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House Subcommittee on Constitution, Civil Rights, and Civil Liberties

HEARING ON LESSONS LEARNED FROM THE 2008 ELECTION

March 19, 2009

As a national non-partisan organization dedicated to protecting and enhancing the democratic rights of U.S. citizens, Dēmos: A Network for Ideas and Action commends the House Subcommittee on Constitution, Civil Rights, and Civil Liberties for convening a hearing on Lessons Learned From the 2008 Election on March 19, 2009. Dēmos takes this opportunity to submit the following comments on continuing serious problems with voter registration experienced by millions of eligible voters during the most recent election cycle. We hope that the Subcommittee will embrace the opportunity to explore reforms in election administration that can address these serious problems and ensure that every American has the opportunity to register to vote and participate in the political process.

Denial of Voter Registration Opportunities to Low-Income Voters

Ensuring access to voter registration for low-income citizens, who all too often have been left out of the electoral process because of unnecessary barriers to voter registration, was a key priority for the Democracy Program at Dēmos during the 2008 election cycle. Our research, investigation and advocacy revealed massive, long-standing failings in states' compliance with Congress' key initiative to ensure full access to voter registration for low-income citizens, the National Voter Registration Act of 1993 ("NVRA").

Through enactment of the NVRA in 1993, Congress aimed to increase voter participation by simplifying "unfair registration laws and procedures,"¹ especially for historically disfranchised populations. Although the NVRA may be popularly known as the "Motor-Voter" law because of its requirement for providing voter registration through state DMV offices, an equally important part of the law is its requirement that state public assistance offices (administering programs such as Food Stamps, TANF, Medicaid and WIC) must provide voter registration services to all persons applying for benefits, recertifying their eligibility for benefits, or recording a change of address.

Despite states' obligations under the NVRA, data strongly suggest that public assistance agencies across the country are not complying with their obligation to provide voter registration services. Dēmos' research shows that between initial implementation of the law in 1995-1996 and the most recent data reported by the EAC for 2005-2006, voter registration applications from public assistance agencies have declined by 79 percent nationwide. Nine states reported decreases of 90 percent or more.² Poor compliance with the NVRA perpetuates an already troubling discrepancy in political participation: nationwide, 80 percent of citizens in households making \$100,000 or more are registered to vote, compared with only 60 percent of citizens in households making less than \$25,000.³

Representative of the problem, but by no means the only offender, was Missouri's Department of Social Services (DSS). The state of Missouri has a substantial income gap with respect to those registered to vote: only 66 percent of adult Missouri citizens in households making less than \$25,000 a year were registered to vote in 2006 compared to 85 percent of those in households making \$100,000 or more. According to data from the Federal Election Commission and Election Assistance Commission, voter registrations from public assistance agencies dropped by 88 percent in Missouri between 1995-1996 and 2003-2004.

Field investigations confirmed what the numbers strongly suggested, specifically, that the agency was not providing the opportunity to register to vote to every individual who applied, recertified, or changed an address in connection with public assistance benefits. We notified the Secretary of State and agency Director about our findings. When we received no response that the offices would change their practices, Dēmos – together with partners including the Lawyers' Committee for Civil Rights Under Law, Project Vote, and a pro bono law firm – filed a complaint in federal district court and requested a preliminary injunction for immediate relief in light of the then-upcoming election.

On July 9, 2008, the Court heard testimony from eleven witnesses and accepted extensive written submissions from the parties. Less than a week after the hearing, on July 15, the Court issued the preliminary injunction we had requested, finding that Missouri DSS had violated the NVRA by failing to provide plaintiffs – and tens of thousands of other low-income Missourians – with the opportunity to register to vote required by the NVRA.⁴ The state's own documents confirmed that the state was short by approximately *one million* of the number of voter registration applications that would have been necessary to provide required voter registration services to DSS clients between 2003 and 2008. Other evidence showed that voter registrations applications completed by clients had been allowed to pile up on a caseworker's desk for more than a year without being submitted to election authorities for processing, and that many local offices were simply unaware of their voter registration obligations. Based on these and other violations, the court directed the agency to immediately comply with the voter registration requirements of the NVRA and adopt a comprehensive plan on how to do so.

