



Concerned Nigerians

Empowerment, Accountability and Unity

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Free and Fair Elections in Nigeria in 2011 and Beyond – The Ways Forward.

Open Letter to Our Stakeholders.

Delivered at the NUJ Event in Osun State, Osogbo - November 22, 2010.

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His Excellency, President Goodluck E. Jonathan, the Senate President, Senator David A. B. Mark, Speaker of the House of Representative, Honorable Dimeji Bankole, the Chairman of Independent National Electoral Commission (INEC), Professor Attahiru Mohammed Jega, Nigeria Union of Journalists (NUJ), all political parties' leadership, fellow Nigerians and all other stakeholders interested in success of Nigeria and Nigerians as a people, 2011 elections' fever is heating up and there is an urgent need to ensure that we learn from the past in order to make Nigeria a better nation.

Summary and Suggestions:

To ensure free and fair elections in 2011, the following steps/actions are necessary:

A. Section 129(1) of the 2010 Electoral Act ^[2] requires amendment to reflect something like this: "Notwithstanding the provisions of the Section 129 subsection (1)(a) - (k) or any other related Act, any valid and non-fictitious evidence, including, but not limited to, photographs; video recordings; voice recordings; oral accounts; written affidavits; written documents; tissue specimens; forensic evidence; finger prints; ballot papers; etc shall be tenable and admissible in any election tribunal and or court of law irrespective of whether or not the process of collecting such evidence contravenes any section and or subsection of this Act. And on this premise, portable video cameras, portable still cameras, voice and other recording devices are permitted at polling stations and any other areas where electoral procedure is conducted."

B. The word "maximum" and the phrase "not exceeding" used in prescribing punishments for offenders in Sections 12, 16, 18, 23, 24, 118, 128, and others in the 2010 Electoral Act ^[2] need to be changed to "minimum" or "not less than". Alternatively, these prescribed punishments may be expanded to clearly spell out the minimum and maximum punishments ascribed to any of the committed election crime. This is the most reliable way to ensure that an

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unscrupulous judge cannot take advantage of the flaws in the Electoral Act to ridicule the judiciary process and make our electoral process a big laughing butt to the world. Such amendment will also go a long way to reassure the public that our legislators are serious about ensuring that voters and votes are protected from criminals and election riggers in 2011 and beyond.

C. The 2010 Electoral Act ^[2] needs to be amended to unequivocally define the roles and qualifications of election observers and to ensure that evidence collected and presented by such observers cannot be dismissed as incompetent the way Justice Garba dismissed pieces of evidence presented by eye witnesses ^[6,7,8].

D. Professor Jega and the INEC need to, not only restructure the new INEC to ensure that the systemic errors and flaws of the past are corrected to ensure that new INEC is truly and fully independent without allowing any form of inducements and or sensitization from within and or without that may compromise the INEC and or its officials, but also need to embark on aggressive public educational campaign to convince the public that the new INEC is different from the old INEC and that it is not going to be "the business as usual". The electorate need to know the detailed measures taken by the new INEC to ensure that it is truly independent and immune to corrupt schemes associated with the old INEC.

E. ConcernedNigerians, a non-profit and non-governmental organization of Nigerians and lovers of Nigeria across the globe, has commenced mobilization of voters for registration across Nigeria using posters, handbills, man-to-man discussions, internet communication etc. Such efforts can be supported and expanded upon by the INEC, federal and other tiers of government, all stakeholders, corporate bodies, NGOs, individuals, etc. INEC may also utilize students, professional groups, academicians, ASUU, NASUU, religious leaders, artisans, NLC, NUJ, media houses etc in reaching out to the electorate with messages that are convincing enough to reduce and or eliminate the current apathy towards electoral processes and sense of election procedure insecurity in Nigeria among Nigerians.

F. 2010 Electoral Act ^[2] needs to be amended to unequivocally spell out clearcut time frames for determination of election dispute litigations and to mandate that under no condition must such determination extend beyond six months post election day.

Details:

Democracy, the tested and proven system of government accepted across the globe as a critical instrument of societal development, was described by

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Abraham Lincoln (former President of the United States of America) as "The government that is from the people like us and is made of many people and is made for the sake of people". In a more refined way, democracy is defined as "The government of the people by the people for the people".

