

Memorandum



Subject	Date
Voting Rights Act §2	February 17, 1982

To Brad Reynolds
Ken Starr
Bruce Fein
Tex Lezar
Chuck Cooper

From John Roberts *JR*

It occurs to me that in our preoccupation with the proportional representation aspect of the §2 problem we may have been shortchanging problems the effects test will pose for blacks and Hispanics. Two instances come to mind:

1. Until recently it was the progressive position to favor annexations of suburbs, in order to expand the tax base to include relatively wealthy whites and thereby increase resources for services for inner-city blacks. An effects test as proposed by the House bill would seem to bar such annexations, regardless of the purpose -- i.e., even if undertaken to increase the tax base for the benefit of inner-city dwellers. There would be a vote dilution effect, so the city is forever saddled with a dwindling tax base.
2. Consolidation of school districts would also be barred by an effects test. Consolidation of a predominantly black school district with a neighboring predominantly white district would be a significant step in promoting school integration, but this laudable purpose could not save the action from being invalidated because of the dilutive effect on black votes for the school board.

Unless these arguments are for some reason unfounded, I think they should be made in future pronouncements on the §2 question. They would give more balance to our position.

Memorandum



Subject	Date
Today's <u>Post</u> editorial	January 26, 1982

To The Attorney General From John Roberts *JR*

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

Responses:

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

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

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

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

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

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

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

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

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

Memorandum



Subject

Talking Points For White House Meeting
on Voting Rights Act

Date

January 26, 1982

To

The Attorney General

From

John Roberts *JR*

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

Suggested Points:

- o It is important that people in the White House understand the President's position on the Voting Rights Act and actively work to see it realized. The position which has been announced and which will be explained in Department of Justice testimony is not simply the Department's view but is the position of the Administration and our President, who deserves his staff's full and active support on this issue.
- o The President's position is a very positive one and should be put in that light. He is for the Voting Rights Act and wants to see it extended. Civil rights groups told us the Act was very successful in its present form and should be extended unchanged. That is essentially the President's position: if it isn't broken, don't fix it.
- o What the President opposes is not the Voting Rights Act but rather efforts to introduce confusion and uncertainty by dramatically altering its terms. He opposes changing the law by introducing an effects test into § 2 because this would throw into litigation existing electoral systems at every level of government nationwide when there is no evidence of voting abuses nationwide supporting the need for such a change. Indeed, the House Report recognized as much when it concluded there was no need to extend preclearance nationwide.

- o An effects test for § 2 could also lead to a quota system in electoral politics, as the President himself recognized. The so-called "savings clause" in the House bill would not remove this danger. Just as we oppose quotas in employment and education, so too we oppose them in elections.
- o Do not be fooled by the House vote or the 61 Senate sponsors of the House bill into believing that the President cannot win on this issue. Many members of the House did not know they were doing more than simply extending the Act, and several of the 61 Senators have already indicated that they only intended to support simple extension. Once the senators are educated on the differences between the President's position and the House bill, and the serious dangers in the House bill, solid support will emerge for the President's position.
- o The President's position is politically saleable, since the position is a positive one. Senator Baker demonstrated this on Sunday's "Meet the Press", when he concisely announced that he favored straight extension, without any muddling with the protections in § 2. We had met earlier with Baker, and his position is an example of what to expect if the President's position is clearly explained.
- o We are confident that this fight can be won, our experience with the Act convinces us that it is very important that the fight be won, and the President is fully committed to this effort. His staff should be as well.