2 Douglas Hess and Scott Novakowski, *Unequal Access: Neglecting the National Voter Registration Act* (Feb. 2008), available at <http://www.demos.org/pubs/UnequalAccessReport-web.pdf>. To put these declines in context, it is important to understand that the maximum possible decline in voter registrations is 100%: a 100% decline means that the number of voter registrations at public assistance agencies has declined to zero, with no further decline being numerically possible. Accordingly, a 79% nationwide decline in voter registrations at public assistance agencies – with some states recording a 90% decline – indicates an extremely grave compliance problem, approaching the outer mathematical boundary for a reduction in voter registrations.

3 *Id.* at 3, citing Douglas R. Hess, Project Vote, "Representational Bias in the 2006 Electorate," (2006), Table 6: Household Income and Voting Behavior, available at <http://www.projectvote.org>.

4 *ACORN, et al. v. Scott, et al.*, 2:08-cv-04084 (W.D. Mo., July 15, 2008), available at <http://www.demos.org/publication.cfm?currentpublicationID=39FF09AD-3FF4-6C82-5C632CED7216F235>.

As a result, voter registration applications received at DSS offices skyrocketed. Whereas all Missouri public assistance agencies had received a total of only 15,500 registration applications over a two-year period in 2005-2006, DSS alone has since received over 70,000 registrations since August 2008 and the end of January 2009. The state's public assistance agency received over 12,700 registrations per month in five and a half months since the court order went into effect—a staggering increase over its previous two-year average of just 649 applications a month.

Dēmos is currently working in at least 10 states to overcome similar problems in compliance with states' voter registration obligations under Section 7 of the NVRA, and data from many more states indicate the need for investigation and enforcement. This problem affects millions of low-income persons who are missing the opportunity to register to vote at a local public-assistance agency. For many low-income individuals, such agencies may be their sole point of contact with the government, and sole opportunity to register to vote.

Ensuring states' compliance with their obligations under Section 7 of the NVRA must be a priority so that low-income citizens may register and participate in our political process, as Congress had intended 15 years ago in passing the NVRA. We are encouraged that the Voting Section of the U.S. Department of Justice, after years of neglecting its responsibility to enforce Section 7 of the NVRA, has entered into settlements with two states in the past year since Dēmos and its partners met with the leadership of the Voting Section last year.⁵ However, there is much more work to be done to fulfill the promise of the NVRA for ensuring the political participation of low-income citizens.

Denial of Voter Registration Opportunities to Veterans

As this Committee is aware, many of our nation's veterans experienced serious obstacles to voter registration and the vote prior to the 2008 presidential election. Many veterans reside for extended periods at VA facilities—nursing homes, emergency housing, rehabilitative care centers, or some other type of facility with few on-site voter registration services—and some, especially those who are disabled, face significant obstacles to traveling off-campus for voter registration.⁶ This problem was exacerbated prior to the 2008 elections by shifting and detrimental VA policies.

In the months preceding the 2008 presidential election, the Veterans Health Administration issued and withdrew no less than three different policies on voter registration. The first policy directive, VHA Directive 2008-23 issued on April 25, 2008, required all VA facilities to develop comprehensive voter registration plans to assist veterans in voting, required the VA to publicly post voter registration information for veteran inpatients, and required that VA facilities provide absentee voter applications if patients cannot leave the facility. Unfortunately, two and a half weeks later, it issued Directive 2008-25, rescinding Directive 2008-23 and announcing a broad *prohibition* against any third-party voter registration drives. In addition, the VA refused to accede to state requests from California, Connecticut, Vermont, North Carolina, and Arkansas that VA facilities serve as voter registration agencies and

5 See DOJ NVRA settlements with Arizona (available at <http://www.demos.org/publication.cfm?currentpublicationID=BB58168C-3FF4-6C82-5DEC8F3E8A072061>) and Illinois (available at <http://www.demos.org/publication.cfm?currentpublicationID=51787F81-3FF4-6C82-568C31CA2CEDD7CD>).