The most important element of democracy that differentiates its system of government from other systems of government like military dictatorship, monarchy, oligarchy etc, is the power given to the people in willingly choosing the people that form the government that rules over them. Any equation and or formula that removes this power of people to choose who rules over them automatically renders any system of government that results from such equation and or formula non-democratic.

The freewill of people to choose their leaders is only feasible if, and only if, the process leading to the choice of such leaders is free and fair. This is the reason why it is imperative that all Nigerians need to ensure that any election in Nigeria is free and fair if we are truly serious about subscribing to democratic system of governance.

Dear stakeholders, there are serious apathies towards electoral process in Nigeria amongst Nigerians, old and young, strong and frail, simply because of their unpalatable experiences in similar processes that featured in the history of our nation. The carnage of maiming and loss of lives that visited the electoral processes in 2007 with virtual impunity are still very fresh in the minds of Nigerians and these and similar reasons serve as serious challenges that can spell doom for the elections in 2011 and beyond unless few critical steps are taken urgently.

Election rigging, among other electoral irregularities, serves as a major obstacle against free and fair election in Nigeria. Many academicians, human rights' groups, principled politicians and the likes have said and written volumes on electoral rigging in Nigeria but the recent graphic pictures of electoral rigging in Nigeria painted by Governor Donald Duke, the former governor of Rivers State, in his speech that was delivered at the Transcorp Hilton Hotel, Abuja and widely circulated,^[1] sent serious chills down the spines of average Nigerians and called for serious discourse on our electoral process if we really want the world to believe that we are truly a democratic nation.

For the sake of record, Governor Donald Duke is a trained lawyer who reigned as a governor of Cross Rivers State, Nigeria on the platform of the ruling party, the People Democratic Party of Nigeria, between May 29, 1999 till May 29, 2007. Having served as a two term governor in Nigerian electoral system, Governor Donald Duke's assertions about electoral rigging in Nigeria cannot be dismissed as fallacies and, thereby, deserve serious attention.

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Summation of the revelations of Governor Donald Duke is that the votes of Nigerians did not count in the Nigerian electoral process because of high level and sophisticated connivances against the masses by some elements in the Commission that was saddled with the responsibilities of conducting elections (the INEC), some people in corridors of power (incumbent governors, presidency, legislators and the likes) from their acts of omissions and or commissions, some grassroots party stalwarts, elements in the law enforcement agencies, etc coupled with poor discharge of civic responsibilities by the people (the masses) as evident by poor turnout for voters' registration and or voting on the election days.^[1]

It is pertinent at this point to put on record high commendations that the current administration and its apparatus deserve in recognition of their efforts at ensuring that the 2011 elections and those after do not repeat the mistakes of the past. Specifically, the roles of the legislatures and the executives at amending the 2006 Electoral Act that eventually produced the 2010 Electoral Act^[2] which significantly increased the legal backing for involvement of people in the process of electing their leaders by ensuring that internal democracy is enforced at parties' levels and that non-democratic consensus candidacy via intra-party oligarchy is outlawed, plus nomination of Professor Jega, a renowned and highly respected academician of impeccable character and immaculate credentials, as the pilot of the commission that shall conduct the 2011 election, amongst others, are highly commendable and are some of the right steps in the right direction. Reliable sources have also reported that Professor Jega has since embarked on internal reorganization and sanitization of the INEC (the Independent National Electoral Commission) to ensure that the negative roles played by that and similar commission in the past electoral processes in our nation are not rehearsed and or reenacted in 2011 and beyond.

There are a lot of vital steps that still need to be taken in order to ensure that free and fair elections are feasible in 2011 however.

The first and foremost prerequisite to free and fair election is a sound and unambiguous legal frame work for electoral process as represented by Electoral Act in our system. A flawed Electoral Act can only produce a disastrous electoral process as evident by the 2006 Electoral Act^[3] and the 2007 elections which resulted from that act. Many changes have occurred in the amended Electoral Act that is now the 2010 Electoral Act^[2] but there are still few clauses that require urgent attention and amendment if we really want the 2011 elections to be free and fair.

