

VOTING RIGHTS ACT (4)

Box 14

CICCONI, JAMES W.; FILES  
SERIES II: SUBJECT FILE

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Purpose: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

IN THE SENATE OF THE UNITED STATES— \_\_\_\_\_ Cong., \_\_\_\_\_ Sess.

S. 1992

H.R. \_\_\_\_\_ (or Treaty \_\_\_\_\_) SHORT TITLE

(title) To amend the Voting Rights Act of 1965 to extend the effect  
of certain provisions, and for other purposes.

- ( ) Referred to the Committee on \_\_\_\_\_  
and ordered to be printed
- ( ) Ordered to lie on the table and to be printed

INTENDED to be proposed by \_\_\_\_\_

Viz: Strike all after the enacting clause and insert in lieu thereof  
1 the following:

2 SEC. 1. That this Act may be cited as the Voting Rights Act Amendments  
3 of 1982.

4 SEC. 2. Subsection (a) of section 4 of the Voting Rights Act of 1965  
5 is amended by striking out "seventeen years" each place it appears and  
6 inserting in lieu thereof "nineteen years".

7 (b) Effective on and after August 5, 1984, subsection (a) of  
8 section 4 of the Voting Rights Act of 1965 is amended --

9 (1) by inserting "(1)" after "(a)";

10 (2) by inserting "or in any political subdivision of such State  
11 (as such subdivision existed on the date such determinations were  
12 made with respect to such State), though such determinations were  
13 not made with respect to such subdivision as a separate unit," before  
14 "or in any political subdivision with respect to which" each place  
15 it appears;

16 (3) by striking out "in an action for a declaratory judgment" the  
17 first place it appears and all that follows through "color through  
18 the use of such tests or devices have occurred anywhere in the ter-  
19 ritory of such plaintiff.", and inserting in lieu thereof "issues a  
20 declaratory judgment under this section.";

21 (4) by striking out "in an action for a declaratory judgment" the  
22 second place it appears and all that follows through "section 4(f) (2)

1 through the use of tests or devices have occurred anywhere in the  
2 territory of such plaintiff.", and inserting in lieu thereof the  
3 following:

4 "issues a declaratory judgment under this section. A declara-  
5 tory judgment under this section shall issue only if such court  
6 determines that during the ten years preceding the filing of  
7 the action, and during the pendency of such action—

8 "(A) no such test or device has been used within  
9 such State or political subdivision for the purpose or  
10 with the effect of denying or abridging the right to  
11 vote on account of race or color or (in the case of a  
12 State or subdivision seeking a declaratory judgment  
13 under the second sentence of this subsection) in contra-  
14 vention of the guarantees of subsection (f)(2);

15  
16 "(B) no final judgment of any court of the United  
17 States, other than the denial of declaratory judgment  
18 under this section, has determined that denials or  
19 abridgements of the right to vote on account of race or  
20 color have occurred anywhere in the territory of such  
21 State or political subdivision or (in the case of a State  
22 or subdivision seeking a declaratory judgment under  
23 the second sentence of this subsection) that denials or  
24 abridgements of the right to vote in contravention of  
25 the guarantees of subsection (f)(2) have occurred any-  
26 where in the territory of such State or subdivision and  
27 no consent decree, settlement, or agreement has been  
28 entered into resulting in any abandonment of a voting  
29 practice challenged on such grounds; and no declara-  
30 tory judgment under this section shall be entered  
31 during the pendency of an action commenced before  
32 the filing of an action under this section and alleging  
33 such denials or abridgements of the right to vote;  
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1           “(C) no Federal examiners under this Act have  
2           been assigned to such State or political subdivision;  
3           “(D) such State or political subdivision and all  
4           governmental units within its territory have complied  
5           with section 5 of this Act, including compliance with  
6           the requirement that no change covered by section 5  
7           has been enforced without preclearance under section  
8           5, and have repealed all changes covered by section 5  
9           to which the Attorney General has successfully object-  
10          ed or as to which the United States District Court for  
11          the District of Columbia has denied a declaratory judg-  
12          ment;

13           “(E) the Attorney General has not interposed any  
14           objection (that has not been overturned by a final judg-  
15           ment of a court) and no declaratory judgment has been  
16           denied under section 5, with respect to any submission  
17           by or on behalf of the plaintiff or any governmental  
18           unit within its territory under section 5; and no such  
19           submissions or declaratory judgment actions are pend-  
20           ing; and

21           and were:“(F) such State or political subdivision and all  
22           governmental units within its territory

23           shall:“(i) have eliminated voting procedures and  
24           methods of election which inhibit or dilute equal  
25           access to the electoral process;

26           “(ii) have engaged in constructive efforts to  
27           eliminate intimidation and harrassment of persons  
28           exercising rights protected under this Act; and

29           “(iii) have engaged in other constructive ef-  
30           forts, such as expanded opportunity for convenient  
31           registration and voting for every person of voting  
32           age and the appointment of minority persons as  
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1 election officials throughout the jurisdiction and at  
2 all stages of the election and registration process.

3 "(2) To assist the court in determining whether to issue  
4 a declaratory judgment under this subsection, the plaintiff  
5 shall present evidence of minority participation, including  
6 evidence of the levels of minority group registration and  
7 voting, changes in such levels over time, and disparities be-  
8 tween minority-group and non-minority-group participation.

9  
10 "(3) No declaratory judgment shall issue under this sub-  
11 section with respect to such State or political subdivision if  
12 such plaintiff and governmental units within its territory  
13 have, during the period beginning ten years before the date  
14 the judgment is issued, engaged in violations of any provision  
15 of the Constitution or laws of the United States or any State  
16 or political subdivision with respect to discrimination in  
17 voting on account of race or color or (in the case of a State or  
18 subdivision seeking a declaratory judgment under the second  
19 sentence of this subsection) in contravention of the guaran-  
20 tees of subsection (f)(2) unless the plaintiff establishes that  
21 any such violations were trivial, were promptly corrected,  
22 and were not repeated.

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24 "(4) The State or political subdivision bringing such  
25 action shall publicize the intended commencement and any  
26 proposed settlement of such action in the media serving such  
27 State or political subdivision and in appropriate United States  
28 post offices. Any aggrieved party may intervene at any stage  
29 in such action.";

30 (5) in the second paragraph—

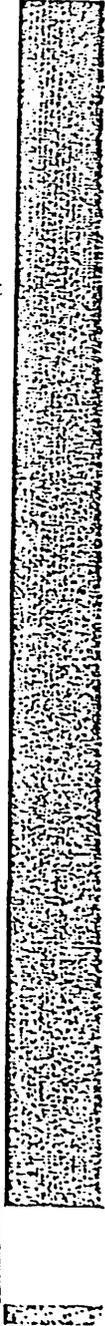
31 (A) by inserting "(5)" before "An action";

32 and

33 (B) by striking out "five" and all that follows  
34 through "section 4(f)(2).", and inserting in lieu

