE ELECTIONS AND LOW MINORITY REPRESENTATION

City	No. On City Council	Population 1970* Non-White	Population 1980 Non-White	Population 1980 Black	No. Minorities Elected 1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	% Minority Elected: 1970-198
Garden City	5	2%	28%	1%	0	0	0	0	0	0	0	0	0	0	0	0%
Junction City	5	16%	35%	22%	0	0	0	0	0	0	0	2	1	1	1	10%
Kansas City, Ks.	3	21%	33%	25%	0	0	0	0	0	0	0	0	0	0	0	0%
Liberal	5	5%	25%	5%	1	0	0	0	0	0	0	0	0	0	0	2%
Wichita	5	3%	19%	11%	1	1	0	0	0	0	0	0	0	0	0	4%

* 1970 Census did not include Hispanics as nonwhite. 1980 Census did. Thus, cities with large Hispanic population show large increase in nonwhite population between 1970 and 1980.

SUMMARY ON COMPROMISE AMENDMENT

Background

As you are aware, the most controversial provision of the House-passed Voting Rights Act bill concerns a proposed change in Section 2. Section 2 contains a general prohibition against discriminatory voting practices. It is permanent legislation and applies nationwide. In the 1980 case of Mobile v Bolden, the Supreme Court held that Section 2 prohibits only intentional discrimination. The House bill would amend Section 2 to prohibit any voting practice having a discriminatory "result".

Much of the intent/results controversy has evolved around whether the Mobile case changed the law. Prior to Mobile, the courts used an "aggregate of factors" or "totality of circumstances" test in voting rights cases. The leading cases articulating this standard are the Supreme Court case of White v Regester, and the Fifth Circuit opinion of Zimmer v McKeithen. According to Zimmer and White, the standard to be applied was whether, based on an "aggregate of factors" the "political processes ... were not equally open to the members of the minority group in question". And the "factors" looked at by the courts in this line of cases included indicia of intentional discrimination, as well as the "result" of the challenged voting practice.

Proponents of the "result" standard in Section 2 have argued that the White/Zimmer "aggregate of factors" test was a "results" test, which the subsequent Mobile case drastically changed. Thus they have argued that by placing a results standard in Section 2, the courts will return to use of the White/Zimmer test. Intent advocates, on the other hand, have pointed to language in the Mobile decision indicating that White was essentially an "intent" case. Thus they have argued that the White/Zimmer approach was simply an articulation of various objective "factors" which could be relied upon to circumstantially proye discriminatory intent.

Key Provisions of the Compromise Amendment

Because neither side of the intent/results controversy has expressed disagreement with the pre-Mobile case law, we have simply codified that case law in our compromise amendment. Specifically, the compromise would add a new subsection to Section 2 explicitly stating that a violation of that section is established when, based on an "aggregate of factors", it is shown that the "political processes leading to nomination and election are not equally open to participation by a minority group". The subsection then provides a nonexclusive list of factors to be considered by the courts, the same factors articulated in White and Zimmer. These factors are:

1. Whether there is a history of official voting discrimination in the jurisdiction;

2. Whether elected officials are unresponsive to the needs of the minority group;

3. Whether there is a tenuous policy underlying the jurisdictions' use of the challenged voting practice;

4. The extent to which the jurisdiction uses large election districts, majority vote requirements, anti-single shot provisions, or other practices which enhance the opportunity for discrimination;

5. Whether members of the minority group have been denied access to the process of slating candidates;

6. Whether voting in the jurisdiction is racially polarized;

7. Whether the minority group suffers from the effects of invidious discrimination in such areas as education, economics, employments, health, and politics; and

8. The extent to which members of minority groups have been elected to office, but with the caveat that the subsection does not require proportional representation.

The Compromise Amendment is Neither an Intent Test nor a Results Test

In our opinion, the pre-Mobile case law, and thus our compromise amendment codifying this case law, represents neither an "intent" standard nor a "results" approach. Nowhere in the pre-Mobile case law did the courts state that a plaintiff must prove that the challenged voting practice was motivated by an intent to discriminate. But similarly, nowhere did the courts state that they were applying a "results" test.[1] Rather, the touchstone of these cases, and of our compromise amendment, is whether certain key factors have coalesced to deny members of a particular minority group access to the political process. Neither election results, nor proof of discriminatory purpose is determinative. Access is the key.

