Memorandum

Subject	Date
Talking Points For White House Meeting on Voting Rights Act	January 26, 1982

To
The Attorney General

From
John Roberts JR

This meeting presents an opportunity to solidify the Administration's position once and for all, to head off any retrenchment efforts, and to enlist the active support of the White House personnel for our position. I recommend taking a very positive and agressive stance.

Suggested Points:

- o It is important that people in the White House understand the President's position on the Voting Rights Act and actively work to see it realized. The position which has been announced and which will be explained in Department of Justice testimony is not simply the Department's view but is the position of the Administration and our President, who deserves his staff's full and active support on this issue.

- o The President's position is a very positive one and should be put in that light. He is for the Voting Rights Act and wants to see it extended. Civil rights groups told us the Act was very successful in its present form and should be extended unchanged. That is essentially the President's position: if it isn't broken, don't fix it.

- o What the President opposes is not the Voting Rights Act but rather efforts to introduce confusion and uncertainty by dramatically altering its terms. He opposes changing the law by introducing an effects test into § 2 because this would throw into litigation existing electoral systems at every level of government nationwide when there is no evidence of voting abuses nationwide supporting the need for such a change. Indeed, the House Report recognized as much when it concluded there was no need to extend preclearance nationwide.

- An effects test for § 2 could also lead to a quota system in electoral politics, as the President himself recognized. The so-called "savings clause" in the House bill would not remove this danger. Just as we oppose quotas in employment and education, so too we oppose them in elections.

- Do not be fooled by the House vote or the 61 Senate sponsors of the House bill into believing that the President cannot win on this issue. Many members of the House did not know they were doing more than simply extending the Act, and several of the 61 Senators have already indicated that they only intended to support simple extension. Once the senators are educated on the differences between the President's position and the House bill, and the serious dangers in the House bill, solid support will emerge for the President's position.

- The President's position is politically saleable, since the position is a positive one. Senator Baker demonstrated this on Sunday's "Meet the Press", when he concisely announced that he favored straight extension, without any muddling with the protections in § 2. We had met earlier with Baker, and his position is an example of what to expect if the President's position is clearly explained.

- We are confident that this fight can be won, our experience with the Act convinces us that it is very important that the fight be won, and the President is fully committed to this effort. His staff should be as well.

Memorandum

Subject	Date
Today's Post editorial	January 26, 1982

To The Attorney General From John Roberts JR

The Post today proclaims that Mobile v. Bolden, by establishing an intent test for § 2, overturned the Supreme Court's previous "totality of circumstances" approach in cases such as Whitcomb v. Davis and White v. Regester. The Post suggests that the House bill would return to this "totality of circumstances" approach.

Responses:

1. The current intent test itself looks to the totality of the circumstances. All evidence of impact or past practices is relevant to proving intent and may be relied upon by plaintiffs. A "smoking gun" is not required.

2. The Post is wrong on the law. Neither Whitcomb nor White considered § 2 at all -- both were Fourteenth Amendment equal protection cases. While it is true that Mobile ruled that § 2 simply repeated the constitutional protections of the Fifteenth Amendment, it is difficult to see how two Fourteenth Amendment cases can be said to have settled the law on this question.

3. As Justice Stewart demonstrated in Mobile, both Whitcomb and White are fully consistent with Mobile and the intent test. Whitcomb overturned a lower-court finding of a constitutional violation in a multi-member district for Indianapolis precisely because the plaintiffs relied on little more than disproportionate results. Plaintiffs failed because "there is no suggestion . . . that Marion County's multi-member district, or similar districts throughout the state, were conceived or operated as purposeful devices to further racial or economic discrimination." 403 U.S., at 149 (emphasis supplied).

White found a constitutional violation in a Texas reapportionment plan which imposed multi-member districts. The question in that case was whether the "multi-member

districts [were] being used invidiously to cancel out or minimize the voting strength of racial groups." 412 U.S., at 765 (emphasis supplied). "Being used invidiously" clearly indicates purposeful discrimination.

