Testimony of

Professor Chandler Davidson

May 9, 2006

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
Legislative Hearing on a Bill To Reauthorize and Amend the Voting Rights Act of 1965
9 May 2006

STATEMENT OF CHANDLER DAVIDSON
PROFESSOR EMERITUS
RICE UNIVERSITY
HOUSTON, TEXAS

Mr. Chairman, Mr. Vice Chairman, and distinguished members of this Committee: Thank you for inviting me to testify before you today. I am deeply honored to have this opportunity to talk briefly about the Voting Rights Act.

I.

This Act was the climax of the period described by the late historian C. Vann Woodward as "the Second Reconstruction." Like the first Reconstruction following the Civil War, its primary purpose was to secure the citizenship rights of African Americans, including the most fundamental of these, the right to vote freely and have one's vote fairly counted.
Central to both Reconstructions was the Fifteenth Amendment, which states, simply:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.
Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Ratified in 1870, the amendment's principle quickly came under attack, and by the beginning of the Twentieth Century, after a brief period in which black males were able not only to vote but to elect fellow blacks to office in significant numbers, the franchise was taken from them throughout the South and in many northern venues as well. This was accomplished in significant measure through fraud, threat, intimidation, and many kinds of violence. One step removed from these activities were the subterfuges of the poll tax, grandfather clause, white primary, understanding tests, felon disfranchisement laws, and literacy tests--all administered by white officials acting under color of law. Blacks and, to a significant extent, poor whites, were the victims. The Fifteenth Amendment as a guarantor of black voting rights was in effect a dead letter in the South.
A terrible tragedy had thus occurred--one unique in the annals of modern democracies. Richard M. Valelly, in his prize-winning history, The Two Reconstructions: The Struggle for Black Enfranchisement, describes it as follows:

No major social group in Western history, other than African Americans, ever entered the electorate of an established democracy and then was extruded by nominally democratic means such as constitutional conventions and ballot referenda, forcing that group to start all over again.

Valelly does not ignore the checkered histories of democracy in a number of western nations since 1789, including France, "which experienced several [disfranchisements] during the nineteenth century." However, such events in other nations "occurred when the type of regime changed, not under formally democratic conditions. . . . Once

previously excluded social groups came into any established democratic system, they stayed in," he observes. In short, "the United States is among the last of the advanced democracies to still be at the business of fully including all of its citizens in its electoral politics."

In spite of the brutal and unprecedented dismantling of the First Reconstruction led by southern white supremacists, African Americans began almost immediately to try to regain their rights. A key organization in this effort was the National Association for the Advancement of Colored People, founded in 1909 by a group of multiracial activists. Late in the World War II period it successfully challenged Texas' all-white Democratic primary, a mechanism by which blacks, and sometimes Latinos, were excluded from the only election in that one-party state that was meaningful. The case was argued before the Supreme Court by Thurgood Marshall of the NAACP Legal Defense Fund, who would later ascend to the Court himself. To the guardians of southern white supremacy, the end of the white primary was seen as a dire challenge to their regime, and, as the civil rights movement in the post-war era gained momentum, in part as a result of the anger of black soldiers returning from a war to guarantee democracy in Europe and Japan only to find themselves excluded from democracy in America, the battle for the Second Reconstruction was joined.

This period in American history, part of our recent past, has been ably chronicled by numerous writers, and its heroes have been placed among the pantheon of America's heroes and martyrs. I am sure that some in this room today have read the compelling saga of the life and times of the Rev. Martin Luther King, Jr., by Taylor Branch. The last volume in the trilogy, At Canaan's Edge, was published earlier this year. In it, Branch describes the riveting events forty-one years ago in Selma, Alabama, which provided the catalyst for the Voting Rights Act.

Three civil rights acts had been passed between 1957 and 1964. None, however, was sufficient to overcome southern resistance to black enfranchisement, which resistance was manifested most particularly in the use of literacy tests administered by whites in discriminatory ways. As late as 1962, somewhat less than one-third of the fifty states employed literacy tests. They were described at the time by political scientists as being "used to bar Negroes from voting in six southern states and to exclude Orientals in several western states." Even New York had a literacy test that discriminated against Puerto Ricans--a barrier that would soon be eradicated by Section 3(e) of the new Act.

