

**Testimony of Dr. James Thomas Tucker  
Native American Rights Fund (NARF)**

**Before the House Committee on the Judiciary  
Subcommittee on the Constitution, Civil Rights, and Civil Liberties**

**Lessons Learned from the 2008 Presidential Election**

**March 19, 2009**

Chairman Conyers, Chairman Nadler, Ranking Member Sensenbrenner and Members of the Subcommittee, thank you for your invitation to testify on the lessons learned from the 2008 Presidential Election. The Native American Rights Fund (NARF), the oldest and largest nonprofit law firm dedicated to asserting and defending the rights of Indian tribes, organizations and individuals nationwide, applauds the Committee for examining this important topic. Voter participation by the First Americans is perhaps more fragile than for any other group. Alaska Natives and American Indians were not recognized as citizens until 1924 and could not vote in many places until much later. Today, language barriers, lack of educational opportunities, geographic isolation, and socio-economic disparities remain challenges to increasing native participation.

Nearly three years ago, members of this Committee worked together in a bipartisan partnership with many of the groups represented today to secure the reauthorization of the Voting Rights Act (VRA). Since then, we have witnessed continuing progress towards achieving the VRA's promise of equal access to the political process for all Americans. The historic election of President Obama, our nation's first African-American President, marked an important step on a journey that began on the Edmund Pettus Bridge in Selma, Alabama forty-four years ago this month. Record numbers of voters, including Native Americans, turned out to vote. Increased early voting opportunities facilitated voter participation. An air of excitement marked a campaign that nearly saw the first woman nominated to the top of the Democratic ticket and did result in the first woman nominated as the Republican Party's vice presidential candidate. We have made much progress together.

Nevertheless, Election 2008 also shows that our work is unfinished. Many barriers to political participation remain.<sup>1</sup> Today's oversight hearing marks a critical first step in responding to those challenges. To assist the Subcommittee in its response, I will cover four topics. I will begin by briefly providing some general observations about voter participation and barriers present in the 2008 Election and their impact on native voters. Next, I will use NARF's recent experiences in Alaska to detail current impediments to voter participation by Native Americans. Finally, I will conclude with some suggestions on remedial steps that should be taken to remove obstacles to voters for future elections.

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<sup>1</sup> See James Thomas Tucker, *Electoral Access, Political Participation and Voter Protection in the 2008 Election*, in the American Bar Association's electronic supplement to AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS (Ben Griffith ed. 2009) (forthcoming).

## Voter Participation and Progress Made by Native Americans

Early and no-excuse absentee voting played a significant role in improving turnout in the 2008 Presidential Election. In 2000, just 13 states offered some form of early voting. In 2004, that number had climbed to 23 states.<sup>2</sup> By 2008, that number had increased to 34 states that allowed either no-excuse absentee voting, in person early voting, or both. Many of those states have large numbers of native voters, including states where all ballots were cast by mail (Oregon and all but two counties in Washington). The growing availability of early voting opportunities has resulted in large increases in pre-election voting, jumping from seven percent in 1992 to an estimated 30 percent in 2008, or about 38 million voters.<sup>3</sup>

Early voting contributed to record voter turnout. More than 131 million people voted in the 2008 Presidential Election, the highest total ever and an increase from the 122.3 million who voted in the 2004 Presidential Election.<sup>4</sup> The tremendous mobilization of voters led to the highest turnout in the past 40 years with about 61.6 percent of eligible voters casting ballots, slightly trailing the voter turnout rate of 63.8 percent in the 1960 Presidential Election.<sup>5</sup> The turnout rate increased from turnout for the 2004 Presidential Election in 33 states and the District of Columbia. Native Americans contributed to that record turnout.

According to preliminary data, in many places Native American turnout was much higher in 2008 than in previous elections. Thanks to registration and get-out-the-vote (GOTV) efforts by groups including the Native Vote Alliance of Minnesota, Take Action Minnesota, and the National Congress of American Indians (NCAI), the Red Lake Reservation in Minnesota reported its highest voter turnout ever. In November 2008, 2,249 tribal members cast ballots, an increase of 125 votes from 2004 and an 800 vote increase from 2000.<sup>6</sup> The NCAI reported survey results showing that tribal turnout on some Minnesota reservations was as high as 83 percent.<sup>7</sup>

In Montana, all nine precincts on the Crow Reservation saw increased voter turnout. Five precincts had turnout increases of 28 percent to 47 percent over 2004 turnout. “Half of the precincts on the Fort Peck Reservation had an increase in voters.”<sup>8</sup> All but two reservations in Montana “had at least one precinct increase voter turnout by at least 25 percent.”<sup>9</sup> Over all,

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<sup>2</sup> Rick Lyman & William Yardley, *Sharp Increase in Early Voting Alters Campaign*, N.Y. TIMES, Oct. 29, 2004.