6 In 2006, 773,600 veterans obtained treatment at inpatient VA facilities. See <http://www1.va.gov/opa/fact/vafacts.asp> (last viewed September 6, 2008).

conduct voter registration themselves (to obviate the problem of a lack of third party voter registration).⁷ State designation of federal agencies as voter registration agencies is provided for in the National Voter Registration Act.⁸

We know from our work that this second policy inhibited voter registration assistance at VA facilities. In mid-August of 2008, a colleague forwarded an inquiry from a veteran who wanted to organize a group of veterans to conduct non-partisan voter registration at a VA facility. After receiving Directive 2008-025 and information about VA Form 10-0462 (which the group of veterans would have needed to sign), he indicated that he felt it would be futile to request approval to try to register veterans at VA facilities.⁹

On September 8, 2008, after this Committee scheduled a hearing on the issue of voter registration assistance for veterans, the VA rescinded Directive 2008-025 and adopted its third policy on voter registration, Directive 2008-053. While an improvement over the second policy, the registration problem remained as the directive required only that each VA facility must adopt “a written published policy on voter assistance” and that information on registering and voting must be posted throughout VA facilities.¹⁰ The new policy neither imposed any affirmative obligation on VA facilities and agencies to register veterans and failed to clarify whether and to what extent outside groups would actually be permitted to conduct voter registration activities. Indeed, the volunteers with responsibility for the policy were prohibited from affirmatively offering voter registration because each had to sign a form agreeing that (1) s/he would strictly limit voter registration assistance to only those veterans who specifically requested it, and (2) s/he would not encourage political participation through voting.¹¹

Data collected by the U.S. Census Bureau indicate that a significant number of veterans remain unregistered to vote. In fact, over 5.3 million veterans (23.2 percent of all veterans) were not registered to vote in 2006.¹² There are also significant gaps in registration rates between more highly educated and affluent veterans and those with lower education and lower income, indicating the need for greater voter registration outreach among such veteran populations. In 2006, only 70 percent of veterans with a high school diploma or less were registered to vote compared to 83 percent of those with a baccalaureate degree and 88 percent of those with an advanced degree.¹³ Similarly, only 73 percent of veterans in households with incomes below \$25,000 were registered to vote compared to 85 percent of veterans in households making \$100,000 or more a year.¹⁴

During the last session of Congress, Representative Robert Brady and Senators Diane Feinstein John Kerry introduced legislation in the House of Representatives (H.R.6625) and U.S. Senate (S. 3308) that would have required the Department of Veterans Affairs to approve state requests for designation of VA sites as voter registration agencies, in accordance with the National Voter Registration Act. The bills also directed the VA to facilitate voter registration activities by nonpartisan organizations and elections officials. The House passed the legislation but the

7 See Written Testimony of Lisa J. Danetz before the Committee on Rules and Administration, United States Senate, at 8 (September 15, 2008), available at http://www.demos.org/publication.cfm?current_publicationID=B9461641%2D3FF4%2D6C82%2D5A2FC05FB2A30A6A.

8 42 U.S.C. § 1973gg-5(a)(3)(B)(ii).

9 Written Testimony of Lisa J. Danetz, *supra*, at 7.

10 VHA Directive 2008-053 at 4.b(1), available at http://www1.va.gov/VHAPUBLICATIONS/ViewPublication.asp?pub_ID=1756.

11 See Transcript of Oral Testimony of Lisa J. Danetz before the Committee on Rules and Administration, United States Senate, at 31 (September 15, 2008).

12 Source: U.S. Census Bureau, Current Population Survey, Voting and Registration in the Election of November 2006, Table 15b, available at <http://www.census.gov/population/www/socdemo/voting/cps2006.html>.

13 *Id.*

14 Source: U.S. Census Bureau, Current Population Survey, Voting and Registration in the Election of November 2006, analysis by Dēmos.

Senate adjourned amidst extensive negotiations in this Committee over the bill. Thus, voter registration of veterans remains an issue.