4. Although this reading of Whitcomb and White is not clear to the Post, it is revealing that it was clear to the lower courts well before Mobile. This is how the Fifth Circuit en banc analyzed Whitcomb and White 3 years before Mobile:

> "In Whitcomb v. Chavis the plaintiffs failed to prove either that the plan being challenged was an intentional racial gerrymander or that there existed an intentional denial of minority access to the political process which the plan did not remedy. . . . In contrast, the Dallas and Bexar County plaintiffs in White v. Regester were successful . . . because they established the requisite intent or purpose in the form of the existent denial of access to the political process." Kirksey v. Board of Supervisors, 554 F.2d 139 (1977).

While the Fifth Circuit may not have been quite correct concerning what constituted intent, it is clear they read Whitcomb and White to require it.

5. It may be useful to point out that the constitutional standard of intent is now set for the Fifteenth Amendment, and Congress cannot change that. It can change the statutory standard, in § 2, but that would be severing the statute from its constitutional base and creating great uncertainty.

ECIAL ASSISTANT TO
THE ATTORNEY GENERAL

Jan. 22, 1982

TO: The Attorney General

FROM: John Roberts JR

This package includes a memorandum on the background of the intent/effects issue, the House Report (discussion of §2 on pp. 28-32 and 71-72), a copy of the opinions in Mobile v. Bolden, and a copy of the opinions in South Carolina v. Katzenbach.

Memorandum

Subject	Date
Voting Rights Act: Background of the Intent/Effects Issue	January 22, 1982

To: The Attorney General

From: John Roberts JR

Section 2 of the Voting Rights Act of 1965 provides:

> "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 the right of any citizen of the United States to vote on account of race or color [or membership in a language minority]."

The pertinent provision of §5, on the other hand, provides that no election law changes in selected jurisdictions may be made until the United States District Court for the District of Columbia or the Attorney General has determined that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color [or membership in a language minority]" (emphasis supplied). Section 5, therefore, by its very terms, obviously incorporates an effects test, and has been so interpreted.

Section 2 presents a more difficult question. The careful legislating of an effects test in §5, by explicit language, while this was not done with §2, strongly suggests that Congress did not intend to incorporate an effects test in §2. There is very little direct legislative history on the intent/effects question for §2. What legislative history there is indicates that §2 was simply intended to restate the prohibitions already contained in the Fifteenth Amendment. The Fifteenth Amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or any state on account of race, color, or previous condition of servitude." As Senator Dirksen stated, §2 was "almost a rephrasing of the Fifteenth Amendment." In determining the meaning of §2, therefore, it is necessary to determine what the Fifteenth Amendment requires.

In Mobile v. Bolden, 446 U.S. 55 (1980), Justice Stewart, writing for a plurality, concluded that Congress intended §2 to mirror the protections of the Fifteenth Amendment, and that the Fifteenth Amendment was only violated by intentional or purposeful discrimination. In his opinion Justice Stewart

surveyed the relatively few Supreme Court precedents on the Fifteenth Amendment, concluding that "our decisions . . . have made clear that action by a state that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose." Justice Stewart was joined in this conclusion by the Chief Justice and Justices Powell and Rehnquist. Justices Blackmun and Stevens concurred in the judgment on other grounds; Justices Brennan, White and Marshall dissented.