Politically, we think the compromise will be attractive. The civil rights groups have repeatedly stated that a return to the pre-Mobile case law is all they want, and in drafting the amendment, we have made every effort not to deviate from the case law. Further, the amendment carefully

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1 Under the traditional "effects" or "results" test applied, for instance, under Title VII of the Civil Rights Act of 1964, the focus of inquiry is whether statistically, the challenged practice has had a disparate impact on a particular minority group. The pre-Mobile courts consistently emphasized that such statistical disparities, i.e., in the voting context, the lack of proporational representation, was not determinative, but rather only one factor, among meny, to be considered.

avoids any possible interpretation that it could require proportional representation, or that it would impose an "effects" test similar to that employed under Title VII. The first sentence makes clear, as did the White and Zimmer opinions, that the issue to be decided is equal access to the political process, and that this determination is to be based on an aggregate of factors, not simply election results. Similarly, the extent to which minorities have been elected to office is listed as only one factor to be considered, and it is accompanied by an express disclaimer that the subsection does not mandate proporational representation.

SB:pab

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February 23, 1982

THE VOTING RIGHTS ACT

File

INTRODUCTION

The Voting Rights Act of 1965 is the most successful civil rights measure ever enacted by Congress. The Fifteenth Amendment declares that the right to vote shall not be denied or abridged by the United States or any state on account of "race, color, or previous condition of servitude," and it gives Congress the power to enforce this right "by appropriate legislation." The Voting Rights Act, without question, was appropriate legislation. Prior to its adoption, only 6.8 percent of voting-age blacks were registered to vote in one southern state; thanks to the Act, that proportion is now almost 70 percent, and in 1980 almost 60 percent of them actually voted.

The denial of the right to vote is a fact of profound significance. According to the Declaration of Independence, government derives its just powers from the consent of the governed, and the governed give their consent in order to secure the natural rights with which all men are equally endowed. In other words, just or legitimate government arises out of, or depends upon, the consent of those who subject themselves to its laws. "We, the people of the United States" gave our consent when, in 1787-88, we ratified the Constitution; except in a few isolated cases, however, black Americans were not given the opportunity to vote for or against the Constitution. In flat violation of "the laws of nature, and of Nature's God," they were governed without their consent. Consequently, they had no opportunity to exercise their political right to be part of the constitutional majorities that wrote the laws of the United States. And from the denial of that right came the denial of the various civil rights that other Americans enjoyed. The point to be stressed is that voting is the principal security for civil rights, because voting ensures that one's interests must be weighed by those who make the laws.

In order to rectify the wrongs done in the beginning, the Fourteenth Amendment bestowed citizenship on black Americans, making them part of "the people of the United States," and the Fifteenth Amendment sought to guarantee their right to act as citizens; and the Voting Rights Act succeeded in making the exercise of that right a reality for most, but, unfortunately, not yet all of our fellow citizens. There continue to be jurisdictions where the right to vote is being denied, which is why Congress should extend the Voting Rights Act. But the bill that passed the House by the overwhelming margin of 365 votes, and is now before the Senate, is much more than an extension of the 1965 Act. It would authorize a further expansion of the already extravagant powers of the federal judiciary (whose members, we need sometimes to remind ourselves, are dependent on nobody's suffrage); it would be unconstitutional insofar as the powers it bestows on the courts are not among those given to the federal government; and, enforced as we have every reason to believe it will be enforced, it would be destructive of the principle of representative government embodied in the constitutional structure.

The objectionable part of this bill is the amended section 2. In its original form, this section was a mere declaration or statutory restatement of the Fifteenth Amendment. In its amended form, the words to deny or abridge the right to vote have been deleted; in their place have been put the words in a manner which results in a denial or abridgement of the right to vote. This new language will authorize suits against states, counties, and municipalities alleging not that they deny the right to vote but, rather, that the way they apportion seats in a legislature, the way they organize their governing units, the way they count votes, and even the way they define themselves, has the effect of abridging the voting power of groups of voters. Moreover, since, as a restatement of the Fifteenth Amendment, section 2 applies nationally, this new language will affect not merely those jurisdictions with a history of denying minorities their right to vote; it will affect the electoral laws, practices, and arrangements of every political subdivision in the country. If this bill is enacted, all fifty states will be deprived of the authority to decide, for themselves, how to organize themselves.