<sup>3</sup> The Pew Center on the States, *electionline.org Briefing: Election 2008 in Review 7* (Dec. 2008).

<sup>4</sup> *2008 Election Turnout Hit 40-Year High*, CBS NEWS, Dec. 15, 2008, available at <http://www.cbsnews.com>.

<sup>5</sup> *Voter Turnout*, CHI. TRIB., Nov. 6, 2008, at 3.

<sup>6</sup> Brad Swenson, *American Indian reservations see record voter turnout*, BEMIDJI PIONEER (Minn.), Nov. 16, 2008, available at 2008 WLNR 21886573.

<sup>7</sup> See Nat'l Cong. of Am. Indians, *Election 2008: Impact in Indian Country* (Nov. 6, 2008) (“NCAI Report”), available at <http://www.ncai.org/fileadmin/pdf/Election2008AnalysisFINALCompatibilityMode.pdf>.

<sup>8</sup> Jodi Rave, *Dakota Wire*, BISMARCK TRIB. (N.D.), Dec. 3, 2008, at B1.

<sup>9</sup> *Id.*

NCAI found that tribal turnout in Montana was about 65 percent, with the Crow Reservations having turnout estimated at 77 percent in some places.<sup>10</sup>

New Mexico had 11 pueblos and tribes that experienced increases in voter turnout of at least 25 percent over 2004, “with five pueblos recording notable increases ranging from 57 percent to 119 percent.”<sup>11</sup> In the northern half of the Standing Rock Reservation, which is on the border between North Dakota and South Dakota, early numbers show a 22.4 percent increase in Indian turnout over 2004 turnout.<sup>12</sup> GOTV and election protection efforts by NCAI, native advocacy groups, and tribal governments proved very successful in most places. Many tribes with substantial increases in voter turnout used full-time voter empowerment staff, administrative efforts to coordinate volunteers, publicity, and provided transportation to the polls.<sup>13</sup>

Increased Native American voter participation resulted in the electoral success of several native candidates. At least 16 Native American candidates were on the ballot in Montana and Oklahoma, and seven were on the ballot in New Mexico and South Dakota.<sup>14</sup> At least 23 Native American candidates from 11 states and 17 tribes won their elections.<sup>15</sup> Rep. Tom Cole (R, OK) an enrolled member of the Chickasaw Nation and currently the only Native American in Congress, won reelection.<sup>16</sup> Denise Juneau of the Three Affiliated Tribes became the first American Indian elected to statewide office in Montana, following her election as State Superintendent of Public Instruction.<sup>17</sup> In the South Dakota state house race, Kevin Killer and Ed Iron Cloud III, enrolled members of the Oglala Sioux Tribe, were elected.<sup>18</sup> Election 2008 proved historic for Native Americans.

According to the National Conference of State Legislators, following the November 2008 election there are 67 natives serving in the legislatures of 16 states: Alaska has four native representatives and three native senators; Arizona has one native representative and one native senator; Colorado has two native senators; Kentucky has one native representative; Maine has two native representatives; Maryland has one native delegate; Montana has six native representatives and three native senators; Nevada has one native state assemblyman; New Mexico has four native representatives and two native senators; North Carolina has one native representative; North Dakota has one native senator; Oklahoma has 21 native representatives and five native senators; Pennsylvania has one native representative; South Dakota has two native representatives and one native senator; Washington has two native representatives and one native

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<sup>10</sup> See NCAI Report, *supra* note 7.

<sup>11</sup> Rave, *supra* note 8.

<sup>12</sup> *Id.*

<sup>13</sup> See NCAI Report, *supra* note 7.

<sup>14</sup> *Id.*

<sup>15</sup> S.E. Ruckman, *Tribal leaders, citizen groups lead Native vote*, NATIVE AM. TIMES, Nov. 14, 2008, at 1.

<sup>16</sup> See NCAI Report, *supra* note 7.

<sup>17</sup> *Id.*

<sup>18</sup> See Ruckman, *supra* note 15.

senator; and Wyoming has one native representative.<sup>19</sup> The number of Native Americans serving in state legislatures across the country is an important measure of progress.

### **Barriers to Voting and their Impact on Native Americans**

Despite the significant strides made in the 2008 Presidential Election, there is work left to do. Many states still do not have early voting laws. Virginia law illustrates the problems that lack of early voting laws can pose. State law there required completion of an absentee affidavit stating one of 17 reasons why it is necessary to cast it. That resulted in some of the nation's longest waiting times with a record turnout of 3.7 million out of 5 million registered voters. It was reported that it could take up to six or seven hours to cast an absentee vote in the days leading up to the deadline.<sup>20</sup> At one precinct in Petersburg, the line into the polling place stretched for more than half-a-mile.<sup>21</sup> Many voters do not have the luxury of waiting in line that long and simply gave up.

