Civil Rts Div'n

Memorandum

Subject	Date
Proposed Intervention in Canterino v. Wilson	February 12, 1982

To The Attorney General

From John Roberts JR

Brad Reynolds has submitted the attached request for approval of intervention by the Civil Rights Division in a sex discrimination case against the Kentucky state prison system. He recommends that we intervene to challenge alleged disparities between the vocational training programs available to male prisoners and those available to female prisoners. Our challenge would be based on the Equal Protection Clause of the Constitution and Title IX.

I recommend that you do not approve intervention in this case, for several reasons:

- o Private plaintiffs are already bringing suit, so there is no need for involvement by the Civil Rights Division. This case could turn into another Ruiz (the Texas prison case) with no real need being demonstrated.

- o Intervening is inconsistent with two of the three themes in your judicial restraint effort: (1) the equal protection claim will be based on semi-suspect treatment of gender classifications, and you have publicly opposed such approaches outside the area of race; (2) relief could well involve judicial interference with state prison programs, and you have stressed leaving such matters to the state authorities whenever possible.

- o Many reasonable justifications for the Kentucky practices can be readily advanced, such as economies of scale calling for certain programs for the male prisoners but not for the many fewer female prisoners. If equal treatment is required, the end result in this time of tight state prison budgets may be no programs for anyone.

Bruce Fein has written a memorandum in opposition to intervention, which is attached. At the very least this request should not be approved without a meeting to discuss whether it is consistent with your public pronouncements.

cc: Tex Lezar

U.S. Department of Justice

Office of the Deputy Attorney General

Associate Deputy Attorney General

Washington, D.C. 20530

September 10, 1984

MEMORANDUM FOR: Honorable James W. Cicconi
Special Assistant to the President
The White House

Honorable John G. Roberts, Jr.
Associate Counsel to the President
The White House

FROM: Roger Clegg RC
Associate Deputy Attorney General

Attached is some background information on bilingual ballot access, which I promised to you this morning.

Attachment

Background on Provision of Bilingual Materials Under the Voting Rights Act (Section 203 determinations)

Event: On June 25, 1984 the Bureau of the Census published a list of counties required to provide bilingual voting materials. The new list significantly reduced the number of counties required to provide such materials. Census determinations were based, in part, on legal advice from the Justice Department. Civil rights groups have complained that the publication was designed to limit the availability of bilingual ballots in the upcoming presidential election. (See N.Y. Times 9/10/84, p. 1.)

I. Facts: When Congress enacted the 1975 amendments to the Voting Rights Act it included new provisions requiring bilingual assistance in all aspects of the electoral process to four language minority groups: Alaskan Natives, American Indians, persons of Spanish heritage and Asian Americans. Under the 1975 formula, bilingual materials were required in counties where more than 5% of the citizens of voting age were members of a single language minority group (e.g., Hispanics).

In 1982, Congress extended the Voting Rights Act and amended Section 203 to change the coverage formula. Senator Nickles (Okla.) sponsored the amendment which limited bilingual assistance to those counties where 5% of the citizens are members of a language minority group and "do not speak or understand English adequately enough to participate in the electoral process." It left the determination of English-speaking ability to the Census Bureau. The purpose of the amendment was to "more accurately target" those counties where bilingual assistance was needed and relieve other counties of the burden of providing bilingual voting materials to voters who speak English.

The 1980 Census asked individuals who spoke another language how well they spoke English. Based on those answers Census determined that many counties which had previously been covered were no longer covered by the law because the number of citizens who spoke only another language, and did not speak English, was less than 5%. Under the old formula 384 counties were required to provide bilingual materials, while the amendment reduced the number to 197. At the same time 27 counties were added which had not previously been required to provide bilingual materials. For persons of Spanish heritage the number was reduced from 301 to 171; 14 were added. (Many additional counties are still covered under a different provision of the law which contains a different formula and which was not amended - Section 4(f)(4)).

II. Position of the United States: The Census Bureau has correctly applied the Congressional mandate of the Nickles Amendment.

III. Relationship to Administration Philosophy: The Administration has consistently taken the position that the protections of the Voting Rights Act are essential to protect the right to participate in the electoral process, but that they should be invoked only where necessary, to avoid undue intrusion into local governmental functions.

