March 11, 2009

Sue Wright
Clerk
US Senate Committee on Rules
305 Russell Building
United State Senate
Washington, DC 20510

Re: Hearing on Voter Registration: Assessing Current Problems

Dear Ms. Wright:

I am writing on behalf of Project Vote to submit written comments for the 'Hearing on Voter Registration: Assessing Current Problems." I request that these comments be considered for inclusion into the record for the Rules Committee hearing scheduled for 11 March 2009.

Project Vote is a national nonpartisan, nonprofit corporation that provides research, guidance, and technical assistance to voter participation and voting rights organizations. Project Vote regularly advises these organizations on the requirements of state and federal law as they apply to the conduct of elections, and monitors the operation and enforcement of these laws. In 2007-2008, Project Vote ran a large-scale, nonpartisan voter registration program in 19 states that helped over 1.3 million Americans apply to become registered voters or update their registration status. We appreciate the interest of the Senate Rules Committee in improving and modernizing our voter registration process in light of recent experience in the states, and we are eager to share our expertise during your deliberations.

At the outset, it is almost unnecessary to say that the "system" of voter registration in this country is not one system, but rather thousands, because every election jurisdiction has broad discretion to impose its own rules. It is almost unnecessary to say this, and yet it is one of the most important things we can say, because states, counties, and cities already vary widely in their compliance with federal constitutional and statutory mandates. Any proposals to enact additional federal standards should be evaluated against the goal of greater clarity and uniformity in the law.

What we learned from the 2008 election should inform any dialogue about how to improve the registration process. In the sections below, we describe problems that Project Vote experienced in 2007-2008 related to access to voter registration services and materials, the placement and removal of voters from the rolls, the intimidation of new voters, and the enforcement of voting laws.

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I. Access to Voter Registration

Access to voter registration has always been particularly challenging for low income citizens and racial minorities. Congress addressed this problem by, among other remedies, requiring in Section 7 of the National Voter Registration Act of 1993 ("NVRA") that public assistance agencies and offices serving the disabled provide voter registration services to their clients. Although many states initially resisted implementing the NVRA and its public agency registration requirement, state agencies managed to facilitate the registration of 2.6 million low-income Americans during the first two years' of the Act's implementation. Regrettably, because of poor compliance and inadequate enforcement, state public assistance agencies helped only 550,000 low-income Americans register to vote in the most recent period measured, 2005-2006. Consequently, the American electorate as recently as 2006 remains skewed towards affluent Americans. Only 60% of adult citizens in households making less than $25,000 were registered to vote, compared to over 80% in households making $100,000 or more. Since the agency registration sites designated by Section 7 are generally the most convenient for low income and racial minority citizens, the agencies' failure to comply with their obligations under the NVRA has a profound impact on both the absolute number of registrations and the demographic makeup of the registered population as a whole.

The NVRA, fortunately, did not rely on government alone to ensure all Americans, regardless of age, income or race, have opportunities to register to vote. The NVRA authorizes mail registration, requires the U.S. Election Assistance to design a federal mail form that states must use and accept, and particularly instructs state to provide mail registration forms to organizations engaged in voter registration drives. However, the ability of civic, religious and political organizations, to facilitate registration by underrepresented Americans as envisioned by the Congress is being increasing hampered by state laws, rules, and procedures. In some instances, judicial decisions are contrary to the intent and language of the NVRA, furthering limiting the effectiveness of mail registration.

At least 8 states—Colorado, Florida, Georgia, Maryland, New Mexico, Ohio, Rhode Island and Texas—have instituted restrictions on the use by organizations of the federal mail voter registration application. In some instances, states have reversed their position (CO, MD, and RI) and in other cases courts have struck down state requirements (FL, GA and OH). Significantly, only in Georgia did a federal judge strike down a state practice as contravening the NVRA; the other courts relied instead on the Constitution.

Congress should explicitly provide in Section 4 of the NVRA for the unfettered access and use by civic, religious, and political organizations of the federal mail form so they can continue to reach out to underrepresented Americans in furtherance of the stated purpose of the Act.

Organizations conduct voter registration drives, of course, to help eligible Americans join the voter rolls. Election officials in several states, however, frustrate organizations' ability to ensure that eligible applicants are placed on the rolls. In 2008, Project Vote ran a program to acquire information on applicants who had been rejected in order to help them cure any administrative deficiencies that led to their rejection. Several jurisdictions refused to provide such information while other jurisdictions would do so only in return for a significant fee. Similarly, some jurisdictions refused to make available records of rejected applications, effectively shrouding the process of determining an applicant's eligibility in secrecy. Congress specifically rejected the notion that voter registration records are confidential or that the process of adding and removing voters from the rolls occur in secrecy in Section 8 of the NVRA.

