

**Statement of Dr. James Thomas Tucker
Wilson Elser LLP – Las Vegas
Native American Rights Fund (NARF)**

Before the Presidential Commission on Election Administration

Barriers to Language Minority Voters and How to Overcome Them

August 8, 2013

Chairman Bauer, Chairman Ginsberg, and Members of the Commission, thank you for the opportunity to provide this statement. There is no more fundamental right than the right to vote. The Commission's charge to identify barriers to voting and policy solutions for removing those barriers comes at a critical juncture. The historic election and re-election of President Obama, our nation's first African-American President, marked an important step in our journey to provide all Americans with equal voting opportunities.

The promises of past federal efforts to improve voting remain unrealized for many voters, particularly language minorities. While turnout numbers have been at record highs in many areas during the most recent Presidential Elections, those numbers can be deceptive. They conceal the wide gulf in turnout between non-Hispanic white voters and language minority voters. There are many factors that contribute to the disparities. My statement will focus on some of those barriers to language minority voters and proposals for ways to remove those barriers.

I am making my statement today on behalf of 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. 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 participation of Native voters, as well as many other language minorities.

We have made much progress together. Nevertheless, the 2012 Election also shows that our work is unfinished. Many barriers to political participation remain.¹ To assist the Commission in its response to these barriers, I will cover three topics. I will begin by briefly

¹ I have previously addressed some of the barriers present in recent elections. 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. 2010).

providing some general observations about voter participation among language minority voters in the 2012 Election. Next, I will detail some of the current impediments to language minority voter participation. Finally, I will conclude with some suggestions on remedial steps that should be taken to improve election administration for language minority voters.

Voter Participation among Language Minorities in the 2012 Election

Many remedial federal laws have concentrated on removing obstacles to registration and voting. The Voting Rights Act itself is one example. Additional efforts have followed, including the National Voter Registration Act or motor-voter law, the Uniform and Overseas Citizens Absentee Voting Act, the Voting Accessibility for the Elderly and Handicapped Act, and the Help America Vote Act (HAVA), among others. The U.S. Election Assistance Commission, which was established by HAVA in 2002, has proved a valuable resource for gathering some of the best practices for improving election administration and facilitating voting, including its resources for language minorities.

Voter participation is probably the best metric for measuring the success or failure of these previous efforts. Turnout data among language minorities indicates that, at best, changes in election administration have had mixed success. Nationally, language minority registration and turnout rates have climbed substantially since Congress added the requirement for providing language assistance in certain jurisdictions in 1975. I will offer some examples:

- **American Indian Voters:** Registration and turnout increased between 50 percent and 150 percent in many places following the enactment of the language assistance requirements.² Voter turnout in precincts on seven Arizona Indian reservations rose from 11,789 in 1972 to 15,982 in 1980, with voter registration increasing by 87 percent in Navajo County, Arizona, and 165 percent in Coconino County, Arizona.³ Turnout among American Indians in Navajo County increased by 120 percent between 1972 and 1990, while Apache County, Arizona, experienced an 88 percent increase during the same period.⁴ American Indians in New Mexico and Utah experienced similar increases in voter registration and turnout.⁵

² *Voting Rights Act: Section 203—Bilingual Election Requirements (Part II): Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 17 (2005) (statement of Jacqueline Johnson, Executive Director, National Congress of American Indians).

³ H.R. REP. NO. 102-655 at 6-7, *reprinted in* 1992 U.S.C.C.A.N. at 770-771.

⁴ S. REP. NO. 102-315, at 12 (1992).

⁵ S. 2236 *Hearings*, 102d Cong., 2d Sess., S. HRG. 102-1066, at 181-189 (1992) (statement of Marshall Plummer, Vice-President of the Navajo Nation).

- **Asian Voters:** Following a modification to the coverage formula for language assistance under the Voting Rights Act in 1992, the number of Asian-Americans registered to vote increased dramatically. Between 1996 and 2004, Asian-Americans had the highest increase of new voter registration, approximately 58.7 percent. During that same period, Asian-Americans experienced an increase in turnout of 71 percent.⁶
- **Latino voters:** The Hispanic voter registration rate, which was 34.9 percent in 1974, has nearly doubled since the language assistance requirements were added to the Voting Rights Act.⁷ Between 1980 and 1990, Hispanic voter participation increased five times the national rate, with approximately 500,000 newly-registered Hispanic voters added between 1990 and 1992.⁸ Hispanic voter registration increased from 7.6 million to 9.3 million between 2000 and 2004.⁹

Despite this substantial progress, language minority voters continue to lag well behind non-Hispanic white voters in registration and turnout rates. The U.S. Census Bureau has released the following data from the 2012 Presidential Election that shows the disparity in voter participation rates among language minority U.S. citizens of voting age:¹⁰

Voter Group	Registration Rate	Turnout Rate
Non-Hispanic white	73.7%	64.1%
Hispanic of any race	58.7%	48.0%
Asian	37.2%	47.3%

⁶ See ASIAN AM. LEGAL DEF. & EDUC. FUND (AALDEF), ASIAN AMERICANS AND THE VOTING RIGHTS ACT: THE CASE FOR REAUTHORIZATION vi (2006), available at <http://www.aaldef.org/docs/AALDEF-VRAReauthorization-2006.pdf>.