The conclusion that a violation of the Fifteenth Amendment must be predicated on proof of discriminatory intent was foreshadowed by a similar ruling concerning the much more heavily litigated Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Fifth Amendment. In the leading case of Washington v. Davis, 426 U.S. 229 (1976), the Court rejected an equal protection challenge to an employment test which had a disproportionate impact on blacks. The Court stated that "our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact." The Court noted that a contrary rule "would be far-reaching and would raise serious questions about, and perhaps invalidate, the whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." The Court noted that Congress could legislate an effects or impact test, as it had to a large extent in Title VII, but ruled that a constitutional, as opposed to statutory, violation must be based on proof of discriminatory purpose or intent. In the leading case of Arlington Heights v. Metro Housing Corporation, 429 U.S. 252 (1977) the Court reiterated the requirement of proof of discriminatory purpose. The Court noted, however, that evidence of purpose need not be direct but could be indirect and circumstantial. This is not to say that the tort standard of "foreseeable consequences" would suffice to establish intent in the constitutional sense, simply that a "smoking gun" is not required.

The basic theory behind the conclusion that §2 incorporates an intent test, therefore, is that §2 mirrors the protections of the Fifteenth Amendment, and the Fifteenth Amendment, like its close cousin the Fourteenth Amendment, incorporates an intent test.

The situation is complicated by some lower court decisions prior to Mobile v. Bolden, which indicated proof of intent was not necessary. Perhaps the leading such case was a decision by the Court of Appeals for the Fifth Circuit, Zimmer v. McKeithen,, 485 F. 2d 1297 (1973), aff'd on other grounds 424 U.S. 636. In that case the Court of Appeals struck down an at-large system for various offices because of the vote dilution effect. The court, rather than focusing on intent, considered a number of factors: the responsiveness of the electoral process to the wishes of minority voters, minority voters' ability to participate in slating candidates, existence of reasons for

the at-large system, and evidence of past discrimination in the electoral process. Lower courts after Zimmer tended to focus on these criteria, at least in part because it permitted them to avoid considering the question of purposeful discrimination which in effect meant labeling elected officials racists.

The argument which the House adopted in its report was that the Zimmer court and the other lower courts correctly identified the tests to be applied in this area, and that the Mobile v. Bolden decision, which overturned these lower court precedents, was erroneous. In Mobile v. Bolden, Justice Stewart noted that the Zimmer approach was inconsistent with the later decisions in Washington v. Davis and Arlington Heights, and wrote that "although the presence of the indicia relied on in Zimmer may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose." If asked a question about Zimmer or any other lower court decision prior to Mobile v. Bolden, I recommend that you simply restate the reasoning of Mobile v. Bolden, and then argue that many of the lower court decisions purporting to follow Zimmer may not in fact be inconsistent with Mobile v. Bolden. As the Supreme Court noted, the criteria relied on in Zimmer may be used as evidence of intent. Many of the lower court decisions prior to Mobile v. Bolden contain sufficient evidence to support a finding of purposeful discrimination, even if the test was not phrased in precisely those terms.

Memorandum

Subject	Date
Voting Rights Act: Section 2	December 22, 1981

To The Attorney General From John Roberts JR

The attached responds to your request for the preparation of a brief statement explaining the problem involved in switching to an "effects test" for §2. The statement was written with a readership of Senators and their staffs in mind.

Brad Reynolds has expressed some reservations about circulating any written statement on this question to the Hill, for fear that the statement would end up in the press and be subject to attack. My own view is that something must be done to educate the Senators on the seriousness of this problem, and that written statements should be avoided only if a thorough campaign of meetings is undertaken.

WHY SECTION 2 OF THE VOTING RIGHTS ACT SHOULD BE RETAINED UNCHANGED

Section 2 of the Voting Rights Act of 1965 provides:

> "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 the right of any citizen of the United States to vote on account of race or color [or membership in a language minority]."

This provision, which is an important part of what has been uniformly described as the most successful civil rights law ever enacted, is applicable nationwide. Unlike §5 of the Act, §2 is a permanent provision which does not expire in August, so no action is necessary to continue its protections. President Reagan, in endorsing extension of the preclearance provisions of §5, has also urged retention of §2 without any change.

The bill recently passed by the House, however, does not continue §2 unchanged, but rather amends that provision by striking out the phrase "to deny or abridge" and substituting the phrase "in a manner which results in denial or abridgement of". There are several reasons why this change is unacceptable.

