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**Testimony of Kristen Clarke
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U.S. Election Assistance Commission

**Public Meeting and Workshop Regarding
Empowering Voters**

September 18, 2008

Empowering Voters During the 2008 Election Cycle

Founded under the direction of Thurgood Marshall, the NAACP Legal Defense and Educational Fund (LDF) is the nation's oldest and, we believe, finest civil rights law firm that has served as legal counsel for African Americans on a significant number of important federal voting rights matters over the course of the last several decades. LDF has also provided testimony in support of the Voting Rights Act of 1965 and other federal voting rights laws and core voting protections. Through extensive litigation, advocacy, public education and election monitoring efforts, particularly in the Deep South, LDF has developed significant expertise regarding barriers to political participation.

I currently serve as the Co-Director of LDF's Political Participation Group. Prior to joining LDF, I served for several years in the Civil Rights Division of the U.S. Department of Justice, handling matters arising under the Voting Rights Act of 1965 and other federal voting rights statutes. I have also coordinated a number of federal observer monitoring efforts around the country. I am pleased to offer this testimony highlighting issues surrounding the provisional balloting process which raises concerns worthy of careful examination by the U.S. Election Administration Commission (EAC) in advance of the upcoming November 2008 federal election.

The most recent federal election cycles have significantly undermined public confidence in our political system. One of the key problems that emerged during these elections concerns the administration and implementation of provisional balloting rules in many states. In our view, state rules and practices that lead to high rejection rates for provisional ballots is a serious problem that denies many eligible citizens the opportunity to meaningfully participate in federal elections. Moreover, high provisional ballot rejection rates appear to be particularly stark in those jurisdictions with significant numbers of minority voters.¹ For these reasons, it is important that the EAC investigate the problems surrounding provisional balloting and offer recommendations about ways that states can improve their respective rules and practices. Improvements and refinements to provisional balloting systems should aim to both cure high rejection rates and progressively reduce the number of provisional ballots cast over time. Improving the administration of provisional balloting in federal elections can help ensure that all voters, including minority voters, are given an equal opportunity to cast a ballot that will count during the upcoming November general election.

¹ Allan J. Lichtman, *Report on the Racial Impact of the Rejection of Ballots Cast in the 2000 Presidential Election in the State of Florida 4*, in U.S. COMMISSION ON CIVIL RIGHTS, *Voting Irregularities in Florida During the 2000 Presidential Election* (2001).

Addressing High Rejection Rates of Provisional Ballots Cast During Federal Elections

After the voting controversies surrounding the 2000 Presidential election, Congress sought to improve the administration of elections by including a “fail-safe” or provisional voting requirement as a core feature of the Help America Vote Act of 2002 (HAVA).² Specifically, Section 302 (a) of HAVA³ requires election officials to provide individuals who are not listed on the voter registration rolls, but believe themselves to be eligible, an opportunity to vote by provisional ballot. If the individual is later determined to be eligible to vote under state law, the provisional ballot will be counted.

While HAVA mandated that all states adopt laws and procedures to help maximize the chances that a provisional ballot cast by eligible voters would count, states have differed in their implementation of provisional voting requirements. Therefore, the rate of provisional ballots cast and counted varies significantly from state to state. For example, during the recent 2008 Presidential Preference Primary in Louisiana, approximately 95 percent of all provisional ballots cast were rejected and not counted. Similarly, 81 percent of provisional ballots cast during Louisiana’s 1st and 6th Special Congressional Primary elections held on March 8, 2008 were also rejected.⁴

Nation-wide surveys conducted by Election Data Services⁵ and Project Vote⁶ found that the primary reason for provisional ballots not being counted was the fact that voters’ names did not appear on the registration rolls. While there are a number of reasons why a voter’s name may not appear on the rolls, there is also evidence that Registrar’s are failing to properly and timely process registration applications and evidence of the implementation of state-wide purge programs that may lead to the disenfranchisement of voters. One such purge program recently adopted by the State of Louisiana likely resulted in the purging of thousands of eligible voters, including many African-Americans, from registration rolls throughout the state.⁷ In response to the high rejection rate of provisional ballot applications, several states have adopted forward-thinking solutions that are aimed at curing the underlying problems and progressively reducing the number of provisional ballots cast during elections across time.

² Help America Vote Act of 2002, 42 U.S.C.A. §§ 15301-15545.

³ Section 302(a) of HAVA: “If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows.”