⁷ *Continuing Need for Section 203's Provisions for Limited English Proficient Voters: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 347 (2006) (statement of John Trasviña, Interim President and General Counsel, Mexican American Legal Defense and Education Fund).

⁸ H.R. REP. NO. 102-655, at 6 (1992), reprinted in 1992 U.S.C.C.A.N. 766, 770.

⁹ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P20-542, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2000, tbl.4a, available at <http://www.census.gov/population/socdemo/voting/p20-542/tab04a.pdf>.

¹⁰ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, VOTING AND REGISTRATION BY SEX, RACE AND HISPANIC ORIGIN, FOR STATES: NOVEMBER 2000, tbl.4b, available at <http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html>. The Census has not provided aggregated data for voter participation rates among Alaska Natives and American Indians for the 2012 Election.

This data reflects depressed voter participation rates among all Latinos and Asians, regardless of their language ability. The disparity is even greater if the analysis is limited to only those jurisdictions required to provide language assistance under the federal Voting Rights Act. The decreased participation in those jurisdictions reflects, in part, the substantial burden that lack of English proficiency places on voters. Voter turnout is lowest where state and local election officials do not provide effective language assistance.

A jurisdiction is required to provide language assistance under Section 203 of the Voting Rights Act if the Director of the Census determines that two criteria are met. First, a population threshold, or “trigger,” must be met. Within a political subdivision of a state, limited-English proficient (LEP) voting age citizens¹¹ in a single language group¹² must either: (a) number more than 10,000 (“10,000 Person Trigger”); (b) comprise more than five percent of all voting age citizens (“Five Percent Trigger”); or (c) comprise more than five percent of all American Indians or Alaskan Native voting age citizens of a single language group residing on an Indian reservation (“Reservation Trigger”).¹³ A state may only be covered for a language using the Five Percent Trigger.¹⁴ A person is LEP if he or she is “unable to speak or understand English adequately enough to participate in the electoral process.”¹⁵ Second, the illiteracy rate of the language minority voting age citizens meeting the population threshold must exceed the national illiteracy rate.¹⁶ “Illiteracy” means “the failure to complete the 5th primary grade,”¹⁷ and was adopted to conform to the Census definition of that term.¹⁸ The 2011 Determinations were

¹¹ “A person is in the voting age population if that person is at least 18 years old That is measured by the American Community Survey as well as the 2010 Census.” U.S. Census Bureau, *Statistical Modeling Methodology for the Voting Rights Act Section 203 Language Assistance Determinations* 7 (Dec. 2011) [hereinafter “Statistical Modeling”], available at http://www.census.gov/rdo/data/voting_rights_determination_file.html. “A person’s U.S. citizenship is measured by the American Community Survey.” *Id.*

¹² A single language group does “not permit subgroups of languages to be aggregated together to trigger coverage for the entire language group. For example, Chinese, Korean, and Vietnamese could not be aggregated together to meet the 5 percent trigger for Asian American language coverage.” JAMES THOMAS TUCKER, *THE BATTLE OVER BILINGUAL BALLOTS: LANGUAGE MINORITIES AND POLITICAL ACCESS UNDER THE VOTING RIGHTS ACT* 82 (Burlington Vt., Ashgate Publishing 2009). Instead, each language within the Asian language group, such as Chinese, must “meet the trigger individually.” *Id.*

¹³ See 42 U.S.C. § 1973aa-1a(b)(2)(A)(i); see also *Statistical Modeling*, *supra*, at 10-11 (describing the statistical formulas used for political subdivisions of states and American Indian Area & Alaska Native Area Level Coverage).

¹⁴ See 42 U.S.C. § 1973aa-1a(b)(2)(A)(i)(II)-(III); TUCKER, *supra*, at 78; see also *Statistical Modeling*, *supra*, at 8, 10 (describing the statistical formula used for statewide coverage using the Five Percent Trigger).

¹⁵ 42 U.S.C. § 1973aa-1a(b)(3)(B).

¹⁶ See 42 U.S.C. § 1973aa-1a(b)(2)(A)(ii).

¹⁷ 42 U.S.C. § 1973aa-1a(b)(3)(E). See also *Statistical Modeling*, *supra*, at 8 (“A person is said to be illiterate if the person has less than a fifth grade education, i.e., that the person has only completed the fourth grade or lower. That is measured by the American Community Survey.”).

¹⁸ See 121 CONG. REC. H4719 (daily ed. June 2, 1975) (statement of Rep. Edwards).

calculated using a national illiteracy rate for voting age citizens of 1.16 percent,¹⁹ a decrease from the 1.35 percent used in the 2002 Determinations.²⁰

As a result of the October 2011 coverage determinations, a total of 248 political subdivisions nationwide are now covered by Section 203.²¹ The 248 covered political subdivisions represent 3.1 percent of the 2,920 counties and 4,972 minor civil divisions that the Census Bureau defines as political subdivisions in the United States.²² Although the number of political subdivisions is a small percentage of the total number nationwide, they nevertheless encompass a disproportionately large number of voters, including some of the nation's most populous urban areas. According to the Census Bureau, there are approximately 65.6 million voting-age U.S. citizens in the covered jurisdictions, which is nearly one-third of the total U.S. citizen voting-age population.²³ Among that population, 5,578,600 are LEP voting-age U.S. citizens who speak a language that is covered in their jurisdiction,²⁴ which is a 38.6 percent increase from the 4,026,381 LEP voting-age U.S. citizens covered under the 2002 Determinations.²⁵

Voter turnout data from the jurisdictions currently covered by Section 203 highlights the decreased level of participation among LEP voters. Places covered for Alaska Native or American Indian languages best demonstrate the problem because they tend to have very high concentrations of language minority voters and/or are homogenous populations located in geographically isolated villages. As a result, nearly all of the voters included in that data are Natives.