1. Like other civil rights protections, such as the Fourteenth Amendment's equal protection guarantee, §2 in its historic form requires proof that the challenged voting law or procedure was designed to discriminate on account of race. This "intent test" follows logically and inexorably from the nature of the evil that §2 was designed to combat. Both the Fifteenth Amendment and §2, which implements the constitutional protection, establish this Nation's judgment that official actions in the area of voting ought not be taken on the basis of race. As the Supreme Court recently made clear in City of Mobile v. Bolden, 446 U.S. 55 (1980), decisions that are proved to have been made on that prohibited basis -- i.e., with the intent to affect voting rights because of race -- must fall.

The House bill would alter §2 dramatically by incorporating in that provision a so-called "effects test". Under the House bill, the inquiry would focus not on whether the challenged action was taken with discriminatory purpose, but rather on whether the "results" of an election adversely affect a protected group.

By measuring the statutory validity of a voting practice or procedure against election "results," the House-passed version of §2 would in essence establish a "right" in racial and language minorities to electoral representation proportional to their population in the community. Any election law or procedure that did not maximize the voting strength of a racial or language minority, as determined by election "results", could be struck down as being impermissibly "dilutive" or "retrogressive" -- based on court decisions under §5 of the current Act (which does include an "effects" test). Historic and common political systems incorporating at-large elections and multi-member districts would be vulnerable to attack. So, too, would redistricting and reapportionment plans, unless drawn to maximize the voting strength of protected groups -- even if at the expense of other equally identifiable and affected groups. The reach of amended §2 would not be limited to statewide legislative elections, but would apply as well to local elections, such as those to school boards and to city and county governments.

As Justice Stewart correctly noted in his opinion in City of Mobile v. Bolden, incorporation of an effects test in §2 would establish essentially a quota system for electoral politics by creating a right to proportional racial representation on elected governmental bodies. Such a result is fundamentally inconsistent with this Nation's history of popular sovereignty.

2. Proponents of the House bill attempt to counter this argument by citing a "savings clause" in §2, which provides that "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" (emphasis supplied). By its terms, however, this provision removes from the §2 prohibition only those election systems that are neatly tailored to provide protected groups an opportunity to achieve proportional electoral success (i.e., single-member districts drawn to maximize minority voting strength). In circumstances where the racial group failed to take advantage of the political opportunity provided by such an election system (by refraining, for example, from running any candidates for office), the resulting disproportionate electoral representation would not, in such a situation, be fatal under the House bill, since that single consequence is not, "in and of itself," sufficient to make

out a violation. If, on the other hand, the challenged electoral system is not structured to permit proportional representation, (such as the common at-large and multi-member district election systems), the so-called savings clause is to no avail. The "results" test in §2 of the House bill would effectively mandate in such circumstances an electoral restructuring (even on a massive scale) so as to allow achievement of proportional representation if the particular racial or language group so desires.

3. Proponents of the amendment also claim that intent is virtually impossible to prove. This argument is simply false. The Supreme Court has made clear that intent in this area, like any other, may be proved by both direct and circumstantial evidence. A so-called "smoking gun" (in terms of actual expressions of discriminatory intent by members of the legislature) is simply not necessary. Plaintiffs can rely on the historical background of official actions, departures from normal practice, and other indirect evidence in proving intent. In this regard, the Voting Rights Act as currently written stands on the same footing as most other federal constitutional and statutory provisions in the civil rights area. Proof of wrongful intent as an element of the legislative offense is the rule -- not the exception. Adherence to that traditional standard in the present context is all the more compelling when one recalls that §2 is intended to be coextensive with the Fifteenth Amendment, which safeguards the right to vote only against purposeful or intentional discrimination on account of race or color.

