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.