Alaska Native Voters: In the 2012 Presidential Election, among the 100 Native villages required to provide language assistance under Section 203 of the VRA, just *four* achieved

¹⁹ See U.S. Census Bureau, *How the Law Prescribes the Determination of Covered Areas under the Language Minority Provisions of Section 203 of the Voting Rights Act* (Oct. 2011) (flowchart), available at <http://www.census.gov/rdo/pdf/PrescribedFlowFor203Determinations.pdf>; Statistical Modeling, *supra*, at 35.

²⁰ See TUCKER, *supra*, at 130, 351.

²¹ See Voting Rights Act Amendments of 1992, Determinations Under Section 203, 76 Fed. Reg. 63,602-63,607 (Oct. 13, 2011) (to be codified at 28 C.F.R. pt. 55) [hereinafter 2011 Determinations].

²² U.S. Census Bureau, *Press Release: Census Bureau Releases 2011 Determinations of Political Jurisdictions Subject to Minority Language Assistance Provisions of Section 203 of the Voting Rights Act* (Oct. 12, 2011), available at <http://2010.census.gov/news/releases/operations/cb11-cn189.html>.

²³ See *id.*

²⁴ See U.S. Census Bureau, Publicly Released Data Files for the 2011 Section 203 Determinations (Dec. 2011), available at http://www.census.gov/rdo/data/voting_rights_determination_file.html (click on tab marked "Download the October 13, 2011 public use data," open the folder Section203_Data_Files.zip, and then open file labeled as "sect203_Determined_Areas_Only.csv") [2011 Determinations Data Files].

²⁵ Compare *id.* with TUCKER, *supra*, at 126 (summarizing census data for the 2002 Determinations).

turnout rates at or above the statewide rate of 59.6 percent.²⁶ Over three-quarters had turnout more than 10 percent lower than the statewide turnout rate. Fifty-nine villages had turnout over 15 percent lower.

The gulf in voter turnout was unsurprisingly greatest in Native villages with the highest LEP and illiteracy rates, a pattern repeated across Alaska. In Bethel, located in the Bethel Census Area, voter turnout was 25.7 percent below the statewide rate; 41.8 percent of all voters there are LEP in Yup'ik, with an illiteracy rate of 33.9 percent. In Barrow, located in the North Slope Borough, turnout was 22.8 percent below the statewide rate; there, 20.4 percent of all voters are LEP in Inupiat, with an illiteracy rate of 12.5 percent.

The turnout in all 44 Native villages identified by the Census Bureau with LEP rates exceeding 10 percent fell far below the statewide turnout rate. On average, 16.1 percent of LEP voters in those villages were illiterate, nearly fourteen times the national illiteracy rate among all voting-age citizens of 1.16 percent. The 44 villages had an average turnout rate of just 39.9 percent, about 20 percent lower than the statewide turnout rate of 59.6 percent. Statewide, in the more than 100 villages located in seven regions covered for language assistance under Section 203, turnout among nearly 30,000 Native voters was just 41.8 percent, or 17.8 percent below the statewide turnout rate.

American Indian Voters: Like Alaska Natives, their counterparts in the lower Forty-Eight also experienced depressed voter participation rates compared to non-Hispanic white voters in the 2012 Presidential Election.²⁷

In Arizona, registered Native voters participated at a rate that was, on average, about twenty percent below the statewide turnout rate of 74.4 percent. The greatest disparities were present in the most geographically isolated precincts. The Havasupai Reservation, located in Coconino County, had a turnout rate of just 30.8 percent. Similarly, a precinct in the Hopi Reservation located in Navajo County had a turnout rate of just 34.8 percent. Both rates are about forty percent below the statewide turnout rate.

By comparison, Native voters in New Mexico turned out at rates much closer to the statewide turnout rate. Out of 71,761 registered voters living on reservations covered under Section 203, the turnout rate was 55.9 percent. That rate is about seven percent below the statewide turnout rate of 62.7 percent. New Mexico has been more successful in promoting Native turnout, largely because of its well-established Native American Elections Information

²⁶ The Census Bureau has identified 104 Alaska Native villages that are covered by Section 203. Election data is unavailable for four of those villages. All Census and turnout data for Alaska Natives is included in Attachment 1.

²⁷ Census and turnout data for American Indians is included in Attachment 2.

Program overseen by the Secretary of State's Office. Some of the best practices discussed below are drawn from New Mexico's program.