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thereof "ten years after judgment and shall  
reopen the action upon motion of the Attorney  
General or any aggrieved person alleging that  
conduct has occurred which, had that conduct oc-  
curred during the ten-year periods referred to in  
this subsection, would have precluded the issu-  
ance of a declaratory judgment under this subsec-  
tion. The court, upon such reopening, shall vacate  
the declaratory judgment issued under this section  
if, after the issuance of such declaratory judg-  
ment, a final judgment against the State or subdivi-  
sion with respect to which such declaratory  
judgment was issued, or against any governmen-  
tal unit within that State or subdivision, deter-  
mines that denials or abridgements of the right to  
vote on account of race or color have occurred  
anywhere in the territory of such State or politi-  
cal subdivision or (in the case of a State or subdivi-  
sion which sought a declaratory judgment under  
the second sentence of this subsection) that de-  
nials or abridgements of the right to vote in con-  
travention of the guarantees of subsection (f)(2)  
have occurred anywhere in the territory of such  
State or subdivision, or if, after the issuance of  
such declaratory judgment, a consent decree, set-  
tlement, or agreement has been entered into re-  
sulting in any abandonment of a voting practice  
challenged on such grounds."; and . . . . .  
(6) by striking out "If the Attorney General" the  
first place it appears and all that follows through the  
end of such subsection and inserting in lieu thereof the  
following:



1           “(6) If, after two years from the date of the filing of a  
2       declaratory judgment under this subsection, no date has been  
3       set for a hearing in such action; and that delay has not been  
4       the result of an avoidable delay on the part of counsel for any  
5       party, the chief judge of the United States District Court for  
6       the District of Columbia may request the Judicial Council for  
7       the Circuit of the District of Columbia to provide the neces-  
8       sary judicial resources to expedite any action filed under this  
9       section. If such resources are unavailable within the circuit,  
10      the chief judge shall file a certificate of necessity in accord-  
11      ance with section 292(d) of title 28 of the United States  
12      Code.”

14           “(7) The Congress shall reconsider and reevaluate the provisions  
15      of this section at the end of the 15 year period following the effective  
16      date of this Act, and at the end of each ten year period following there-  
17      after.”

18      SEC. 3. Section 2 of the Voting Rights Act of 1965 is amended to read  
19      as follows:

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

26           (b) A violation of subsection (a) ~~is~~ is established if, based on the  
27      totality of circumstances, it is shown that the political processes leading  
28      to nomination or election in the state or political subdivision are not  
29      equally open to participation by members of a class of citizens protected by  
30      subsection (a) in that its members have less opportunity than other members  
31      of the electorate to participate in the political process and to elect  
32      representatives of their choice. The extent to which members of a protected  
33      class have been elected to office in the State or political subdivision is  
34      one "circumstance" which may be considered, provided that nothing in this

1 section establishes a right to have members of a protected class elected in  
2 numbers equal to their proportion in the population.

3  
4 SEC. 4. Section 203(b) of the Voting Rights Act of 1965 is amended  
5 by striking out "August 6, 1985" and inserting in lieu thereof "August 6, 1992".

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7 SEC. 5. Title II of the Voting Rights Act of 1965 is amended  
8 by adding at the end the following section:

9 VOTING ASSISTANCE

10 "SEC. 208. Any voter who requires assistance to vote by reason  
11 of blindness, disability or inability to read or write may be given  
12 assistance by a person of the voter's choice, other than the voter's  
13 employer or agent of that employer."

14 SEC. 6. Except as otherwise provided in this Act, the amendments  
15 made by this Act shall take effect on the date of the enactment of this  
16 Act.

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# Finally, Hope for Voting Rights

NY Times  
May 2, 1982

A breakthrough is at hand for a renewed, strengthened Voting Rights Act.

The Senate Judiciary Committee, often the bloody battleground and even graveyard for civil rights legislation, finally has in sight a bill just as strong and popular as the measure that passed the House last fall, 389 to 24. The consensus is now so broad that only one question remains: Will the President join the celebration, or stick with a tiny band of die-hard, right-wing resisters?

If this new consensus holds, Senator Robert Dole of Kansas will deserve much credit. A centrist Republican, he has labored for a bill that would be fair without antagonizing conservatives. Through negotiations with civil rights stalwarts like Senators Kennedy and Mathias, he has found a formula the President should be able to endorse.

The national consensus for voting rights protections boiled up in 1965. Then and in 1970 and 1975, Congress swept away literacy tests, poll taxes and other barriers to the ballot. And states with the worst discrimination records have had to get approval from Washington before making any changes in their election rules.

This pre-clearance provision, however, stuck in Southern throats. Pressure grew for early, easy "ballot." The House said no. Instead, it devised a realistic way to restore sovereignty to jurisdictions that could show a decade of fairness, while maintaining supervision for others. The Dole plan embraces that early "ballot" concept while monitor-

ing recalcitrant jurisdictions for up to 25 years. A second thorny issue concerns the burden placed on plaintiffs trying to challenge laws and practices that subtly but effectively deny voting rights to minorities.

The problem arose from a 1980 Supreme Court ruling involving Mobile, Ala. The Court appeared to require, no matter how severe the discriminatory effect, that plaintiffs prove that such laws and practices arose for discriminatory motives. Mobile's blacks had to search Reconstruction era archives for evidence. They found it, but not every minority community will be so fortunate.

Hence the House bill defines a violation on the basis of discriminatory "results." The Administration argued that the bill, by requiring certain election outcomes, would impose "proportional representation" — ethnic quotas — on state and local politics. The Justice Department said it was not reassured by the House bill's explicit disclaimer of any such purpose. Again, Senator Dole has achieved a deft compromise, adding new disclaimers that offer additional, reasonable reassurances.

Those assurances offer President Reagan a respectable way out of the hole he has dug for himself on voting rights. They allow him to say that the quota issue is no longer the drawback he thought it was. If he means what he says about a lifelong commitment to civil rights, here is a superb way, paved by a legislator of impeccable G.O.P. credentials, to prove it.

## The Washington Post

AN INDEPENDENT NEWSPAPER

May 3, 1982

### Voting Rights Compromise

**T**HE PRESIDENT will soon be offered a compromise on the voting rights bill and with it an opportunity to improve his relations with the black community, to respond to moderates in his own party and to assume the leadership on an important civil rights issue. He should take it.

Extension of the Voting Rights Act has been the primary legislative objective of civil rights leaders this year. That law, parts of which are due to expire in August, has been extraordinarily effective in protecting the franchise in areas where racial discrimination had been the rule. It should be extended. The president favors extension of the law, but his support has been obscured in a bitter dispute over a change that was adopted by the House when it passed the extension bill on a vote of 389 to 24 last October.

The House bill provides that a voting system can be found to be discriminatory if the effect of that system is to exclude minorities from the political process. The Justice Department opposed this provision, arguing that litigants should have to prove that public officials intended to discriminate when they devised the voting system. An effects test, said department officials, would lead to racial quotas and proportional representation.

No one wanted such a result, and key members of the Senate Judiciary Committee have been working to amend the bill in order to meet some of the administration's objections. Over the last two weeks, Sens. Robert Dole and Edward Kennedy and Charles Mathias have hammered out a compromise that is expected to be offered to the full Judiciary Committee by Sen. Dole early this week. More than a dozen members of the committee have indicated they will support this version of the bill.

The key changes are designed to guarantee that plaintiffs must show that the totality of circumstances — not just the election results — prove discrimination. Further, the new bill would provide specifically that no group has a right to win elective office in numbers equal to its proportion in the population.

These changes in the bill should meet any legitimate objections raised by the administration. They provide assurance that civil rights groups and legislators ranging from liberal to quite conservative have made a good-faith effort to respond to the administration's concerns. The president has everything to gain by praising the compromise and urging prompt passage of the amended bill.

also intends to designate David R. Jones as Chairman.