IV. Anticipated criticisms and planned Department of Justice responses:

Criticism: The new determinations will result in the "disenfranchisement" of many voters who need bilingual assistance.

Response: The Nickles Amendment was intended to and does in fact more accurately target those areas of the country where there are significant concentrations of language minorities who need bilingual assistance. The 1975 amendments, which initiated this requirement, did not guarantee every voter bilingual assistance, but only those voters living in counties where more than 5% needed assistance. Under the old formula even those who spoke English fluently were counted. The new formula is still designed to give help to those who cannot participate in the electoral process because they do not speak English; it simply does not provide assistance for those who can speak English. While a number of counties are dropped from coverage because they do not meet the new criteria, twenty-seven counties were added.

Criticism: The new coverage determinations were made on the basis of "subjective data" which cannot reliably measure language proficiency.

Response: Congress granted the Director of the Census unreviewable discretion to decide whether he had data which could be used to meet the criteria established by the Nickles Amendment. The Director of the Census has decided that information contained on the 1980 census questionnaire can be used to assess the English language proficiency of the groups protected by the Act. That judgment call clearly falls within the scope of responsibility granted by the Nickles Amendment. By granting the Bureau of the Census authority to decide whether new determinations could be made under the criteria used in the Nickles Amendment, Congress reaffirmed its trust in

the expertise and professionalism of the Bureau of the Census. Many important governmental decisions are based on Census determinations and courts have upheld that basis of decision-making. The data used by Census included as many bilingual citizens as possible. Only those who indicated a high degree of English-speaking ability were considered to have adequate ability to participate in the electoral process.

Criticism: The decrease in the number of counties required to provide bilingual assistance sends a "symbolic" message to Hispanic voters that they are not welcome to participate in the electoral process.

Response: Congress extended the bilingual assistance provisions for ten years. That is a clear message of support for minority participation in the political process. The 1982 amendments, by more accurately targeting areas of need, will enhance participation by language minorities.

Criticism: The Census Bureau should not have published these determinations until after the 1984 elections.

Response: The Census Bureau, pursuant to its longstanding policies, published these determinations as soon as the data was available. The Nickles Amendment was passed in large part because it was viewed as a means of relieving counties of unnecessary legal obligations, and nothing in the legislative history of this amendment suggests that Census should have delayed publication.

V. Talking Points

- The statute was amended by Congress. The Census Bureau and the Department of Justice are simply following the law.

- When it adopted the Nickles Amendment, Congress clearly anticipated that a number of counties would be dropped from the list of those required to provide bilingual assistance.

- Bilingual assistance is still required for those who cannot participate in the electoral process because they do not speak English. The new formula simply excludes those who, although they speak another language, also speak English well enough to participate on the basis of English language materials alone.

- The Census Bureau used data which included as many potentially covered individuals as possible. Only those who indicated a high degree of English proficiency were considered to have adequate ability to participate in the electoral process.

Memorandum

Subject	Date
Regional Op-ed Piece on Consequences of an Effects Test in §2 of the Voting Rights Act	March 1, 1982

To The Attorney General

From John Roberts JR

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

Robert McConnell
Assistant Attorney General
Office of Legislative Affairs

Kenneth W. Starr
Counselor to the Attorney General

Tex Lezar
Special Counsel to the Attorney General

Attached is a first draft of an op-ed piece which discusses simply the possible local consequences of the change in §2 proposed in the House bill. The draft contains a paragraph focusing on the consequences in Phoenix, and would therefore be appropriate for submission in Arizona. This paragraph can be changed to focus on other cities depending on where the piece is submitted. The proposal is to submit the piece as broadly as possible to regional newspapers, each paper carrying the piece with a specific example from its region. If the Attorney General submits the general op-ed piece which had been prepared earlier, the regional op-ed pieces could be signed by Bob McConnell or Brad Reynolds.

Attachment

Congress is currently considering the question of extending the Voting Rights Act of 1965. President Reagan supports extension of the Act for an unprecedented ten year period. A bill which has passed the House of Representatives and is presently under consideration by the Senate, however, would not simply extend those provisions of the Act which are due to expire, but would also dramatically change section 2, a permanent provision of the Act.

