FEDERAL VOTING ASSISTANCE PROGRAM
DEPARTMENT OF DEFENSE
WASHINGTON, DC 20301-1155

November 6, 2009

The Honorable Chris Nelson
Secretary of State
500 E Capitol Building, Suite 204
Pierre, SD 57501-5070

Dear Secretary Nelson:

Thank you for the work you and your State have done to support the Legislative Initiatives recommended by the Federal Voting Assistance Program (FVAP). We want to continue and expand that relationship in this election cycle. We have taken a fresh look at the Legislative Initiative process, and are incorporating new perspectives into this year's Initiatives. While most of our legislative recommendations are familiar, FVAP is developing a weighted score to measure FVAP's success in convincing States to adopt those initiatives. The scores are weighted to mirror the frequency of voting failure experienced by military and overseas voters, in the applicable stages of the voting process which the Legislative Initiative addresses. Although originally planned to be released with these letters and using voting failure data from the 2006 election, the State-by-State Index will instead be published in FVAP's 2008 Election Survey Report, to be released by the end of the year, in large part because of the input received back from election officials to the preliminary draft sent to all States in early October 2009. We appreciate that feedback and are incorporating those recommendations, including recalculating the frequency of voting failure based upon 2008 election data, to be used in the State-by-State Index scoring process. We will make sure you receive an advance copy of that index, and FVAP's approximation of the score assigned your State, before the final 2008 Election Survey Report is published.

FVAP's new strategic goal is to bring the absentee voting success rates for Uniformed Service members, their families, and citizens residing outside the U.S. equal to that of the general population's. FVAP is defining voting success rates both in terms of the percent of absentee ballots requested by military and overseas voters that are returned in time to be counted, and the percent of absentee ballots timely returned that are counted. The simple fact is that military and overseas voters find it much more difficult to vote than does the general population. Many factors contribute to these difficulties, but FVAP's preliminary analysis is that the single greatest reason for absentee voting failure is that ballots are not received in time to be returned by the States' deadlines. This can be overcome by sending ballots out earlier, providing voters more time to return them, and by transmitting ballots to voters faster, such as by email.

Given our new focus, FVAP is realigning its Legislative Initiative recommendations to the States. The enclosed initiatives focus on sending ballots to voters at least 45 days before the election. FVAP also recommends the expanded use of email and online transmission for all election materials throughout the entire absentee voting process, replacing fax and postal mail where possible. Until secure programs for the electronic transmission of voted ballots are established, we recommend that States allow voters to return static copies of voted ballots through available electronic means. However, the decision to send a voted ballot by unsecure electronic means must rest with the

individual voter with their full understanding they necessarily relinquish their right to a secret ballot. It is FVAP's experience that many voters protected by the *Uniformed and Overseas Citizen Absentee Voting Act (UOCAVA)* willingly accept that relinquishment if it is the only way for their ballot to be returned in time to be counted.

Email and online capabilities are widely available to Uniformed Service members and overseas citizens, vastly eclipsing the usefulness of faxing. After a September 2008 visit to military bases in the Middle East, Asia and Europe, a delegation of six State Chief Election Officials reported that "the system of delivering ballots and returning them by mail is archaic compared to the pace of modern military operations" and "...reliance on fax machines to speed the voting process... is largely unworkable for deployed troops." The delegation also reported that individual service members and overseas citizens confirmed that in overseas locales, fax capabilities were not readily available and "indicated a strong preference for, and almost universal access to, email or internet based voting procedures."

FVAP realizes that universal adoption of email and online applications to deliver voting materials will not happen immediately, as State governments must engage the legislative and policy decision-making process to implement such changes (that is also why, for the first time, FVAP is sending this letter to the State Chief Election Officer and the leaders of State legislative chambers, in recognition of the role both branches of government play in resolving these problems). In the interim, FVAP will encourage and assist Uniformed Service and overseas voters to greatly increase the use of the Federal Write-in Absentee Ballot (FWAB). Given the inherent delays in sending ballots by mail, the FWAB represents the only ballot readily available for many of these voters. Therefore, FVAP recommends that States expand the use of the FWAB to include simultaneous registration, ballot request, and voted absentee ballot for all elections at all levels: general, primary, special, and runoff elections for Federal, State, and local offices. In expanding the use of the FWAB in this manner, individually-developed State Write-In Ballots will no longer be needed, and FVAP recommends that they be replaced with the FWAB alone. That is why FVAP is also dropping its previous Legislative Initiative recommendation on State Write-In Absentee Ballots – they are made moot with universal adoption of the FWAB. Universal adoption of the FWAB will standardize the "emergency ballot" process for *UOCAVA* voters, reduce confusion as to which form to use, and allow election officials to focus their education on a single form and its processes.