*David R. Jones* is currently executive director of development, Vanderbilt University, a position he has held since 1976. He was executive director of the Tennessee Republican Party in 1975-76. He was administrative assistant to Senator James L. Buckley (R-N.Y.) in 1971-74. Mr. Jones was executive director of the Charles Edison Memorial Youth Fund in 1968-70. Previously, he was an instructor of history in St. Petersburg, Fla., in 1961-63, and Clearwater, Fla., in 1960-61. He attended West Liberty State College in West Virginia (A.B., 1960); L.M.U. (1956-57); and George Williams College in Chicago, Ill. (1955-56). He is married, has three children, and resides in Nashville, Tenn. He was born January 1, 1938, in Buffalo, N.Y.

*Richard E. Kavanagh* is senior vice president and manager of the Chicago Municipal Finance Group, A.G. Becker Inc., Chicago, Ill. Previously, he was Chief of the Finance Branch, Chicago Region, Department of Housing and Urban Development. In 1977 he was appointed member, Governor's Ad Hoc Financial Advisory Committee for Bond Offerings, State of Illinois. He attended DePaul University (B.S.). He is married, has four children, and resides in Naperville, Ill. He was born November 14, 1931, in Chicago, Ill.

*Marilyn D. Liddicoat* is vice chairman of the Santa Cruz County Board of Supervisors, Santa Cruz, Calif. She was first elected to the Board in 1976. Previously, she was president of the Santa Cruz County Board of Education and was judge pro tempore of the Santa Cruz Municipal Court. She maintained a private civil legal practice for many years. She graduated from the University of California (B.A.) and the University of Southern California (J.D.). She is married, has three children, and resides in Watsonville, Calif. She was born October 24, 1931, in Los Angeles, Calif.

*Kenneth R. Reher* is executive director of the Pennsylvania Higher Education Assistance Agency, where he has served since 1964. He developed the first State scholarship and student loan program in the country to be completely automated. Previously, he was coordinator, Division of Testing of the Pennsylvania Department of Public Instruction, 1961-64, and guidance specialist, Department of Public Instruction, in 1960-61. Mr. Reher graduated from Villanova University (B.S., 1948); Westminster College (M.S., 1952); and Allegheny College (LL.B., 1975). He is married, has one child, and resides in Camp Hill, Pa. He was born August 7, 1922, in Sharon, Pa.

## Voting Rights Act

*Statement by the President.*  
*November 6, 1981*

Several months ago in a speech, I said that voting was the most sacred right of free men and women. I pledged that as long as I am in a position to uphold the Constitution, no barrier would ever come between a secret ballot and the citizen's right to cast one. Today I am reaffirming that commitment.

For this Nation to remain true to its principles, we cannot allow any American's vote to be denied, diluted, or defiled. The right to vote is the crown jewel of American liberties, and we will not see its luster diminished.

To protect all our citizens, I believe the Voting Rights Act should and must be extended. It should be extended for 10 years—either through a direct extension of the act or through a modified version of the new bill recently passed by the House of Representatives. At the same time, the bilingual ballot provision currently in the law should be extended so that it is concurrent with the other special provisions of the act.

As a matter of fairness, I believe that States and localities which have respected the right to vote and have fully complied with the act should be afforded an opportunity to "bail-out" from the special provisions of the act. Toward that end, I will support amendments which incorporate reasonable "bail-out" provisions for States and other political subdivisions.

Further, I believe that the act should retain the "intent" test under existing law, rather than changing to a new and untested "effects" standard.

There are aspects of this law, then, over which reasonable men may wish to engage in further dialog in coming weeks. As this dialog goes forward, however, let us do so in a spirit of full and total commitment to the basic rights of every citizen.

The Voting Rights Act is important to the sense of trust many Americans place in their Government's commitment to equal rights. Every American must know he or she can count on an equal chance and an equal vote. The decision we are announcing

proof be reasonable.

I am aware that recent court decisions have caused some degree of uncertainty in an area of the law which had, heretofore, been relatively clear. This uncertainty has, in turn, led to the entirely legitimate concerns I have outlined above. These <sup>above</sup> concerns are not in direct conflict, however, and both can thus be addressed.

Our nation's successful seventeen-year experience with the Voting Rights Act has taught us that the courts, in determining whether a violation has occurred, look not to one factor but to a variety of factors, either alone or in combination. This is as it should be: as we should not require a "smoking gun" to prove a voting rights violation, neither should we allow courts to invalidate election systems and procedures on the basis of non-proportional results.

A "middle-ground" approach drafted along such lines will, I feel, address both of the major concerns expressed. It is my understanding that such an amendment will be introduced shortly by Senator \_\_\_\_\_ (and Senator \_\_\_\_\_), and I wholeheartedly endorse his/their effort.

With calmness and in a spirit of cooperation that does not yield to partisanship, we must move forward with passage of an extension of the Voting Rights Act before certain of its provisions expire in August. I believe the compromise measure, fair to all the legitimate concerns involved, is the right and proper course for us to follow. I invite you to join me in supporting it and, thereby, restate our Nation's basic commitment to protect the voting rights of all Americans.

Sincerely,

RR

DRAFT

Dear Senator \_\_\_\_\_:

Last November I stated my strong belief that the Voting Rights Act should and must be extended to ensure that the most precious of rights -- the right to vote -- is protected for all our citizens. I felt, and still feel, that the present law's language, which has worked well over many years and through many successful voting rights lawsuits, should be retained. I have also expressed the view that any extension should contain a reasonable "bailout" provision.

My concern, reflected in testimony by the Attorney General, is with what I consider to be an unwise change in Section 2 of the Act in the bill passed by the House of Representatives. As presently worded, the change could lead to guaranteed proportional representation by allowing federal courts to restructure election procedures and systems at all levels of government nationwide to ensure that election results reflect the minority percentage of the total population. Though I am confident it was not intended by the bill's sponsors, this type of guaranteed proportional representation, if it transpired, would run directly counter to the traditional electoral principles of our country. Thus, I feel our reservations with regard to the proposed changes in Section 2 are both real and worthy of serious attention.

At the same time, I understand and can sympathize with the fears of many in the civil rights community that the burden of proof in voting rights cases not be overly strict. When the possible denial or dilution of any American's vote is at issue, the interests of justice and the integrity of our system demand that the burden of

JWC  
4/28/82

DRAFT PRESIDENTIAL STATEMENT RE VOTING RIGHTS

~~This week, the Senate Judiciary Committee has begun consid-  
eration of legislation to extend the Voting Rights Act.~~

Last November I stated my strong belief that the Voting Rights Act should and must be extended to ensure that the most precious of rights-- the right to vote-- is protected for all our citizens. ~~It is my understanding that a compromise amendment to the~~ Now, as the Senate Judiciary Committee begins its consideration of legislation to accomplish this ~~worthy goal~~, I want to again stress my firm commitment to an extension of the Voting Rights Act.