Section 2 has, since the Act was first enacted in 1965, prohibited abridgment or denial of the right to vote on account of race or, since 1975, membership in a language minority group. Despite widespread agreement that the Act has proven to be the most successful civil rights law ever enacted, and despite the lack of any evidence supporting the need for any change, the House bill would alter section 2 to ban not only voting practices or procedures designed to discriminate on the basis of race or membership in a language minority group, but also practices or procedures which -- however well-intentioned -- can be considered to somehow "result" in such discrimination. In legal terms, the House bill would alter the established "intent test" in section 2 and substitute an "effects test."

Under an intent test the court examines all of the circumstances surrounding enactment or retention of a voting law to determine if the law was enacted or retained with the purpose of discriminating on a prohibited basis. Under an effects test, on the other hand, the Act would be triggered whenever the representation on an elected body failed to mirror the racial or language makeup of the particular jurisdiction. If an effects test were enacted in section 2 election systems across the nation and at every level of government would be subject to litigation. The end result could be massive restructuring to achieve proportional representation -- essentially a quota system for electoral politics.

A local example will make the significance of the proposed change in section 2 clear. The City Council of Phoenix consists of six members, elected at-large. Spanish-speaking residents comprise some 15% of the population of Phoenix, yet there are no Spanish-speaking members on the City Council. If the at-large system is challenged under the current section 2, a court will determine if that system was established to exclude Hispanics from city government. Under an effects test, however, that question would be irrelevant -- the failure to achieve proportional representation, if at all traceable to the at-large system, would be enough for a court to strike down the current form of government in Phoenix. The court could order drawing of single member districts, increases in the size of the City Council, or other measures designed to increase the chances of proportional representation. The citizens of Phoenix would lose

control of their form of government without any showing of discriminatory purpose or intent.

The House bill does contain a so-called "savings clause," which 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." In practice, however, this clause would save very little. In the above illustration, for example, the existence of an at-large system is enough to render the savings clause irrelevant. Even in single-member elected bodies, the fact that the districts are not drawn in such a manner as to promote proportional representation would be enough to escape the savings clause.

No case has been made to justify the dramatic change in section 2 contained in the House bill. On the contrary, the case has been made by long experience that the Voting Rights Act, in its present form, is the most successful civil rights law ever enacted. It should be retained without change.

Memorandum

Subject	Date
Response to Vernon Jordan on the Voting Rights Act	November 17, 1981

To See List Below

From John Roberts JR
Special Assistant to
the Attorney General

It was suggested that we consider responding to Vernon Jordan's November 16 piece in the N.Y. Times criticizing the President for his "sham" endorsement of the Voting Rights Act. I have taken a stab at a first draft if anyone is interested in appropriating all or parts of it.

Addressees:

The Attorney General

Edward C. Schmults
Deputy Attorney General

W. Bradford Reynolds
AAG/Civil Rights Division

Stan Morris
Associate Deputy Attorney General

Bruce Fein
Associate Deputy Attorney General

Kenneth W. Starr
Counselor to the Attorney General

Thomas P. DeCair
Director, Public Affairs

Tex Lezar
Special Counsel to the Attorney General

Last summer a broad range of civil rights groups argued strenuously that the Voting Rights Act of 1965 was the most successful piece of civil rights legislation ever enacted. Two weeks ago President Reagan agreed, and endorsed extension of the Act for a full ten years -- longer than any previous extension. He also endorsed extension of the bilingual provisions to make them coextensive with the general provisions in terms of time.

Dexterously snatching defeat from the jaws of victory, however, Vernon Jordan -- in a recent piece in this newspaper -- labeled the President's enthusiastic endorsement of the Voting Rights Act a "sham". It was, oddly, a "sham" in Mr. Jordan's eyes precisely because it was an endorsement of the highly successful Voting Rights Act itself rather than an endorsement of an untested piece of legislation which has passed the House. The House bill to amend the Voting Rights Act would make a radical change in the law by substituting an "effects test" for the current "intent test" in §2, which is applicable nationwide. Rather than risk such a radical experiment in a law which has been so widely praised for its effectiveness, President Reagan expressed his preference to keep §2 in the Act unchanged. As the old saying goes, if it isn't broken, don't fix it.

