Voting Rights

OA 11841

Meese, Edwin, III: Files

VOTING RIGHTS

RECOMMENDATIONS (9:00)

1. MEESE LAU DOLE

A. - IMPRESS UPON HIM that holding up endorsement ~~acceptance~~ of a compromise to the litmus test of acceptability w Leadership Cnf. Civil Rights will not work —

- He should be working w/ fellow Republs Heflin Hatfield Deconcini, not seeking endorsement of Kennedy + Metzenbaums
B. Ask him to reconsider on Republican + suggest he could be subject to attack from right
C. Suggest that he request, on his own, NO votes today in mark up on the rationale that he is still attempting to formulate a compromise that will address his concerns of proportional representation + proponents of House bill concerns on ~~voter~~ proving intent.

2. INFORM THURMOND + LAXALT it would be helpful if no votes MSZ today as we continue to formulate compromise.

3. He should get hints that his lack of support for us on this could cause him problems w/ the Right.
- he's been pushing us to compromise; we indicate we will, but instead of working w/ us & the Republicans, he's working w/ civil rights groups who have already said they will not compromise.

SECTION-BY-SECTION SUMMARY OF COMPROMISE AMENDMENT

The compromise amendment would amend Section 2 of the Voting Rights Act by dividing it into three new subsections, as follows:

Subsection (a)(1) would retain the existing language of Section 2 which prohibits a state or political subdivision from imposing or applying any voting practice or procedure "to deny or abridge the right of any citizne to vote on account of race, color, etc. As interpreted by the Supreme Court in Mobile, this language prohibits only intentional discrimination.

Subsection (a)(2) would retain the language of the House amendment to Section 2 which prohibits a state or political subdivision from imposing or applying any voting practice or procedure "in a manner which results in a denial or abridgement of the right to vote on account of race, color," etc.

Subsection (b) would define how a violation of the "results" standard in subsection (a)(2) is proved. The language is taken directly out of the White v Regester decision and it makes clear that the issue to be decided is access to the political process, not election results. It also includes a strengthend disclaimer conerning the proportional representation issue. Specifically, it provides that the extent to which members of a protected class have been elected to office is one circumstance to be considered under the results test, but that nothing in the section should be construed to require proportional representation.

The compromise amendment is consistent with the Administration's compromise in the sense that it focuses on the case of White v Regester as articulating an appropriate standard to be used in Section 2 cases. It differs from the Adminstration's proposal in that it makes clear that the White standard is a "results" standard, in the sense that proof of discriminatory purpose is not required.

TEXT OF COMPROMISE

Section 2 is amended to read as follows:

Section 2

(a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision (1) to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2); or (2) in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a)(2) is established if, based on the totality of circumstances, 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 or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a): that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one "circumstance" which may be considered, provided that nothing in this section shall be construed to require that

members of a protected class must be elected in numbers equal to their proportion in the population.

Leadership Conference on Civil Rights

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

April 23, 1982

Analysis of Proposed Language for Section 2 of the Voting Rights Act

The proposed bill would retain the current language of Section 2 of the Voting Rights Act as Section 2(a), and add an "explanatory" section 2(b). This clever piece of drafting would probably nullify all the efforts of those who have struggled for a strong Voting Rights bill, because the Supreme Court would likely construe it not as a return to a pre-Mobile non-intent test, but as a confirmation and clarification of the intent test, i.e., a codification of Justice Stewart's plurality opinion in Mobile.

This paradox comes about because of the peculiar use of White v. Regester. Whereas proponents of the "results" test in the House-passed bill have made it crystal clear that test means the test of White v. Regester and Zimmer v. McKeithen as those cases were universally understood for years -- no requirement of intent -- the new proposal co-opts particular language of White v. Regester for the erroneous claim of Brad Reynolds and Senator Hatch that White (and all the other pre-Mobile cases) required purpose always.

If this ambiguity is not eliminated, the whole purpose of returning to the White standard is undermined. This is why the "results" language of the House bill must be retained, and why out-of-context language must be avoided -- even if it is from a good case.