When, in 1965, this authority was taken from the southern states -- mostly southern states -- and handed over to the Department of Justice and the federal courts, it was understood to be a "Draconian" measure, necessitated only by the discriminatory behavior of those states; and the law enacted to remedy this was understood to be a temporary measure. The offending states and local jurisdictions could "bail out" by demonstrating that they had ceased their discriminatory practices. But there can be no "bail out" from the coverage of section 2. So long as section 2 is in force, the federal judiciary will be authorized to rewrite every state law and every local ordinance affecting the results of every election. And in every state. It will be authorized to do in Boston, Baltimore, and Butte, what the Federal District Court for the Southern District of Alabama did in City of Mobile v. Bolden (100 S.Ct. 1490 [1980]).

The issue in this case was not whether Mobile or Alabama deprived black citizens of their right to vote; it was whether the practice of electing City Commissioners in at-large elections "diluted" the voting strength of black voters. The District Court found "dilution" in the fact that, although Negroes comprised approximately one-third of the city's population, "no Negro had [ever] been elected to the Mobile City Commission." Then, in an exercise of the kind of power we have come to expect from our federal courts, it issued an order disestablishing the commission form of government and the electoral system and decreeing that they be replaced by a mayor-council system with council members to be elected from single-member districts. On appeal, the Court of Appeals affirmed, but a sharply divided Supreme Court reversed. The amended section 2 is intended to reverse the Supreme Court, a fact that the House Report on the bill makes no attempt to conceal.

City of Mobile was not a Voting Rights Act case; since its governing and electoral laws had been in effect since 1911, the city was not required to pre-clear them with the Justice Department. The case was decided under the Fourteenth and Fifteenth Amendments, and, as the Supreme Court read these Amendments, the plaintiffs had to show discriminatory intent. In a Voting Rights Act case, the state, county, or city bears the burden of showing that its electoral laws, practices, and arrangements do not have a discriminatory effect. According to Voting Rights law, a discriminatory effect is one where the minority group's vote is "diluted," and a vote is "diluted" when the group is deprived of the opportunity to elect one of its own. For example, a vote is "diluted" when the number of blacks in an electoral district is not sufficient "to ensure the opportunity for the election of a black representative." (United Jewish Organizations v. Carey, 97 S.Ct. 996, 1008 [1977].) In this case, New York was required to create districts 65 percent nonwhite (and, in the process, had to distribute the members of what had been a consolidated Hasidic Jewish community among other districts).

To reach the required 65 percent goal, New York had to engage in blatant racial gerrymandering. In fact, in redrawing its district lines, race was the only criterion employed, just as it was some 25 years ago when Alabama redrew the boundaries of the city of Tuskegee and, without removing a single white voter, managed to exclude all but a tiny fraction of Tuskegee's black voters from the city (all but four of a total of 400). The Supreme Court had no difficulty in finding discriminatory intent in this action and struck it down as a blatant violation of the Fifteenth Amendment. (Gomillion v. Lightfoot, 364 U.S. 339 [1960].) What Alabama was forbidden to do, New York was required to do; and if the amended section 2 is adopted, every state will be required to do.

One of Chief Justice Warren's legacies to American politics is the aphorism, "Legislators represent people, not trees or acres," and, that being so, the states were forbidden to apportion seats in either house of their legislatures on any basis other

than population. Now, according to these Voting Rights cases, legislators must represent not undifferentiated people -- people defined only as individuals living in districts of approximately equal size -- but groups of people defined by their race or language preference, and they can be said to represent them only if they are of that race or prefer that language.

What sort of electoral system can, in practice, "ensure the opportunity for the election of a black representative?" There can be no doubt but that an at-large system has the effect of "diluting" the black vote -- wherever there is racial bloc voting and wherever blacks constitute a minority. (Look at the U.S. Senate.) There is also no doubt but that, without blatant gerrymandering, a single-member district system is not likely to overcome vote dilution. (Look at the U.S. House of Representatives.) (The various states are now trying to reapportion their election districts -- state and federal -- in the light of the 1980 census; and one shudders to think of how much more difficult that task will be when, in addition to meeting the equal population requirement, they are required to reapportion with a view to ensuring "the election of a black [American Indian, Asian American, Alaskan Native, or Spanish Origin] representative.") The only system that can meet the new section 2 requirement is proportional representation.