Additionally, FVAP strongly supports standardizing the voting process for Uniformed Services and overseas voters across all States. The State Election Official delegation discussed above also stated that the sheer variety of State and local laws imposed on Uniformed Services and overseas voters is of its own right an impediment to their voting because of the complexity it introduces for the voters and Voting Assistance Officers charged with helping them. The 2008 *Voting Assistance Guide* was 460 pages long because of that complexity. Only through assiduously editing and standardizing the individual State sections was FVAP able to reduce the 2010 Guide to 275 pages, which is still far too long and may discourage *UOCAVA* voters from even attempting to participate in the process. FVAP therefore supports the Uniform Law Commission initiative to draft a model law for military and overseas absentee voting. The Commission's goal is to simplify the myriad absentee voting regulations and procedures into a uniform process common to all 56 States and territories. We strongly urge you to collaborate with your State Commissioners on this process, encourage their participation, and provide input as to how such a model law should look. The Commission is very sensitive to the issues of enactibility of model laws, and early inputs from States are crucial to the Commission's understanding as to what the range of possibilities is for such a law.

Finally, FVAP has revised its draft legislative language to parallel that being developed by the Uniform Law Commission.

Other initiatives remain crucial to alleviating the problems faced by citizens covered by the *UOCAVA*, including the elimination of notary and witnessing requirements, the authorization for the State Chief Election Official to implement emergency measures, the establishment of late registration procedures, and the enfranchisement of U.S. citizens who have never resided in the United States.

This year, based upon data from the 2006 election, FVAP evaluated our Legislative Initiatives and sorted them according to the degree by which each affected *UOCAVA* populations, taking into consideration the major factors that hinder these groups' ability to successfully vote absentee. That analysis indicated that three initiatives provided the most benefit to the voters: 45 day ballot transit time prior to Election Day, the use of electronic transmission, and expanding the use of the Federal Write-In Absentee ballot to include primary, run-off and special elections for federal, State and local offices. However, many election officials responded to our draft Index scoring and weighting methodology and raised very good reasons why 2006 data may not be representative of *UOCAVA* voting failure. Therefore, FVAP is revising its analysis of *UOCAVA* voting failure based upon 2008 data collected in FVAP's election survey and the Election Assistance Commission's Election Day Survey of local election officials. FVAP will provide you an advance copy of those weighted measures, State-by-State Index when completed, and the final version will be included in our 2008 Post-Election Survey Report.

After reviewing South Dakota's existing election code and procedures, we have identified eight Initiatives for your legislature to consider during the upcoming legislative session. These Initiatives are discussed in detail with suggested wording in the enclosed Legislative Initiatives document. Information available to FVAP indicates that there are 7900 Uniformed Service members, 2936 family members of voting age, and approximately 9800 overseas citizens who claim South Dakota as their voting residence[1]. Please do not hesitate to contact us for assistance. We would be happy to provide written or in-person testimony to clarify our position on any or all of these initiatives.

Sincerely,

Bob Carey
Director

Enclosure:
2010 Legislative Initiatives and Sample Language

CC:
President of the Senate Dennis Daugaard
Speaker of the House Thomas Deadrick

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[1] Based on your state's population as a ratio of the general population factored against an estimated 3.7 million voting age overseas citizens

FVAP
2010 Legislative Initiatives

45-Day Ballot Transit Time

The most significant barrier to successful absentee voting is the late receipt of blank ballots which leaves citizens without sufficient time to vote and return absentee ballots by mail. Uniformed Service members, their families, and overseas citizens are challenged exercising their right to vote. The Military Postal Service Agency urges military voters in Iraq and Afghanistan to send ballots back at least 28 days before an election, and voters at other overseas military installations to send ballots back at least 21 days before an election. FVAP further recommends that citizens residing overseas return their ballots at least 28 days before an election, or earlier, depending on foreign mail service. Ballots, therefore, must be sent 45 days prior to the election if sent through international mail and overseas military post offices in order to provide adequate time for voters to receive, vote, and return ballots, with any likelihood that their votes will be successfully received by election officials. Accepting and counting absentee ballots that were cast up to Election Day but were not received until after the election would further enfranchise these voters, and FVAP's scoring provides additional points to States that provide such post-Election Day ballot return deadlines.