The basic problem is that the language of Section 2 that was interpreted by the Supreme Court in Mobile would remain unchanged (i.e., it would not have the "result" phrase inserted). It is a basic principle of statutory construction that where language that has been construed by a court remains unchanged, the court's interpretation is thereby ratified. In simple terms, if the language doesn't change, the meaning stays the same. This principle can be modified if language is added which clearly commands a different meaning of the language that has been construed, but the language in the proposed Section 2(b) does not do that at all. Rather, it simply amplifies the sentence construed in Mobile, thus suggesting the interpretation that Congress was simply clarifying the confusion of the multiple opinions in Mobile by codifying the Stewart plurality opinion.

The fact that the added language is taken from White v. Regester, doesn't help. White vs. Regester, of course did not require proof of discriminatory intent. (There was no proof of discriminatory intent in the case; courts and commentators universally viewed it as not requiring intent; and perhaps most telling, the Supreme Court Reporter did not see any such requirement, for his headnote read "3. The District Court's order requiring disestablishment of the multimember districts in Dallas and Bexar Counties was warranted in the light of the history of political discrimination against Negroes and Mexican-Americans residing, respectively, in those counties and the residual effects of such discrimination upon those groups. Pp. 9-14.").

Nonetheless, Justice Stewart's plurality opinion in Mobile, under judicial compulsion to reconcile new decisions with past cases, described White as "consistent" with an intent analysis (without quite claiming that proof of intent had been required in that case), and selected two specific sentences from White for support for this position. Those are the very same sentences inserted in the new proposal for a Section 2(b). Therefore, by repeating language which the plurality opinion in Mobile cited to support its "intent" holding (even though out of context), the proposed Section 2(b) would be interpreted as supporting, not changing, the "intent" requirement of Mobile. (If this language were included in the report, though, where it would be put in context by a fuller description of White, the danger could be minimized.)

The danger that the proposed language would be used to support a ratification of the Mobile plurality opinion is accentuated by the fact that Brad Reynolds and Senator Hatch have continually characterized White as an "intent" case; (Reynolds has even characterized Zimmer vs. McKeithen as an intent case, which no one else has ever done.) Senate testimony of Brad Reynolds, pp. 52, 73, 93, 113, 125 (March 1, 1982). Their position makes the proposed amendment even more dangerous, because of another settled doctrine of statutory construction: generally, only the explanations of a bill's supporters count, while the views of opponents are discounted for a variety of sound reasons. If the proposed bill were adopted with the support of Brad Reynolds and Senator Hatch, their explanations of it -- which would quite likely characterize it in purpose terms -- could count as much in setting the meaning of Section 2 as the views of the supporters of the House-passed bill, or even more, since with the crucial language in Section 2(a) unchanged from current law, the language would be theirs and and not ours.

In short, this language could well simply codify the "intent" requiremetn of Justice Stewart's opinion in Mobile.

(Significantly, this language does not include the words "designedly or otherwise," which were in Fortson v. Dorsey, Burns v. Richardson, and Whitcomb v. Chavis, all of which were cited approvingly in White v. Regester).

JWC

VOTING RIGHTS ACT MEETING -- April 26, 1982

Attached are the options regarding Section 2 of the Voting Rights Act which have been considered or proposed at some point in the current debate. The original "factors test" compromise proposed by Dole has been excluded from this list because it is unacceptable to both sides and is no longer supported by its author.

The options are:

1. Current Law: This includes an intent test and preserves the Mobile standard. This option will not be supported by Dole or Heflin, could probably garner only 7 votes in committee, and would certainly lose on the Senate floor. We have indicated we will compromise in committee, thus moving away from this option. We could return to it if efforts to work out an acceptable compromise fail, though prospects would be slim.

2. House Bill: This includes an effects test that would overturn the Mobile standard. The House Bill could lead to proportional representation, and we have so testified. This passed the House by an overwhelming margin, and has 65 co-sponsors in the Senate. We have stated that we could only accept it if the effects test is altered.

3. Reynolds I: This would add only one sentence to House Bill that would preclude proportional representation. Use of word "invidiously" implies an intent factor even though "results" language is still present. Conservatives would have problems with the latter and moderates might object to the former. Advantage is simplicity and fact it accomplishes our key objective.