We hasten to add our strong belief that the mechanism provided for in the National Voter Registration Act for designation of divisions of the federal government as voter registration agencies should not be restricted to the Department of Veterans Affairs. Extending voter registration opportunities for many citizens who interact with other federal agencies could help expand the franchise. Preliminary research suggests that voter registration could rise among newly-naturalized Americans and lower-income applicants and recipients of Supplemental Security Income and/or Social Security Disability Insurance if divisions of the United States Citizenship and Immigration Services and the Social Security Administration were also designated as voter registration agencies.

Voter Registration Problems Revealed By Provisional Ballot Usage

Experts estimate that as many as 3 million votes were lost in the 2000 election because of registration problems alone.¹⁵ The Help America Vote Act of 2002 (HAVA) and its provisional balloting requirement were a response to these widespread problems. To ensure that no voter is turned away from the polls, provisional ballots are to be distributed to individuals who, among other things, believe they are registered to vote but whose names cannot be found on the voter rolls at the polling place. Provisional votes are subsequently counted if election officials are able to verify that the individual is a legitimate voter under state law.¹⁶ While provisional ballots can save votes, they are not without their problems.¹⁷

While provisional ballots themselves pose many problems, their use (and abuse) is actually a symptom of a much more fundamental problem: a dysfunctional voter registration system. Examination of provisional ballot data can thus shed light on the scope and character of the problems affecting our registration system. Nationwide, hundreds of thousands, sometimes even millions, of voters who believe they have properly taken the steps necessary to register to vote are showing up at the polling place only to find their names omitted from the voter rolls. In many cases, their provisional ballots are not counted.

Over 1.9 million provisional ballots were cast in the 2004 presidential election.¹⁸ Sixteen states reported that over 1 percent of all ballots cast in that election were provisional.¹⁹ Provisional ballots made up over 3 percent of ballots cast in six states and over 5 percent in another three states.²⁰ In the 2006 midterm election, twelve states reported that over 1 percent of ballots cast were provisional, with Arizona reporting a provisional balloting rate of 4.7 percent and Ohio a rate of 3 percent.²¹

15 CalTech/MIT Voting Technology Project, *Voting: What Is, What Could Be* (July 2001).

16 42 U.S.C. § 15482.

17 See e.g. Scott Novakowski, *A Fallible 'Fail-Safe': An Analysis of Provisional Balloting Problems in the 2006 Election* (Dēmos, November 2007), available at <http://www.demos.org/pubs/failsafereport.pdf>; Scott Novakowski, *Provisional Ballots: Where to Watch in 2008* (Dēmos, October 2008), available at http://www.demos.org/pubs/provisionalballot_brief.pdf; and Advancement Project, *Provisional Voting: Fail Safe Voting or Trapdoor to Disenfranchisement* (September 2008), available at <http://www.advancementproject.org/pdfs/Provisional-Ballot-Report-Final-9-16-08.pdf>.

18 Kimball W. Brace and Michael P. McDonald, *2004 Election Day Survey* (U.S. Election Assistance Commission, 2005), http://www.eac.gov/election_survey_2004/toc.htm.

19 Eagleton Institute of Politics, Rutgers University and Moritz College of Law, The Ohio State University, *Report to the U.S. Election Assistance Commission on Best Practices to Improve Provisional Voting* (2006), available at http://www.eagleton.rutgers.edu/News-Research/ProvisionalVoting_VoterID.html.

20 Ibid.

21 U.S. Election Assistance Commission, *2006 Election Administration and Voting Survey*, available at <http://www.eac.gov/program-areas/research-resources-and-reports/completed-research-and-reports/election-day-survey-results>.

