EXHIBIT V

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VOTING RIGHTS ACT EXTENSION

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

S. 1992

with

ADDITIONAL, MINORITY, AND SUPPLEMENTAL VIEWS

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As the Supreme Court has repeatedly noted, discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups, are an impermissible denial of the right to have one's vote fully count, just as much as outright denial of access to the ballot box.[110]

In adopting the "result standard" as articulated in *White* v. *Regester*, the Committee has codified the basic principle in that case as it was applied prior to the *Mobile* litigation.

The Committee has concluded that *White*, and the decisions following it made no finding and required no proof as to the motivation or purpose behind the practice or structure in question.[111] Regardless of differing interpretations of *White* and *Whitcomb*, however, and despite the plurality opinion in *Mobile* that the *White* involves an "ultimate" requirement of proving discriminatory purpose, the specific intent of this amendment is that the plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose.[112]

Section 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy.

If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, there is a violation of this section. To establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question.

Typical factors include:[113]

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

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footnote [109] continued.

General or the district court to disapprove a proposed voting law change unless the submitting jurisdiction establishes that it "does not have the purpose *and will not have the effect* of denying or abridging the right to vote *on account of race or color* . . . ." (Emphasis disprove discriminatory purpose and the burden to disapprove discriminatory impact. The same use of "on account of race or color" is made in a different context in Section 4(a). Thus it is patently clearly that Congress has used the words "on account of race or color" in the Act to mean "with respect to" race or color, and not to connote any required purpose of racial discrimination. Any other arguments based on similar parsing of isolated words in the bill that there is some implied "purpose" component in Section 2, even when plaintiffs proceed under the results standard, are equally misplaced and incorrect.

[110] *Fortson* v. *Dorsey*; *Burns* v. *Richardson*.

[111] A study of the opinion in *White* reveals no discussion of evidence or analysis by the court as to the motivation behind the challenged practice, nor any suggestion that such a finding was essential to relief "Mr. Justice White's opinion assigned plaintiffs a heavy burden, but not one requiring proof of discriminatory intent." P. Brest, "The Supreme Court—Forward, In Defense of the Antidiscrimination Principle,' 90 Harv. L. Rev. 1, 44 (1976).

The Committee does not adopt any view of *White* as requiring plaintiff to meet some "objective design" test that is, in effect, a version of the "foreseeable consequences" test of tort law. Although *White* refers to the "design" of the multimember districts, the context makes clear that this refers to their particular format, and has no connotation of purpose. Thus, Brest observes: "The Court did not imply that the multimember districts had been discriminatorily designed." Id. (Emphasis added.)

[112] The Fifth Circuit, when it affirmed *Bolden* in 1978, held that the *White-Zimmer* factors allowed the district court to infer discriminatory purpose. Under the Committee bill that step is unnecessary: a finding of the appropriate factors showing current dilution is sufficient, without any need to decide whether those findings, by themselves, or with additional circumstantial evidence, also would warrant an inference of discriminatory purpose.

[113] These factors are derived from the analytical framework used by the Supreme Court in *White*, as articulated in *Zimmer*.

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; [114]

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.[115]

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.[116]

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.[117]

While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.

The cases demonstrate, and the Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.[118]

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[114] The courts have recognized that disproportionate educational employment, income level and living conditions arising from past discrimination tend to depress minority political participation, e.g., *White* 412 U.S. at 768; *Kirksey* v. *Board of Supervisors*, 554 F.2d 139, 145. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

[115] The fact that no members of a minority group have been elected to office over an extended period of time is probative. However, the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote", in violation of this section. *Zimmer* 485 F.2d at 1307. If it did, the possibility exists that the majority citizens might evade the section e.g., by manipulating the election of a "safe" minority candidate. "Were we to hold that a minority candidate's success at the polls is conclusive proof of a minority group's access to the political process, we would merely be inviting attempts to circumvent the Constitution . . . Instead we shall continue to require an independent consideration of the record." *Ibid.*

[116] Unresponsiveness is not an essential part of plaintiff's case. *Zimmer; White* (as to Dallas.) Therefore, defendants' proof of some responsiveness would not negate plaintiff's showing by other, more objective factors enumerated here that minority voters nevertheless were shut out of equal access to the political process. The amendment rejects the ruling in *Lodge* v. *Buxton* and companion cases that unresponsiveness is a requisite element, 639 F.2d 1358, 1375 (5th Cir. 1981), (an approach apparently taken in order to comply with the intent requirement which the Supreme Court's plurality opinion in *Bolden* imposed on the former language of Section 2.) However, should plaintiff choose to offer evidence of unresponsiveness, then the defendant could offer rebuttal evidence of its responsiveness.

[117] If the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact. But even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process.

[118] The courts ordinarily have not used these factors, nor does the Committee intend them to be used, as a mechanical "point counting" device. The failure of plaintiff to establish any particular factor, is not rebuttal evidence of non-dilution. Rather, the provision requires the court's overall judgment, based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is, in the language of *Fortson* and *Burns*, "minimized or canceled out."