4. Reynolds II: Maintains intent language of current law and adds a subsection that modifies the Mobile standard by using language from White v. Regester. We maintain this places the burden of proof where it was before Mobile, though the civil rights coalition argues that lack of change in the intent language will be viewed by the courts as an endorsement of the Mobile standard. Reynolds II is being represented as our current position in committee. If it is to succeed it must be supported by Heflin and Dole (and, through them, DeConcini) while maintaining conservative support.

5. Dole: This was forwarded to us yesterday by Senator Dole with a request for our views by c.o.b. today. The Dole Compromise uses both results and intent language as a violation standard, then adds a section that attempts to make clear the "results" portion is to be interpreted consistent with White. It also has a prohibition on proportional representation. The Justice Department feels that Dole's compromise is inferior to Reynolds II; there are also indications that it would not be supported by conservatives on the committee.

CURRENT LAW & HOUSE BILL (in brackets and italics)

Section 2 of the Voting Rights Act

(House amendments indicated in italics and brackets)

TITLE I—VOTING RIGHTS

SEC. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision [to deny or abridge] *in a manner which results in a denial or abridgement of* the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). *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.*

* * * * * * *

SEC. 4.[1] (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the [seventeen] *nineteen* years preceding the filing of the action for the purpose or with the

[1] The amendments made by subsection (a) of the first section of this Act shall take effect on the date of enactment of the Act.

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 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.

*/ 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.

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) This section is violated whenever such voting qualification or prerequisite to voting, or standard, practice, or procedure is used invidiously to cancel out or minimize the voting strength of any group protected by subsection (a). Such a violation is established by proof sufficient to support findings that the political processes leading to nomination and election in the State or political subdivision are not equally open to participation by members of the protected group. The fact that candidates supported by any such 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."

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".

SECTION-BY-SECTION SUMMARY OF COMPROMISE AMENDMENT DOLE

The compromise amendment would amend Section 2 of the Voting Rights Act by dividing it into three new subsections, as follows:

Subsection (a)(1) would retain the existing language of Section 2 which prohibits a state or political subdivision from imposing or applying any voting practice or procedure "to deny or abridge the right of any citizne to vote on account of race, color, etc. As interpreted by the Supreme Court in Mobile, this language prohibits only intentional discrimination.

Subsection (a)(2) would retain the language of the House amendment to Section 2 which prohibits a state or political subdivision from imposing or applying any voting practice or procedure "in a manner which results in a denial or abridgement of the right to vote on account of race, color," etc.

Subsection (b) would define how a violation of the "results" standard in subsection (a)(2) is proved. The language is taken directly out of the White v Regester decision and it makes clear that the issue to be decided is access to the political process, not election results. It also includes a strengthend disclaimer conerning the proportional representation issue. Specifically, it provides that the extent to which members of a protected class have been elected to office is one circumstance to be considered under the results test, but that nothing in the section should be construed to require proportional representation.

The compromise amendment is consistent with the Administration's compromise in the sense that it focuses on the case of White v Regester as articulating an appropriate standard to be used in Section 2 cases. It differs from the Adminstration's proposal in that it makes clear that the White standard is a "results" standard, in the sense that proof of discriminatory purpose is not required.

Section 2 is amended to read as follows:

Section 2

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(b) A violation of subsection (a)(2) is established if, based on the totality of circumstances, 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 or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a): that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one "circumstance" which may be considered, provided that nothing in this section shall be construed to require that

members of a protected class must be elected in numbers equal to their proportion in the population.

F- Voting Rights Act

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) This section is violated whenever such voting qualification or prerequisite to voting, or standard, practice, or procedure is used invidiously to cancel out or minimize the voting strength of any group protected by subsection (a). Such a violation is established by proof sufficient to support findings that the political processes leading to nomination and election in the State or political subdivision are not equally open to participation by members of the protected group. The fact that candidates supported by any such 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."

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".