The followings are few areas of the 2010 Electoral Act^[2] that require urgent attentions:

ADMISSIBLE WITNESSES AND EVIDENCE

A. Section 129, subsection(1)(i) of the 2010 Electoral Act ^[2], which outlaws the presence of anyone within 300 meter radius of polling booths after voting or being refused to vote without further clarification to legally recognize eye witnesses who may collect vital pieces of evidence that may be useful in election tribunal or court of law, is a repeat of the similar subsection of section 136 of the defunct 2006 Electoral Act ^[3] which was used as a tool to scuttle people's mandates during election tribunal proceedings by some judges on a pretext that pieces of evidence presented by eye witnesses to prove electoral irregularities were inadmissible since those eye witnesses were unlawfully present at their respective polling stations for reasons other than voting pursuant to that cited section of the Electoral Act. While many observers faulted this obvious legal robbing of people off the rights of choosing their leaders, a critical review of this referenced section reveals that those judges only took advantage of one of the legal loopholes in the 2006 Electoral Act ^[3], which, unfortunately, is still preserved in the 2010 Electoral Act ^[3] without meaningful modification to seal that legal loophole.

B. Electoral process and its results in any nation are, historically and naturally, susceptible to disputes and or litigations. Pieces of evidence presented at dispute resolution sittings are vital to determining the merit of allegations of irregularities. Valid and non-fictitious eye witnesses' evidence, irrespective of how, when and where collected, are legally considered as concrete evidence. Electoral Act that gives room for a judge to discredit eye witnesses' evidence without proof that such pieces of evidence are malicious and or fictitious is a flawed Electoral Act and requires immediate and urgent amendment to prevent a repeat of the mistakes of the past.

C. While it is understandable that Section 129 of the 2010 Electoral Act ^[2] must have been promulgated to ensure hitch-free elections without unwanted disturbances, there is a need to add a clause to that section or to the Electoral Act itself that shall legally recognize any evidence collected by any eye witness or other witnesses that may help in adjudging the fairness of the electoral process to the extent that such evidence shall be deemed tenable and admissible in any election tribunal and or court of law irrespective of the provision of Section 129 of the Electoral Act or any other related laws. Such clause will ensure that no judge and or arbitrator will fail to admit and or utilize an otherwise admissible evidence that shall help in determining the fairness of any electoral process conducted using the Electoral Act.

D. **Suggested Solution:** ConcernedNigerians' group suggests that a clause like the following should be inserted into the new Electoral Act that shall form the legal frame work of the 2011 elections to address the potential negative effects of Subsection 129(1)(i) of the 2010 Electoral Act ^[2]: "Notwithstanding the provisions of Section 129, subsection (1)(a) - (k) or any

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other related Act, any valid and non-fictitious evidence, including, but not limited to, photographs; video recordings; voice recordings; oral accounts; written affidavits; written documents; tissue specimens; forensic evidence; finger prints; ballot papers; etc, shall be tenable and admissible in any election tribunal and or court of law irrespective of whether or not the process of collecting such evidence contravenes any section and or subsection of this Act. And on this premise, portable video cameras, portable still cameras, voice and other recording devices are permitted at polling stations and any other areas where electoral procedure is conducted.”

SECURITY and PUNISHMENTS FOR ELECTION CRIMES:

The past electoral processes in Nigeria were marred by varieties of crimes perpetrated by various individuals and groups across all walks of life. The most concerning issue to most Nigerians and observers across the globe is that most of these electoral crimes were perpetrated with impunity. Many politicians hired thugs that publicly and secretly harassed, maimed and or killed unarmed voters and other Nigerians across the country with little and or no intervention from the security agencies that supposed to protect the lives and properties of Nigerians. Few of these crimes ended in many courts of law across the country with the alleged criminals emerging unscathed or with as little as few hundreds of naira as fines for offenses as grievous as assaults, murders, ballot box snatching, arson etc. The more disheartening aspect of the whole thing was that most of these crime perpetrators often worked for people in corridors of power and, as such, enjoyed heartbreaking leniencies of the presiding judges who would manipulate the laws as much as possible to satisfy their benefactors in the corridors of power.