Spanish-speaking Voters: County-level turnout data by Hispanic origin is not provided by the Census Bureau for the 212 counties covered under Section 203. Nevertheless, 2012 election data from the counties themselves provides strong evidence of the disparities in turnout between LEP Latinos and non-Latinos. Among the 212 covered counties, 78 had turnout rates at least ten percent below their statewide turnout rate.²⁸

That data also provides some insight into geographical differences in turnout. Latino voters participated at the greatest rate in Florida. Out of the ten counties separately covered for Spanish under Section 203 (Florida is also covered statewide for Spanish), only two rural counties – Hardee and Hendry – had disparities more than ten percent below Florida's statewide turnout rate of 71.5 percent. Incidentally, both of those counties had been separately covered under Section 5 of the Voting Rights Act until the Supreme Court struck down the coverage formula in *Shelby County v. Holder*.

Generally, rural or less populated counties covered for Spanish were more likely than urban counties to have lower voter turnout. Some examples of counties where turnout was more than ten percent below the state turnout rate include: Yuma County, Arizona; Imperial, Kern, Kings, Madera, Merced, and Tulare Counties in California; and Chaves, Doña Ana, Eddy, Lea, Luna, and San Miguel Counties in New Mexico; and nearly all of the Texas counties with disparities exceeding ten percent.

Jurisdictions that have been more recently covered for Spanish likewise tended to have greater disparities in voter turnout. Examples of county or city-level jurisdictions with turnout rates more than ten percent lower than the state turnout rate include: Aleutians East Borough, Alaska; all nine covered cities and towns in Connecticut; three out of the four covered counties in Kansas; all eleven covered cities and towns in Massachusetts; all three covered cities and towns in Rhode Island, among others.

Asian language-speaking Voters: Analysis of county-level data for jurisdictions covered by Section 203 for Asian languages experiences the same difficulties as those jurisdictions covered for Spanish. Nevertheless, county and city-level elections data clearly reflects lower voter participation. Six out of the 22 jurisdictions covered for an Asian language had turnout rates more than ten percent below the statewide turnout rate in the 2012 Presidential Election.²⁹

²⁸ Census and turnout data for Spanish-speaking voters is included in Attachment 3.

²⁹ Census and turnout data for Asian language voters is included in Attachment 4.

In two rural Alaska boroughs covered for Filipino (Aleutians East and Aleutians West Boroughs), the turnout rates among the eligible voting population were more than thirty percent below the statewide turnout rate. In the Aleutians East Borough, just 21.4 percent of citizens of voting-age population cast ballots.

The remaining four jurisdictions with the most depressed turnout rates are in urban areas. Two of those jurisdictions have been the subjects of enforcement activities by the Justice Department. In 2000, the United States secured relief for Arabic and Bengali voters in Hamtramck, Michigan, following widespread discrimination against them in the November 1999 election. After an Arab-American declared his candidacy for office, a group of non-Arab voters challenged “the citizenship of voters who ‘looked’ Arab, had dark skin such as Bengali voters, or who had distinctly Arab or Muslim names.” In addition, non-Arab voters intimidated language minorities who tried to vote, and denied language minorities equal opportunities to serve as poll workers.³⁰

Similarly, in 2005, the United States secured relief for LEP Chinese-speaking and Vietnamese-speaking voters in the metropolitan Boston area. Quincy, which is a suburb of Boston, became covered for Chinese in 2011. In the 2012 Election, voter turnout in Quincy was almost eleven percent below the statewide turnout rate.

Barriers to Voting and their Impact on Language Minorities

Despite the significant strides made in the 2012 Presidential Election, there clearly is work left to do. Many states still do not have early voting laws. Those that do often fail to make them fully accessible to language minority voters. For example, in Alaska, nearly all of the state’s early voting locations are in non-Native urban areas. State election officials did not ask Native communities if they wanted early voting locations. When several Native communities requested early voting several months before the 2012 Election, the Director of Elections denied their request. The impact on Alaska Natives can be tremendous because voting activities (particularly local school elections, primaries, and municipal elections) often occur during periods of subsistence fishing.

Lack of outreach also contributes to reduced language minority turnout. Many language minorities are new to the registration and voting process. Some are new U.S. citizens (although this group comprises only a minority of all LEP voters covered by Section 203). In certain places, language assistance has never have been provided to eligible LEP voting-age citizens. In areas where language assistance may be provided, LEP voters are not informed it is available.

³⁰ Jocelyn Friedrichs Benson, *Expanding the Language Protections of the Voting Rights Act to Additional Communities*, in TUCKER, *supra*, at 301.

Election officials often fail to reach out to language minority voters, despite the greater need that those voters have to become educated about and participate in elections.

Language assistance has been unavailable in many states with early and absentee voting. The turnout data discussed above shows that problem was especially prevalent in newly covered jurisdictions or in rural or less populated areas. The absence of effective language assistance for pre-election activities, such as registration, sample ballots and voter information materials, and instructions on requesting, completing, and returning absentee ballots, has a significant negative impact on LEP voter participation.

A similar lack of effective language assistance has been an issue on Election Day. NARF, which previously brought a successful lawsuit in the Bethel region of Alaska,³¹ recently filed a new Section 203 enforcement action in the Dillingham and Wade Hampton regions.³² The evidence shows that in these and other covered jurisdictions, election officials fail to have a sufficient number of trained and qualified translators for every part of the voting process.

In addition, language minorities were much more likely to experience delays in voting during the 2012 Election. Many precincts with large numbers of LEP voters failed to have a sufficient number of bilingual poll workers. As a result, LEP voters had to wait longer to receive language assistance because the demand for their services far exceeded the supply.