Mr. Jordan is the one who is backing away from endorsing the Voting Rights Act by urging serious changes in its provisions. He argues that an effects test is necessary in §2 because intent -- which has been required under the law since 1965 -- cannot be proved: "Local officials don't wallpaper their offices with memos about how to restrict minority-group members' access to the polling booth." This ignores what Mr. Jordan presumably knows, that intent in this area, as in any other, can be proved by circumstantial evidence. Broad aspects of criminal law and tort law typically require proof of intent, as §2 has for 16 years, and I was not aware that criminal convictions are now impossible to obtain or that intentional tortfeasors were no longer being found liable.

Section 5 of the Act, the preclearance provision applicable only to selected jurisdictions, has always had an effects test. The President endorsed extension of §5 as is, just as he endorsed extension of §2 as is. In 1965, when Congress incorporated an effects test in §5 -- but not §2 -- it did so on the basis of substantial evidence concerning the covered jurisdictions. No similar evidence has been adduced to support the House proposal to change §2 to an effects test. When the Supreme Court upheld §5 in the 1966 case of South Carolina v. Katzenbach, it based its decision in large part on the evidence considered by Congress. Extending an effects test nationwide under §2 in the absence of such considered evidence would present grave constitutional questions.

Mr. Jordan also criticizes the President for suggesting that Congress consider a reasonable "bailout" provision permitting jurisdictions which have an established record of complying with the law to remove themselves from the preclearance requirements if certain conditions are met. Few have doubted the need -- based on essential fairness -- for some form of bailout. Mr. Jordan argued that the President could have countered minority-group members' anger at his programs "by a strong, forthright statement endorsing the version of the Voting Rights Act extension that has already been passed by the House of Representatives," but even the House bill contains a bailout provision.

Whether a bailout will weaken the Act depends, of course, on what the conditions of bailout are. A bailout based on a history of compliance with the Act can hardly be accused of weakening the goals of the Act. Jurisdictions could not "lie low" simply to escape coverage, as Mr. Jordan suggests, if there were a probationary period during which they would be subject to renewed coverage if they committed a violation. Clear and reasonable terms can be drafted by Congress which permit bailout without weakening the Act. But the problem should be addressed by Congress, and not pushed into the courts. The House bailout provision threatens to do just that through the use of vague terms which would only be given meaning after years of litigation, and then not by elected representatives but by the courts on a sporadic, ad hoc basis.

In endorsing extension of the Voting Rights Act, the President has taken a strong step advocated by civil rights activists. The only ones who could be disappointed by the President's actions are not those truly concerned about the right to vote but rather those who, for whatever reason, were simply spoiling for a fight that never materialized.

U.S. Department of Justice
Office of the Deputy Attorney General

9/27

To: John Roberts

From: Roger Clegg

Here is the updated version of the Chicago background material. Sorry for the delay, but it took us a long time to get the circuit court's opinion.

BACKGROUND
ON
UNITED STATES v. CHICAGO BOARD OF EDUCATION

Event: On Wednesday, September 26, the Seventh Circuit Court of Appeals, at the request of the Department of Justice, reversed a district court order requiring the United States to, among other things, provide the Chicago Board of Education with $103 million for the forthcoming school year and propose legislation ensuring that Chicago receives at least $103 million in each future year to fund a desegregation program for Chicago's public schools. Civil rights groups and the City of Chicago may criticize us for this.

I. Facts: On August 13, 1984, District Judge Shadur in Chicago entered an order which imposed a variety of substantial obligations upon the United States. The underlying desegregation lawsuit was settled in 1980 by a consent decree between the United States and the Chicago Board of Education. One provision of that consent decree required both the United States and Chicago to "make every good faith effort to find and provide every available form of financial resources adequate for the implementation of the desegregation plan."

The district judge concluded that this "good faith effort" provision required the United States to do a number of things, including:

(1) Give Chicago $103.858 million for this school year and, in any event, $29 million from the Department of Education immediately;

(2) Propose and support legislation which would ensure that Chicago gets at least $103.858 million for this and each subsequent school year;

(3) Oppose legislation which would keep Chicago from getting at least this much money each year;

(4) Require all parts of the Executive Branch to look for money for Chicago.