The public opinion samplings conducted amongst potential voters in Nigeria by ConcernedNigerians and many other groups revealed that the most important reason why many Nigerians chose not to register to vote and or vote was inadequate security coupled with justified belief that electoral criminals in Nigeria were mostly untouchable and thus killed and maimed with impunity. During the recent voters’ registration mobilization embarked on by ConcernedNigerians, the single question that featured most from Nigerian potential voters was “How do you ensure our security?” or “How can our vote count when there is insecurity around election period?”. Both versions of these questions center on security. If we want free and fair elections in 2011 and beyond, the legal frame work for such elections must be unequivocal about the prescribed punishments for election criminals so that the public can feel protected and secured.

Punishment is naturally used as a deterrent to criminals and potential criminals and, thus, should be severe enough to serve this purpose so that everyone is aware of the consequence of any criminal act. A critical study of the 2010 Electoral Act ^[2] raises serious concerns about wordings used in pre-

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scribing punishments for various electoral crimes. We cite few citations hereunder:

Section 128 of the 2010 Electoral Act ^[2] which outlaws disorderly conduct at elections but then prescribes "conviction to a maximum fine of N500,000 or imprisonment for a term of 12 months or both".

The disturbing semantic in this clause is the word "MAXIMUM", which legally means a fine ranging from zero naira to five hundred thousand naira and or an imprisonment ranging from one second of jail to one year of imprisonment. A presiding judge cannot be faulted if he or she pronounces an alleged criminal pursuant to this section guilty but then chooses to fine such criminal one hundred naira. This type of punishment is not severe enough to serve as deterrent to anyone who may choose to commit election crime.

There are many other flawed clauses like this Section 128 in the current 2010 Electoral Act ^[2] in which the word "MAXIMUM" or phrase "NOT EXCEEDING" was used in defining the prescribed punishments for various election crimes. These sections include, but not limited to, Sections 12, 16, 18, 23, 24, 118, etc.

SUGGESTED SOLUTION: The word "maximum" and the phrase "not exceeding" used in prescribing punishments for offenders in Sections 12, 16, 18, 23, 24, 118, 128, and others in the 2010 Electoral Act ^[2] need to be changed to "minimum" or "not less than". Alternatively, these prescribed punishments may be expanded to clearly spell out the minimum and maximum punishments ascribed to any of the committed election crime. This is the most reliable way to ensure that an unscrupulous judge cannot take advantage of the flaws in the Electoral Act to ridicule the judiciary process and make our electoral process a big laughing butt to the world. Such amendment will also go a long way to reassure the public that our legislators are serious about ensuring that voters and votes are protected from criminals and election riggers in 2011 and beyond.

INDEPENDENT OBSERVERS AND ELECTION MONITORING:

Election is a process similar to the conventional examination where series of frauds and cheating may occur and can only be limited and or prevented by adequate and objective monitoring. Independent observers are recognized across the globe as vital instrument in objective monitoring of elections since they are more likely to hold no allegiance to any of the parties involved in such election. Neither officers of the INEC (Independent National Electoral Commission) as constituted by Section 1 of the 2010 Electoral Act ^[2], nor polling agents, who are party officials as prescribed by the Section 45 of the same Act, are qualified to observe and or report objectively about what transpired at polling stations and or during elections because of their various allegiances.

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The recently reported plans of the INEC to employ realtime electronic monitoring of the 2011 elections^[4] using satellites is highly welcome and commended. This remote electronic form of monitoring requires objective human realtime monitoring as backup for many reasons, including the fact that this highly technical mode of election monitoring is alien to our system and not yet well tested and proved to be hundred percent hitch-free. Objective human monitoring is still imperative to ensure free and fair elections in 2011.

Pursuant to Section 1 of the 2010 Electoral Act^[2], the INEC can sue and can be sued. In actual fact, the INEC was joined as respondent in many litigated election disputes that followed the 2007 elections^[5]. In view of this, INEC officers and the evidence collected by INEC are not enough to serve as the main mode of monitoring elections in 2011. If INEC is sued, evidence collected by INEC shall most likely be used to defend INEC rather than to incriminate INEC.