RP

It is my understanding that a compromise amendment to the ~~House-passed bill~~ will soon be introduced by Senators Robert Dole and Dennis DeConcini that will attempt to address several of the concerns that have been raised regarding features in ~~the bill~~. ~~This Administration, as reflected in testimony by the AG, has been particularly concerned that ambiguities in the House bill's language could lead to court-ordered restructuring of election procedures and systems at all levels of government to ensure that election results reflect a minority group's percentage of the total population. This type of guaranteed proportional representation, if it transpired, would run directly contrary to the traditional electoral principles of our country.~~ <sup>extension bill passed by the House of Rep's</sup> <sup>though,</sup> Upon review of the language in the compromise amendment, however, we feel it now contains the safeguards and protections

TP

3. Section 2 of S. 1992 could be amended to clarify that the White v. Regester standard should be applied in lawsuits brought pursuant to Section 2. It is suggested that this change be made in the following manner:

Sec. 2. Section 2 of the Voting Rights Act of 1965 is amended by striking out "to deny or abridge" and inserting in lieu thereof "in a manner which results in a denial or abridgement of" and is further amended by adding at the end of the section the following sentences: "An election system results in such a denial or abridgement when used invidiously to cancel out or minimize the voting strength of racial or language minority groups. The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section." \*/

Much of the testimony which has been presented to Congress by the proponents has criticized the Mobile standard as being significantly more difficult to satisfy than the White v. Regester standard; and the proponents have testified that the intent of Section 2 of S. 1992 is to legislatively adopt the White standard. Although we have been concerned that the language of Section 2 as proposed by S. 1992 may bring about results which reach far beyond an adoption of the White standard, a specific legislative adoption of the White standard would eliminate those concerns. It would be necessary under this option to reflect clearly in the legislative history that the added sentence explicitly adopts the White standard. Politics aside, we believe that the White standard would be acceptable to civil rights groups (in fact, it is the standard which such groups have advocated). Of course, hearings in the House and Senate have indicated that any amendment to S. 1992 may receive opposition even if such amendment furthers the design of the proponents.

\*/ See White v. Regester, 412 U.S. 755, 765 (1973). The Court further described the legal standard as follows:

To sustain [challenges to at-large, multi-member district, or other election procedures], it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question - that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

412 U.S. at 765-766. The en banc Court of Appeals for the Fifth Circuit applied this legal standard in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) and in the numerous vote dilution lawsuits which followed Zimmer.

Strike all after the enacting clause and insert in lieu thereof the following:

SEC. 1. That this Act may be cited as the "Voting Rights Act Amendments of 1981".

SEC. 2. Section 4(a) of the Voting Rights Act of 1965 is amended by:

- (1) striking out "seventeen" each time it appears and inserting in lieu thereof "twenty-seven"; and
- (2) striking out "ten" each time it appears and inserting in lieu thereof "seventeen".

SEC. 3. Section 2 of the Voting Rights Act of 1965 is amended by -

- (1) inserting "(a)" after "2.", and
- (2) by adding at the end thereof a new subsection as follows:

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

SEC. 4. Section 203(b) of the Voting Rights Act of 1965 is amended by striking out "August 6, 1985" and inserting in lieu thereof "August 6, 1992".

*before which: 1985 amendment to voting rights act*  
*- state allowed to come up with...*

SECTION-BY-SECTION SUMMARY OF COMPROMISE AMENDMENT

DOLE

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

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

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

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

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

Section 2 is amended to read as follows:

Section 2

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

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

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

## VOTING RIGHTS ACT MEETING -- April 26, 1982

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

The options are:

1. Current Law: This includes an intent test and preserves the Mobile standard. This option will not be supported by Dole or Heflin, could probably garner only 7 votes in committee, and would certainly lose on the Senate floor. We have indicated we will compromise in committee, thus moving away from this option. We could return to it if efforts to work out an acceptable compromise fail, though prospects would be slim.
2. House Bill: This includes an effects test that would overturn the Mobile standard. The House Bill could lead to proportional representation, and we have so testified. This passed the House by an overwhelming margin, and has 65 co-sponsors in the Senate. We have stated that we could only accept it if the effects test is altered.
3. Reynolds I: This would add only one sentence to House Bill that would preclude proportional representation. Use of word "invidiously" implies an intent factor even though "results" language is still present. Conservatives would have problems with the latter and moderates might object to the former. Advantage is simplicity and fact it accomplishes our key objective.
4. Reynolds II: Maintains intent language of current law and adds a subsection that modifies the Mobile standard by using language from White v. Regester. We maintain this places the burden of proof where it was before Mobile, though the civil rights coalition argues that lack of change in the intent language will be viewed by the courts as an endorsement of the Mobile standard. Reynolds II is being represented as our current position in committee. If it is to succeed it must be supported by Heflin and Dole (and, through them, DeConcini) while maintaining conservative support.
5. Dole: This was forwarded to us yesterday by Senator Dole with a request for our views by c.o.b. today. The Dole Compromise uses both results and intent language as a violation standard, then adds a section that attempts to make clear the "results" portion is to be interpreted consistent with White. It also has a prohibition on proportional representation. The Justice Department feels that Dole's compromise is inferior to Reynolds II; there are also indications that it would not be supported by conservatives on the committee.

Section 2 of the Voting Rights Act

(House amendments indicated in  
italics and brackets)

TITLE I—VOTING RIGHTS

**SEC. 2** No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision ~~to deny or abridge~~ *in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.*

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

<sup>1</sup>The amendments made by sub-section (a) of the first section of this Act shall take effect on the date of enactment of the Act.

GRASSLEY AMENDMENT TO SECTION 2 OF THE VOTING RIGHTS ACT

Sec. 2. No voting qualification or prerequisite to voting, or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section. Provided, however, that with respect to standards, practices or procedures not relating to access to voter registration or the polling place, such standards, practices or procedures shall be in violation of this section only if 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 in contravention of the guarantees set forth in section 4(f)(2).

Sec.2(a) No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). In determining whether a violation of this section has been established, the court shall consider the totality of the circumstances surrounding the imposition and application of such voting qualification or prerequisite to voting or standard, practice or procedure. Nothing in this Act shall be construed to permit a remedy effectively requiring that candidates of any race, color or language minority must be elected in proportion to the total number of citizens of that race, color or language minority in the population of a State or political subdivision.

(b) It shall be an affirmative defense to a claim for relief under this section that a voting qualification or prerequisite to voting or standard, practice or procedure was imposed and applied for a purpose other than to deny or abridge the right of any citizen to vote on account of race, color, or membership in a language minority and serves a rational governmental interest. The defendant shall establish such defense by a preponderance of the evidence. The court shall consider evidence that any nondiscriminatory purpose proffered pursuant to this subsection is a pretext for a voting qualification or prerequisite to voting or standard, practice or procedure which denies or abridges the right of any citizen to vote on account of race, color, or membership in a language minority.

JC copy

Strike all after the enacting clause and insert in lieu thereof the following:

SEC. 1. That this Act may be cited as the "Voting Rights Act Amendments of 1981".

SEC. 2. Section 4(a) of the Voting Rights Act of 1965 is amended by:

- (1) striking out "seventeen" each time it appears and inserting in lieu thereof "twenty-seven"; and
- (2) striking out "ten" each time it appears and inserting in lieu thereof "seventeen".

SEC. 3. Section 2 of the Voting Rights Act of 1965 is amended by -

- (1) inserting "(a)" after "2.", and
- (2) by adding at the end thereof a new subsection as follows:

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

SEC. 4. Section 203(b) of the Voting Rights Act of 1965 is amended by striking out "August 6, 1985" and inserting in lieu thereof "August 6, 1992".