Further, in 2008, some county election officials in Texas and Louisiana literally refused to process applications from certain registration drives, and one county required registration workers to check each application against a database to ensure they were not duplicates of previously registered voters. While one must have sympathy for public officials inundated with new applicants, they are not justified in shifting the burden of doing their jobs to members of the public, particularly when voter registration workers are often volunteers.

II. Processing Applications and Maintaining Lists

Congress required states to register as voters eligible Americans who applied at least 30 days before a federal election and to notify applicants of the disposition of the application in Section 8 of the NVRA. The statute, however, does not specify a deadline for sending out disposition notices. Election officials in a number of jurisdictions therefore send out notices intermittently or at the close of registration. This practice not only denies applicants an opportunity to correct any problems or submit a new application, it also encourages useless re-registration by individuals who, fearing their applications were not processed, submit a second or even their application. We urge Congress to correct this oversight by requiring covered states to determine the eligibility of an applicant and sending her a disposition notice within 10 days of receipt of an application.

In addition, there is evidence that departments of motor vehicles and public assistance agencies in some states fail to submit applications to election officials within commonly do not transmit applications on a regular basis, sometimes accumulating them until it is too late for the would-be voter to supply additional information or fix errors. These voter registration sites usually do not provide the applicant with a receipt for his application, and thus he leaves the agency with no "paper trail" showing that he attempted to register, which could serve as evidence that he might be able to offer when he appears at the polling place on election day.

In some states, a disposition notice that is returned to the board of elections is cause for cancellation of the application for registration, even when it was otherwise successful. This unfortunate policy takes advantage of an ambiguity in Section 6(d) of the NVRA, and we urge Congress to clarify the law on this matter. As the law currently reads, a non-deliverable disposition notice "may" be followed by the list maintenance protocol described in Section 8 of the NVRA. We suggest this process be made mandatory by substituting "must." The registrant should be allowed to correct any error in the address on the spot if he appears to vote on election day. If he does not appear, the notification process set forth in Section 8 *must* be followed before he is dropped from the roll.

Many states carried out aggressive list maintenance programs in 2007-2008 that led to the purging of thousands of voters in violation of the NVRA. It is apparent that there is widespread confusion about the requirements of Section 8, which sets forth an elaborate process by which voter rolls are updated and is intended to minimize the risk of erroneous purging. While we need not quote the statutory language here, the law is clear that (1) systematic purges based on change of address may not be conducted within 90 days of a federal election; and (2) failure to vote, even over a long period of time, is *not*, without more, a ground for removal from the voter roll. The election of 2008 saw renewed interest among voters who had not exercised the franchise in decades, many of them elderly African Americans.

Compounding the general misunderstanding of the list maintenance rules is the advent of statewide databases. With the requirement that states create and maintain a statewide electronic database of registered voters, some states have attempted to match a new registrant's data with existing databases of drivers' license numbers or Social Security numbers and deny registration to an applicant whose data does not match. This use of databases is inconsistent with the purpose of the database requirement imposed by the Help America Vote Act and is, moreover, notoriously unreliable because of the proliferation of data entry and other errors in such databases. A settlement and consent decree in *Washington Association of Churches v. Reed* put a stop to Washington's use of such a match process and made clear that the NVRA rules for registration processing and list maintenance are still applicable, notwithstanding HAVA's database requirement.

In another variation on the misuse of the state database, some states have formed regional compacts to share voter registration information, with the object of rooting out duplicate entries—voters who have moved from one state to another without canceling registration in the prior state. (The compact states include Iowa, Kansas, Missouri, and Nebraska in one agreement, joined later by South Dakota and Minnesota; and another compact spearheaded by Kansas, and including Arizona, Arkansas, Colorado, New Mexico, Oklahoma, and Texas.) Louisiana, though not participating in any ongoing compact, did inquire of a number of far-flung jurisdictions soon after Hurricane Katrina, to determine whether displaced Louisianans had registered to vote in other states.

It is important to note that the vast majority of registration duplications occur through inadvertence and not criminal intent. But whatever the explanation, the appearance of two registration records for the (apparently) same person is only the *beginning* of the process mandated by the NVRA. While there is nothing in the law prohibiting states from sharing registration data, a state cannot then unilaterally cancel the voter's registration when he appears to have moved. Rather, the law requires the state to follow the protocol of multiple mailings and a waiting period as set forth in Section 8.