- before relief: 1st consider alternatives before ordering proportional representation

- State allowed to come up w/ remedies

Explanation of Proposed Amendment

Testimony has been presented to both Houses of Congress to the effect that dilution of the voting strength of racial and language minority citizens resulting from the long-standing utilization of certain voting procedures (such as at-large or multi-member district election systems) continues to be a serious problem. The testimony has also suggested that, in light of the decision of the Supreme Court in City of Mobile v. Bolden, 446 U.S. 55 (1980), it is virtually impossible to challenge such voting procedures successfully under the existing "intent" standard in Section 2 of the Voting Rights Act. Notwithstanding recent court decisions finding discriminatory "intent" on the basis of circumstantial evidence -- most notably in the Mobile case itself on remand from the Supreme Court -- there appears to be continuing support for Congress to amend the language in Section 2.

The amendment to Section 2 proposed in the bill passed by the House of Representatives, and incorporated verbatim in S.1992, sets forth a "results" test in terms sufficiently ambiguous to have raised serious and legitimate concerns over its possible interpretation by the courts. In this regard, the Administration has argued that the Section 2 "results test," as worded in the House bill and S.1992, could well lead to a requirement of proportional representation. Although the proposed amendment contains a provision that "[t]he 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," that proviso is not an adequate protection against proportional representation since it is framed in such narrow terms (i.e., "in and of itself") that any other evidence, no matter how insignificant, would justify overturning an existing electoral system.

In light of the ambiguity in the Section 2 language that has been proposed as an amendment, and the growing sentiment in Congress to find an acceptable modification of the existing Section 2 language, the attached compromise, taken verbatim from the Supreme Court decision in White v. Regester, 412 U.S. 755, (1973), is recommended.

The legal standard announced by the Supreme Court in White v. Regester, 412 U.S. 755 (1973), has drawn considerable support from all sides as an appropriate standard for resolving judicial challenges to election standards, practices, or procedures which are brought pursuant to Section 2. In White, the Court held that election systems which "are being used invidiously to cancel out or minimize the voting strength of racial groups" violate the Fourteenth Amendment. 412 U.S. at 765. The Court 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.

While the language of the House-passed Section 2 is totally new and therefore has not yet been addressed by any court, much of the testimony presented to Congress by the proponents of the House-passed bill indicates an intent to adopt legislatively White-Zimmer as the standard to govern the resolution of claims under Section 2. For example, on February 11, 1982, Frank Parker, Director, Voting Rights Project, Lawyer' Committee for Civil Rights Under Law, testifying before the Senate Subcommittee on the Constitution, stated that the amended Section 2

> is designed to restore the pre-Mobile understanding of the proper legal standard . . . The application of this standard is illustrated in Whitcomb v. Chavis, White v. Regester, and Zimmer v. McKeithen. Merely a discriminatory effect measured by the absence of minority office holders would not be sufficient. Minority voters would have to prove that the challenged electoral law or practice denied minority voters equal access to the political process.

Archibald Cox, president of Common Cause and Professor of Law at Harvard University, testifying before the subcommittee on February 25, asserted that under the proposed Section 2 lack of proportionality of minority officeholders would not be enough to show a violation. The court, he contended, would have to look at the entire situation, the total context, to determine whether minorities were deliberately shut out of the system. A violation would exist where minority voters were substantially and systematically excluded from an equal opportunity for meaningful participation in the political process. Also, Armand Derfner, Director of the Voting Law Policy Project of the Joint Center for Political Studies testified on February 2, 1982, that

> the amended Section 2 adopts a clear test which cannot give rise to the fears expressed by some witnesses and Members of the Sub-committee. It restores the test (commonly known as the test of White v. Regester) that was in use for a decade before Mobile v. Bolden dramatically changed the law.

The principle concern is that the new language in amended Section 2 of the House bill and S.1992 is susceptible to a broader reading than suggested by the foregoing testimony -- a reading that could well lead to a "proportional representation" standard. In order to remedy such concerns so as to ensure that

Section 2 will not be misread, but rather will be understood to reach discriminatory conduct as contemplated under the White-Zimmer standard, the provision should be clarified to make the intent of Congress unmistakable in this regard.