*- before relief: 1st conviction affirmative before ordering punitive damages*  
*- state allowed to come up with remedies*

### Explanation of Proposed Amendment

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

The amendment to Section 2 proposed in the bill passed by the House of Representatives, and incorporated verbatim in S.1992, sets forth a "results" test in terms sufficiently ambiguous to have raised serious and legitimate concerns over its possible interpretation by the courts. In this regard, the Administration has argued that the Section 2 "results test," as worded in the House bill and S.1992, could well lead to a requirement of proportional representation. Although the proposed amendment contains a provision that "[t]he fact that members

of a minority group have not been elected in numbers equal to that group's proportion of the population shall not, in and of itself, constitute a violation," that proviso is not an adequate protection against proportional representation since it is framed in such narrow terms (i.e., "in and of itself") that any other evidence, no matter how insignificant, would justify overturning an existing electoral system.

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

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

To sustain [challenges to at-large, multi-member district, or other election procedures], it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential.

The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question -- that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

412 U.S. at 765-766. The en banc Court of Appeals for the Fifth Circuit applied this legal standard in Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), and in the numerous vote dilution lawsuits which followed Zimmer.

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

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

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

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

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

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

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

SECTION-BY-SECTION SUMMARY OF COMPROMISE AMENDMENT

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

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

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

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

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

TEXT OF COMPROMISE

Section 2 is amended to read as follows:

Section 2

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

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

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



# Leadership Conference on Civil Rights

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

April 23, 1982

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

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

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

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

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

*"Equality In a Free, Plural, Democratic Society"*

32nd ANNUAL MEETING • FEBRUARY 22-23, 1982 • WASHINGTON, D.C.

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

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

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

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

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

## SUMMARY ON COMPROMISE AMENDMENT

### Background

As you are aware, the most controversial provision of the House-passed Voting Rights Act bill concerns a proposed change in Section 2. Section 2 contains a general prohibition against discriminatory voting practices. It is permanent legislation and applies nationwide. In the 1980 case of Mobile v Bolden, the Supreme Court held that Section 2 prohibits only intentional discrimination. The House bill would amend Section 2 to prohibit any voting practice having a discriminatory "result".

Much of the intent/results controversy has evolved around whether the Mobile case changed the law. Prior to Mobile, the courts used an "aggregate of factors" or "totality of circumstances" test in voting rights cases. The leading cases articulating this standard are the Supreme Court case of White v Regester, and the Fifth Circuit opinion of Zimmer v McKeithen. According to Zimmer and White, the standard to be applied was whether, based on an "aggregate of factors" the "political processes ... were not equally open to the members of the minority group in question". And the "factors" looked at by the courts in this line of cases included indicia of intentional discrimination, as well as the "result" of the challenged voting practice.

Proponents of the "result" standard in Section 2 have argued that the White/Zimmer "aggregate of factors" test was a "results" test, which the subsequent Mobile case drastically changed. Thus they have argued that by placing a results standard in Section 2, the courts will return to use of the White/Zimmer test. Intent advocates, on the other hand, have pointed to language in the Mobile decision indicating that White was essentially an "intent" case. Thus they have argued that the White/Zimmer approach was simply an articulation of various objective "factors" which could be relied upon to circumstantially prove discriminatory intent.

### Key Provisions of the Compromise Amendment

Because neither side of the intent/results controversy has expressed disagreement with the pre-Mobile case law, we have simply codified that case law in our compromise amendment. Specifically, the compromise would add a new subsection to Section 2 explicitly stating that a violation of that section is established when, based on an "aggregate of factors", it is shown that the "political processes leading to nomination and election are not equally open to participation by a minority group". The subsection then provides a nonexclusive list of factors to be considered by the courts, the same factors articulated in White and Zimmer. These factors are:

1. Whether there is a history of official voting discrimination in the jurisdiction;
2. Whether elected officials are unresponsive to the needs of the minority group;

3. Whether there is a tenuous policy underlying the jurisdictions' use of the challenged voting practice;
4. The extent to which the jurisdiction uses large election districts, majority vote requirements, anti-single shot provisions, or other practices which enhance the opportunity for discrimination;
5. Whether members of the minority group have been denied access to the process of slating candidates;
6. Whether voting in the jurisdiction is racially polarized;
7. Whether the minority group suffers from the effects of invidious discrimination in such areas as education, economics, employments, health, and politics; and
8. The extent to which members of minority groups have been elected to office, but with the caveat that the subsection does not require proportional representation.

The Compromise Amendment is Neither an Intent Test nor a Results Test

In our opinion, the pre-Mobile case law, and thus our compromise amendment codifying this case law, represents neither an "intent" standard nor a "results" approach. Nowhere in the pre-Mobile case law did the courts state that a plaintiff must prove that the challenged voting practice was motivated by an intent to discriminate. But similarly, nowhere did the courts state that they were applying a "results" test.<sup>1</sup> Rather, the touchstone of these cases, and of our compromise amendment, is whether certain key factors have coalesced to deny members of a particular minority group access to the political process. Neither election results, nor proof of discriminatory purpose is determinative. Access is the key.

Politically, we think the compromise will be attractive. The civil rights groups have repeatedly stated that a return to the pre-Mobile case law is all they want, and in drafting the amendment, we have made every effort not to deviate from the case law. Further, the amendment carefully

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<sup>1</sup> Under the traditional "effects" or "results" test applied, for instance, under Title VII of the Civil Rights Act of 1964, the focus of inquiry is whether statistically, the challenged practice has had a disparate impact on a particular minority group. The pre-Mobile courts consistently emphasized that such statistical disparities, i.e., in the voting context, the lack of proportional representation, was not determinative, but rather only one factor, among many, to be considered.

avoids any possible interpretation that it could require proportional representation, or that it would impose an "effects" test similar to that employed under Title VII. The first sentence makes clear, as did the White and Zimmer opinions, that the issue to be decided is equal access to the political process, and that this determination is to be based on an aggregate of factors, not simply election results. Similarly, the extent to which minorities have been elected to office is listed as only one factor to be considered, and it is accompanied by an express disclaimer that the subsection does not mandate proportional representation.

SB:pab

Section 2 of the Voting Rights Act

(House amendments indicated in italics and brackets)

TITLE I—VOTING RIGHTS

Sec. 2<sup>1</sup> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *[to deny or abridge] in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f) (2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.*

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

<sup>1</sup>The amendments made by subsection (a) of the first section of this Act shall take effect on the date of enactment of the Act.

since in some areas, the percentage of adults living on Indian lands who are not fluent in English may range as high as 60 to 70 percent. Claims that providing language assistance in the electoral process promotes cultural segregation were described as "silly, woefully, and overwhelmingly in error."<sup>18</sup> Testimony clearly showed that contrary to such claims, such assistance has the effect of bringing into the integral and integrated workings of communities, with substantial language minority populations, "a sense of comradeship, and participatory democracy."<sup>19</sup>

Further belying such claims is the high degree of participation by Mexican American citizens in the political process within the State of New Mexico. New Mexico, with an Hispanic population of 36.6 percent, has provided bilingual voter assistance almost continuously since it became a state. As a consequence, New Mexico is the only (mainland) state in which Hispanics hold statewide offices—in fact, they hold 40 percent of such positions; it also has the largest number of Hispanics elected to office—35 percent of its State Senators, 28 percent of its State Representatives, and 30 percent of its County Commissioners are Hispanics.<sup>20</sup> No other state approaches this degree of integration of Mexican-American citizens into its political system. One witness concluded that such political integration "moves us toward a more united and harmonious country."<sup>21</sup>

It is on the basis of all of this evidence that the Committee believes it necessary to extend the Section 203 provisions at this time. Language assistance is provided to address the vestiges of voting discrimination against language minority citizens and is an integral part of providing the protections which the Act has sought to extend to all minorities.