This order was earlier "stayed" (i.e., not put into effect pending the appellate court decision) by the Court of Appeals. On Wednesday, the Court of Appeals reversed the district court and vacated this order in its entirety. The

appellate court ruled that the district court had greatly overstated the United States' obligations under the decree and that the lower court's findings of "bad faith" conduct by the United States were erroneous and, in any event, were not sufficient to support the remedial order's sweeping requirements. The Court of Appeals accepted the Justice Department's argument that the decree did not require the Executive Branch to engage in legislative activity to make funds available to Chicago but required only that Chicago receive its "equitable fair share" of funds Congress has already appropriated to assist local desegregation programs across the country. The Court of Appeals did not reach the broader constitutional questions concerning the judiciary's authority to direct Executive Branch activities but based its decision solely on an interpretation of the consent decree.

II. Position of the U.S.: The district court's order was based on a clearly erroneous interpretation of the United States' obligations under the decree. Moreover, it impermissibly interfered with relations between the Executive and Legislative Branches of the Federal Government and, by judicial fiat, redirected to Chicago funds that the Secretary of Education had already allocated to other needy school districts to support local education and desegregation efforts. As noted, the Court of Appeals ruled that the lower court had incorrectly interpreted the decree and therefore did not address the question of whether the order violated separation of powers principles.

III. Relationship to Administration Philosophy: The Administration has consistently stressed that courts should not engage in "judicial activism" that impermissibly interferes with the legislative and executive functions of Government. Our opposition to the district court's attempt to restrain the President from exercising his most basic and exclusive constitutional duties was consistent with this policy.

IV. Anticipated Criticisms and Planned Department of Justice Responses:

Criticism: The Reagan Administration has undermined Chicago's desegregation program.

Response: The Administration will not allow a federal judge to dictate to the President how to make the funding decisions entrusted to his discretion or how to conduct his relations with Congress. Chicago is completely free to fulfill its responsibility to desegregate its schools and the Administration supports these efforts. However, as the Court of

Appeals ruled, the decree did not require taxpayers across the country to fund this program, at the expense of other worthy education and desegregation activities in other communities.

Criticism: The Reagan Administration is reneging on a legal commitment entered into by a prior Administration.

Response: Wrong. The consent decree does not commit the United States to act as an "insurer" for Chicago, requiring that the Federal Government provide all desegregation funds that Chicago is either unwilling or unable to raise in order to cure prior segregation. Nor did the decree "contract away" the President's right and obligation to perform his constitutional duties. The Court of Appeals correctly ruled that the district judge's interpretation of the decree's language was clearly erroneous.

V. Talking Points:

- The district court's interpretation of the language in the decree was simply wrong.
- The Administration fully supports Chicago's desegregation efforts but it will not, and is not required to, shift the lion's share of federal desegregation and education funds to Chicago at the expense of other needy school districts.
- The Court of Appeals agreed with the Justice Department on both of these points.

Memorandum

5/1983 File

Subject	Date
Development of Legislative Changes to 42 U.S.C. § 1983	August 9, 1982

To Steve Brogan
Office of Legal Policy

From John Roberts JR

I am in receipt of the memorandum dated August 6 from Jon Rose to the Deputy Attorney General on this topic, and am looking forward to the contemplated meeting to discuss it. I did, however, want to convey some comments immediately on one particular aspect of the § 1983 problem which I did not feel was adequately addressed in the memorandum.

The memorandum, in its discussion of current law (p. 8) and legislative proposals to limit statutory claims (p. 11), assumes that the Supreme Court held, in Maine v. Thiboutot, 448 U.S. 1 (1980), that the coverage of § 1983 extends to "all statutory rights." While there is certainly broad dicta in Thiboutot to support this conclusion, more recent Supreme Court opinions -- and one significant appellate case -- call it into question.

In Pennhurst State School v. Halderman, 451 U.S. 1 (1981), the Court remanded claims based on § 1983 for a determination whether the statute on which the claim was based secured individual rights within the meaning of § 1983 and whether the underlying statute provided an exclusive remedy, precluding suit under § 1983. The first question represents a highly significant retrenchment on the broad dicta of Thiboutot. At issue was a federal law requiring state plans to contain certain assurances, and the Court, through Justice Rehnquist, noted that "It is at least an open question whether an individual's interest in having a state provide those 'assurances' is a 'right secured' by the laws of the United States within the meaning of § 1983." Id., at 28.

