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

c. Kuhl ✓

Counselor to the Attorney General

March 17, 1982

TO: Tex Lezar
Hank Habicht
Carolyn Kuhl
Chips Stewart
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FROM: Ken Starr

F.Y.I.

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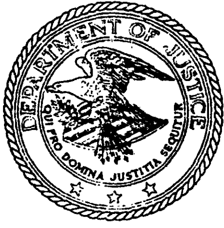

Office of the Attorney General
Washington, D.C. 20530

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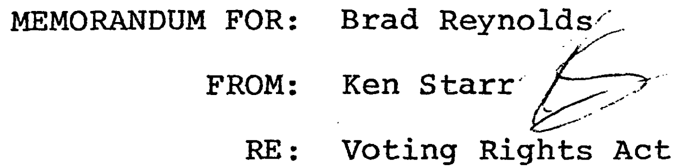

MEMORANDUM FOR: Brad Reynolds

FROM: Ken Starr

RE: Voting Rights Act

I am attaching an excellent piece on the Voting Rights Act which appears in the current issue of <u>The American Spectator</u>. You may want to add this to your files of favorable editorial comment on the Administration's position.

Attachment

cc: Robert McConnell (w/attachment)
Jonathan Rose (w/attachment)

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acknowledgment of its right to rule over a united Vietnam.

In my judgment, our formal recognition of the Socialist Republic of Vietnam as the particular political expression of the people of South Vietnam is precluded by Article Five of the United Nation's declaration on aggression which says, "No territorial or special advantage resulting from aggression is or shall be recognized as lawful." Hanoi's 1975 invasion of South Vietnam not only violated the Paris Agreements on Ending the War but constituted an act of aggression under international law, which defines it as the use of armed force by a state against the territorial integrity and political independence of another state. The creation of the Socialist Republic incorporating all of Vietnam under one government as the consequence of such aggression was in violation of international law and should not be legitimated. Perhaps this September the Reagan Administration should challenge Hanoi's credentials to sit in the United Nations.

The proper approach for peace in Indochina is neutralism under the political formula reached in 1954 during the Geneva conference. There would again be two Vietnams with both Laos and Cambodia as independent and non-aligned nations. One Vietnam could be socialist, the other nationalist. However, both Vietnams should also be committed to a legal regime of international neutrality along the lines of Switzerland and Austria. No state would henceforth be threatened by Hanoi, and military expenditures in Southeast Asia would be reduced. The Association of Southeast Asian nations has long since called for a zone of neutrality in that heterogeneous part of the world. All significant emigre Vietnamese nationalist leaders who have been consulted have accepted the broad outlines of such a proposal, except that many would prefer to have a unified neutral Vietnam instead of two separate states.

A two-Vietnam arrangement would be to the benefit of every concerned power save Moscow and the current Hanoi ruling group. Hanoi will never agree to the end of its dominion until force of arms leaves it with no other choice. Conversely, those Indochinese who would bring a measure of humanity and justice to their countries have nothing left but an appeal to Heaven—and its corollary, the violent struggle for political liberty. □

THE PUBLIC POLICY

AFFIRMATIVE VOTING RIGHTS

by Terry Eastland

Extension of key enforcement provisions of the Voting Rights Act, scheduled to expire August 6, has never been in doubt. The only question has been the form extension should take, and the current betting would have to favor the version overwhelmingly passed last fall by the House of Representatives, a bill that now has more than 60 Senate supporters.

If this version should prevail, however, the great promise of the Voting Rights Act would be tragically denied. For there would no longer be any reason to hope that the act might facilitate a more integrated vote—one in which voters define their interests in terms other than their own race and ethnicity. Indeed, there would be good reason to fear that the polarization of society along racial and ethnic lines would increase dramatically.