Generally, early voting made some waiting times shorter than expected in states that had it. Nevertheless, lengthy waiting times did occur.<sup>22</sup> Those delays did not impact every group equally.<sup>23</sup> Native American voters had to wait much longer in many places. Inadequate staffing and resources allocated to predominately minority precincts were blamed for the disparities. Language assistance also was unavailable in many states with early and absentee voting. Alaska, which has the highest percentage of native voters of any state, continued to experience a lack of sufficient trained and qualified translators for every part of the voting process.

Overall, Native American turnout increased, but it did drop in some localities. In Montana, voter turnout fell in some precincts on the Northern Cheyenne and Rocky Boy reservations.<sup>24</sup> In New Mexico, voter turnout in seven Navajo precincts dropped by as much as 90 percent.<sup>25</sup> In Alaska, native turnout showed little improvement over the 2004 Presidential Election, when it was estimated at 44.8 percent, compared to non-native turnout of 68.4 percent.<sup>26</sup> It is unclear what the causes of decreased turnout were in Montana and New Mexico. However, NARF has observed that inadequate language assistance and voter outreach by state election officials contributed to depressed native turnout in Alaska. It is possible that also may have been an issue in other states where native turnout remained flat or dropped.

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<sup>19</sup> Nat'l Conf. of State Leg., Native American Legislators (updated Feb. 2009), *available at* <http://www.ncsl.org/programs/statetribe/2009triblg.htm#AK>. NCSL also reports that 12 Native Hawaiians are serving in Hawaii's legislature. *See id.*

<sup>20</sup> Tyler Whitley, *Lawmakers File Bills to Address Voting Problems*, RICHMOND TIMES DISPATCH, Dec. 11, 2008, at A1.

<sup>21</sup> Editorial, *Polling Post-Mortem*, ST. LOUIS POST-DISPATCH, Nov. 10, 2008, at A16.

<sup>22</sup> *See* Tucker, *supra* note 1.

<sup>23</sup> Richard Wolf, *Survey Reveals Disparities on Election Day*, USA TODAY, Dec. 10, 2008, at A8.

<sup>24</sup> Jodi Rave, *Dakota Wire*, BISMARCK TRIB. (N.D.), Dec. 3, 2008, at B1.

<sup>25</sup> *Id.*

<sup>26</sup> *See* 152 CONG. REC. S7962 (daily ed. July 20, 2006) (statement of Sen. Specter).

Election Day problems reportedly included polling place closures because of equipment breakdowns, voters failing to receive absentee ballots who were not allowed to vote at the polls, and thousands of voters turned away without being offered provisional ballots.<sup>27</sup> Voter registration issues were the most prevalent barrier reported.<sup>28</sup> Registration problems included not receiving a voter registration card listing the voter's precinct, the voter's name not appearing on the registration list, going to the wrong polling place, or even having the voter turned away without being allowed to cast a ballot.

In Montana, the state Republican Party challenged voters based on change-of-address information in Democratic-leaning precincts.<sup>29</sup> Many of those precincts were located on Indian reservations. American Indians in seven counties, including three with large reservation populations, filed a lawsuit to stop the registration challenges.<sup>30</sup> Challenging native voters is especially pernicious because there is no viable question that they are U.S. citizens. Unfortunately, impediments to native registration in Montana have been an ongoing problem.<sup>31</sup> Fortunately, the native voters were able to dismiss their lawsuit after Republican officials dropped their challenges.<sup>32</sup> Nevertheless, challenges to native registration remain a real threat in future elections.

State photo identification requirements that were enacted to prevent impersonation voter fraud contributed to some voters being delayed or turned away without being allowed to vote. That was true even in states that had not enacted a voter identification law. A study by the Massachusetts Institute of Technology reported that 12 percent of voters in states without a voter identification law were asked to present a photo ID to vote, while 20 percent of voters in states with a voter identification law were not asked for ID.<sup>33</sup>

Photo identification requirements can have a discriminatory impact on Native Americans. NCAI reported that its election protection efforts identified "local tensions with State officials" and "confusion about IDs."<sup>34</sup>

In Arizona, Agnes Laughter, a 77 year-old grandmother who only speaks Navajo and has "voted all her adult life using her thumbprint as her identification," was forced to sue election officials to restore her right to vote. Ms. Laughter was first turned away from the polls in 2006,

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<sup>27</sup> See Election Protection, *An Election Alert: Virginia and Pennsylvania*, Nov. 4, 2008, available at <http://www.866ourvote.org/newsroom>.