Language minority turnout also is affected by the lack of convenient polling places. Generally, language minority voters as a group face greater socio-economic barriers to voting, including the inability to take time off from work or lack of transportation. Polling place closures and realignments often fail to consider their impact on economically disadvantaged voters.

Shifting a community's voting method to vote-by-mail or absentee voting likewise tends to impact language minorities more severely because language assistance for LEP voters often does not accompany those changes. In Alaska, the precincts with the lowest turnout rates tend to be in Native villages that the Division of Elections has designated as "Permanent Absentee Voting," or PAV, sites.

State photo identification requirements enacted to prevent impersonation voter fraud also have contributed to language minority 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

³¹ *Nick et al. v. City of Bethel et al.*, case no. 3:07-cv-0098-TMB (D. Alaska July 30, 2008).

³² *Toyukuk v. Treadwell*, case no. 3:13-cv-0137-JWS (D. Alaska 2013). A copy of the Complaint is included as Attachment 5.

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.³³ Language minorities continue to be vulnerable to having their registrations rejected or being turned away on election day because of photo identification laws.

Finally, language minorities tend to be more vulnerable to reductions in election budgets than other voters. Language assistance and outreach to LEP minorities does not have to be a costly venture. A majority of jurisdictions covered by Section 203 have reported no additional costs for either oral or written language assistance.³⁴ Nevertheless, jurisdictions that are newly covered or have not been in compliance with Section 203 will likely have some costs to develop an effective language assistance program.

Two more recent developments have caused some jurisdictions covered under Section 203 to scale back, eliminate, or fail to implement effective programs to assist LEP voters. First, many state and local governments are in financial distress as a result of the economic downturn. Second, the drop-off in local revenue coincided with the end of federal funding under HAVA.³⁵ Section 101 of HAVA allocated funding for states “providing assistance to Native Americans, Alaska Native citizens, and to individuals with limited proficiency in the English language.” Payments were not limited to covered jurisdictions, providing a financial incentive to non-covered jurisdictions to take steps to make voting more accessible to LEP voters.³⁶ Increasingly, those funds have been exhausted. Absent local tax revenue or federal dollars, some local election officials are taking no meaningful steps to comply with Section 203.

Some of the most at-risk positions are 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 these positions are eliminated or work hours are reduced, it is likely that violations of federal voting laws, particularly the Voting Rights Act, will follow.

³³ Richard Wolf, *Survey Reveals Disparities on Election Day*, USA TODAY, Dec. 10, 2008, at A8.

³⁴ TUCKER, *supra*, at 135-61. Most jurisdictions that did have costs for language assistance incurred expenses of less than 1.5 percent for oral language assistance and less than 3 percent for written language assistance. *See id.*

³⁵ HAVA made substantial federal funding available for language assistance. *See* Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301-15545). Total funding for programs directly assisting voters, including accessibility for minority language and disabled voters, amounted to \$3.75 billion from Fiscal Years 2003 to 2005. *See* 42 U.S.C. §§ 15304, 15407, 15424.

³⁶ 42 U.S.C. § 15301(b)(1)(G).

Recommendations for Best Practices in Language Assistance

Recent elections show several areas where additional work is needed to improve the experience of voters and aspiring voters. The Commission therefore has a very challenging task ahead of it. To facilitate the Commission’s work, the balance of this statement will focus only of those best practices pertaining to language assistance.

Before identifying some of these best practices, it is first necessary to explain what federal law requires. Section 203 mandates bilingual elections in covered jurisdictions. The provision applies to four language groups, Alaska Natives, American Indians, Asian Americans, and persons of Spanish Heritage,³⁷ as well as the distinct languages and dialects within each of those groups.³⁸ Language assistance must be provided for voting activities in every type of public election conducted in a covered jurisdiction and its political subdivisions, including primary, general, and special elections.³⁹ Section 203 applies regardless of whether a public election is to fill an office, to remove an elected official, or to vote on a bond issue, ballot question, or referendum.⁴⁰

Jurisdictions covered by Section 203 generally must ensure that all “voting materials” they provide in English are also provided to voters in the languages of all groups or sub-groups that triggered Section 203 coverage.⁴¹ “Voting materials” include: voter registration materials, voting notices such as information about opportunities to register, registration deadlines, polling place information (including the times they are open, their location, and the voter’s election precinct assignment), absentee voting, voting materials provided by mail, all election forms, polling place activities and materials, instructions, publicity, ballots, and other materials or information relating to the electoral process.⁴² Written materials may not have to be provided to some members of certain Alaska Native and American Indian groups whose languages historically are unwritten.⁴³ Instead, for any group whose language has been found to be

³⁷ See 42 U.S.C. §§ 19731(c)(3), 1973aa-1a(e).

³⁸ See 121 CONG. REC. H4716 (daily ed. June 2, 1975) (statement of Rep. Edwards); S. REP. NO. 94-295 at 24 n.14, reprinted in 1975 U.S.C.C.A.N. 790-91 n.14 (quoting Letter from Meyer Zitter, Chief, Population Division, Bureau of the Census, to House Judiciary Committee, Apr. 29, 1975).

³⁹ See 28 C.F.R. § 55.10.

⁴⁰ See *id.*

⁴¹ See 42 U.S.C. § 1973aa-1a(b)(1). An extended discussion of what jurisdictions must do to comply with Section 203 is provided in TUCKER, *supra*, at 90-105, 261-89.