In the first few years after the act's passage, the dream of an integrated vote seemed plausible. In conformity with the original purpose of the Voting Rights Act—to improve black access to the polls—racially discriminatory roadblocks began falling wherever they existed, mainly, of course, in the South. Consequently, black registration began to increase by the thousands. In Mississippi—to cite one of the most heartening results—the percentage of blacks registering to vote jumped from seven percent the year before the act was passed to almost 60 percent in 1967.

Soon enough, however, the Justice Department, which has enforcement authority for the act, ceased to be concerned with ensuring equal political opportunity. Instead, taking its cue from a 1969 Supreme Court decision, it turned to a new issue—the prevention of what it called "vote dilution."

According to Section 5 of the act, nine Southern states and parts of thirteen others must "preclear" any changes in their voting procedures with the Civil Rights Division of the Justice Department. As it worked out, "preclearance" has been required even in changes involving annexations, reapportionments, and shifts from ward to at-large voting. Invariably, the Justice Department has asked whether any such change would "dilute" the voting strength of minority groups (blacks, in most cases). This question assumes that blacks will—and *should*—vote for blacks. Any voting change that fails to maximize the chances of electing minority group candidates has been instantly suspect, and in most cases rejected.

Amazingly enough, as extension legislation moved through the House of Representatives not one voice was raised objecting to the Justice Department's handling of Section 5 cases. In fact, the House voted not simply to extend Section 5, heretofore merely a temporary provision, but to engrave it permanently into the U.S. Code. And despite opposition efforts by an embattled and tiny group of representatives, the House voted to make "bail-out" from Section 5, already difficult, virtually impossible.

As a result, it is likely that Section 5 jurisdictions will henceforth have virtually no hope of escaping Justice Department pressure to achieve what amounts to proportional representation by race. Section 5, always said to be a temporary measure that would ease the nation into an era in which race won't matter, has become a permanent measure designed to ensure that any new election guidelines will place a premium on skin color and ethnic background.

The problems with Section 5 are

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small, however, compared with what the House has done to Section 2. A permanent provision of the Voting Rights Act, Section 2 is a codification of the Fifteenth Amendment, which prohibits the adoption of any election law or procedure that denies or hampers a person's right to vote on account of race or color. It applies to *all* states, not just those covered by Section 5. It also applies to any discriminatory voting practice that might have been established prior to 1965, no matter how long ago its adoption.

Like the Fifteenth Amendment, Section 2 requires that an intent to discriminate be demonstrated to prove a violation. In rewriting Section 2, the House Judiciary Committee has dropped this requirement. Now a violation would be established if, as the committee's report explains, "the alleged unlawful conduct has the effect or impact of discrimination on the basis of race, color, or membership in a language minority group."

The implications of this "strengthening" of Section 2 are plain enough. Any political unit—a city, say, or a county—with an at-large voting system that fails to elect minority candidates in approximate proportion to the number of their group in the general population will be vulnerable to a Section 2 lawsuit, and will probably be required to establish a district electoral scheme. To put the matter another way, schemes that "dilute" the vote of minorities will immediately draw fire and probably be outlawed. Courts will probably examine Section 2 claims in terms of "vote dilution," and because the majority of the nation's cities and many counties elect their representatives in an at-large manner, hundreds of lawsuits might ensue.

As disturbing as the revision in Section 2 is, very few members of the House found reason to object—four, if my count is accurate. But the voices of Thomas Bliley, Caldwell Butler, Dick Cheney, and Jim Collins were merely crying in the Washington wilderness. Although it spent seven weeks in hearings, the House Judiciary Committee needed only one day to consider the revision to Section 2. Only three witnesses appeared, and all three favored the change. Press treatment was no better. Mr. Butler, a member of the committee, composed a dissent for the committee report, but it went unreported in the *Washington Post*. When he and his colleagues raised objections on the House floor during the two debates on the bill held October 2 and 5, their points barely received passing mention in the *Post*. Thus, no one following the extension legislation could have confidently guessed what was happening to Section 2. Meanwhile, the White House, reticent about taking a position on the extension legislation, did not object to the rewriting of Section 2 until two weeks after the legislation had passed the House, and then only very quietly.