<sup>28</sup> CNN, *Voter Hotline*, available at <http://www.cnn.com/ELECTION/2008/voter.hotline/> (last visited Mar. 16, 2009).

<sup>29</sup> Bob Herbert, *The Real Scandal*, N.Y. TIMES, Oct. 21, 2008, at A29.

<sup>30</sup> Rave, *supra* note 8.

<sup>31</sup> See *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002 (D. Mont. 1986) (lawsuit by Crow and Northern Cheyenne against at-large elections in Montana that included evidence of discriminatory voter registration practices).

<sup>32</sup> Rave, *supra* note 8.

<sup>33</sup> Wolf, *supra* note 23.

<sup>34</sup> See NCAI Report, *supra* note 7.

when new voter identification laws went into effect in Arizona. She was unable to meet state requirements because she was born in a Hogan, has no electricity (and therefore no utility bills), has no birth certificate, does not have a tribal identification card, and does not drive. Therefore, she had no way of proving her citizenship to be able to vote. Her lawsuit was settled in May 2008, following Arizona's agreement to use an expanded list of identifications that Native Americans could use when they vote. Even then, Ms. Laughter had to endure a lot of red tape and bureaucratic delay:

Her work-worn hands rubbed the crook of her cane as she patiently waited at the Tuba City office of the Arizona Department of Motor Vehicles which did not have a machine to immediately issue the ID, at the Navajo Area Office where she had to obtain an Affidavit of Birth, on the drive to the DMV office in Flagstaff, in the plastic chairs beneath the lighted sign that would eventually display her number waiting for the elusive identification card that would allow her to vote.<sup>35</sup>

Ms. Laughter expressed her joy when she learned she would be able to vote again. "All of my heartache has changed as of this day. I have an identity now. My thumbprint will stand. I feel fulfilled."<sup>36</sup> Her lawsuit undoubtedly made a substantial difference for many native voters in Arizona who wanted to participate in the 2008 Presidential Election. But it is likely that not all native voters, particularly those isolated on the Hopi, Navajo, or Tohono O'odham reservations, were able or willing to engage in the sort of odyssey Ms. Laughter had to fulfill to restore her fundamental right of citizenship.

### **Barriers to Native Voters in Alaska**

The promise of federal legislation to remove voting barriers is unrealized for thousands of Alaska Native voters. In the 2008 Presidential Election, the statewide turnout rate in Alaska was 66 percent.<sup>37</sup> Turnout among Alaska Natives, on the other hand, was just 47 percent, nearly 20 percent lower.<sup>38</sup> That is little higher than the estimated native turnout of 44.8 percent in the 2004 Presidential Election.<sup>39</sup>

Depressed native turnout in Alaska during one of the highest-profile elections in American history is no coincidence. It is a continuation of the pattern of neglect and discrimination by state election officials against geographically and linguistically isolated native voters. I will briefly summarize some of the more glaring barriers that we have encountered in Alaska in 2008, particularly (though not exclusively) in the Bethel region.

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<sup>35</sup> *Clinic Helps Navajo Woman Restore Right to Vote*, U.S. FED. NEWS, Nov. 10, 2008, available at 2008 WLNR 21517476.

<sup>36</sup> *Id.*

<sup>37</sup> See State of Alaska, Division of Elections, Official Results of the Nov. 4, 2008 General Election, available at <http://www.elections.alaska.gov/08general/data/results.pdf>.

<sup>38</sup> See NCAI Report, *supra* note 7.

<sup>39</sup> See *supra* note 26.

NARF represents individual limited-English proficient (LEP) Yup'ik voters and tribes in the Bethel region of Alaska who have been denied access to the political process by a combination of State neglect, indifference to federal laws, and ideological opposition to providing language assistance to LEP voters. In July 2008, we obtained some preliminary relief for those voters in *Nick et al. v. City of Bethel et al.*, case no. 3:07-cv-0098-TMB (D. Alaska July 30, 2008).<sup>40</sup>

Alaska and its political subdivisions are subject to the bilingual election requirements and preclearance requirements of the VRA.<sup>41</sup> Several areas of the State, including the Bethel region, are separately covered by Section 203 of the VRA for Alaska Native languages.<sup>42</sup> In the Bethel region, Yup'ik is the predominant language. The LEP rate in the area is very high. Among all eligible voters, nearly 21 percent are LEP in Yup'ik. In eight Yup'ik villages more than half of eligible voters are LEP, and ten villages have LEP rates between 20 to 50 percent. Because of the State's educational discrimination, the illiteracy rate among LEP Yup'ik voters greatly exceeds the national average: 21.5 percent, nearly 16 times the national illiteracy rate of 1.35 percent. Yup'ik is the largest native language group in Alaska, and the Bethel region has the largest concentration of Yup'ik voters in the State.