⁴² See 42 U.S.C. § 1973aa-1a(c); 28 C.F.R. §§ 55.15, 55.18.

⁴³ See 42 U.S.C. § 1973aa-1a(c).

“historically unwritten,” the covered jurisdiction must provide “oral instructions, assistance, or other information relating to registration and voting” in the covered language.⁴⁴

Jurisdictions covered by Section 203 also must provide oral language assistance to voters.⁴⁵ Oral language assistance includes “announcements, publicity, and assistance” to the extent such assistance is needed to allow the language group triggering coverage to participate effectively in elections.⁴⁶ Oral language assistance must be available to language minorities “who cannot effectively read either English” or the covered minority language.⁴⁷ Furthermore, covered jurisdictions are required to provide bilingual poll workers or “helpers” to language minority voters at polling places on Election Day.⁴⁸ Jurisdictions should be proactive in recruiting bilingual poll workers who are members of the covered language minority group to ensure that oral language assistance is available.⁴⁹ If they fail to do so, they also may violate Section 2 of the VRA,⁵⁰ which prohibits discriminatory poll official appointment policies or practices.⁵¹

Election officials in communities required to provide language assistance to voters in Spanish are responsible for ensuring that their language assistance program is effective. An “effective” program is one that provides the same information to LEP voters that is provided to voters fully proficient in English. That means that oral and written translations must satisfy three criteria: (1) they must be accurate translations of the voting information; (2) they must be complete translations; and (3) they must be uniform translations – that is, the translations should be the same in every precinct, so that the quality of assistance is not defined solely by the

⁴⁴ *Id.* However, even for those Alaska Native or American Indian language found to be “historically unwritten,” federal courts have required that written translations be provided to poll workers in the covered language to ensure that oral translations are complete, clear, and accurate reflections of the information provided to voters in English. *See* TUCKER, *supra*, at 284-86 (summarizing rulings in *Nick v. City of Bethel*, case no. 3:07-cv-0098-TMB (D. Alaska filed June 2007)); *Apache County v. United States*, Civil Action No. 77-1515, mem. op. (D.D.C. June 12, 1980) (three-judge court).

⁴⁵ *See generally* 42 U.S.C. § 1973aa-1a(b)(3)(A) (defining “voting materials” as including “assistance”).

⁴⁶ 28 C.F.R. § 55.20(a).

⁴⁷ *Id.* at § 55.20(b).

⁴⁸ *Id.* at § 55.20(c).

⁴⁹ *See* U.S. COMM’N ON CIVIL RTS., A CITIZEN’S GUIDE TO UNDERSTANDING THE VOTING RIGHTS ACT 16 (1984). The jurisdiction also should take appropriate steps to confirm that “bilingual” poll workers actually are bilingual in English and the covered minority language, and also are able to read and write in both languages, if applicable. *See id.* For more discussion, *see* TUCKER, *supra*, at 102-05.

⁵⁰ 42 U.S.C. § 1973.

⁵¹ *See Harris v. Graddick*, 593 F. Supp. 128 (M.D. Ala. 1984). The absence of minority language poll officials may discourage language minority citizens from voting because they do not feel welcome at polling places, particularly if they have been mistreated at the polls in the past or no language assistance is available for them in the present. *See id.* at 131-32; U.S. COMM’N ON CIVIL RTS., THE VOTING RIGHTS ACT: UNFULFILLED GOALS 79-80 (1981).

capabilities of an individual translator. Of course, voters also must be educated about the availability of language assistance and how to use it to make their votes effective.

On the surface, these elements of an effective language program can be readily implemented. But they also require use of best practices to be successful. This list is intended to identify some of those practices. Further elaboration on many of these points will be detailed in forthcoming reports from the National Association of Latino Elected and Appointed Officials (NALEO) Educational Fund. In addition, the Commissioners have been provided with a copy of a detailed study on best practices that I co-directed as part of the record supporting reauthorization of the Voting Rights Act in 2006.⁵²

Best practice # 1: Identify the language needs of the covered group

Every five years, the Director of Census identifies which jurisdictions are required to provide language assistance under Section 203, and in what languages. But those determinations do not inform election officials about where language assistance has to be provided. Section 203, by its terms, requires that language assistance be offered throughout the covered jurisdiction. But election officials still need to identify where LEP language minority voters reside, and whether particular forms of language assistance must be tailored to those voters' needs to be effective.

This approach is called “targeting.” It allows election officials to focus their efforts on those areas of the community where LEP voters are located. There are many ways to target: relying on Census data; using voter registration lists if racial or ethnic data is gathered; asking an expert to analyze the population to identify where LEP voters live; requesting new voters to state their language preference when they register; having poll workers identify whether language assistance is needed, including through tracking when it is provided; and working with community organizations.

The most effective approach is use a combination of these methods, along with input from the Latino community. It also must be a fluid and not a static process because of changing demographics in the community.

⁵² See James Thomas Tucker & Rodolfo Espino, *Government Effectiveness and Efficiency? The Minority Language Assistance Provisions of the VRA*, 12 TEX. J. CIV. LIBERTIES & CIV. RTS. 163 (2007). A copy of the article is included as Attachment 6.

