Testimony of

# Professor Drew S. Days, III

May 17, 2006

Mr. Chairman and Members of the Committee, I want to thank you for inviting me to participate in these hearings concerning the reauthorization of the Voting Rights Act of 1965, one of the most important pieces of legislation in our Nation's history.

Chief Justice Warren, in his path-breaking opinion in South Carolina v. Katzenbach upholding the constitutionality of the 1965 Voting Rights Act, stated with respect to Section 5: After enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil to its victims I think the central issue before this Congress is, at heart, whether 40 years after the Act's passage, the time has come to shift this advantage of time and inertia back to the jurisdictions covered by Section 5. My answer is that it is not. Instead, the Voting Rights Act and Section 5, in particular, should be reauthorized to promote further progress in achieving truly equal participation in the political process free of racial discrimination and exclusion or to prevent "backsliding" that may result in undermining what success the Act has already achieved.

I have not been able to review all of the testimony and studies presented to the House of Representative and now, to the Senate, with respect to the reauthorization. Based upon my four years administering Section 5 and other provisions of the Act, however, I believe that they offer ample evidence of contemporaneous and continuing problems of electoral practices discriminatory in purpose and effect to support renewal. I have in mind especially the reports prepared by the National Commission on the Voting Rights Act and by the Voting Rights Project of the American Civil Liberties. In contrast, other appearing before this Committee and its House counterpart, have pointed to the small numbers of objections lodged by the Attorney General in the preclearance process to support their contention that Section 5 is no longer needed: jurisdictions have simply stopped discriminating on their own. But relying, once again, on my experience in administering that regime I believe that those same figures can also be read to indicate that vigorous enforcement of Section 5 in the past and more recent active informational efforts by the Department with respect to its preclearance process have resulted in a high level of compliance among covered jurisdictions. During my time at the Justice Department, compliance was increased markedly to the extent that a covered jurisdiction anticipated a forceful federal response if preclearance was not sought and to the degree that they expected fair, prompt, respectful and constructive treatment of their submissions.

It is not surprising that members of this Committee and some witnesses have also expressed concern that a reauthorized Section 5 might be open to successful challenge in the Supreme Court. For the Court has, over the last decade, found several civil rights statutes unconstitutional in the Boerne case and its progeny because they failed, in its estimation, to satisfy a "congruence and proportionality" standard. In doing so, the Court has focused on whether Congress: 1) identified the constitutional right or rights under Section 1 of the 14th Amendment that it sought to enforce; 2) found evidence of a history of "widespread and persisting deprivation of those constitutional rights"; and 3) established that there was a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.

Several points, however, need to be noted with respect to this line of cases and their potential impact on any challenges to a reauthorized Section 5. First, the Court has in recent years "pulled back" from what for a time appeared to be its unwillingness to uphold any civil rights legislation providing private damage remedies in suits brought against states. Consequently, one section of the American with Disabilities Act (Tennessee v. Lane) and the Family and Medical Leave Act (Nevada v. Hibbs) have now been held constitutional exercises of Congress's Section 5 powers. In so holding, the Court has given effect to its very early acknowledgment in Boerne that "Congress must

have wide latitude" in determining "when congruence and proportionality between the injury to be prevented or remedied and the means to be adopted to that end" have been achieved.

Second, unlike the earlier laws struck down by the Court, these latter two decisions have involved, in one case (Hibbs) Congress's effort to remedy discrimination against women in the workplace (a gender classification), and the other (Lane), access for the disabled to the courts, a fundamental constitutional right. Given the new composition of the Supreme Court, predictions as to what course a majority will take in this respect are little more than pure speculation. But certainly these two most recent decisions make clear that legislation addressed to remedying or preventing discrimination against groups or rights entitled to heightened protection will receive a certain degree of deference. Since Section 5 is directed at eradicating racial discrimination, a suspect classification, with respect to voting, one of the most basic of rights, the Court's deference to Congress should be at its greatest.
Third, this possibility is supported further by the fact that the Court has upheld the enactment of the Voting Rights Act and Section 5, in particular, as a model example of Congress's exercise of its prophylactic and remedial constitutional powers. For it correctly recognized the fundamental nature of the right to vote free from discrimination,

Congress's explicit constitutional mandate under Section 2 of the 15th Amendment and the devastating consequences for those unable to function as first class citizens in our representative democracy (Lopez v. Monterey County).
The clear lesson from this line of "New Federalism" decisions is that congressional fact-finding and the making of a solid legislative record hold the key to any chance of legislation, such as a reauthorized Voting Rights Act, passing constitutional muster. In my estimation both the House and Senate Committees are approaching this undertaking in exactly the right fashion.

There remain several subsidiary questions with respect to reauthorization of the
Voting Rights Act that I would like to address briefly. The first has to do with the proposal to amend Section 5 to address the difficulties created for effective enforcement of the Act as a result of the Court's decision in Reno v. Bossier Parish, II. It held there that the preclearance requirement is met to the extent that a change results in no retrogression, even though the jurisdiction's action was the result of a discriminatory intent. This decision strikes me as basically at war with the spirit of Section 5 and one that clearly places an unfair burden on those that the Act was designed to protect. Left unaddressed by amendment, Bossier Parish II will force harmed minority citizens to bring their own Section 2 litigation in order to obtain redress. Second, the new standard established by Georgia v. Ashcroft has substituted an amorphous, easily manipulable standard for determining a Section 5 violation in place of the theretofore well-established and well understood Beer non-retrogression test. To me, it constitutes an open invitation to mischief.

Conclusion
Mr. Chairman and Members of the Committee, no one can deny that the Nation has come far since 1965 in realizing the promise of the 15th Amendment that "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."
I think we must ask ourselves in 2006 as the Congress considers the reauthorization of the Voting Rights Act, "Why not complete the job started in 1870 and 1965? Why not ensure against "backsliding" from where we have reached in this long journey? Let's keep the advantage of time and inertia on the side of those still hoping to enjoy fully their rights as citizens of the United States.

Thank you.