Sample Language

For any general, special, [presidential preference,] or primary election, including any runoff election, for federal office; any general, special, [recall,] or primary election, including any runoff election, for statewide or state legislative office [or state ballot measure]; any general, special, [recall,] or primary election, including any runoff election, for local government office [or local ballot measure], no later than 45 days before the election the official charged with preparing and distributing ballots and balloting materials in each jurisdiction shall transmit ballots and balloting materials to all absent uniformed services voters and overseas voters who by that date have submitted a valid military-overseas ballot application. When a ballot application from an absent uniformed services voter or overseas voter arrives after the jurisdiction has begun transmitting ballots and balloting materials to voters, the official charged with distributing ballots and balloting materials shall transmit these materials to the voter within two working days.

Email and Online Transmission of Voting Materials

Email and online capabilities are widely available to, and have become the communications standard for Uniformed Service members and overseas citizens, basically replacing fax and mail. Transmission of voting materials by email or online has improved the opportunity to vote for *UOCAVA* citizens by providing high-speed delivery of election materials to and from voters and local election officials. Fax capabilities, on the other hand, are generally unavailable to military voters and overseas citizens. It is necessary that email and online

transmission options are available to all Uniformed Service members, their families, and overseas citizens, and that they become the principal methods of sending election materials to these citizens. It is also crucial that the States expand the use of email and online transmission for all elections materials, including registration forms, ballot requests and absentee ballots. Furthermore, voting materials transmitted by electronic means should not require subsequent submission by mail.

While this scoring system does not give points for providing electronic absentee balloting systems, it does provide points for allowing, at the voter's discretion, the return of static copies of voted ballots by electronic means, such as a scanned copy of a voted ballot emailed back to an election official. Although necessarily forcing the voter to relinquish the right to a private ballot, many Uniformed Services and overseas voters would rather give up that right and have their ballots counted, then to not have their ballot counted at all. FVAP believes that option must be preserved for these voters.

The use of these technologies opens a rapid, cost-efficient and effective line of communication between local election officials and *UOCAVA* voters that is capable of providing immediate updates regarding the successful delivery of voting materials and voter registration information. Finally, for the more mobile *UOCAVA* voters, especially Uniformed Services voters, email addresses are much more stable and consistent than postal mail addresses.

Sample Language

Absent uniformed services voters or overseas voters who have requested to receive ballots and balloting materials by electronic transmission may choose either facsimile transmission or electronic mail delivery, or Internet delivery if offered by the voter's jurisdiction. Local election officials, with the assistance, as appropriate, of [the state's chief election authority], shall transmit ballots and balloting materials to the voter using the electronic means that the voter has chosen.

Expanded Use of Federal Write-In Absentee Ballot

UOCAVA citizens should be authorized to use the Federal Write-In Absentee Ballot (FWAB) to vote in general, primary, special, and runoff elections for Federal, State and local offices. When insufficient time exists between the scheduling of a special or runoff election and the set election date, citizens may not receive their State ballots in time to vote. Expanding the use of the FWAB for <u>all</u> elections provides *UOCAVA* citizens a greater opportunity to vote in these elections.

Additionally, the FWAB should be accepted simultaneously as a voter registration application, absentee ballot request, and absentee ballot. This provision will allow this highly mobile population to participate in elections far in advance of a deployment, reassignment or move. Finally, FVAP is recommending a new policy that the FWAB be the only write-in ballot used for Uniformed Services and overseas voters; the authorization and use of both a FWAB and a

State Write-In Absentee Ballot introduces greater complexity and opportunity for error for Uniformed Services and overseas voters. Using the single FWAB will allow future technological solutions by FVAP to incorporate State and local races into online FWAB solutions, further extending this franchise opportunity.

Sample Language

(1) Election officials shall permit absent uniformed services voters and overseas voters to use the Federal Write-In Absentee Ballot, in accordance with the provisions of the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. Section 1973ff, to vote for all offices in any general, special, primary, or runoff election for Federal, State, or local government office, or a ballot measure.

(2) Election officials shall permit absent uniformed services voters and overseas voters to use the Federal Write-In Absentee Ballot voter declaration as a request for registration and an application for a military-overseas ballot simultaneous with the submission of the Federal Write-In Absentee Ballot, if the request is [received by the later of the 15th day before the election or the last day for other voters in the state to apply for an [absentee ballot] for that election].