Both of the limits on the scope of § 1983 briefly discussed in Pennhurst resurfaced in Justice Powell's opinion for the Court in Middlesex Cty. Sewerage Authority v. Sea Clammers, 453 U.S. 1 (1981). There the Court noted: "In Pennhurst, we remanded certain claims for a determination (i) whether Congress had foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue there was the kind that created enforceable 'rights'

under § 1983" Id., at 19. The Court in fact held that the statute at issue in Sea Clammers provided exclusive remedies barring suit under § 1983. What may be more significant, however, is the recognition that certain statutory claims may not fall within § 1983 because they cannot be considered to create "rights". Thiboutot involved a welfare statute, clearly creating rights for the recipients, so its holding -- as opposed to its dicta -- does not require extension of § 1983 coverage to statutes other than those clearly securing individual rights.

In First National Bank of Omaha v. The Marquette National Bank of Minneapolis, 636 F.2d 195 (8 Cir. 1980), cert. denied, 450 U.S. 1042 (1981), the court distinguished Thiboutot and held that a claimed violation of the National Bank Act did not give rise to a § 1983 claim. The court recognized that under Thiboutot § 1983 covered statutory claims, but reasoned that it should be limited to statutes securing "personal rights akin to fundamental rights protected by the Fourteenth Amendment." The opinion merits lengthy quotation:

> "The Supreme Court decision in Thiboutot makes clear that § 1983 does protect rights established by statutes enacted pursuant to authority other than the Fourteenth Amendment. The opinion, however, does not change the type of statutory rights protected by § 1983. Thiboutot involved the rights of individuals pursuant to a federally-created welfare program. These rights of beneficiaries to receive minimal subsistence and support under the AFDC program so as to be able to obtain food and shelter represent important personal rights akin to fundamental rights protected by the Fourteenth Amendment . . . . On the other hand, rights incidental to the National Bank Act are qualitatively different and not within the contemplation of § 1983. . . . . The Supreme Court's holding that § 1983 provides a cause of action for interference with rights under the Social Security Act does not represent a significant departure from prior case law or expansion into areas unrelated to the interests protected by the Fourteenth Amendment. A holding by this court, establishing a cause of action for interference with rights pursuant to the National Bank Act, would represent a dramatic and unwarranted extension of the Civil Rights Act. We do not believe that such a departure is mandated by the opinion in Thiboutot or that such a cause of action was within the intent of the Congress that enacted the civil rights statutes." 636 F.2d, at 198-199.

The court recognized that the language of Thiboutot "suggests that § 1983 actions should be broadly permitted, even in areas outside welfare, First Amendment, and social security cases." The court noted, however, that the Supreme Court "fails to say this explicitly. In light of the narrow holding in the case concerning social security cases, the general language in the opinion, and the major ramifications of such a holding, we do not think such an expansion of § 1983 is justified."

This reasoning could also apply to constitutional claims under § 1983. The Commerce Clause, for example, does not secure individual rights but rather allocates governmental authority between state and federal government. Commerce Clause claims therefore should not be recognized as § 1983 claims, and attorneys fees should not be available in such cases.

I do not, of course, suggest that we rely on this incipient judicial effort to undo the damage created by Thiboutot. The understanding of the broad reach of § 1983 conveyed by the August 6 memorandum is the generally accepted view. I do think, however, that we should recognize limits of the sort suggested in the Eighth Circuit case as possible ones in our analyses, and not necessarily accept the broadest reading of Thiboutot as the only one. Our legislative proposals could perhaps even be cast as efforts to "clarify" rather than "overturn" that decision.

cc: Ken Starr
Bruce Fein

Memorandum

Subject	Date
Voting Rights Act Testimony: Questions & Answers	January 21, 1982

To The Attorney General

From John Roberts JR

Attached are draft questions and answers for your upcoming testimony on the Voting Rights Act.

cc: Deputy Attorney General
Brad Reynolds
Robert McConnell
Kenneth W. Starr
Tex Lezar
Charles Cooper

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 or 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 only uphold election plans which were carefully tailored to achieve election results which mirror the population make-up, but a particular group in the community failed to take advantage

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of the opporutnity, for example, if no members of the group ran for office. Only in such a case would the violation be predicated on the failure to achieve proportional representation "in and of itself".

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.