AMENDMENTS TO SECTION 2 OF THE ACT

As discussed throughout this report, there are numerous voting practices and procedures which result in discrimination. In the covered jurisdictions, post-1965 discriminatory voting changes are prohibited by Section 5. But, many voting and election practices currently in effect are outside the scope of the Act's preclusion provision, either because they were in existence before 1965 or because they arise in jurisdictions not covered by Section 5.

Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e., litigation or preclusion. The lawfulness of such a practice should not vary depending upon when it was adopted, i.e., whether it is a change. Yet, while some discriminatory practices and procedures have been successfully challenged under Section 2 of the Voting Rights Act, the Supreme Court's interpretation of Section 2 in *City of Mobile v.*

<sup>18</sup>The Honorable Barbara Jordan, former Member, U.S. House of Representatives (June 18, 1970).  
<sup>19</sup>Testimony of the Honorable Roberto Mondragon, Lieutenant Governor of New Mexico (June 18, 1970).  
<sup>20</sup>Testimony of the Honorable Robert Abrams, Attorney General of the State of New York (Hearing of June 18).

*Balden*<sup>22</sup> has created confusion as to the proof necessary to establish a violation under that section.<sup>23</sup>

Prior to *Balden*, a violation of Section 2 could be established by direct or indirect evidence concerning the context, nature and result of the practice at issue. In *Balden*, Justice Stewart, writing for the plurality, construed Section 2 of the Act as merely restating the prohibitions of the Fifteenth Amendment. The Court held that a challenged practice would not be unlawful under that section unless motivated by discriminatory intent. The Committee does not agree with this construction of Section 2 and believes that the intent of the section should be clarified.

Section 2 of H.R. 9112 will amend Section 2 of the Act to make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision. Many of these discriminatory laws have been in effect since the turn of the century.<sup>24</sup> Efforts to find a "smoking gun"<sup>25</sup> to establish racial discriminatory purpose or intent are not only futile,<sup>26</sup> but irrelevant to the consideration whether discriminatory has resulted from such election practices.

The purpose of the amendment to section 2 is to restate Congress' earlier intent that violations of the Voting Rights Act, including Section 2, could be established by showing the discriminatory effect<sup>27</sup> of the challenged practice. In the 1965 Hearings, Attorney General Katzenbach testified that the section would reach any kind of practice . . . if its purpose or effect was to deny or abridge the right to vote on account of race or color.<sup>28</sup> [emphasis added] As the Department of Justice concluded in its *amicus* brief in *Lodge v. Bushong*,<sup>29</sup> applying a "purpose" standard under Section 2 while applying a "purpose or effect" standard under the other sections of the Act would frustrate the basic policies of the Act.

By amending Section 2 of the Act Congress intends to restore the pre-*Balden* understanding of the proper legal standard which focuses on the result and consequences of an allegedly discriminatory voting

<sup>22</sup>444 U.S. 119 (1980).  
<sup>23</sup>*Complete Election v. Elmore County, Florida*, 639 F.2d 1239 (5th Cir. 1981), with *Lodge v. Bushong*, 639 F.2d 1239 (5th Cir. 1981), and *Thomas County, Georgia*, 639 F.2d 1241 (5th Cir. 1981).  
<sup>24</sup>*Hefner*, June 24, 1961, C. Vann Woodward, J. Morgan Kousser, 630 F.2d 1239 (5th Cir. 1981).  
<sup>25</sup>The Supreme Court and commentators have noted that legislative motivation is often impossible to ascertain and unwieldy results are rendered in futile, and its application may lead to undesirable and unwieldy results. See *id.*, at 1241.  
<sup>26</sup>107(1) "It is difficult or impossible for any court to determine the purpose of a statute, especially in the case of a group of legislators. Furthermore, there is an inherent contradiction in the concept of a law being enacted for the bad motives of its sponsors. If the law is struck down for the bad motives of its sponsors, it is the sponsor's own fault for not necessarily what went into congressional speeches about a statute is not necessarily what went into the legislative process. An assessment after *Ferry*, 79 Cal. 2d 137 (1970).  
<sup>27</sup>*Id.*, at 137.  
<sup>28</sup>107(1) "It is not necessary to establish a purpose or effect to establish a violation of the Act."  
<sup>29</sup>*See* Committee Hearings, 1965, Memorandum from: Hiroshi Motomura, To: Sally Kaufman, on 5/15/64 before the Committee on the Judiciary, United States Senate, 80th Cong., 639 F.2d, 1240 (5th Cir. 1981).



It is intended that citizens have a private cause of action to enforce their rights under Section 2. This is not intended to be an exclusive remedy for voting rights violations, since such violations may also be challenged by citizens under 42 U.S.C. §§ 1971, 1983 and other voting rights statutes. If they prevail they are entitled to attorneys' fees under 42 U.S.C. §§ 1973(f) and 1988.

#### AMENDMENTS TO SECTION 4 (E) OF THE ACT

Over the past century, The Congress repeatedly has enacted legislation in an attempt to secure the guarantees of the Fifteenth Amendment. The Enforcement Acts authorized the executive branch to enfranchise newly emancipated black; the results were dramatic. Under the Hayes-Tilden Compromise the Federal Government acquiesced to pressures of states promises to diligently enforce the Civil War Amendments. Upon repeal of the Enforcement Acts disfranchisement of blacks was swift and complete, and until the Voting Rights Act of 1965 enforcement of the fifteenth amendment was left to the judicial branch.

The legislative history for the 1965 Act makes clear the inability of one branch of government to effectively enforce that right, despite congressional acts streamlining the judicial process for voting rights litigation.<sup>108</sup>

Pursuant to Section 2 of the Fifteenth Amendment Congress passed the Voting Rights Act of 1965. The Act gave the executive branch a greater role in enforcing the right to vote and strengthened judicial remedies in voting rights litigation.

Disturbed at the lack of progress in minority participation within the political process in the covered jurisdictions, Congress in 1975 began to explore alternative remedies. Proponents of these different remedies argued that the Voting Rights Act as written, provided no incentive for the covered jurisdictions to do other than retain existing voting procedures and methods of election. The record showed that frequently the changes which did occur continued the effects of past discriminatory voting practices. After exploring these proposals, Congress chose not to adopt changes in the Act's remedies at that time.

After listening once again to the litany of discriminatory practices and procedures which continue to dominate these covered jurisdictions, the Committee determined that some modification of the Act was necessary to end the apparent inertia which exists in these jurisdictions.

The Committee believes these proposed changes to the bailout provision, set forth in H.R. 3112, as amended, will provide the necessary incentives to the covered jurisdictions to comply with laws protecting the voting rights of minorities, and to make changes in their existing voting practices and methods of election so that by eliminating all discriminatory practices in the elections process increased minority participation will finally be realized. This is a reasonable bailout which will permit jurisdictions with a genuine record of nondiscrimination to achieve exemption from the requirements of Section 5.

A major change in current law is that counties within fully covered states will be allowed to file for bailout independently from the State.

<sup>108</sup> H.R. 3112.

The amendment does retain the concept that the greater governmental entity is responsible for the actions of the units of government within its territory, so that the State is barred from bailout unless all of its counties/parishes can also meet the bailout standards. Likewise, any county bailout would be barred unless units within its territory could meet the standard.

