

Memorandum

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Subject	Date
Voting Rights Act	February 8, 1982

To Brad Reynolds
Assistant Attorney General
Civil Rights Division

From John Roberts *JR*

Attached are some editorial suggestions on your draft. I do not agree with the Attorney General that it is necessary to "talk down" to the audience we hope to reach any more than we already did in the previous drafts. Perhaps, as you suggest, we can run both versions in different places, or with different authors. In any event we can put both versions before the Attorney General and the others for a final decision. I tend to think it is more important to get something out somewhere soon than to fiddle much more with exactly what that something is going to be. The frequent writings in this area by our adversaries have gone unanswered for too long. We should meet with the Attorney General for a final decision on this soon.

Perhaps no more important question will come before the Congress this year than the question of extending the Voting Rights Act of 1965. The President ~~has come out in~~ fully supports ~~of~~ a straight extension of the Act in its present form for 10 years. He recognizes, as do most Americans, ~~that the Act has worked extraordinarily well for the past seventeen years, but a need remains to continue its protections for an additional period.~~

while

extremely

there

a need

Remarkably, this position has been mischaracterized in the press and elsewhere as a retreat from existing law and a dilution of the Voting Rights Act. Those who insist upon making such assertions favor an amendment to the present Act that was passed by the House of Representatives last Fall. That amendment would change the existing law in several material respects, the most drastic of which is in Section 2 of the statute. Under the House passed amendment, Section 2 -- which applies nationwide to both existing and new voting practices and procedures in every State, locality, political subdivision, and school district in this country -- would ~~measure a violation on the basis of election results.~~ Contrary to the law as it now exists (and has existed since 1965), the House version does not require a showing that an individual or community intended to violate Section 2 in order to make out a violation, but only that the conduct in question had a "discriminatory" effect.

a permanent provision

a violation of

could be based solely on

discriminate

~~The question has understandably been asked why the Administration opposes this change in the Act. Let me explain.~~

for several reasons.

Because Section 2 in the House amendment defines a violation on the basis of whether the "results" of any particular election demonstrate a discriminatory effect, ~~(even though entirely unintended), the very real prospect is that most, if not all, political subdivisions in this country will eventually be~~ subject to court challenge on the ground that they have failed to produce proportional representation on the basis of race or membership in a language-minority group.

Such an approach could result in

even though the action take was not taken to discriminate

Thus, a community with an at-large system of government ~~(which most municipalities in the United States utilize), and having, for example, 30% minority population,~~ ~~can~~ be faulted under Section 2 of the House bill if the election "results" do not produce a similar minority representation in the City Council. It matters not under the proposed effects test that this result was ~~but~~ a natural consequence of the electoral process. As with the equal employment cases where an effects or results test is used, the violation in the political arena will turn solely on a statistical analysis -- i.e., has the election met the quota for minority representation.

the typical form in this country which had:

The House bill does contain a disclaimer provision, but that provision will not prevent the predictable consequences of a change in Section 2 to an effects test. This is because the disclaimer provision protects only against the situation where the failure of a minority group to obtain proportional representation is attributable to wholly political considerations--such as where no candidate from a particular racial or language minority group chooses to run, ~~or runs but is defeated in the election because of an ineffective campaign.~~ To guard against a finding of liability in such circumstances, the House bill explicitly states that disproportional representation will not "in and of itself" be a violation of Section 2. If, however, any nonpolitical factor can be said to have contributed in any respect to disproportional representation (such as the existence of an at-large system or multi-member districts), the disclaimer provision has no relevance, and disproportional election results can be held to violate Section 2 under the House amendment.

It is the Administration's strong belief that the strength of the electoral process in this country resides in the fact that each individual is guaranteed a right to vote, as provided in the Fifteenth Amendment of the Constitution, not a right to have the person voted for actually elected.

principle

That fundamental ~~distinction~~ has remained ~~as~~ the centerpiece of our democratic system of government since it was founded. ~~It was not altered in any way by Congress in 1965 when it first enacted the present Section 2 of the Voting Rights Act, that includes an intent test.~~ Nor did Congress when it reenacted the statute in 1970 or 1975 see fit to make the change now being proposed by the House.

did not alter this principle

with an intent test in Section 2.

If the Voting Rights Act, ~~Section 2,~~ is to be so drastically revised as to visit on all political subdivisions in this country the prospect of proportional representation based on race or membership in a language-minority group, Congress should demonstrate that there is a need for such an amendment. The situation in 1982 with regard to voting abuses is certainly not what it was in 1965. The present Act has been applauded by all our citizenry, both black and white, as the most effective piece of civil rights legislation ever passed by Congress. It was reenacted in 1970 and in 1975 notwithstanding demonstrated progress because Congress felt there remained a need to continue its special protections. The President supports passage of the same Act once again, extending its provisions unchanged for another ten years. No one, however, has shown any need whatsoever to make the significant amendment to Section 2 that has been proposed by the House.

The proponents of the House measure argue that it is desirable because the intent test ~~that is now in~~ Section 2 makes it "virtually impossible" to prove a violation. There is no basis to this claim. The intent test has long been the standard of proof for constitutional and statutory violations in the civil rights area and it has worked most effectively. Far from requiring ~~that it is necessary~~ to "get inside the minds" of particular individuals to determine their intent (as the proponents of the House bill argue), the standard has been met time and time again by resort to both direct and indirect evidence. In fact, it is well established that proof of discriminatory effects is one of the factors to be considered in ascertaining intent. This point was underscored by Justice Stewart in his recent opinion in Mobile v. Bolden, where the Supreme Court confirmed that Section 2 has, and has always had, an intent standard.

plaintiffs

The Administration's position follows the Mobile decision. It is our firm belief that the Voting Rights Act, which has worked so well for the past seventeen years, should be reenacted in its present form. To change ~~now~~ to an effects test in Section 2, without any showing of need, would invite years of unnecessary complex and disruptive litigation, just when the courts had settled most of the difficult questions under the present statute. ~~e~~ It would also leave political subdivisions throughout ~~this~~ country at the mercy of the courts, which could on a showing of unintended discriminatory effects, order a restructuring of governmental systems that are not now, and have never been, designed to produce proportional representation based on race or membership in a language-minority group.

litigation which could result in

simply because they are not designed to

Such a result makes no sense. It is premised on the faulty, and terribly offensive, notion that blacks can only be represented by blacks, Mexican-Americans can only be represented by Mexican-Americans, and whites can only be represented by whites. Indeed, the House bill, by amending Section 2 to require for the first time an effects test, would encourage just such a polarization of society along racial lines. Too much progress has been made for Congress now to countenance such a backward step.

The present Act has worked, and worked well. As so many both within and outside of the civil rights movement have urged with respect to this legislation: "If it is not broken, don't fix it." The President agrees, and he has therefore asked Congress to extend the present law for another ten years. There is every reason for Congress to do so.