### **1. Lack of outreach**

Alaska's most basic failing is its virtually non-existent outreach to native voters and native villages to provide voting opportunities. State election officials acknowledge that voter outreach is critical. Lieutenant Governor Sean Parnell, who is statutorily responsible for administering state elections, agreed that the most effective approach to providing language assistance during the voting process is to work with the local tribal governments and reach out to LEP voters in areas where Alaska Native languages are spoken. That has not occurred.

Alaska did almost no outreach to native villages until after NARF filed its lawsuit in June 2007. According to the State's own records, it sent out voter registration forms for the first time to some native villages in 2006. However, no forms were sent to Yup'ik villages in the Bethel region. The State did not send out any voter registration packets to tribal councils in the Bethel Census Area in 2007, even though the State conducted two elections there and had been sued for its lack of outreach. No follow-up mailings or telephone calls were made to determine if native villages needed assistance with voter registration. All mailings were done in English, causing many LEP natives to throw the materials away because they could not read them.

No elections employees have attended tribal council meetings in the Bethel region for purposes of increasing voter participation. Becka Baker, the State's Region IV supervisor, admitted that she had not traveled to any of the villages despite being in her position for over four years. She explained, "My job is to conduct elections and... that's what I'm focused on.

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<sup>40</sup> I have included a copy of the preliminary injunction as an attachment to my testimony.

<sup>41</sup> See 40 Fed. Reg. 49,422 (Oct. 22, 1975).

<sup>42</sup> See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 67 Fed. Reg. 48,871 (July 26, 2002).

I'm not focused on attending tribal council meetings in all of these communities.” She acknowledged that doing so “quite possible may” provide a good opportunity to improve access for LEP voters, “but I wouldn't know that unless I attended one.”

Consistent with that neglect, the State did not reach out to native organizations to facilitate voter turnout even when it was convenient to do so. The Alaska Federation of Natives (AFN), Alaska Inter-Tribal Council (AITC), and Bureau of Indian Affairs regularly hold meetings in Anchorage and Juneau that are attended by tribal leaders from all over Alaska, including the Bethel region. State officials ignored those opportunities to meet with them. The second-longest tenured State elections employee, a supervisor who has been employed by Alaska for nearly two decades, admitted that the first time election officials met with AFN and AITC members about facilitating native participation was in the summer of 2008, when court action on our Motion for a Preliminary Injunction was imminent.

Alaska has conducted voter registration drives in some of the predominately white and non-native areas of the State. However, Whitney Brewster, the State's Director of Elections until December 2007,<sup>43</sup> admitted that election officials did not target any voter registration efforts at native voters, such as those in the Bethel region.

## **2. English-only election materials and assistance**

Alaska is a hotbed of English-only opposition to providing any materials or assistance in languages other than English.<sup>44</sup> Consistent with the State's ideological opposition to bilingual election materials, voter registration forms have only been available in English and Tagalog, with the latter forms added under threat of litigation by the U.S. Department of Justice. No language assistance for the registration or voting process, whether in audio or written form, is available for LEP Alaska Natives.

All elections materials that Alaska sends out are in English-only. State election officials attempt to shift their responsibility for providing assistance in Alaska Native languages to the tribal governments. The registration packets sent to certain parts of Alaska in 2006 included a “request for the tribal governments to provide as much assistance to the LEP applicants as needed.”

Even when native voters read English, they often cannot read and understand the language well enough to understand English election materials. Dr. Claudia Dybdahl, a linguist who chairs the Department of Education at the University of Alaska-Anchorage, analyzed Alaska's voter registration form. She determined that it was written at a 13.83 grade level, requiring roughly two years of college to understand it. Most Alaska Natives do not have any college education and suffer from the effects of the state's past and present educational

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<sup>43</sup> Ms. Brewster resigned her position and was reassigned just a few weeks after she was deposed in 2007.

<sup>44</sup> For example, in 1998 voters enacted the Official English Initiative, which required that only English be used for “all government functions and actions.” Alaska Stat. § 44.12.300 (1998). The law subsequently was struck down for violating the free speech guarantees of the State Constitution. *See Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 187-188 (Alaska 2007).



discrimination.<sup>45</sup> Alaska's lack of assistance in their native language prevents them from being able to understand most election materials.

### **3. Lack of publicity about voter registration in native languages**

In 2008, for the first time, Alaska aired radio announcements in Yup'ik that included a limited amount of information about voter registration deadlines. However, the radio announcements did not reach all of the native villages in the Bethel area. The State did not pursue alternative ways of communicating election information in native languages, such as through VHF radios that are commonly used in the villages. As a result, large native villages such as Tuluksak received no information in Yup'ik for the 2008 Presidential Election.