The other recognized observers pursuant to Section 45 of the 2010 Electoral Act^[2] are polling agents who are party officials. These observers may not be adjudged to be objective as well because of their party affiliation and allegiance. In fact, Justice Garba, in the case of Senator Ibikunle Amosun vs. Governor Gbenga Daniel, ruled that "Ward Supervisors (polling agents) called by Amosun were not competent to prove allegations of violence, ballot snatching, ballot stuffing and multiple voting because they were members of the petitioner's political party who were naturally interested in winning the case."^[6] Furthermore, this position of Justice Garba premised on one of the flaws of the 2006 Electoral Act^[3] had been cited many times in many courts.^[7,8]

The only area where "observers" was mentioned in the 2010 Electoral Act is in Section 61(1) which permitted the presence of "accredited observers" at polling station^[2]. There is no section of the 2010 Electoral Act that describes how these observers are to be accredited for the purpose of the election and what roles these observers shall play, when these observers must apply for accreditation and to whom must the application be directed and who are qualified to apply as "accredited observers" and how these "accredited observers" can be known to the electorate.

Please, note that Section 129(1)(i) of the 2010 Electoral Act already forbids presence of any one within 300 meters of polling booth and this similar section had been used in the past to dismiss evidence of eye witnesses (election observers) as inadmissible^[2]. Ambiguity in the current 2010 Electoral Act as regards to the definition and roles of election observers is nothing but a serious precursor for reenactment in 2011 of irregularities with impunity that marred the 2007 elections^[1,7,8].

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Free and fair elections shall remain a mirage without independent, neutral and objective umpires that can observe and then report their observations in election tribunals and or courts of law in Nigeria or anywhere else and then be recognized and have their pieces of evidence admitted and utilized by presiding judges.

SUGGESTED SOLUTIONS: The 2010 Electoral Act ^[2] needs to be amended to unequivocally define the roles and qualifications of election observers and to ensure that evidence collected and presented by such observers cannot be dismissed as incompetent the way Justice Garba dismissed pieces of evidence presented by eye witnesses ^[6,7,8].

INEC OFFICERS and their Independence and Neutrality

The Independent National Electoral Commission (INEC) and its officials are constituted to be totally independent in their affairs and acts to ensure free and fair elections ^[2,3]. Unfortunately however, the INEC had not been seen and perceived as being independent in many ways as evident by the narrative picture painted in the aforementioned speech of Governor Donald Duke amongst others ^[1,5-8]. These acts of omission and or commission that rendered INEC dependent seriously contributed to the failures in the 2007 electoral process ^[1]. Once again, we recognize the report that the new INEC, under the leadership of Professor Jega, has reportedly taken series of steps to ensure that the INEC truly acts independent. Few concerns still remain:

A. The Resident Electoral Commissioners (RECs): The RECs, under the new INEC, were posted to their various places of assignments in allegedly similar ways the old RECs were as narrated in the revelations of Governor Donald Duke ^[1]. We reliably have it that most of these RECs are still allegedly residing in official quarters provided by incumbent governors in their hosting states across the country, thereby plausibly making them direct and or indirect beneficiaries of benevolence of these incumbent governors. If the concerns raised in the revelations of Governor Donald Duke are valid, possible compromisation of the new RECs, the same way the old ones were allegedly compromised as detailed by Governor Duke ^[1], is not impossible. A compromised REC is a compromised INEC with election that is bound to be compromised and not free and fair ^[1,5-8].

B. Presiding and other Officers of INEC: As detailed in the aforementioned revelations of Governor Donald Duke, most of the electoral frauds leading to compromised results were allegedly perpetrated and perfected at the polling station levels across the nation using varieties of permutations and or inducements ^[1]. There is nothing written or unwritten currently to convince the electorate that the presiding and other officers of the INEC are not going be compromised as their predecessors allegedly did in the previous elections ^[1].

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SUGGESTED SOLUTION: Professor Jega and the INEC need to, not only restructure the new INEC to ensure that the systemic errors and flaws of the past are corrected to ensure that new INEC is truly and fully independent without allowing any form of inducements and or sensitization from within and or without that may compromise the INEC and or its officials, but also need to embark on aggressive public educational campaign to convince the public that the new INEC is different from the old INEC and that it is not going to be “the business as usual”. The electorate need to know the detailed measures taken by the new INEC to ensure that it is truly independent and immune to corrupt schemes associated with the old INEC.

