October 22, 2004

Chris Nelson, Secretary of State
Office of the Secretary of State
500 East Capitol Avenue, Suite 204
Pierre, South Dakota 57501-5070

Larry Long, Attorney General
Office of the Attorney General
500 East Capitol Avenue
Pierre, South Dakota 57501-5070

VIA FAX TO: (605) 773-6580 (original will follow)
(605) 773-4106 (original will follow)

Re: voter registration procedure in South Dakota

Dear Secretary Nelson and Attorney General Long:

I write to request your immediate attention to an unlawful voter registration procedure that threatens to disenfranchise hundreds, if not thousands, of South Dakota voters on November 2.

It has come to my attention that county auditors in Bennett, Hughes, Jackson and Shannon counties have refused to accept voter registration applications on which the applicant did not answer both of the questions that appear at the top of the form. Because these questions are duplicative of other information required on the form, denying the right to vote in state or federal elections on that basis would violate the Civil Rights Act of 1964, 42 U.S.C. § 1971(a)(2)(B), and rights secured by the United States Constitution.

South Dakota's voter registration application, a copy of which is enclosed, allows the voter to attest to U.S. citizenship in two ways and to attest to age eligibility in three ways. It includes the questions "Are you a citizen of the United States?" and "Will you be 18 years of age or before election day?" along with "Yes" or "No" checkboxes at the top of the form. It also separately asks the applicant to provide his or her date of birth and, by signing his or her name, to "declare, under penalty
of perjury (5 years imprisonment and $5,000 fine),
that: I am a citizen of the United States; . . .
[and] I will be 18 on or before the next election . . . ."

The Help America Vote Act (HAVA) of 2002
required South Dakota to put the checkbox questions
on the voter registration application. See HAVA §
303, 42 U.S.C. § 15483(b)(4)(A). HAVA also provides
that "[I]f an applicant for voter registration fails
to answer the [citizenship] question . . . ., the
registrar shall notify the applicant of the failure
and provide the applicant with an opportunity to
complete the form in a timely manner to allow for the
completion of the registration form prior to the next
election for Federal office." (Emphasis added.)
HAVA does not require election officials to reject an
application if the voter fails to check the "Yes" box
regarding citizenship as long as the question is
answered elsewhere.

State law requires county auditors to review
applications "for eligibility and completeness,"
S.D.C.L. § 12-4-5.3, but it does not require or
authorize them to refuse or reject applications on
which the applicant did not complete one or both of
the duplicative questions at the top of the form.

Clearly, if an applicant signs an oath under
penalty of criminal perjury and imprisonment for five
years that he or she is a U.S. citizen and will be 18
on or before the next election, the applicant has
answered the questions of age and citizenship.
Similarly, if the applicant provides his or her date
of birth, no further information is necessary to
determine whether the applicant is of legal age to
vote. Neither HAVA nor state law requires anything
more.

In fact, if county auditors refuse or reject
voter registration applications for such an
immaterial omission, they would violate an
independent provision of federal law. Under 42
U.S.C. § 1971(a)(1)(2)(B) (enacted as part of the Civil
Rights Act of 1964), it is illegal for an election
official to deny "the right of any individual to vote
in an election because of an error or omission on any
record or paper relating to an application,
registration, or other act requisite to voting, if such error is not material to determining whether such individual is qualified under state law to vote in such election." When a voter swears, under penalty of criminal perjury, that he or she is a U.S. citizen and is old enough to vote, it is immaterial that the voter may have left unchecked two duplicative boxes that ask precisely the same questions. Thus, if a county auditor denies the right to vote to a registrant under these circumstances, he or she will be violating federal law and will be subject to suit by the Attorney General or by a private citizen.

Furthermore, the refusal to register a voter based on such an immaterial omission also would violate the fundamental right to vote under the Fourteenth Amendment. "Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 665 (1966).

At least six other states with similar voter registration forms - Colorado, Iowa, Michigan, Ohio, Washington, and Wisconsin - have already concluded that the failure to check a citizenship box should not prevent a voter registration from being processed for all federal, state and local elections, so long as the applicant signs the oath swearing that he or she is a U.S. citizen. This conclusion is consistent with recent guidance from the Election Assistance Commission (EAC). See Election Assistance Commission, Best Practices in Administration, Management and Security in Voting Systems and Provisional Voting: A Toolkit for Election Administrators and Stakeholders at 56 (July 30, 2004) (available on the Internet at http://www.eac.gov/bp). South Dakota should join these states and the EAC in assuring the full recognition of the right to register and vote in the upcoming election.

To that end, I urge you to do the following: (1) issue an immediate directive to all county auditors in South Dakota prohibiting them from refusing or rejecting a voter registration application on which the applicant did not complete the checkboxes; (2) issue an immediate directive to all county auditors
in South Dakota requiring them to review voter registration applications that they have already refused or rejected and to accept any that were refused or rejected because the applicant did not complete the checkboxes; (3) take all necessary steps to ensure that any provisional ballots cast by persons who are not on the voter rolls because they did not complete the checkboxes are counted; and (4) promulgate an administrative rule to make clear in the future that county auditors may not deny voter registration to an applicant who does not complete the checkboxes.

I look forward to your prompt response to this letter. I request a response by October 26, 2004, to enable us to resolve this issue quickly in a way that fully protects the voting rights of all South Dakotans.

Sincerely,

[Signature]

Bryan Sells
Staff Counsel

closure

cc: Shellie Baker, Hughes County Auditor
Sherill Dryden, Shannon County Auditor
Susan Williams, Bennett County Auditor
Vicki Wilson, Jackson County Auditor
Patrick Duffy
Jennifer Ring
Voter Registration Application for County

Use this form to register to vote or report a name, address or party change.

Please print. Complete entire form. Return this form to your county auditor.

Are you a citizen of the United States of America? □ Yes □ No

Will you be 18 years of age on or before election day? □ Yes □ No

If you checked 'no' in response to either of these questions, do not complete this form.

Last                     First                     Middle

Residence Address        Apt or Lot #      City/Town      State      Zip

Mailing Address (if different)  City/Town  State      Zip

If residence address is a post office box, rural box, or general delivery, you must give the location of your residence:

Print previous name, if changed:

Driver License Number Required: State of driver license issue

(If you do not have a valid driver license, you must give the last four digits of your social security number)

Please register me as a member of the Party

I declare, under penalty of perjury (5 years imprisonment and $5,000 fine), that

* I am a citizen of the United States;
* I maintain my home at the above address;
* I will be 18 on or before the next election;
* I have not been judged mentally incompetent;
* I am not currently serving a sentence for a felony conviction which included imprisonment, served or suspended, in an adult penitentiary system;
* I authorize cancellation of my previous registration as written below.

Dated ____________/__________  Voter Signature:

For county auditor's office use only:


Previous Voter Registration Information Required

I wish to be registered as shown above. I was last registered with the following name and address which will be cancelled:

Last                     First                     Middle

Previous Address        City/Town      State      Zip

County

Dated ____________/__________  Voter Signature:

The deadline for registration is 15 days before any election. Your form must be received by the auditor by this deadline if you are to vote in the next election.

Within 15 days you will receive a notice of your registration. If you do not, contact your county auditor.