The proposed clarification would add to Section 2 the language used by the Supreme Court in White v. Regester, so as to remove all controversy as to the governing test for the resolution of dilution lawsuits brought pursuant to Section 2. Consistent with legal precedents, the House passed proviso has also been modified to focus on the electoral success of candidates supported by a minority group rather than members of the group itself. This proposal is set forth in the attachment.

To EM:

In my opinion, we could politically stand the worst bailout the liberals could pass provided there was a limit (like 10 yrs).

Tactically, our major battle must be fought on the §2 effects test, I feel. We can't dilute that fight.

As you already know, an "effects test" applies nationwide and could potentially kill the GOP in the South.

Jim Cicconi

Mr. Meese

House Bill - Defects

1. Perpetual Extension
2. Bail Out
3. § 2 - effects test

Grassley Bill

1. 5 yr Extension
2. Different Bail-out Formula

THE WHITE HOUSE
WASHINGTON

CABINET AFFAIRS STAFFING MEMORANDUM

DATE: January 25, 1982 NUMBER: 044235CA DUE BY: n/a

SUBJECT: Voting Rights -- Q's and A's

	ACTION	FYI
ALL CABINET MEMBERS	☐	☐
Vice President	☐	☐
State	☐	☐
Treasury	☐	☐
Defense	☐	☐
Attorney General	☐	☐
Interior	☐	☐
Agriculture	☐	☐
Commerce	☐	☐
Labor	☐	☐
HHS	☐	☐
HUD	☐	☐
Transportation	☐	☐
Energy	☐	☐
Education	☐	☐
Counsellor	☑	☐
OMB	☑	☐
CIA	☐	☐
UN	☐	☐
USTR	☐	☐
CEA	☐	☐
CEQ	☐	☐
OSTP	☐	☐
_____	☐	☐
_____	☐	☐

	ACTION	FYI
Baker	☐	☐
Deaver	☐	☐
Anderson	☐	☐
Clark	☐	☐
Darman *(For WH Staffing)*	☑	☐
Jenkins	☐	☐
Gray	☐	☐
Beal	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
_____	☐	☐
CCNRE/Boggs	☐	☐
CCHR/Carleson	☐	☐
CCCT/Kass	☐	☐
CCFA/McClaughry	☐	☐
CCEA/Porter	☐	☐

REMARKS: Attached are Q's and A's relating to the Attorney General's Voting Rights Testimony.

RETURN TO: Craig L. Fuller
Assistant to the President
for Cabinet Affairs
456-2823

DRAFT

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?

DRAFT

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.

DRAFT

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

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.

DRAFT

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.

25 JAN 1982

THE WHITE HOUSE
WASHINGTON

Q & A attached

Q & A were delivered to the attorney for hand delivery to EOP 1/25

CABINET AFFAIRS STAFFING MEMORANDUM

DATE: 1/22/82 NUMBER: 044235 DUE BY: n/a

SUBJECT: Voting Rights

	ACTION	FYI
ALL CABINET MEMBERS	☐	☐
Vice President	☐	☐
State	☐	☐
Treasury	☐	☐
Defense	☐	☐
Attorney General	☐	☐
Interior	☐	☐
Agriculture	☐	☐
Commerce	☐	☐
Labor	☐	☐
HHS	☐	☐
HUD	☐	☐
Transportation	☐	☐
Energy	☐	☐
Education	☐	☐
Counsellor →	☑	☐
OMB	☑	☐
CIA	☐	☐
UN	☐	☐
USTR	☐	☐
CEA	☐	☐
CEQ	☐	☐
OSTP	☐	☐
_____	☐	☐
_____	☐	☐

	ACTION	FYI
Baker	☐	☐
Deaver	☐	☐
Anderson	☐	☐
Clark	☐	☐
Darman *(For WH Staffing)*	☑	☐
Jenkins	☐	☐
Gray	☐	☐
Beal	☐	☐
_____	☐	☐
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CCNRE/Boggs	☐	☐
CCHR/Carleson	☐	☐
CCCT/Kass	☐	☐
CCFA/McClaughry	☐	☐
CCEA/Porter	☐	☐

REMARKS:

Attached is the DOJ testimony on Voting Rights. Q & A's will be forwarded when received. Please advise of any changes desired.