Speed of Election Litigation Trials:

Justice delayed is justice denied. In most democratic world, litigated election disputes are resolved before the declared winners of such elections are sworn into their various offices. The aftermaths of the 2007 elections served as acid tests for our democratic system. Just barely a month ago, and over three years after the 2007 elections that engendered the litigations, the Nigeria judiciary finally returned the governorship mandate to the rightful owner, Governor Kayode Fayemi, after years of judicial rigmaroles in the case of Fayemi vs Oni ^[9]. A similar case in Osun State, Aregbesola vs. Oyinlola, suffers delays after delays ^[10-12]. Almost four years after the 2007 elections, there are still many unresolved election litigations pending in Nigerian courts due to ambiguity of the 2006 Electoral Act^[3] in defining time limits for determination of election litigations.

SUGGESTED SOLUTION: 2010 Electoral Act ^[2] needs to be amended to unequivocally spell out clearcut time frame for determination of election dispute litigations and to mandate that under no condition must such determination extend beyond six months post election day.

Mobilization for Voters’ Registration and Voting:

Aside the Electoral Act which serves as legal framework for elections, the next determinant of free and fair election is adequate voters’ registration followed by significant turnout of voters for voting.

There are serious, but genuine, concerns and apathies towards elections in Nigeria across all walks of life. During our recent opinion polls about Nigerians’ readiness for 2011 elections, most of Nigerians that indicated that they would register and vote were card-carrying members of one political party or the other and they, unfortunately, constituted less than thirty percent of the eligible voters in Nigeria. Among the non-party membership eligible voters in Nigeria, majority reported that they would either not register to vote and or would not vote. Many Nigerians who reluctantly stated that they would register to vote quickly added that they would, however, not vote. The major reasons given by those that stated that they would not register to vote and or

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would not vote were mainly their belief that their votes never counted in the previous elections and that they believed that their votes would not count in the coming elections in 2011. They argued that why did they have to waste their time in registering and or voting when such votes would not count? Other major reason why Nigerians either decided not register and or vote was their fear for their lives and those of their loved ones because of insecurity and series of violence and killings perpetrated against electorate and perceived political opponents in the previous elections.

Democracy and free and fair election are only feasible if, and only if, people partake in the electoral process. An election without adequate voters' registration and or voters' turnout can only bring forth a caricature of true democracy that is not a true government of the people by the people for the people.

Poor voters' registration and or voters' turnout is a serious precursor for riggings and frauds in electoral processes as evident by the revelations of Governor Donald Duke^[1] and other experiences in the past elections in Nigeria. Poor registration allows surplus voters' registration materials that can be converted to illegal use by party stalwarts and their cronies . Poor voters' turnout is another great opportunity for party stalwarts to convert un-utilized voting materials to their illicit advantage at the expense of their political rivals^[1].

In order to ensure free and fair elections in 2011 and beyond, there is an urgent need to embark on serious and aggressive door-to-door mobilization campaigns focusing on educating the electorate about their civic responsibilities while assuring them that adequate security shall be provided and that their votes shall count and that it shall not be "business as usual" in 2011. The time to commence such campaign is now since the voters' registration for 2011 elections is yet to commence.

SUGGESTED SOLUTION: ConcernedNigerians, a non-profit and non-governmental organization of Nigerians and lovers of Nigeria across the globe, has commenced mobilization of voters for registration across Nigeria using posters, handbills, man-to-man discussions, internet communication etc. Such efforts can be supported and expanded upon by the INEC, federal government and other tiers of government, all stakeholders, corporate bodies, NGOs, individuals, etc.

INEC may also utilize students, professional groups, academicians, ASUU, NASUU, religious leaders, artisans, NLC, NUJ, media houses etc in reaching out to the electorate with messages that are convincing enough to reduce and or eliminate the current apathy towards electoral processes and sense of election procedure insecurity in Nigeria among Nigerians.

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In conclusion, while we commend the current government's efforts at both executive and legislative levels to ensure free and fair elections in 2011 and beyond, many stones are still left unturned in-order to ensure that the 2011 elections are truly free and fair. We are all stakeholders and we all need to play our roles collectively and individually to transform our nation for better.

ConcernedNigerians could be contacted at oya@concernednigerians.com and you may visit our website at www.concernednigerians.com for further details.

Long live Federal Republic of Nigeria.



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