Participation with Uniform Law Commission Effort and Adoption of Recommendations

The Uniform Law Commission (ULC) is drafting the *"Military Services and Overseas Civilian Absentee Voting Act"* to be presented for future adoption by the States. FVAP supports the efforts of the Commissioners in this endeavor, and recommends that the States participate in and support the drafting of the *Act* through their State representatives on the Commission. The sheer diversity of individual election laws regarding Uniformed Services and overseas voters is, in and of itself, a serious hindrance to these voters successfully exercising their franchise. Uniformity and standardization of voting laws for the Uniformed Services and overseas voters would substantially ease the burden of compliance and improve voter success. Furthermore, FVAP recommends that the State Chief Election Official work closely with the State legislative body to enact the *Act* when it is presented to the States for adoption. John Sebert, Executive Director of ULC (john.sebert@nccusl.org) and Katie Robinson, ULC staff representative to the Military and Overseas Voting Drafting Committee (katie.robinson@nccusl.org), are available to discuss your State's involvement in the ULC effort at (312) 450-6600.

Emergency Authority for State Chief Election Official

During a period of a declared emergency or other situation where a short time-frame for ballot transmission exists, the Governor or designated State official should have the authority to

designate alternate methods for handling absentee ballots to ensure *UOCAVA* voters have the opportunity to exercise their right to vote.

Sample Language

If an international, national, state, or local emergency or other situation arises that makes substantial compliance with the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. Section 1973ff et seq., impossible or impracticable, as confirmed by the existence of armed conflict involving United States Armed Forces or the mobilization of those forces, including State National Guard and Reserve component members of this state, or by the occurrence of a natural disaster or the existence of a state of emergency, civil unrest, war, or other exigency in a foreign country, or by an official declaration by the governor that a state of emergency exists, the governor directly, or by delegation to [the state's chief election authority], may prescribe, by emergency order or rule, a special procedure or requirement as may be necessary to facilitate absentee voting by those absent uniformed services voters or overseas voters directly affected who are eligible to vote in this state. [The state's chief election authority] shall take reasonable steps to provide absent uniformed services voters and overseas voters with timely notice of any special procedure or requirement prescribed under this section.]

Removal of Notarization and Witnessing Requirements

Notarization and witnessing requirements on voter registration applications, ballot requests, and voted ballots present a real barrier to voting for many *UOCAVA* citizens. Citizens living in remote areas overseas are hindered because notary services may not exist or may be prohibitively expensive and difficult to access. Similarly, witnessing requirements, especially those that specify the age or citizenship of the witness, may disenfranchise voters who cannot satisfy this requirement due to their location or circumstances. Notarization or witnessing requirements for all absentee balloting materials should be removed, and the voter's signature and date, under the self-administered oath on these voting materials, should verify the legitimacy of the voter and the application or ballot.

Sample Language

No notarization or authentication requirement other than the declaration specified in [Title I, Sec. 101 (b) (7) of Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. Section 1973ff et seq.] or the declaration on the Federal Post Card Application and Federal Write-In Absentee Ballot, may be required for the execution of any document under this [act].

Late Registration Procedures

Recently discharged Uniformed Service members and their accompanying families or overseas citizens returning to the U.S. may become residents of a State just before an election, but not in time to register by the State's deadline and vote. The adoption of special procedures for late registration would allow these citizens to register and vote in the upcoming election.

Sample Language

An individual who has been discharged or separated from the Uniformed Services, the Merchant Marine, an accompanying family member, or a citizen who is returning from outside the United States, too late to register by the regular State deadline shall be entitled to register and vote in that election if they so notify the registrar for the address at which they claimed as their residence prior to the discharge or return to the United States before the day of the election, and if they would otherwise have been qualified to register to vote.

Enfranchise Citizens Who Have Never Resided in the U.S.

Many U.S. citizens, who have never resided in a State or territory, are not entitled to vote under current State law. These citizens are voting age children of U.S. citizens who are eligible to vote under *UOCAVA* themselves. Absent the decisions made by these children's parents to reside overseas, these disenfranchised children of *UOCAVA* voters would likely otherwise be allowed to vote. Therefore, FVAP urges that these U.S. citizens be allowed to vote in elections for Federal offices in the State in which either parent is eligible to vote under *UOCAVA*.

Sample Language

(a) An overseas voter is eligible to vote in this state if the last place where the voter was, or if then of voting age would have been, eligible to vote before leaving the United States is within this state.

(b) An overseas voter who was born outside the United States and who is not included in subparagraph (a) is eligible to vote in this state if the last place where a parent or guardian of the voter was, or under this [act] would have been, eligible to vote before leaving the United States is within this state, and if the voter has not previously registered to vote in any other state.

(c) An overseas voter who is eligible to vote in this state shall register to vote using, and be assigned to the voting [precinct/district] of, the address of the voter's last place of residence in this state, or, in the case of a voter eligible under subsection (b), the address of the voter's parent's or guardian's last place of residence in this state.