Since late January, when the Senate Judiciary Committee began considering extension legislation, Section 2 has received wider attention. But even now, despite some debate on the issue, there is a conspicuous lack of candor among the defenders of a revised Section 2.

To begin with, few proponents of the House version of extension openly admit that Section 2 has been rewritten to *overturn* a two-year-old Supreme Court ruling in *Mobile* v. *Bolden* which held that a Section 2 violation requires a demonstration of discriminatory intent. The favorite language—whether of the House Judiciary Committee report, the *Post* editorial page, or civil rights lobbyists—is that the Section 2 revision would merely "clarify" the law (and, thus, the Fifteenth Amendment) by "re-

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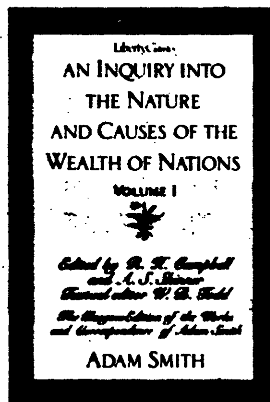

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turning" it to the pre-*Mobile* standard. (Suffice to say, when conservatives try to "clarify" the meaning of the Fourteenth Amendment as it might apply to fetuses, or when they try to "return" to the status quo before *Roe* v. *Wade*, they are charged with attempting to undermine the very foundations of the Republic. Overturning the Supreme Court seems to depend on the political ends being served.)

Second, there has been in some quarters a strange silence about what the possible repercussions of a revised Section 2 might be. No reader of the House Judiciary Committee report can fail to grasp that Section 2 was rewritten to make winners out of the losers in *Mobile*. These losers and their allies—the ACLU, the NAACP, and others—have declared without qualification that *Mobile* would keep them from successfully challenging hundreds of at-large systems. Nevertheless, the *Post*, for one, has said not a word about the rash of lawsuits that would likely result from the House version of Section 2. Nor has it noted that the purpose of these lawsuits would be to effect proportional representation by race, or something close to it. In fact, on January 26 the *Post* casually wrote: "Opponents of [Section 2] say this would require courts to strike down any voting system that didn't result in proportional representation. Not true."

But consider this: After *Mobile* was decided in 1980 the *Post* commented that the ruling "derails the legal theory that civil rights lawyers had hoped would force a shift from at-large elections to ward or district elections in cities all over the country"; that it "cut[s] down dozens, perhaps hundreds, of legal challenges that would have been made against existing systems of government or multimember legislative districts"; and that it "avoid[s] the logical terminal point of those challenges: that election district lines must be drawn to give proportional representation to minorities." At the least the *Post* should read its own files. On the other hand, these words from the past might be unsettling: They were voiced in partial sympathy with the Court's decision.

Third, there has been an attempt to argue that Section 2, as revised, is consistent with the legislative history of the Voting Rights Act. Not true, as the *Post* might say. In trying to justify a Section 2 "effects" test, the House Judiciary Committee, in the most disingenuous sentence in its report, cites Attorney General Katzenbach's 1965 congressional testimony that Section 2 would apply to any voting practice whose "purpose or effect was to deny or abridge the right to vote on account of race or color." But Katzenbach was referring to practices affecting equal access to the ballot—not, as the committee report would have us believe, to "vote dilution."

Fourth, there has been a refusal to understand what the Supreme Court was doing in *Mobile*. Contrary to what defenders of the House extension contend, no Court decision has ever required anything other than an "intent" standard for Section 2 or the Fifteenth Amendment. Although the Court has on occasion used the "effects" standard that the House now wants written into Section 2, it has done so only when considering voting rights claims in a Fourteenth Amendment context. Moreover, in a series of other Fourteenth Amendment cases involving racial issues, the Court has always demanded a showing of discriminatory intent or purpose.