Because of the continuing record of voting rights violations which has been presented to the Congress in 1970, 1975 and at this time, and further documented in numerous studies and reports, the jurisdiction is required to present a compelling record that it has met the amended standard.

The amended bailout provisions become effective on August 6, 1983 from August 6, 1982 to August 5, 1984, the jurisdictions will be required to comply with the current bailout provision. This 2 year delay will allow the Department of Justice to continue to effectively enforce Section 5 and also make necessary preparations and decisions about re sources to respond to these bailout suits.

#### ALTERNATIVE PROPOSALS

In addition to H.R. 3112, as reported to the House, other proposals to amend the Voting Rights Act of 1965 are addressed in the Committee record. Some of these proposals were contained in legislation before the Subcommittee on Civil and Constitutional Rights.

##### *Judicially Ordered Preclearance*

Under current law, once a jurisdiction is brought under the coverage of the special provisions of the Act (accordingly, since 1965, 1970, or 1975 triggers) the jurisdiction must automatically submit or preclear all of its proposed electoral changes, either to the Attorney General or to the District Court for the District of Columbia; most changes are precleared with the Justice Department. This process is commonly referred to as the automatic administrative preclearance procedure or more simply, preclearance. In addition, current law provides that administrative preclearance may be required for a period of time, as part of a judicially imposed remedy, in areas not automatically subject to the special provisions of the Act.

A proposal to replace existing procedure with a judicially imposed preclearance process was discussed in the hearings.<sup>109</sup> Under this proposal, administrative preclearance would be imposed by a court anywhere in the country, if it made a judicial finding that a pattern and practice of voting rights abuses existed in a specific jurisdiction.

The hearing record demonstrates most emphatically that the effect of this approach would be to signify a return to the pre-1965 legislative approach, which the legislative history of the 1965 Act showed to be most ineffective in protecting the voting rights of minorities.<sup>110</sup> This proposal would mean that for each of the currently covered jurisdictions, which number over 900, a lawsuit would have to be initiated to require the jurisdiction to submit. Given the overwhelming evidence of a continuing pattern and practice of voting discrimination against

<sup>109</sup> On May 4, H.R. 3173 was introduced by Representative Hyde in further clarity the changes proposed in the alternative bill H.R. 3113. Now, superseded H.R. 3112.  
<sup>110</sup> See 1085 House Hearings.

ORRIN G. HATCH  
UTAH

411 RUSSELL SENATE OFFICE BUILDING  
TELEPHONE: (202) 224-5281

HATCH HOT LINE 1-800-862-4300  
(UTAH TOLL FREE)

## United States Senate

WASHINGTON, D.C. 20510

March 15, 1982

COMMITTEES:  
JUDICIARY  
LABOR AND HUMAN  
RESOURCES  
SMALL BUSINESS  
BUDGET  
OFFICE OF TECHNOLOGY  
ASSESSMENT

Dear Colleague:

With hearings recently completed on the Voting Rights Act in the Subcommittee on the Constitution which I chair, I would like to take the liberty of summarizing the key issue that has emerged in the debate. That is the issue of whether or not to change the standard for identifying 15th Amendment violations from an "intent" to a "results" standard.

While there have been significant differences of opinion among witnesses on the merits of these standards, I believe that there has been virtually total agreement that the issue is a highly significant one. Personally, I believe that the issue involves one of the most substantial constitutional issues to come before Congress in many years. In effect, the issue is: How is Congress going to define the concepts of "civil rights" and discrimination?

Section 2 of the Voting Rights Act codifies the 15th Amendment to the Constitution and applies to the entire country-- The 15th Amendment to the Constitution forbids public policies which deny or abridge voting rights "on account" of race or color. Section 2 has always been one of the least controversial provisions of the Voting Rights Act because it codified that principle. Application of the 15th Amendment (and section 2), of course, is not limited to those jurisdictions "covered" by the Voting Rights Act; they apply to the entire country.

Section 2 and the 15th Amendment have always required some showing of intentional or purposeful discrimination in order to establish a violation-- The Supreme Court stated in the 1980 case of *Mobile v. Bolden* that no decision of the Court had ever "questioned the necessity of showing purposeful discrimination in order to show a 15th Amendment violation." Similarly, they noted that the 14th Amendment's Equal Protection Clause has always required that claims of racial discrimination "must ultimately be traced to a racially discriminatory purpose." There is no Supreme Court decision under either the 15th Amendment or Section 2 that has ever allowed discrimination to be proved by an "effects" or "results" standard.

It is unconstitutional for Congress to overturn a constitutional interpretation of the Supreme Court by simple statute-- The Supreme Court having interpreted the parameters of the 15th Amendment in Mobile, Congress lacks authority to enact legislation (presumably under the authority of the 15th Amendment) that interprets the amendment in a different manner. This is precisely the constitutional controversy involved in efforts by some in Congress to overturn the Roe v. Wade abortion decision by simple statute.

The "intent" standard is the proper standard for identifying civil rights violations-- The 15th Amendment prohibits denial or abridgement of voting rights "on account of" race or color. This has always been interpreted to mean "because of" race or color. As the Supreme Court observed in a 1977 decision, "A law neutral on its face and serving ends otherwise within the power of government to pursue is not invalid simply because it may affect a greater proportion of one race than another." Washington v. Davis. The "intent" standard reflects what has always been the understanding of discrimination-- the wrongful treatment of an individual "because of" or "on account of" his or her race or skin color.

The "results" standard is a radically different standard for identifying discrimination-- The "results" standard would sharply alter the traditional conception of discrimination by focusing primarily upon the results of an allegedly discriminatory action rather than upon the processes leading up to that action. It would radically transform the goal of the Voting Rights Act from equal access to the electoral process into equal outcome in that process.

The "results" test would establish a standard of proportional representation by race as the standard for identifying discrimination-- The only logical impact of the new "results" test will be to establish proportional representation by race as the standard for identifying racial discrimination (see Attachment). There is no other possible meaning to the concept of discriminatory "results". The new standard is premised upon the idea that racial disparities between population and representation are invariably explained by discrimination.

The so-called proportional representation disclaimer in section 2 is a smokescreen-- The disclaimer language states that evidence of the lack of proportional representation shall not "in and of itself" establish a violation. This is extremely misleading. What this means is that lack of proportional representation plus one additional scintilla of evidence will establish a violation. What would constitute an additional scintilla? Among such factors, referred to in the House report and elsewhere, are the existence of an at-large election system, re-registration laws, evidence of racially polarized voting, majority vote requirements, anti-single shot vote re-

quirements, impediments to independent candidacies, disparities in registration rates among racial groups, a history of discrimination, a history of lack of proportional representation, the past existence of dual school systems, a history of English-only ballots, evidence of maldistribution of services in racially-identifiable neighborhoods, staggered election terms, residency requirements, numbers of minority election personnel, etc. etc.

The theory of the "results" test is that each of these so-called "objective factors of discrimination" explains the lack of proportional representation. Virtually any community in the country lacking proportional representation is going to have one or more of these factors which would complete a violation. In addition, any further electoral or voting procedure or law that could be arguably considered a "barrier" to minority voting participation, e.g. purging non-voters off of registration lists periodically, could serve as the basis for the additional scintilla of evidence required by the so-called disclaimer provision.