In 2006, Alaska aired two radio announcements in Yup'ik about elections information. According to the Director of Elections, the purpose of the announcements was “[t]o get information across to voters who do not speak English,” including “[v]oter registration, deadlines, date of election, absentee voter deadline, that there's an election.” However, the Division of Elections failed to confirm the actual content of the announcements. The Yup'ik announcements said:

On August 22nd, from 7 in the morning until 8 o'clock in the evening there will be voting for leaders. When you vote [unknown, something like all your choices] are written in the Division of Elections. Also [unknown]. And be sure to bring your ID when you go to vote. For those who need more information, call 888-383-8683.

According to a Yup'ik translator, the State's radio announcements were given in an English diction, inflection, and intonation difficult for a native speaker to understand. No information was provided about voter registration deadlines. The other announcement was virtually identical, except that it referred to the date of the general election in 2006.

Alaska's remaining publicity about voter registration deadlines was limited to English-only press releases sent to broadcast stations. When the State sends out voter information to broadcast stations with the notation of “Local Native Language Requested,” it does not confirm whether any of that information is actually broadcast or whether any translations into native languages are accurate. As the State Director of Elections admitted, “With the media, you never know what is accurate and uniform, frankly.” She further acknowledged that broadcast stations provided with voter information “pick and choose what information they choose to pass along, if at all.”

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<sup>45</sup> See Decision and Order, *Moore v. State of Alaska*, Case No.3AN-04-9756-CIV (Alaska Super. Ct. June 21, 2007) (unpublished opinion), at 194-95 (finding that Alaska violated its constitutional responsibility to maintain a public school system” by failing to sufficiently oversee the quality of secondary education in many Alaska Native villages and to provide a “meaningful opportunity to learn the material” on a graduation exam); *Kasayulie v. State of Alaska*, Case No. 3AN-97-3782-CIV (Alaska Super. Ct. 1999) (finding that Alaska violated the Constitution by using a dual, arbitrary, unconstitutional, and racially discriminatory system for funding school facilities); Settlement Agreement, *Hootch v. State Operated Sch. Sys.*, Civil No. 72-2450, *settled sub nom, ex rel. Tobeluk v. Lind* (Alaska Super. Ct. Sept. 3, 1976) (acknowledging the State's failure to provide any secondary schooling in native villages).

#### **4. Lack of communications in native languages about voter purges**

When Alaska's election officials conduct their annual purges of voter registration rolls, all written information about voters being removed from the list is in English only. The National Voter Registration Act (NVRA) requires that voters be notified that they are being purged to give them an opportunity to contact elections officials to remain registered.<sup>46</sup> Although Alaska officials have claimed that they provide that notice, they also have conceded that all written communications to LEP Yup'ik voters are in English.

State officials have no information about whether any purge announcements or notices have been translated by private citizens into Yup'ik and if so, whether those translations were accurate and complete. The State has not made any efforts to remedy the lack of language assistance for registration activities in other ways. Oral Yup'ik is not provided for any voter registration information including purges because an elections supervisor explained, "All our communications are done in English."

During the 2008 Presidential Election, we learned of an elderly LEP voter in the native village of Kasigluk who had been disenfranchised for over two decades because of Alaska's failure to provide information about voter purges in native languages. "She had not voted in many years because her name was not on the list and she could not vote. She did not know how to get her name back on the list..." Failure to comply with the overlapping requirements of the NVRA and the VRA has resulted in similar voting discrimination in other native communities.<sup>47</sup>

#### **5. Lack of language assistance in polling places**

Alaska's failure to provide language assistance is detailed in the attached Order granting the Plaintiffs' Motion for a Preliminary Injunction in the *Nick* litigation. In February 2009, the Plaintiffs filed a Motion for Further Relief under the injunction, documenting several violations of the Court's Order during the 2008 Presidential Election. The Motion was supported by more than three dozen declarations from voters in 17 native villages.

#### **6. Lack of registration and voting site accessibility assessments**

The Voting Accessibility for the Elderly and Handicapped Act of 1984 was passed, in part, to remove barriers that the elderly and disabled faced in the registration and voting process.<sup>48</sup> Registration and voting locations must be physically accessible, or alternatives need

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<sup>46</sup> See 42 U.S.C. § 1973gg-6(c).

<sup>47</sup> Several provisions of the VRA require that barriers to registration be removed. See generally 42 U.S.C. § 1973(a) (the general nondiscrimination provision); 42 U.S.C. § 1973c(a) (barring changes in registration procedures with a discriminatory purpose or that place minority voters in a worse position); 42 U.S.C. § 1973aa (barring the use of tests or devices, including English literacy, as a prerequisite to registration); 42 U.S.C. § 1973aa-1a (requiring language assistance be provided for voter registration activities).