While nationwide provisional balloting data from the 2008 election is not yet available, Ohio is one state that is again attracting attention for its high provisional balloting rate. Statewide, 3.6 percent of votes cast were provisional, up from an already-high 3 percent in 2006.²² Franklin County, home to city of Columbus, had a rate of 5 percent and Cuyahoga County, containing Cleveland, had a rate of 4.3 percent.²³

Such high numbers of provisional ballots and high provisional balloting rates are indicative of breakdowns in our registration system. In most cases, provisional voters clearly believe they have followed all the steps required to be registered to vote. In fact, HAVA requires that each provisional voter sign an affirmation attesting that they are a registered voter.²⁴ Calls received by the Election Protection hotline in 2006 confirm that many voters given provisional ballots believed they had properly registered, some even saying they had confirmed their registration status with election officials as recently as the day before the election.²⁵ Furthermore, numbers of provisional ballots cast do not include the throngs of voters who were erroneously turned away from the polls without being offered a provisional ballot or refused to cast one because they believed it would not count.²⁶

Just as troubling as high rates of provisional ballots being cast are the large numbers of provisional ballots that are rejected. In 2004, over one in three of the 1.9 million provisional ballots cast were ultimately rejected.²⁷ In 2006, almost 22 percent of the 791,483 provisional ballots cast were rejected.²⁸ Because HAVA left up to the states the decision of which provisional ballots to count, states vary dramatically in their rejection rates. In 2006, for example, rejection rates ranged from a high of over 93 percent in Kentucky to 1.6 percent in Oregon. The primary reason provided by the states for rejecting provisional ballots that year was because voters were determined to be “not registered.” The second most frequent reason was that the ballot was cast in the “wrong precinct.”²⁹ Thus, the majority of rejected provisional ballots in 2006 were discarded because of problems directly related to voter registration.³⁰ In these circumstances, not only is our registration system failing our citizens, but the safety net designed to protect them is also proving ineffective.

The widespread use of provisional ballots is indicative of fundamental, underlying problems with our voter registration system. While increasing access to the franchise, voter registration reform would also largely eliminate the problems associated with provisional ballots. By tackling these problems, registration reform would reduce the usage of, and problems related to, provisional ballots. Indeed, states that allow Election Day or Same Day Registration report much lower numbers of provisional ballots. For example, in 2006, Wisconsin reported 271 provisional ballots cast and Wyoming reported only 22 statewide.³¹ After adopting EDR in 2007, Iowa experienced a dramatic drop in provisional ballot usage, from 14,661 provisional ballots in the 2004 election to only 4,725 in 2008.³² North Carolina also experienced a huge drop: 92,533 provisional ballots were cast in the 2006 general

22 Ohio Secretary of State, 2008 Election Results, available at <http://www.sos.state.oh.us/SOS/elections/electResultsMain/2008ElectionResults.aspx>.

23 Ibid.

24 42 U.S.C. § 15482(a)(1),(2)

25 Scott Novakowski, *A Fallible 'Fail-Safe': An Analysis of Provisional Balloting Problems in the 2006 Election* (Dēmos, November 2007), available at <http://www.demos.org/pubs/failsafereport.pdf>

26 Ibid.

27 EAC, 2004. See note [4].

28 EAC, 2006. See note [7].

29 In 2006, thirty states and the District of Columbia automatically rejected provisional ballots cast in the wrong precinct even if they were cast in the correct jurisdiction or, in some cases, even the correct polling place.

30 In 2006, 66 percent of rejected provisional ballots were discarded for the following reasons: the voter was determined to be “not registered,” the voter’s registration was “not timely received” by election officials, the voter was purged from the rolls, or because the provisional ballot was cast in the wrong precinct or jurisdiction. EAC, 2006. See note [7].

31 EAC, 2006. See note [7].

32 Iowa Secretary of State 2008 Report, available at <http://www.sos.state.ia.us/pdfs/2008report.pdf>.

election, as compared to 53,972 in the high-turnout 2008 presidential election. Gary Bartlett, Executive Director of the North Carolina State Board of Elections, has attributed this drop to the state's use of Same-Day Registration.

Harassment of Voters Using Lawful Voter Registration Methods in Ohio

Other disturbing voter registration problems observed by Dēmos during Election 2008 included harassment of and unfounded accusations against lawful registrants by law enforcement authorities in Greene County and Hamilton County, Ohio.