I am not unmindful of the disclaimer in the amended section 2 -- that disproportionality of result "shall not, in and of itself, constitute a violation of this section." All that means is that some factor in addition to disproportionality will have to be present before it can be said that a group's vote has been abridged by being "diluted." What factors? They can be found in the cases already litigated. Despite the disclaimer, the amended section 2 will require proportional representation of blacks and the language minority groups -- in all 50 states.

This will almost surely promote racial bloc voting, on the part of whites as well as nonwhites, and that is not something we should be trying to do in this country. The principle of such voting is that a person's interests are defined by his race, that, for example, a black can be fairly represented only by a black and not, for example, by Peter Rodino; that white can be fairly represented only by a white and not, for example, Edward Brooke or Tom Bradley. If that were true, why bother to hold elections? Why gerrymander districts, why replace at-large systems with single-member districts, or plurality voting with majority, and so on, in order to ensure the proportional representation of nonwhites? Why does the Constitution require elections? The answer to this question turns on the Constitution's understanding of representation and representative government.

Representative government does not imply proportional representation, or any version of it that is likely to enhance bloc voting by discrete groups. The Framers of the Constitution referred to such groups as "factions," and they did their best to

minimize their influence. The idea that a legislative assembly should be a "mirror" or a "reflection" of the people was advanced assiduously by the opponents of the Constitution, the so-called Anti-federalists. As one of them said in the New York ratifying convention, "the idea that naturally suggests itself to our minds, when we speak of representatives, is, that they should resemble those they represent." Such an idea may naturally have suggested itself in 1787-88, as it did earlier, but the Framers emphatically rejected it. Representation, as they understood it, was one of the discoveries made by the new and improved "science of politics," discoveries that would, for the first time in history, make free government possible. To them, representation was a means of refining and enlarging the public views "by passing them through the medium of a chosen body of citizens." Under a proper system of representation, "the public voice, pronounced by representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose."

Whereas the Anti-federalists called for small districts and, therefore, many representatives, the Framers called for (and got) larger districts and fewer representatives. They did so as a means of encompassing within each district "a greater variety of parties and interests," thus freeing the elected representatives from an excessive dependence on the unrefined and narrow views that are likely to be expressed by particular groups of their constituents.

Prepared at the request of
The Heritage Foundation by
Walter Berns

Walter Berns is a Resident Scholar at the American Enterprise Institute. The above is drawn from his testimony before the Senate Judiciary Committee, Subcommittee on the Constitution (January 27, 1982), and from a forthcoming article, "Voting Rights and Wrongs" in Commentary, March 1982.

THE WHITE HOUSE

WASHINGTON

January 25, 1982

MEMORANDUM FOR ELIZABETH H. DOLE

THRU: DIANA LOZANO

FROM: MORTON BLACKWELL

SUBJECT: PROPOSED Q & A ON THE VOTING RIGHTS ACT

The proposed questions and answers for the Attorney General on the Voting Rights Act which were just received do not alter my criticism of the proposed testimony.

The proposed answers relating to the "effects" test were implicit in the testimony.

The discussion of bail-out makes explicit the Administrations's weakness on this issue.

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Document No. _____

WHITE HOUSE STAFFING MEMORANDUM

DATE: 1/25/82 ACTION/CONCURRENCE/COMMENT DUE BY: _____

SUBJECT: Q.&A. RE VOTING RIGHTS

	ACTION	FYI		ACTION	FYI
VICE PRESIDENT	☐	☑	GERGEN	☐	☑
MEESE	☐	☑	HARPER	☐	☑
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FIELDING	☐	☑	_____	☐	☐
FULLER	☐	☐	_____	☐	☐

Remarks:

Attached are the Q. & A. we just received from Justice.

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

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 25, 1982

PERSONAL & ~~CONFIDENTIAL~~

MEMORANDUM

TO: Craig L. Fuller
Director of Cabinet Administration

FROM: Robert A. McConnell
Assistant Attorney General

Enclosed are the Q's and A's that relate to the Attorney General's Voting Rights Testimony.

Enclosure
cc: Ken Duberstein
Assistant to the President
for Legislative Affairs

Pam Turner
Special Assistant
Office of Legislative Affairs

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Q. What are the major differences between the Administration position on extension and the bill to extend the Voting Rights Act which has passed the House?

A. The major difference is that we actually support extension of the existing Voting Rights Act. The House bill in fact makes major changes in the Act. Our experience has not indicated the need for these changes.