<sup>48</sup> See 42 U.S.C. § 1973ee.

to be provided for registration by mail or at the residence of an applicant.<sup>49</sup> Registration and voting aids, such as telecommunications devices for the deaf and instructions in large type must be displayed at each registration site and polling place.<sup>50</sup>

Alaska's election officials view federal requirements to evaluate the accessibility of voter registration sites in native villages as unworthy of their attention. Villages generally have social service agencies that may be used for voter registration. However, no State officials have visited those villages to determine whether they are accessible to the elderly and the disabled.

State election officials admitted that they had conducted in-person polling site accessibility surveys for the three precincts in the City of Bethel, which is where most non-natives and whites in the Bethel region reside. However, they acknowledged that they had not done any in the native villages outside of city. Instead, all of those required accessibility surveys for the villages are conducted over the telephone.

No full-time Division of Elections employee has visited any of the native villages outside of the City of Bethel between 2000 and the present for election related purposes. Becka Baker, the Region IV Supervisor, who has been responsible for elections in most of the voting precincts in the Bethel Census Area since 2003, has never traveled to any of the native villages outside of the City of Bethel. She has never even considered taking a flight out to the villages to see the conditions of the registration and polling sites. Native voters should not be an afterthought for any elections official.

## **7. Lack of special needs assistance for voter registration**

Alaska likewise does not disseminate information about special needs assistance for registration and voting. The State describes special needs assistance in this way on its website: "If you had planned on going to your polling place on election day but become ill or are homebound, you can vote by having a personal representative bring you a ballot."<sup>51</sup> LEP native voters are not provided with that information in their native language.

Although Alaska offers registration and voting opportunities by mail, that denies access to LEP voters who cannot read English and for whom the State provides no language assistance. In-person registration and voting, preferably at the home of registrants as provided in the Voting Accessibility for the Elderly and Handicapped Act, is needed but not offered. Such home visits generally also will require that information be communicated in a native language. Many elderly LEP Alaska Natives who cannot walk to registration and polling locations or use English-only mail-in or Internet registration processes have not been voting because of the State's violations.

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<sup>49</sup> See 42 U.S.C. § 1973ee-2.

<sup>50</sup> See 42 U.S.C. § 1973ee-2.

<sup>51</sup> See State of Alaska, available at <http://www.elections.alaska.gov/voting.php>.

## **8. Lack of information about the status of provisional ballots**

The Help America Vote Act of 2002 (HAVA) provides that an individual whose name does not appear on a voter registration list but who declares their eligibility, must be offered the choice to cast a provisional ballot. The voter also must be given written information on how to determine the disposition of their ballot. Election officials must establish a free access system (such as a toll-free number) accessible to the voter that informs them if their vote was counted, and if it was not counted, the reason it was not.<sup>52</sup> Section 303 of HAVA provides for a variety of procedural safeguards to ensure the timely processing and maintenance of voter registration applications and record.<sup>53</sup>

In Alaska, that has not happened for LEP native voters in past elections. LEP voters who encounter registration issues often are turned away without being offered a provisional ballot. If an LEP voter is offered and casts a provisional ballot, the State does not provide information to them in their native language advising them about what the status of their ballot is. Even if that information was provided, it would not matter. The State's Director of Elections admitted that the free access system provided for voters who cast provisional ballots is in English only. The State has taken no steps to provide that information in Alaska Native languages such as Yup'ik.

### **Policy Recommendations**

The experience of Native Americans in the 2008 Presidential Election identifies several areas where additional work is needed.<sup>54</sup> In some cases, federal law already addresses many of the barriers that native voters encountered. The problems NARF and its clients have observed in Alaska highlight that there has been a general lack of enforcement of federal voting protections in many parts of Indian country.

This Subcommittee should request that the Justice Department more actively enforce federal voting laws on behalf of Alaska Natives and American Indians where discrimination has been reported. NARF is encouraged by many of the recent steps that the Obama Administration has taken to address the neglect of natives. President Obama has announced that he will be appointing a cabinet level Native American affairs senior advisor. Furthermore, Department personnel have consulted with NARF in the Section 5 review process on several recent discriminatory voting changes that Alaska has attempted to implement. Nevertheless, vigorous oversight of the Department in its enforcement activities remains essential for protecting access of native voters to the political process.

Furthermore, NARF commends the U.S. Department of Justice for its continued monitoring of elections with large native populations in places like Arizona, New Mexico, and South Dakota. However, native voters in Alaska voters have been left out of that monitoring

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<sup>52</sup> See 42 U.S.C. § 15482.