The long struggle for black voting rights during the Twentieth Century crested on the Edmund Pettus Bridge in Selma, when peaceful demonstrators were savagely attacked by law enforcement officers on March 7, 1965. This event, which came to be known in the annals of the civil rights movement as Bloody Sunday, was filmed by news photographers and immediately telecast around the world. It shocked the conscience of America, and at the behest of President Lyndon Johnson, a bipartisan Congress passed the Voting Rights Act a few months later.

There was deep symbolism in the fact that Johnson chose the President's Room in the nation's capitol as the site for the signing. One hundred four years earlier, in 1861, Abraham Lincoln, in the same room, had signed the first Confiscation Act, by which the Union had taken control of all slaves whom the Confederacy had coerced into service. Lincoln's action was the first legal step toward full emancipation of slaves. After signing the Act, Johnson met in the Cabinet Room with several African-American leaders, including the Rev. King and Rosa Parks. An aide to Johnson later recalled: "There was a religiosity about the meeting, which was warm with emotion--a final celebration of an act so long desired and so long in achieving." After the ceremony Dr. King said the new Act "would go a long way toward removing all the obstacles to the right to vote." A few years later, at the end of his presidency, Johnson pointed to the Act as his greatest accomplishment.

II.

The Act's purpose was to enforce, finally, the Fifteenth Amendment, primarily honored in the breach for ninety-five years. It consisted of two parts: a permanent one applying nationwide, and a non-permanent one, consisting of several features that were set to expire in 1970. Both parts were soon found constitutional by the Supreme Court. Congress renewed and expanded the nonpermanent features in 1970, 1975, and 1982, the last time for 25 years.

The Act has been interpreted by the courts and by Congress as targeting both major forms of racial vote discrimination: disfranchisement and vote dilution. The first is exemplified by literacy tests administered unfairly by whites. The second consists of procedures in predominantly white jurisdictions which, combined with racially polarized voting, prevent minority voters from electing their preferred candidates, even when the minority voters in question are fully enfranchised. Vote dilution, which had been widely used by whites in the Nineteenth Century when black males could vote, began to be used once more in the mid-Twentieth Century, particularly after the abolition of the white primary, as increasing numbers of blacks began to be able to exercise the franchise.

The major permanent feature of the Act is Section 2, which applies nationally. As amended by Congress in 1982, it prohibits any voting qualification or practice that results in denial or abridgement of voting rights on the basis of a citizen's race, color, or membership in one of four language-minority groups: speakers of Spanish or of Native American, Native Alaskan, and Asian languages.

Section 5, the most widely known of the Act's non-permanent features, requires the states and political subdivisions

covered according to a formula, or "trigger," in Section 4--which is also non-permanent--to submit all proposed electoral changes for preclearance either to the Attorney General or the U.S. District Court for the District of Columbia, to ensure, as the statute puts it, that the proposed change "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."
Currently, the jurisdictions subject to Section 5 preclearance include eight states in their entirety, mostly in the South, and parts of eight others. Among the latter are Virginia, which is almost entirely covered, aside from a small number of independent cities and counties which have "bailed out" from the requirements of Section 5 by meeting the requirements specified in the Act for bail-out; and North Carolina, forty of whose 100 counties are covered.
Another temporary provision of the Act is contained in Sections 6-9 and 13, which enables the Attorney General or U.S. courts to send federal examiners and observers to certain jurisdictions when racial discrimination in voting appears likely on the basis of information obtained from those jurisdictions.
Yet another temporary provision concerns the needs of citizens who are not proficient in English. In 1975, when Congress amended the Act for the second time, it concluded that "through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the election process." The language-minority groups specifically mentioned were "persons who are American Indian, Asian American, Alaska Natives, or of Spanish heritage." Under different coverage formulas, Section 4(f)4 and Section 203 require language assistance for these citizens, including "registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process," to enable them to vote without hindrance.

III.