Moreover, violations of §2 should not be made too easy to prove, since they provide a basis for the most intrusive interference imaginable by federal courts into state and local processes. The district court judge in the Mobile case, for example, acting solely on the basis of perceived discriminatory "effects", struck down the city's three-member, at large commission system of government, which had existed in Mobile for 70 years. In its place the federal judge ordered a mayoral system with a nine-member council elected from single-member districts. It would be difficult to conceive of a more drastic alteration of local governmental affairs, and under our federal system such an instrusion should not be too readily permitted.

4. Section 2 in its present form has been a successful tool in combatting racial discrimination in voting. The House in its hearings on extension of the Voting Rights Act failed to make the case to support a change in the existing "intent" standard. Significantly, no testimony was offered as to election practices in non-covered jurisdictions to

indicate a need to introduce a nationwide "results" test in §2. When Congress decided in 1965 to depart from the "intent" standard embedded in the Fifteenth Amendment and to adopt an "effects" test for §5 as a "temporary" measure for specifically identified covered jurisdictions, it based that legislation on a comprehensive congressional record of abuses of minority voting rights. The Supreme Court upheld the constitutionality of such legislation because a basis for such drastic special remedial measures had been fully demonstrated. To seek some seventeen years later to impose a similar "effects" standard nationwide on the strength of a record that is silent on the subject of voting abuses in non-covered jurisdictions is not only constitutionally suspect, but also contrary to the most fundamental tenants of the legislative process on which the laws of this country are based.

Memorandum

Subject	Date
Section 2 of the Voting Rights Act and City of Mobile v. Bolden	November 6, 1981

To The Attorney General

From John Roberts
Special Assistant to
the Attorney General

Section 2 of the Voting Rights Act of 1965, which is applicable nationwide, provides:

> "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 the right of any citizen of the United States to vote on account of race or color."

In City of Mobile v. Bolden, 446 U.S. 55 (1980), the question was presented whether §2 prohibited practices which had the effect of diluting black voting strength or rather simply prohibited practices whose purpose was to discriminate against blacks in the exercise of their right to vote. The plaintiffs claimed that the at-large system of city government prevailing in Mobile operated to discriminate against blacks in violation of §2 and the 14th and 15th Amendments. The plurality opinion in Bolden, authored by Justice Stewart and joined by the Chief Justice and Justices Powell and Rehnquist, began by assuming that there existed a private right of action to enforce §2, a question which remains undecided. The plurality ruled that §2 simply elaborated on the 15th Amendment, and that to prevail under §2 plaintiffs must demonstrate a discriminatory purpose or intent behind the challenged practice. The plurality concluded that §2, like the 15th Amendment, is violated by state action only if that action is "motivated by a discriminatory purpose." The Court also rejected the contention that the 14th Amendment equal protection guarantee was violated, since a violation of the 14th Amendment must also be premised on a showing of discriminatory intent.

Justice Blackmun, concurring in the result, rather cryptically "assumed" that proof of intent was necessary for plaintiffs to prevail on their constitutional claim, without discussing §2 of the Voting Rights Act. He concluded to reverse on the ground that the District Court's remedy -- mandating single member districts -- was too extreme, and that the District Court should have considered alternative proposals. Justice Stevens also

did not address §2 in terms, and developed a complicated test for a 15th Amendment violation turning on whether the challenged political structure was not the product of a routine decision, had significant adverse impact on a minority group, and was unsupported by any neutral justification. Justice Stevens' approach purported to turn on objective effects rather than discriminatory purpose or intent. Justice White dissented, arguing that even if discriminatory intent were required it had been demonstrated in this case. Justice Marshall dissented, arguing that a showing of discriminatory effect was sufficient. Justice Brennan joined both Justice Marshall and Justice White in dissent.