The most significant change is in §2. The House bill would substitute an effects test for the intent test which has been in §2 since the beginning. We support retaining the intent test for §2. It is critical to an understanding of the Act to distinguish between §2 and §5 in talking about the intent/effects issue. Section 2 is a permanent provision, and no action is necessary to retain its protections. Section 5 applies only to selected jurisdictions and only to election law changes, while §2 applies nationwide and to existing systems and practices regardless of when they were established. Section 5 already contains an effects test, and we support its retention.

Q. Why should the law have a different test for §2 than for §5? Why not have some consistency in the law?

A. There is no inconsistency whatever in having an intent test for §2 and an effects test for §5, as is the case with the exisiting Voting Rights Act. The different sections are addressed to different problems. It makes sense to have an effects test for election law changes in certain areas which suffer from a history of election law discrimination. Section 2 is not so limited. It applies not only to changes but to existing systems, and not only to certain areas but nationwide. The law has worked smoothly with an intent test for §2 and an effects test for §5. The Supreme Court in the Mobile v. Bolden decision saw no inconsistency in this, and our experience has revealed none.

Q. The effects test in the South, where you have admitted there is a need for special protections, only covers election law changes, not practices or systems in existence in 1965. Shouldn't a results test be put into §2 to reach discriminatory practices in the South which were already in place when the Voting Rights Act was enacted?

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A. Congress, when it enacted the Voting Rights Act in 1965, did in fact attack directly the existing practices in the South which Congress thought operated to deny blacks the right to vote. Literacy, educational, morality, and other qualification tests used to prevent blacks from voting were declared to be illegal. Congress thus carefully considered existing practices in the South, and directly cured those which were discriminatory. Congress then enacted an effects test for election law changes in selected jurisdictions in the South, and an intent test for election practices nationwide. We continue to believe that this is the proper approach. It has been tried and found effective. It would seem odd to legislate against existing practices more stringently now, after there has been so much progress, than Congress did in 1965.

Q. The House Report, however, states that the Mobile v. Bolden decision was erroneous and that an effects test for §2 will restore the original understanding disturbed by the Court ruling. Do you agree?

A. Not at all. We fully agree with Justice Stewart's opinion in Mobile v. Bolden. Justice Stewart, carefully examining the legislative history, correctly concluded that Congress enacted §2 in order to enforce the guarantee of the Fifteenth Amendment that the right to vote shall not be denied or abridged on account of race or color. Indeed, the prohibition in §2 is a paraphrase of the constitutional prohibition. As Justice Stewart's scholarly opinion demonstrates, the Supreme Court's decisions have always made clear that proof of discriminatory purpose was necessary to establish a violation of the Fifteenth Amendment. Congress therefore intended when it enacted §2 to include an intent test.

Q. Why does the Fifteenth Amendment, and, by your reasoning and the reasoning of Justice Stewart's opinion in Mobile v. Bolden, §2, have this unusual intent test?

A. The intent test is not an unusual exception; it is the general rule in the civil rights area. For example, the equal protection clause of the Fourteenth Amendment, the basis for many of the historic civil rights advances, contains the same intent requirement contained in the Fifteenth Amendment and §2 of the Voting Rights Act.

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Q. Why is it necessary that §2, a statutory provision, track the requirements of the Fifteenth Amendment, a constitutional provision?

A. As Justice Stewart demonstrated in Mobile v. Bolden, that was in fact the desire of Congress when it enacted §2. The goal of §2 is to enforce the Fifteenth Amendment guarantee, so it makes eminent sense to follow the legal grounds for a violation of the Amendment in the statute. A departure may be called for in special circumstances where special enforcement problems exist, as Congress recognized when it legislated an effects test for a temporary period for selected jurisdictions in §5. A similar departure of general applicability in §2 would represent a radical change in the law, severing the statute from its constitutional moorings, and creating grave uncertainty in its application.

Q. What is so bad about such uncertainty?

A. There is the very real danger that elections across the nation, at every level of government, would be disrupted by litigation and thrown into court. Results and district boundaries would be in suspense while courts struggled with the new law. It would be years before the vital electoral process regained stability. The existing law has been tested in court and has proved to be successful. There is no need for unsettling change.

Q. Why do you object to the effects test for §2 in the House bill?

A. Primarily because our experience in securing the right to vote through §2 as it exists in the Voting Rights Act has been very successful, and no basis has been established for any change. In reviewing the Voting Rights Act last summer in the course of preparing recommendations to the President, I met personally with scores of civil rights leaders as well as state officials in order to obtain their views. The one theme that emerged from these discussions was clear: the Act has been the most successful civil rights legislation ever enacted, and it should be extended unchanged. As the old saying goes, if it isn't broken, don't fix it.