It is now forty-one years since passage of the Act. From one perspective, this is a rather long period of time. On the other hand, that period constitutes the longest uninterrupted stretch of time in the history of our republic in which blacks nationwide have been able to vote with relative freedom. From this perspective, black voters have barely got their sea legs on the American ship of state.
There is no question that they and their allies among other groups have made good use of the tools the Act has provided in combating vote discrimination. The statute has had a major impact in incorporating racial and language minorities into the polity. Perhaps the most striking evidence of this fact is the extraordinary increase in black elected officials in the South. In 1970, there were 565. In 2000, there were 5,579. Nonetheless, race is still a major fault line in American politics, and problems of racial discrimination in voting are widespread, if diminished. It is therefore useful to take stock of the extent to which this discrimination still persists.
Research by the National Commission on the Voting Rights Act, a group created by the non-profit organization, Lawyers' Committee for Civil Rights Under Law, focused on the extent to which these temporary features were employed by the government or by private citizens to combat racial or language discrimination since 1982, when the Act was last renewed by Congress. Composed of a politically and ethnically diverse group of men and women, including former elected and appointed public officials, scholars, lawyers, and leaders, the Commission held ten hearings across the nation in 2005, at which more than 100 witneses spoke. It also gathered information through the Freedom of Information Act from the Justice Department and surveyed a wide range of data and reports on minority voting rights. The findings were reported in February 2006 in the document, Protecting Minority Voters: The Voting Rights Act at Work: 1982-2005. Among the Commission's findings are the following facts:

? The Justice Department sent 626 letters objecting to one or more proposed discriminatory election changes in Section 5 jurisdictions, and there would have been even more if some jurisdictions--after receiving requests from the Department for more information on some submitted changes--had not withdrawn them. There were at least 225 withdrawals of one or more proposed changes since 1982, although not all of them were because the jurisdictions believed the changes would be objected to.

? Instead of submitting proposed election-related changes to the Justice Department, jurisdictions may submit them to the U.S. District Court for the District of Columbia. This seldom happened, but in the period since 1982, this court refused to approve 25 such proposals.

? Under the Act, the Justice Department, or private citizens, may file "enforcement actions" to ensure that Section 5 is properly obeyed. For example, if a covered jurisdiction attempts to implement a voting change that has not received preclearance, the Department, either alone or in concert with private parties, may file suit under Section 5. The Commission identified 105 successful enforcement suits in nine states. There were probably others in at least some of the remaining seven Section 5-covered states.

? The Justice Department sent several thousand federal observers in 622 separate Election Day "coverages" when it had reason to expect racial discrimination. These observers have the ability to enter polling places and to observe votes being counted, and not only did they report instances of discrimination, their presence probably discouraged many more such instances. In Mississippi alone there were 250 coverages since 1982 where observers were dispatched to election sites, involving more than 3,000 federal observers. Significantly, Louisiana, Mississippi, Alabama, Georgia, and South Carolina--five of the six states originally covered by Section 5--accounted for almost two-thirds--66 percent--of all 622 coverages since 1982.

? The language-assistance provisions also allow the government to file enforcement actions to ensure that language minorities are given proper assistance. There have been 19 such actions since 1982. While few in number, these suits have played an important role in changing the way voting officials do business in the jurisdictions where they have been filed. Some--Boston and Dade County, Florida, for example--are quite large, and Justice Department intervention (even short of filing a suit) can have a major effect on the ability of many citizens who are not proficient in English to vote easily.

In addition to measuring the impact of the non-permanent features of the Act, the Commission attempted to ascertain how many Section 2 lawsuits were filed in the post-1982 period which resulted in a favorable outcome for minority plaintiffs. Each such case would indicate that minority vote discrimination had been occurring. A nationwide study conducted at the University of Michigan Law School by Professor Ellen Katz and her students identified 117 reported suits between 1982 and 2005. Most of them targeted one or another form of minority vote dilution. In the same period, research by the National Commission's staff revealed 653 successful Section 2 suits, reported and unreported, in nine Section 5 states alone. This suggests that the total number of reported and unreported Section 2 cases which were resolved in a manner favorable to minority plaintiffs is significantly greater nationally. Moreover, several of these successful lawsuits each targeted more than one jurisdiction's election procedures, so the number of successful suits understates the number of discriminatory election procedures that were actually changed thanks to Section 2.

IV.

In summary, the findings of the National Commission on the Voting Rights Act point to a worrisome continuation of racially inspired vote discrimination. These findings are corroborated by other careful studies. In my opinion, as a scholar who has written extensively on the Act and its effects for more than thirty years, the non-permanent features of this monumental legislation should be renewed.