Mobile, as Edward J. Erler of the National Humanities Center pointed out in Senate subcommittee hearings in January, called for a halt to readings of the Constitution and the Voting Rights Act that would not only allow but *require* proportional representation by race. Accordingly, as Erler said, the most reasonable and effective way for the Court to do this was "to restore the authority of those cases requiring proof of discriminatory purposes as a necessary prerequisite to a claim of voting discrimination." As Justice Stevens wrote in his opinion in *Mobile*, "The fact is that the Court has sternly set its face against the claim, however phrased, that the Constitution somehow guarantees proportional representation."

Finally, none of the proponents of Section 2 have addressed the most important question of all—what kind of society would the House bill help create? No one in this debate has declared himself in favor of proportional representation by race, at least not in public. One can only conclude that everyone recognizes that such representation would violate the basic premises upon which the nation was founded. Why would it violate these premises? To force an answer is to expose unquestioned racial assumptions—that blacks should vote for blacks, that blacks should represent blacks, that there must be a "black" view of things (and a Hispanic one, an Indian one, an Asian one)—which no one, at least not in the polite world of Washington, is willing to defend explicitly. What proponents of a revised Section 2 prefer is to go about maximizing black and minority voting strength by carving out black majority districts, all the while protesting that proportional representation is not the object of this game. But whatever it is called, or, as Justice Stevens might say, however it is phrased, there is no difference in principle between preventing "vote dilution" and working toward proportional representation. The principle in both instances is that voting is a group exercise defined by race.

The House version of the Voting Rights Act extension is a towering monument to this principle. It contradicts what Justice Stevens stated in *Mobile*, that "there is no national interest in creating an incentive to define political groups by racial char-

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acter." It also places a premium on what amounts to the maintenance of segregation, since integration makes it more difficult to draw districts by race. It assumes that proportional representation by race will result in greater legislative benefits for blacks and other minorities, although for this to happen minority representatives would have to form coalitions *not* based on race—precisely what the legislation would prevent voters from doing. Further, the House bill unfairly implies that at-large systems are inherently inferior to district electoral schemes. In an at-large election, a citizen can cast votes in every election, and thus influence every outcome; in a district election, a citizen is confined to influencing only his district's outcome. The House bill thus invites a sort of separate but equal politics—hardly what the architects of the Voting Rights Act of 1965 envisioned.

Civil rights leaders have turned the House bill into an emotional issue, urging its passage with sermons, marches, and so on. Few politicians have had the courage to ask many questions, and the Reagan Administration is, given its handling of tax exemption for racially discriminatory schools, in a tenuous position to rally opposition. The issue seems to be in the hands of the Senate, but fortunately there may be an easy way out for all those senators nervous about opposing the House bill. Civil rights lobbyists started out last year by saying that they wanted the Voting Rights Act extended as is, no changes allowed. This would be a splendid alternative. □

THE REAL WORLD

PATRIOTIC MATERIALISM

by Ben J. Wattenberg

The lily-white suburbs aren't. The white noose has become a polka-dot scarf. That explains a lot. The census results show that from 1970 to 1980 the number of whites living in suburbs went up by 13 percent. During the same time the number of blacks went up by 44 percent. There were about four million blacks in suburbs in 1970; today, there are six million. Now, it would be terribly misleading to suggest that these six million black people are all grilling steaks in the spacious backyards of four-bedroom split-levels with full two-car garages. Suburbs aren't like that. They have poor people. And people living in small apartments. And crime. And some of the whites are just moving to farther-out suburbs to be away from blacks.

But it's also true that suburbia was, is, and will be the locale of the American dream. Remember, that's where June Allyson and Fred MacMurray wanted to get the little white house with the picket fence. It's where schools are better. There is no shortage of doctors in suburbia. Most folks there own a spot of green. All in all, it's a pretty good statistical index of where, to use an ugly phrase from market research, the up-scale people live.