Q. Is there anything substantively wrong with an effects test for §2?

A. Legal "tests" are not plucked out of thin air but should follow logically from the goal of the legislation. I believe

the goal of the Voting Rights Act to be that no one be denied the right to vote on account of race. If this is in fact the goal, an intent test, such as in the current Voting Rights Act, logically follows: a court should look to see if official action was taken with the purpose of denying voting rights on account of race. If, on the other hand, the goal of the Voting Rights Act is that election results somehow mirror the racial balance in any given jurisdiction, an effects test should be used. Since we do not believe that it was the goal of the Voting Rights Act to mandate any type of election results, certainly not results based on race, we do not think an effects test makes any sense.

Q. How would an effects test mandate certain election results?

A. Based on court decisions under §5 of the Act, which contains an effects test, any election law or practice which produced results which did not mirror the population make-up of a community could be struck down.

Q. What does that mean in practical terms?

A. In essence it would establish a quota system for electoral politics, a notion we believe is fundamentally inconsistent with democratic principles. At-large systems of election and multi-member districts would be particularly vulnerable to attack, no matter how long such systems have been in effect to the perfectly legitimate reasons for retaining them. Any re-districting plans would also be vulnerable unless they produced electoral results mirroring the population make-up. And I should emphasize that §2 applies not only to statewide elections but elections to local boards as well, such as school boards. All elected bodies, no matter at what level, would be vulnerable if election results did not mirror the racial or language composition of the relevant population.

Q. How can your fears about the effects test in §2 of the House bill be correct, when the bill specifically provides that "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"?

A. We have studied that clause and do not think it is sufficient to prevent the problems I have identified. As I read the clause, it would uphold only those election plans which have been carefully tailored to achieve election results which mirror the population make-up of the community in question. In such circumstances, if a particular group in the community fails to take full advantage of the election opportunity under the system

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that is in place -- such as where no members of the group elect to run for office -- the savings clause of the Act makes it clear that there is no violation, since the failure to achieve proportional representation does not "in and of itself" offend the statute. If, on the other hand, there are any features in the election system that a court can point to as contributing in any way to a disproportioned election result -- as would almost invariably be the case -- then the savings clause is to no avail.

Q. It is argued, however, that "intent" is impossible to prove. This seems to make some sense. Decisionmakers usually don't state, in front of witnesses, that "I'm doing this to discriminate against blacks".

A. If the "intent test" required such direct proof, you might have a point. But the Supreme Court has made clear that it does not. Intent in the civil rights area may be proved by circumstantial and indirect evidence as well as by any available direct evidence. A "smoking gun" of the sort referred to in your question has never been required. For example, in the case of Arlington Heights v. Metro Housing Corporation, 429 U.S. 252 (1977), Justice Powell, writing for the Court, stated that "determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." He went on to point out that evidence of impact or effect was "an important starting point" in the inquiry. Other relevant factors included the historical background to a decision, the sequence of events leading up to it, and any departures from normal practice or procedures. An inquiry into such factors is hardly "impossible."

Q. Are there any other differences besides the intent/effects issue between the House bill and the Administration position?

A. Yes. The House bill extends the special preclearance provisions in §5 indefinitely, while the bill we support provides for a 10 year extension. Congress' practice has been to provide for periodic extensions, which permits review to determine if the extraordinary preclearance requirements -- including submission of proposed changes to the Attorney General -- continue to be necessary. We see no reasons to depart from this historic practice which has worked so well. The extension we support -- 10 years -- is longer than any previously adopted by Congress.

Q. Doesn't the Administration support a bailout?

A. We do think Congress should consider a reasonable bailout that would permit jurisdictions with good records of compliance to be relieved of the preclearance requirements so long as voting rights were not endangered in any way. We do not have a specific formula in mind, but think that the question should be considered by Congress. We will be happy to work with the committee in the weeks ahead on this question.

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Q. What's wrong with the bailout in the House bill?

A. As I have noted, I do not want to get into the details of the various bailout proposals beyond stating that the question should be addressed. There may be some difficulties with the House bill bailout, since it uses imprecise terms, such as "constructive efforts," which may result in the question being tied up in the courts for years. That would not be good for any election system.