⁴ See Post-Election Statistical Report, Louisiana Secretary of State *available at* <http://www.sos.louisiana.gov/tabid/176/Default.aspx>

⁵ See Report of Election Data Services, 2004 Election Day Survey (2004) *available at* http://www.eac.gov/clearinghouse/docs/eds2004/eds-2004-part-2-chapter-6/attachment_download/file

⁶ See Report of Project Vote, Maximizing the Effectiveness of Provisional Balloting *available at* http://projectvote.org/fileadmin/ProjectVote/Policy_Briefs/Project_Vote_Policy_Brief_6_Maximizing_the_Effectiveness_of_Provisional_Voting.pdf

⁷ See Testimony of Kristen Clarke, NAACP Legal Defense and Educational Fund, U.S. House Committee on House Administration, Elections Subcommittee (October 23, 2007) *available at* http://www.naacpldf.org/content/pdf/barriers_to_voting/Testimony_Kristen_Clarke_Voter_List_Maint.pdf

Using the Provisional Ballot Application as a Voter Registration Form

A number of states, including Maryland and Oregon, utilize the provisional ballot envelope as a voter registration application; other states require voters to complete an affidavit which may also serve as a voter registration application. Kansas and Tennessee do not include voter registration applications as a part of the provisional ballot but, instead through state law, mandate that voters complete a separate registration application before casting a provisional ballot. While different in methodology, at least 12 states employ a system whereby provisional ballots effectively serve as a voter registration application.

Using the provisional ballot as a voter registration application ensures that those citizens whose names are excluded from the rolls are added to the rolls in advance of the next election. This process also helps ensure that citizens' efforts are not wasted, as the registration application provides for the possibility that those voters deemed ineligible will be given the opportunity to cast a ballot in any subsequent election. This process allows local election officials to add eligible individuals in their jurisdiction to the rolls, and also helps local election officials update their files as the voter registration form may capture corrections or changes to a voter's address, party affiliation, or other personal information.

Interestingly, the survey data illustrates that states with this combined provisional ballot/registration application process record a higher provisional ballot acceptance count across time. Indeed, those individuals whose names were excluded from the rolls are more likely to find their names on the rolls in subsequent elections resulting in a reduction in the number of provisional ballots that would be cast in any future election. That said, the success of such a system is also tied to adequate and effective training of poll officials who must ensure that provisional ballots are only offered in limited instances.⁸ Poll workers must also be able to clearly and effectively address any questions that voters might have to ensure that voters complete the provisional ballot/voter registration application correctly.

Discouraging Restrictive Rules That Limit the Counting of Provisional Ballots Cast in Federal Elections

In recent federal elections, there has been tremendous confusion among local and state election officials regarding whether provisional ballots should only be counted if cast in the voter's assigned precinct. Section 302(a) of HAVA states that provisional ballots should be counted if the voter declares their eligibility in the "jurisdiction" where they wish to vote. Some states have interpreted "jurisdiction" narrowly to mean "the precinct in which a person is a legally qualified elector." These states prohibit the counting of ballots even in those instances in which a voter may have cast their ballot at the right polling place but wrong precinct table and in instances in which a voter may have been misdirected to the wrong precinct by poll officials. In our view, this restrictive interpretation significantly undermines the objectives that Congress sought to achieve in its adoption of HAVA. Those provisional ballots cast in the incorrect precinct but in the correct jurisdiction should

⁸ LDF's recent election monitoring efforts reveal that poll officials often overuse and misuse provisional ballots offering them to voters in instances not contemplated by HAVA.

be counted, and the EAC should closely examine varying state practices in this regard and offer guidance that helps ensure that “every vote counts.”

Conclusion

Despite the important Congressional goals underlying the adoption of HAVA, recent federal elections reveal a number of problems and issues with the implementation and administration of the provisional balloting process. Unnecessary restrictions upon the counting of provisional ballots and high rejection rates among those provisional ballots cast, raise important concerns for those committed to the goal of ensuring that all citizens have the right to participate in elections. Over the next several weeks, the EAC stands to play an important role by providing guidance to states that can help address the problems seen in recent federal elections and ensure fulfillment of the original Congressional goals underlying HAVA. Guidance offered now can help better inform and shape the training of those poll workers that will be dispatched to polling sites around the country for the November 2008 general election. Guidance can also help bring about uniformity and clarity in the administration of the provisional balloting system in states, and help ensure that local and state election officials enforce provisional balloting rules in a way that increases the likelihood such ballots will be counted or, at minimum, ensures that those voters deemed ineligible are added to the registration rolls for subsequent elections.