In the society as a whole, there is no question that blacks are still behind whites. There is also little doubt that they have been catching up. So, too, in the suburbs. Blacks are still proportionately less likely to live there than whites, but the trend is clear. The 1970 census showed 18 percent of blacks living in suburbs; the 1980 data shows 23 percent.

The move to the suburbs shouldn't surprise anyone. Historically, when Americans become better off, they move to the suburbs. And despite all the recent talk about cuts in "the programs," the reality of black life in America has much improved in recent years. In an NBC-Associated Press public-opinion poll of blacks last year, 60 percent of the respondents said that blacks in America are "better off" than ten years ago versus 17 percent who said blacks were "worse off." Those are opinions, but those views are backed up by data concerning housing, jobs, and education—and income too, although the data there gets tricky.

White attitudes toward blacks have also changed. A Louis Harris poll from 1963 showed that about half of the whites in America (47 percent) would be upset "only a little" or "not at all" if "blacks moved into this neighborhood." By 1978 the white Americans holding that essentially nonracist view had climbed to 70 percent. That unfortunately still leaves about 30 percent of whites who don't like blacks, but the numbers have changed in a big way.

Two thoughts occur to me about these developments, one about blacks in suburbs, another about blacks in slums.

Blacks have made progress in America. The move-to-suburbia numbers show that quite clearly. My sense is that blacks are making progress because of their own hard work in a society that rather suddenly "opened up" for them. Blacks were denied that equal opportunity in America for centuries. When that opportunity was made available, millions of blacks took advantage of it. It is ungracious and unfair to suggest that those black advances were simply bestowed by an almighty government passing out goodies to assuage earlier guilt.

The blacks moving to the suburbs are machinists, policemen, salesmen, teachers, computer programmers, and auto workers, many of them in families with both husband and wife working damn hard to make ends meet, with children who are, or will be, attending college at almost the same rate as whites. Whitney Young of the Urban League once told me that Martin Luther King had told him, "Never forget that Negroes in America are materialistic, religious, and patriotic." Which is not a bad description of whites, either.

Oddly enough, that same very healthy move to the suburbs has created bigger-than-ever problems in the worst areas of the big-city slums. If opportunity long denied becomes available, if many blacks take advantage of opportunity, if they accordingly leave the bad neighborhoods in which they lived—what happens? What happens is that in a strange way both the appearance and reality of those worst neighborhoods become even worse.

Try to visualize it: Suppose 100 blacks lived in a "bad" inner-city slum neighborhood in, say, 1960. In the course of 20 years, half move out, either to suburbs or to better in-city neighborhoods. The ones who leave are the ambitious, the educated, the healthy, the well-employed, the leaders of the church, and the Boy Scouts.

Who stays? Disproportionally, the aged, the unemployed, the ill-employed, the sick, the broken families, as well as the social and criminal derelicts—winos, bums, junkies, muggers.

Interestingly, the statistical portrait not only of leavers but of stayers may have improved. After all, in the last two decades a vast array of services has been introduced to help the poor: Medicaid, rent supplements, food stamps, to name but a few. In addition, minimum wages went way up. Social Security has also escalated sharply and in a way that particularly helps the elderly poor. You don't have to love "big government" to accept the fact that these programs have helped poor people become less poor.

But when you visit a neighborhood of worst-area-stayers, that is not what you sense or feel. A neighborhood whose bright, ambitious, and stable members have moved upward and onward is a sick area, even if the statistics are better. Its economy and its values both erode. For whatever solace it is, that seems to be the way social progress in America works, for blacks and for whites. Do well, move out.

Over the long haul it works out pretty well. But in the short term, the hurricane swirls into the vacuum. □

Ben J. Wattenberg is a senior fellow at the American Enterprise Institute. This article is adapted from Mr. Wattenberg's bi-monthly United Feature Syndicate column.

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