Whitcomb, *White*, *Zimmer*, and their progeny dealt with electoral system features such as at-large elections, majority vote requirements and districting plans. However, Section 2 remains the major statutory prohibition of all voting rights discrimination. It also prohibits practices which, while episodic and not involving permanent structural barriers, result in the denial of equal access to any phase of the electoral process for minority group members.

If the challenged practice relates to such a series of events or episodes, the proof sufficient to establish a violation would not necessarily involve the same factors as the courts have utilized when dealing with permanent structural barriers. Of course, the ultimate test would be the White standard codified by this amendment of Section 2: whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their choice.[119]

The requirement that the political processes leading to nomination and election be "equally open to participation by the group in question" extends beyond formal or official bars to registering and voting, or to maintaining a candidacy.

As the Court said in *White*, the question whether the political processes are "equally open" depends upon a searching practical evaluation of the "past and present reality."[120]

Finally, the Committee reiterates the existence of the private right of action under Section 2, as has been clearly intended by Congress since 1965. See *Allen* v. *Board of Elections*, 393 U.S. 544 1969).

DISCLAIMER

When a federal judge is called upon to determine the validity of a practice challenged under Section 2, as amended, he or she is required to act in full accordance with the disclaimer in Section 2 which reads as follows:

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

Contrary to assertions made during the full Committee mark-up of the legislation, this provision is both clear and straightforward.

[119] This aspect of the statute's scope is illustrated by a variety of Section 2 cases involving such episodic discrimination. For example, a violation could be proved by showing that the election officials made absentee ballots available to white citizens without a corresponding opportunity being given to minority citizens. See *Brown* v. *Post*, 279 F. Supp. 60, 63–64 (W.D.La. 1968). Likewise, purging of voters could produce a discriminatory result if fair procedures were not followed, *Toney* v. *White*, 488 F.2d 310 (5th Cir. 1973), or if the need for a purge were not shown or if opportunities for re-registration were unduly limited. Administration of an election could likewise have a discriminatory result if, for example, the information provided to voters substantially misled them in a discriminatory way. *United States* v. *Post*, 297 F. Supp. 46, 50–51 (W. D. La. 1969).

[120] 412 U.S. at 769–770. Therefore, for purposes of Section 2, the conclusion in the *Mobile* plurality opinion that "there were no inhibitions against Negroes becoming candidates, and that in fact Negroes had registered and voted without hindrance", would not be dispositive. Section 2, as amended, adopts the functional view of "political process" used in *White* rather than the formalistic view espoused by the plurality in *Mobile*. Likewise, although the plurality suggested that the Fifteenth Amendment may be limited to the right to cast a ballot and may not extend to claims of voting dilution (without explaining how, in that case, one's vote could be "abridged"), this section without question is aimed at discrimination which takes the form of dilution, as well as outright denial of the right to register or to vote.

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from the forseeable consequences of adopting or maintaining the challenged practice.

By codifying the "results" standard articulated in *White* and its progeny, the amendment retains the repeated emphasis in those cases that there is nothing, *per se*, unlawful about at-large elections systems. Only when such systems operate, in the context of other objective factors and the totality of circumstances, to effectively deny members of a minority group the opportunity to participate equally in the process, is a violation established.

By referring to the "results" of a challenged practice and by explicitly codifying the *White* standard, the amendment distinguishes the standard for proving a violation under Section 2 from the standard for determining whether a proposed change has a discriminatory "effect" under Section 5 of the Act.[224]

New Subsection 2(b) also replaces the so-called "disclaimer" language in the House-passed bill in order to make more clear that the amended section creates no right to proportional representation.[225] The Committee language codifies the approach used in *Whitcomb*, *White* and subsequent cases, which is that the extent to which minorities have been elected to office is only one "circumstance" among the "totality" to be considered.[226]

It expressly states that members of a minority group do not have a right to be elected in numbers equal to their proportion in the population. The disclaimer thus guarantees that the question of whether minority candidates have been successful at the polls will not be dispositive in determining whether a violation has occurred. If a violation is established traditional equitable principles will be applied by the courts in fashioning relief that completely remedies the prior dilution found to be in violation of this section.

X. SECTION-BY-SECTION ANALYSIS

Section 1

This section provides that the Act may be cited as the "Voting Rights Act Amendments of 1982."

Section 2

This section contains substantial revisions to the so-called bailout provisions of the current law. The effect of the amendments is to keep covered jurisdictions subject to the bailout in current law for two more years, at which time they may bail out by showing a 10-year record of full compliance with the law and by demonstrating positive steps to afford full opportunity for minority participation in the political process. The effect of the first amendment made by this Section is to retain the current bailout standard until August 5, 1984.

Section 2(b)

This section provides that the amendments made in S. 1992 to Section 4(a), relating to the new standards for bailout, are effective on and after August 5, 1984.

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[224] Plaintiffs could not establish a Section 2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group.

[225] The disclaimer in the legislation passed by the House simply states that a lack of proportional representation "in and of itself" does not constitute a violation.

[226] *Whitcomb*, 403 U.S. at 149; *White* 412 U.S. at 766–69; *Zimmer* 485 F. 2d at 1305.