III. Intimidation of New Voters

Intimidation of newly-registered voters was also a strategy in evidence in the 2008 election cycle. In October, the New Mexico Republican Party held a press conference to display voter registration cards for 10 voters they claimed cast ballots illegally in the NM primary. Nine of the 10 were Latino, all identified as Democrats, and most were 18 or 19 years old. An investigation revealed that at least eight of them were legitimate, eligible voters. Several of them were then harassed by a private investigator, who was reportedly hired by an attorney for the Republican Party. This intimidation incident is the subject of a pending lawsuit in New Mexico.

In Greene County, Ohio, the Sheriff launched an investigation of alleged voter fraud during Ohio's "golden week," when a citizen could register and vote on the same day. A county prosecutor admitted that no one had alleged that voter fraud was occurring. Nonetheless, only a public outcry and media attention succeeded in ending the investigation. In Hamilton County, Ohio, a grand jury was convened by a county prosecutor to investigate similar, unspecified allegations of voter fraud—allegations that were disavowed by both the County election board and the Secretary of State.

The Wisconsin Republican Party issued a call to law enforcement and security personnel to serve as "volunteer poll watchers" in inner city precincts in Milwaukee, chillingly evoking racially-motivated

"ballot security" programs that should be relegated to the distant past. While it is clear that these strategies are illegal under the Voting Rights Act and the NVRA, as a practical matter the damage is done as soon as the story hits the press. New voters, particularly newly minted citizens from countries where voter intimidation is a time-honored political tradition, are effectively deterred from voting freely, or voting at all.

IV. Enforcement Issues

Further exacerbating the constellation of voter registration problems has been a pattern of lax enforcement of the federal voting rights statutes by the Department of Justice in recent years. The agency registration provisions of NVRA Section 7, in particular, have been largely ignored by the Department—and even more flagrantly flouted by the agencies themselves. The enforcement of Section 7 is an area where recent experience has proven that a little effort goes a long way. Jurisdictions that have been ordered to comply with the law (and a few that have undertaken to do so voluntarily) by offering voter registration have shown immediate and remarkable success in adding new registrants. A new and energetic commitment to Section 7 enforcement by the Department of Justice is long overdue.

Compounding the problem of spotty federal enforcement has been a troubling pattern of permissiveness in NVRA interpretation by the courts. From the time of the NVRA's enactment, states have attempted to impose their own registration requirements, in contravention of the spirit--sometimes even the letter--of the NVRA, whose purpose was to simplify registration and make it more easily accessible. Unfortunately, the courts have given the states wide berth in imposing additional eligibility requirements. Technical and redundant questions on state registration forms, for example, operate as grounds for rejecting otherwise valid applications. Obviously, the more complex the form, the more it disadvantages applicants of limited literacy or limited English proficiency.

The federal mail-in form, heralded initially as simple "postcard registration," has now been encumbered by 18 pages of state-specific instructions. A 2008 request to the Election Assistance Commission by the state of Michigan would, if approved, direct Michigan applicants to mail their federal form to the appropriate county or township election office (of which there are 542!) rather than the state office, despite the NVRA's explicit language that forms are returnable *to the appropriate state election official.* Such a procedure would unduly complicate the registration process, expand the opportunities for error, and add pages of county and township listings to the state-specific instructions. Nevertheless, at this writing, Michigan's request is still pending before the EAC.

In 2004, the federal form was redesigned pursuant to HAVA, but old forms were still being circulated as recently as the fall of 2008, sometimes to the detriment of the registrant. In Indiana, old forms surfaced at a nursing home, whose unsuspecting elderly residents' applications were rejected because they were on obsolete forms, until Project Vote filed a lawsuit and obtained an order requiring that their provisional ballots be counted. Despite that order, however, the named plaintiff was denied a provisional ballot at her polling place and was unable to vote. It is not known how many others had the same experience.

While the foregoing does not purport to be an exhaustive list of the issues of 2008, we hope that it gives the Committee a sense of the registration problems that have persisted over a period of decades, as well as some (like state database matching) that are of more recent origin. What is most vexing is the

intractability of some of these injustices, which should have been remedied long ago. It is perhaps not surprising, though, with literally thousands of election districts operating with some measure of autonomy that a problem solved in one town is bound to crop up in another. That is why federal regulation and oversight is so essential in ensuring that our system of registration and voting will soon be worthy of the public's confidence.

Thank you for the opportunity to submit testimony to the Senate Committee on Rules "Hearing on Voter Registration: Assessing Current Problems."

Sincerely,

Michael Slater
Executive Director