Thus, although the question cannot be considered finally resolved since Justice Stewart's opinion in Bolden was only for a plurality, the latest word from the Supreme Court is that §2 incorporates an intent test, and that a demonstration of discriminatory effect is not sufficient. The House bill would reverse this ruling, and permit plaintiffs to prevail under §2 simply upon demonstrating discriminatory effect. This would make challenges to a broad range of voting practices much easier, and give courts far broader license to interfere with voting practices across the country. In particular, such widely accepted practices as at-large voting would be subject to attack, since it is fairly easy to demonstrate that such practices have the effect of diluting black voting strength. For Congress and the President to invite such judicial remaking of the political system through an effects test is sharply inconsistent with the thrust of your Federal Legal Council speech.

Memorandum

Subject	Date
Voting Rights Act	January 25, 1982

To The Attorney General

From John Roberts JR

The attached Q & A's contain suggested responses to the anticipated questions on whether Mobile v. Bolden changed the law of §2.

cc: Brad Reynolds
Ken Starr
Chuck Cooper

Q. The House Report concluded that the plurality in Mobile v. Bolden erroneously interpreted §2 as requiring proof of discriminatory intent or purpose rather than mere effect. Do you agree?

A. Not at all. We believe that Justice Stewart, writing for the plurality in Mobile v. Bolden, correctly concluded that Congress intended when it enacted §2 to require proof of discriminatory intent. Justice Stewart examined the legislative history and determined that §2 was passed to enforce the prohibition against discrimination in voting contained in the Fifteenth Amendment. Indeed, as Senator Dirksen pointed out at the time, §2 simply rephrased the Fifteenth Amendment. As Justice Stewart's review of the relevant precedents demonstrates, the Fifteenth Amendment has always required proof of discriminatory intent, just as the more heavily litigated equal protection clause of the Fourteenth Amendment has. Congress therefore intended §2 to incorporate an intent test.

This conclusion is also fortified by contrasting §2 with §5, which does contain an effects test. Section 5 explicitly bans election law changes with the purpose or effect of abridging the right to vote. If Congress intended §2 to include an effects test, it easily could have written one in, as it did with §5.

Q. Whatever the merits of the plurality decision in Mobile v. Bolden, it seems clear that the decision dramatically changed the established understanding of what the law meant. Lower court decisions had not required proof of intent, and Congress had no reason to suppose such proof would be required. Shouldn't Congress amend §2 to return to the original understanding disturbed by the Supreme Court?

A. It's hard to see how the law could have been "established" prior to Mobile v. Bolden, since that was the first decision by the Supreme Court on this particular §2 issue. By the same token, as Justice Stewart demonstrated in his opinion, there had been several decisions interpreting the Fifteenth Amendment as requiring proof of intent, and §2 was enacted to enforce the Fifteenth Amendment. For these reasons, I do not agree that Mobile v. Bolden was a dramatic shift in the law.

Q. Prior to Mobile v. Bolden, however, the accepted analysis of voting cases was that established by the Fifth Circuit en banc in Zimmer v. McKeithen. In that 1973 case, followed by many other courts, the court did not focus on "intent" but rather several criteria looking to effect or impact -- lack of minority access to the candidate selection process, unresponsiveness of elected officials to minority concerns, a history of discrimination, lack of legitimate reasons for certain election rules, and so on. You're not denying that Mobile v. Bolden changed all that, are you?

A. In the first place, the Zimmer case to which you refer did not involve §2 at all. The case considered constitutional claims and §5, which of course contains an effects test.

Second, I do not believe that it is correct to view Zimmer or cases which relied upon the Zimmer criteria as standing for the proposition that proof of intent is not required, even assuming the reasoning applies to §2 cases. Rather, as the Fifth Circuit itself made clear in the 1978 case of Nevett v. Sides, 571 F. 2d 209, those cases stand for the proposition that proof of intent is required, but that intent can be demonstrated through the various criteria. At most, then, Mobile v. Bolden clarified what is needed to prove intent. It did not alter the law in ruling that proof of intent was required. As the Supreme Court pointed out, the Zimmer criteria may be significant starting points in proving intent.

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

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

DRAFT

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

 DRAFT

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.