RETURN TO: Craig L. Fuller
Assistant to the President
for Cabinet Affairs
456-2823

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 21, 1982

MEMORANDUM

TO: Craig L. Fuller
Assistant to the President
for Cabinet Affairs

FROM: Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

Pursuant to the directions given me by Mr. Meese and Mr. Baker at our January 13th meeting, please find attached a draft of proposed testimony for the Attorney General on the Voting Rights Act. Proposed Q and A's will be forwarded to you in the immediate future.

Attachment

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 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, 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 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.

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.

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.

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.

22 JAN 1982

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)

DRAFT

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.

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DRAFT

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.

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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.

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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.

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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, 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.

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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

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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.

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.

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.

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	☒S	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 some 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 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, 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 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.

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.

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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.

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The Administration therefore fully supports S. __, co-sponsored by Senators _____ and _____.

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

20 JAN 1982

Voting Rights Act

For Meese Baker Deaver copy of the cut

THE WHITE HOUSE

WASHINGTON

January 20, 1982

NOTE FOR: EDWIN MEESE III
JAMES A. BAKER III
MICHAEL K. DEAVER

SUBJECT: VOTING RIGHTS -- SITUATION AS OF 12:30, JANUARY 20

FROM: RICHARD G. DARMAN

Key points are as follows:

(1) Administration position. The Administration's position has in no way changed since the Presidential announcement and associated press release.

(2) Who asked for postponement of testimony? The inescapable facts seem to be that the Department of Justice initiated the request for postponement; Hatch only reluctantly agreed; Justice obtained White House concurrence in the change of date; Justice thought it had Hatch's concurrence in an agreement that responsibility for changing the date would be shared; Justice feels Hatch violated this agreement.

(3) What bill we are supporting. At the moment, the Administration is not supporting a particular bill -- although our policy is to accept the House bill with appropriate amendment, or a bill that amounts to a straight 10-year extension with appropriate bail-out. Senator Laxalt is attempting to put together an appropriate coalition to introduce the 10-year extension bill. He is not certain that this can be done properly -- but hopes to be able to accomplish this by Monday.

(4) Public statements on these matters. Dave Gergen, Craig Fuller, Ken Duberstein, and I have worked out the attached statement with Ed Schmults. It is being released at Justice now -- with information on it provided to the press here as well. Duberstein and Justice are informing Hatch of our public posture on this.

(5) Justice testimony -- and associated questions and answers. Schmults assures me that he will either have this here to Fuller tonight -- or have an explanation why not. When it arrives, I will circulate it. If it does not arrive, I will assure that appropriate action is taken.

In light of all this, I suggest we not meet further on this until tomorrow. If you disagree, please let me know.

cc: Anderson, Dole, Duberstein, Fuller, Fielding, Williamson, Bradley, Gergen, and Garrett

Q & A ON VOTING RIGHTS TESTIMONY POSTPONEMENT

Available to Press at the Justice Department

Q. Why did the Administration postpone the Attorney General's testimony before Senator Hatch's subcommitee at the last minute?

A. The Justice Department and Chairman Hatch consulted on the question of when the Administration should testify. The Administration felt it desirable to present its first public testimony before the Senate on the Voting Rights Act after the Congress had returned. The issue is an important one and it was felt that the testimony should be at a time when the Congress is here, especially the Senate, which is now considering extension of the Act. Senator Hatch concurred with the Attorney General, and agreed, further, that the opening of the Hearings themselves should be postponed until the full Senate returns.

Q: Senator Hatch's subcommittee staff is saying that the administration delayed the testimony so that it could prepare its own legislation. Are you working on your own bill?

A: We do not intend to transmit legislation to the Congress, but of course we will be working with the Senate to develop legislation that we hope will reflect the President's stated position.

Q: There are reports that you're changing your position -- are you rethinking the President's position?

A: Our position remains exactly as stated by the President and that is the position the Attorney General will take next week when he testifies before Senator Hatch's subcommittee.

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