Under Ohio law, voters are permitted to register and cast an in-person absentee ballot on the same day during the six-day window between the beginning of early voting and the end of the registration period. This "Golden Week" for same-day registration in Ohio extended from September 30 through October 6, 2008 in the recent presidential election. Despite legal challenges to this registration procedure by the Ohio Republican Party, four different federal and state courts upheld the lawfulness of this registration method in decisions issued in late September 2008.³³

Despite the clear lawfulness of Ohio's same-day registration procedure under both Ohio and federal law, law enforcement officials in Greene County, Ohio, announced that they were launching an investigation into voting by each of the 302 persons in Greene County who registered and cast an absentee ballot on the same day during the period September 30 through October 6. The Greene County sheriff announced the investigation even though he acknowledged in news reports that he lacked any first-hand reports or evidence that could support allegations of voter fraud. Instead, the only grounds cited for the investigation were unsubstantiated "concerns" expressed in telephone calls by members of the public who appeared to object to registration and voting by students in the community, unaccompanied by any specific allegation of actual fraud or other illegal conduct committed by any specific voter.

After learning of this disturbing threat of voter harassment, Dēmos immediately drafted a letter to the Greene County Sheriff and Prosecuting Attorney stating that a law-enforcement investigation based solely on the fact that a voter registered to vote using lawful methods threatened the federally protected rights of Greene County voters under Section 11(b) of the Voting Rights Act of 1965, among other protections.

Section 11(b) of the Voting Rights Act, 42 U.S.C. § 1973i(b), provides:

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 3(a), 6, 8, 9, 10, or 12(e).

³³ Dēmos participated as counsel in defending the legality of Ohio's same-day registration period in conjunction with a variety of Ohio voters and advocacy groups. The litigation is described further in the attached letter to Greene County officials dated October 10, 2008 (also available at: <http://www.demos.org/pubs/GreeneCountyLetterFinal.pdf>)

Our letter pointed out that an investigation based on nothing more than a voter's decision to use a lawful method of registration would surely chill the willingness of voters in Greene County to exercise their right to register to vote in future elections, and that it was difficult to view such an investigation as anything other than unlawful intimidation under Section 11(b) of the Voting Rights Act. We accordingly urged the Greene County officials immediately to cease their investigation and we provided a copy of our letter to the U.S. Department of Justice. Fortunately, within hours after we sent our letter, Greene County officials announced that they were dropping their investigation.

Officials in Hamilton County, Ohio also made highly publicized and unwarranted allegations of voter fraud against some 600 Hamilton County voters who took advantage of the same-day registration window during the 2008 election. In announcing the investigation, Hamilton County Prosecuting Attorney Joe Deters declared "We know of certain voter fraud."³⁴ However, after news reports noted that Mr. Deters was serving as the Southwest Ohio Regional Chairman of the McCain campaign, Mr. Deters recused himself from the investigation and turned it over to a court-appointed special prosecutor.

In January 2009, the special prosecutor released a report establishing that the claims of voter fraud were in fact groundless.³⁵ "Ultimately," the report stated, "the investigators discovered get-out-the-vote practices, sponsored by community organizations, which took full advantage of this unique absentee-voting period, but no evidence that these practices violated Ohio law."³⁶

Dēmos is concerned that these groundless accusations of voter fraud, and unwarranted investigations of lawful voter registration, may chill lawful voter registration activities. The Committee may wish to inquire whether the Voting Section of the U.S. Department of Justice uncovered other instances of voter registration intimidation through similar tactics during the 2008 election and, if so, what steps are being taken to address this problem.

CONCLUSION

Dēmos appreciates this opportunity to inform the Subcommittee of the serious voter registration problems that continue to impede and deter millions of citizens from full participation in the political process. We look forward to working with the Committee on its continuing efforts to address and overcome these problems in the 111th Congress.

³⁴ Kimball Perry and Howard Wilkinson, "Deter Steps Out of Voter Probe," Cincinnati Enquirer, October 20, 2008

³⁵ "Vote fraud claims were wrong," Cincinnati Enquirer, January 28, 2009, available at <http://news.cincinnati.com/apps/pbcs.dll/article?AID=/AB/20090128/NEWS01/901280317/>

³⁶ *Id.*