Best practice # 2: Make language assistance the same priority as other election tasks

The most common mistake that election officials make that leads to violations of Section 203 is to treat language assistance as a lower priority than other election tasks. In Alaska, election officials in the *Nick* litigation testified that they “set aside” work on their language program to address what they believed were more important election tasks. Doing that ultimately resulted in an injunction being entered against them, and the State of Alaska paying nearly two million dollars in litigation costs.

Best practice # 3: Be proactive and not reactive or passive in providing language assistance

It is common for election officials in jurisdictions covered by Section 203 to state their belief that language assistance is not required because no one asks for it. But that turns the requirements of Section 203 on its head. It is the jurisdiction and its election officials, not the voters, who are responsible for ensuring that effective language assistance is provided. That is not possible if election officials do not inform LEP voters in their language about the availability of language assistance. It likewise is not possible if poll workers are passive and do not affirmatively ask voters in their native language if they need assistance in that language.

Low use of assistance often is not an indication that it is not needed. Rather, it may highlight that the availability of assistance has not been advertised effectively, or that the assistance itself is not effective. That is particularly true in jurisdictions that have become covered more recently or are places where election officials are just starting a language assistance program. If there is low use, then election officials cannot make assumptions about what that means. They need to investigate it and determine the cause for the low use.

Best practice # 4: Use a Bilingual Coordinator

Bilingual coordinators serve as liaisons between election officials and LEP language minority voters and community organizations. Their primary functions are to improve the availability and quality of language assistance, and to make sure that LEP voters know about it. Although Section 203 does not require bilingual coordinators, their use makes it much more likely the jurisdiction’s language program will be effective.

Effective bilingual coordinators usually have several duties. They help develop and implement the language program. They train election officials and poll workers about providing language assistance. They work with community organizations to inform them about the program and to solicit their feedback on ways to make the program more effective. They assist in recruiting bilingual voters to serve as poll workers, confirming that they are proficient in their speaking and reading abilities in both English and the covered language. They prepare written

and audio aids and help to ensure translations are clear, complete, and accurate. They can trouble-shoot language assistance issues before, during, and after elections.

Election officials need to bear in mind that even if they use a bilingual coordinator, that they (the election officials) remain responsible for ensuring the jurisdiction complies with Section 203. As I learned in my Air Force officer training, “you can delegate authority, but you cannot delegate responsibility.”

Best practice # 5: Recruit bilingual poll workers with the assistance of local organizations

Outreach to community organizations is essential to providing effective language assistance. As the Justice Department has explained:

The cornerstone of every successful program is a vigorous outreach program to identify the needs and communication channels of the minority community. Citizens who do not speak English very well, often rely on communication channels that differ from those used by English-speakers. Each community is different. The best-informed sources of information are people who are in the minority community and those who work with it regularly. Election officials should talk to them.

Local language minority organizations and elected officials are among of the best resources for identifying and recruiting poll workers. In communities covered for Alaska Native or American Indian languages, tribal council members can play the same role. In some cases, those contacts may agree to serve on language assistance liaison committees or as bilingual poll workers. But even if they do not, they will usually assist election officials in identifying people who can.

One mistake that many election officials make is that they assume that they are not responsible if local organizations do not cooperate. For example, in the *Nick* litigation, state election officials blamed the lack of language assistance on the failure of tribal councils to provide qualified bilingual poll workers. However, the buck always stops with the election officials, not volunteers they solicit for help in performing their responsibilities.

Best practice # 6: Confirm the language abilities of bilingual poll workers

Language assistance is meaningless if “bilingual” poll workers are not fluent and literate in English and the covered language. For example, in the Justice Department’s Section 203 litigation in Passaic County, New Jersey, some poll workers who were identified as bilingual in Spanish only used a very crude form of Spanglish that was unintelligible to the voters. In one precinct, a poll worker identified as that precinct’s bilingual worker was fluent in Polish and not in Spanish. Lack of qualified bilingual poll workers amounts to no language assistance at all.

Language skills usually can be readily confirmed by a fluent bilingual speaker, such as the bilingual coordinator. A brief conversation is one way to confirm. Another way is to ask the poll worker to translate a ballot or other voting materials. Some jurisdictions administer standardized oral or written language tests.

Best practice # 7: Provide prepared written translations in the covered language

Language assistance that is provided must be complete, accurate, and uniform. Even when a jurisdiction has capable bilingual poll workers, it is useful to have prepared translations for instructions and for ballot measures or propositions. That way, each LEP voter can receive the same information regardless of the precinct in which they vote.

Glossaries of common election terms are among the most frequently used forms of prepared written translations. The U.S. Election Assistance Commission has sample glossaries available in several languages in each of the four language groups covered under Section 203. Election officials should work with their bilingual coordinators to adapt those model glossaries to their jurisdiction.

Best practice # 8: Translate all voting materials and confirm they are accurate

Section 203 requires that covered jurisdictions translate all voting materials into the covered language. The Justice Department has said that the definition of voting materials “should be broadly construed to apply to all stages of the electoral process.” In jurisdictions covered for Alaska Native or American Indian languages, written translations of all voting materials should at least be provided to bilingual poll workers and election officials, who can read those translations to the voter.

The translations themselves must be effective, which requires that they be clear, complete and accurate. If there are multiple dialects of the covered language, then the written translations should be in the dialect that is most commonly used among voters.