<sup>53</sup> See 42 U.S.C. § 15483.

<sup>54</sup> I understand that the House Rules and Administration Committee may have overlapping or primary responsibilities for some of the policy recommendations that follow.

despite judicial findings of voting discrimination. NARF recently requested Attorney General Holder certify the Bethel Census Area for federal observers because of the Preliminary Injunction in the *Nick* case and evidence of ongoing discrimination.

NARF requests that this Subcommittee encourage Attorney General Holder to appoint federal observers in Alaska. In 2006, Congress significantly streamlined the process for appointing federal observers in jurisdictions like Alaska that are covered under Section 4 of the VRA.<sup>55</sup> As the House Judiciary Committee Report accompanying the 2006 amendments explained, “that minority voters will be better served by authorizing the Attorney General to directly certify jurisdictions for the use of Federal observers.”<sup>56</sup> However, not a single new jurisdiction covered by Section 4 of the VRA has been certified by the Attorney General for federal observers using that broader authority.<sup>57</sup> Thousands of LEP native voters in the Bethel Census Area of Alaska remain at risk of the disenfranchisement identified in the *Nick* litigation without the oversight of federal observers. Elections will be held in the Bethel region later this year, making it critical that certification happen soon.

The Obama Administration has stated that civil rights will be one of its priority issues. As we prepare for the 2010 round of redistricting, it also is critical that the Justice Department be provided with sufficient resources to vigorously enforce federal voting laws, particularly Sections 2, 4(f)(4), 5, 203, and 208 of the VRA, the NVRA, and HAVA. This Subcommittee should ensure that the Department has adequate resources to meet the Administration’s mandate and to fully restore the Civil Rights Division in response to the Inspector General’s recent findings of unlawful politicization.

Early voting proved to be a safety valve that relieved much of the pressure on polling places that otherwise would have been overwhelmed on Election Day. Voters had greater opportunities to vote in the evenings or the weekends leading up to the election, when it was more convenient for them. If a voter failed to provide required identification or there was a problem with their voter registration, early voting afforded greater opportunities to address the deficiency than on Election Day. For those reasons, this Subcommittee should consider legislation that will expand early voting opportunities for federal elections.

Voter registration also has continued to be a barrier to voting by Native Americans and other racial, ethnic, and language minority groups. It would be beneficial to examine legislation requiring same-day voter registration for federal elections. The Subcommittee would have to be mindful of removing and not erecting further barriers for native voters in the registration process. For example, Agnes Laughter’s lack of identification required to register to vote highlights a barrier that many natives continue to experience. Registration opportunities must comply with language assistance requirements under the VRA. In addition, access to voter registration, whether in advance of an election or in the polling place on Election Day, must be fully accessible to special needs voters, including the elderly and disabled.

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<sup>55</sup> Pub. L. No. 109-246, 120 Stat. 577, 578-79 (July 27, 2006) (codified at 42 U.S.C. §1973f(a)).

<sup>56</sup> H. Rep. No. 109-478, at 63.

<sup>57</sup> See U.S. Dep’t of Just., Civ. Rts. Div., Voting Sec., *About Federal Observers and Election Monitoring*, available at [http://www.usdoj.gov/crt/voting/examine/activ\\_exam.php](http://www.usdoj.gov/crt/voting/examine/activ_exam.php) (last revised Mar. 9, 2009).

Additionally, the Subcommittee should consider election reform legislation introduced in the 110th Congress. For example, native voters have experienced the disabling effects of deceptive practices, harassment, and intimidation for which federal remedies remain incomplete.

Finally, NARF has one particular concern that is a product of our current economic crisis. Many local jurisdictions have been severely impacted by the loss of tax revenue and investment income, which may lead to personnel reductions. However, some of the most at-risk positions will be Native American elections personnel, bilingual coordinators, and others who coordinate native voter outreach and participation in states like Alaska, Arizona, New Mexico, and South Dakota. If those positions are eliminated or work hours are reduced, it is likely that violations of federal voting laws, particularly the VRA, will follow. Therefore, the Subcommittee should consider holding an additional oversight hearing on the impact of the recession on efforts by state and local jurisdictions to comply with the VRA and other federal voting laws.

## **Conclusion**

Bill Moyers observed, “Although our interests as citizens vary, each one is an artery to the heart that pumps life through the body politic, and each is important to the health of democracy.” Election 2008 showed that our democracy remains vibrant, despite suffering from some ailments. NARF looks forward to working with Members of the Subcommittee in identifying the cures to the remaining barriers to political participation for many voters, including Native Americans. Thank you very much for your attention. I will welcome the opportunity to answer any questions you may have.