The major target of proponents of the "results" test is the at-large system of election throughout the country-- More than 12,000 jurisdictions throughout the country have adopted at-large systems of elections. These are opposed by some in the civil rights community because they do not maximize the possibility of proportional representation. If the "results" test is approved in section 2, any community with an at-large system of election (lacking proportional representation for minority groups) will be in severe jeopardy. The at-large system of election, both in the North and the South, is the major target of the civil rights community through the revised section 2 (although by no means the only target).

The "results" test will ensure that Federal courts will become far more deeply involved in dismantling local governmental structures which do not maximize the possibilities of proportional representation by race-- As the Supreme Court observed in Mobile, "The dissenting opinion ("results" test) would discard fixed principles in favor of a judicial inventiveness that would go far toward making this Court a super-legislature." In the Mobile decision itself, the Court reversed an order by the lower court requiring the dismantling of the local structure of government in Mobile (at-large system) despite a failure to prove purposeful discrimination and despite clear evidence that the at-large system in Mobile served important, non-racially related purposes.

The "results" test would substitute the rule of an individual judge for a rule of law-- Perhaps the most serious defect of the "results" test is that it completely undermines a clear rule of law fixed by the "intent" test and substitutes a new rule that cannot possibly offer the slightest bit of guidance to a community as far as how to conduct its affairs, short of assuring proportional representation by race. There is absolutely no guidance beyond this standard as far as what voting and election laws and procedures are permissible and what are not.

The "intent" test is not impossible to prove and it does not require mind-reading or 'smoking guns' of evidence-- It is interesting that the claim should be made that "intent" is impossible to prove when it has always been the standard for constitutional civil rights violations, e.g. equal protection clause, school busing, 13th Amendment, 14th Amendment, 15th Amendment. It is also interesting when it is recognized that "intent" is proven every day of the week in criminal trials, without the need for express confessions or 'smoking guns'. Indeed, it is even more difficult to prove in criminal cases because it must be proven there "beyond a reasonable doubt" rather than simply "by a preponderance of the evidence" as in civil rights cases. Intent has always been proven, not solely through circumstantial evidence, but through circumstantial evidence as well, i.e. through the totality of the circumstances. As the Supreme Court observed in 1978, "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available." *Arlington Heights v. Metropolitan Authority*. Major voting rights cases have been won by plaintiffs under the "intent" standard before and after *Mobile*.

I am aware that there is a great deal of political pressure upon Members of this body to support the House version of the Voting Rights Act without changes. I would respectfully suggest, however, that if this measure becomes law, most of the Members of this body will have communities that will become the target of litigation by so-called "public interest" law firms. I have prepared some information on a few of these communities which will be vulnerable under the proposed amendments to the Act and will be glad to share this information with any interested Members or their staff.

It is rare that an issue comes along of the constitutional and practical significance of the proposed changes to the Voting Rights Act. I would ask each of you, whether or not you have already joined as a co-sponsor of this measure, to consider these issues very carefully. They are not simple issues but they are of critical importance.

Please do not hesitate to contact me or Mr. Stephen Markman of my Judiciary Committee staff (x48191) if we can be of further assistance to you in explaining the significance of these (or any other) changes in the Voting Rights Act.

Sincerely,



Orrin G. Hatch  
United States Senate

AMENDMENT NO. ----- Ex. ----- Calendar No. -----

Purpose: -----  
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IN THE SENATE OF THE UNITED STATES— ----- Cong., ----- Sess.

S. 1992 -----

H.R. ----- (or Treaty ----- )

SHORT TITLE

(title) ----- To amend the Voting Rights Act of 1965 to extend the effect  
----- of certain provisions, and for other purposes.  
-----  
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- ( ) Referred to the Committee on -----  
and ordered to be printed  
( ) Ordered to lie on the table and to be printed

INTENDED to be proposed by MR. DOLE -----

Viz: Strike all after the enacting clause and insert in lieu thereof

1 the following:

2 SEC. 1. That this Act may be cited as the "Voting Rights Act  
3 Amendments of 1981".

4 SEC. 2. Section 4(a) of the Voting Rights Act of 1965 is amended  
5 by:

6 (1) striking out "seventeen" each time it appears and inserting  
7 in lieu thereof "twenty-seven"; and

8 (2) striking out "ten" each time it appears and inserting in lieu  
9 thereof "seventeen".

10 → SEC. 3. Section 2 of the Voting Rights Act of 1965 is amended by -

11 (1) inserting "(a)" after "2.", and

12 (2) by adding at the end thereof a new subsection as follows:

13 "(b)(1) A violation of this section is established when, based on an  
14 aggregate of factors, it is shown that such voting qualification or pre-  
15 requisite to voting, or standard, practice, or procedure has been imposed  
16 or applied in such a manner that the political processes leading to nomination  
17 and election in the state or political subdivision are not equally open to  
18 participation by a minority group protected by subsection (a). "Factors"  
19 to be considered by the court in determining whether a violation has been  
established shall include, but not be limited to:

20 (A) Whether there is a history of official discrimination in the State  
21 or political subdivision which touched the right of the members of the  
22 minority group to register, vote, or otherwise participate in the

1 democratic process;

2 (B) Whether there is a lack of responsiveness on the part of elected  
3 officials in the state or political subdivision to the needs of the members  
4 of the minority group;

5 (C) Whether there is a tenuous policy underlying the state's or  
6 political subdivision's use of such voting qualification or prerequisite to  
7 voting, or standard, practice, or procedure;

8 (D) The extent to which the state or political subdivision uses or  
9 has used large election districts, majority vote requirements, anti-single  
10 shot provisions, or other voting practices or procedures which may enhance  
11 the opportunity for discrimination against the minority group;

12 (E) Whether the members of the minority group in the state or political  
13 subdivision have been denied access to the process of slating candidates;

14 (F) Whether voting in the elections of the state or political sub-  
15 division is racially polarized;

16 (G) Whether the members of the minority group in the state or political  
17 subdivision suffer from the effects of invidious discrimination in such  
18 areas as education, employment, economics, health, and politics; and

19 (H) The extent to which members of the minority group have been,  
20 elected to office in the state or political subdivision, provided that,  
21 nothing in this subsection shall be construed to require that members  
22 of the minority group must be elected in numbers equal to their propor-  
23 tion in the population."

24

25 SEC. 4. Section 203(b) of the Voting Rights Act of 1965 is amended  
26 by striking out "August 6, 1985" and inserting in lieu thereof "August 6,  
27 1992".

28

29

30

KANSAS CITIES WITH AT-LARGE ELECTIONS AND LOW MINORITY REPRESENTATION

City	No. On City Council	1970* Population		No. Minorities Elected											% Minority Elected: 1970-1980			
		Non-White	Non-Black	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980				
Garden City	5	2%	28%	1%	0	0	0	0	0	0	0	0	0	0	0	0	0	0%
Junction City	5	16%	35%	22%	0	0	0	0	0	0	0	0	2	1	1	1	1	10%
Kansas City, Ks.	3	21%	33%	25%	0	0	0	0	0	0	0	0	0	0	0	0	0	0%
Liberal	5	5%	25%	5%	1	0	0	0	0	0	0	0	0	0	0	0	0	2%
Wichita	5	3%	19%	11%	1	1	0	0	0	0	0	0	0	0	0	0	0	4%

\* 1970 Census did not include Hispanics as nonwhite. 1980 Census did. Thus, cities with large Hispanic population show large increase in nonwhite population between 1970 and 1980.