All translations should be completed well in advance of when they are distributed to voters. That way, election officials can confirm that the translations are accurate and understandable to voters. There are several ways to do this. The bilingual coordinator may review the materials. Any community members who work with election officials should be consulted. The most proficient bilingual poll workers or master poll workers also are an excellent resource. Some jurisdictions even work with bilingual personnel at local public schools or colleges to assist in the translations.

Translation quality should be regularly evaluated. Asking voters for feedback or reviewing voter complaint forms are key sources of information about whether a translation is effective or not.

Best practice # 9: Train bilingual poll workers before every election

All poll workers should be trained on basic election procedures. Bilingual poll workers also must be trained on how to provide language assistance. In each of the enforcement cases I have brought under Section 203, local election officials have provided little, if any, training on how to provide language assistance. Their failure to provide that training often leaves otherwise qualified poll workers unsure of how they should offer language assistance.

Training should include an explanation of what the law requires. It should include instructions on common election terms they will encounter. Poll workers should review all voting materials and prepared translations. They should be given an opportunity to participate in role-playing exercises so the first time they encounter a language assistance issue is not on Election Day. And most important of all, they should be directed to be proactive in offering language assistance by greeting voters they determine are LEP in a covered language in that language.

Poll workers should be provided with a checklist of all voting materials that are to be used during the election. They should be trained on where to display all of the voting materials, including materials printed in Spanish. That training should be reinforced through instructions or a diagram accompanying their polling place supplies. A mock polling place set-up displaying the signs and materials and where and how they should be used also can be very effective.

Another problem we have seen is that many jurisdictions try to cut corners by only requiring that poll workers attend training every two or four years. Every election is different. Each ballot has different offices and propositions on it. The instructions for voting may be different. If bilingual poll workers are not given training on the language assistance requirements for each election, it can result in ineffective assistance – and a Section 203 violation – on Election Day.

Best practice # 10: Plan ahead and recruit and train back-up bilingual poll workers

Rarely will an election go as planned. Some poll workers will not show up. That makes it particularly important for election officials to recruit additional bilingual poll workers, train them on language assistance procedures and translations, and hold them in reserve for the inevitable no-shows.

Election officials should track those bilingual poll workers who are no-shows on Election Day and do not call in to report their absence. Unreliable workers should not be used in future elections.

Best practice # 11: Use “master poll workers” to improve quality control

Some election officials often have so many precincts that it is not possible for them to visit all of them (or possible any of them) on Election Day to confirm that effective language assistance is being provided. A good solution to this problem is for election officials to identify their strongest bilingual poll workers and train them to be “master poll workers.” Each should be assigned a reasonable number of polling places to supervise.

Master poll workers should make sure that all language materials and signs are available to LEP voters, there are enough bilingual poll workers, and that effective language assistance is being provided. They should speak to bilingual poll workers in the covered language to confirm that they are able to provide assistance. If voters have made complaints about one or more bilingual poll workers, then the master poll worker can replace the poll workers from a pool of back-ups. Master poll workers should document what they observe to use for post-election assessments about what went right and what went wrong.

Best practice # 12: Publicize the program and engage in community outreach

The best language program is of little use if LEP language minority voters do not know about it. The Justice Department’s guidelines emphasize the importance of publicity in an effective language assistance program:

The Attorney General will consider whether a covered jurisdiction has taken appropriate steps to publicize the availability of materials and assistance in the minority language. Such steps may include the display of appropriate notices, in the minority language, at voter registration offices, polling places, etc., the making of announcements over minority language radio or television stations, the publication of notices in minority language newspapers, and direct contact with language minority group organizations.

Election officials are more likely to take “appropriate steps” if they follow three simple rules regarding publicity. First, they should make sure that information provided through English media, including voter information pamphlets, mailers, print ads, public service announcements, signs, and radio and television ads, are also provided through similar media in the covered language.

They also should determine whether there are other forms of media that are more accessible for LEP voters. For example, many communities have the following sources in the covered languages: newspapers, cable and television stations, radio stations, and even websites and blogs. Alaska Native and American Indian voters in particular tend to rely upon radio stations, the signals for which may be limited in their range because of the geographic isolation of Native communities.

Election officials likewise should communicate publicity that may be unique to the covered LEP voters. That publicity may include: distributing pamphlets about the language program in the covered language; voter information meetings to explain how to receive assistance; and recruitment drives for bilingual poll workers.

Best practice # 13: Have a dedicated toll-free number for language assistance

Only a fraction of covered jurisdictions have a dedicated toll-free number available for language assistance inquiries. Just 39 percent reported that they offered that service in all covered languages.⁵³ The absence of such a toll-free number substantially impairs the effectiveness of language assistance. It usually means that LEP voters are not receiving language assistance for many of the critical pre- and post-election activities.

Jurisdictions establishing a toll-free number must have a qualified and trained bilingual worker who is proficient in English and the covered language. They also must be knowledgeable about the election office's language program for LEP voters. A toll-free should be used because a call to the elections office may be long-distance, particularly in large jurisdictions or in areas with large numbers of geographically isolated voters. Many of those LEP voters cannot afford to pay for the calls.

The toll-free number should be advertised in all publicity to the LEP voters. Signs in the covered languages also should be available in every polling place that inform LEP voters about the number. That will make it more likely that all voters will be able to receive at least some assistance in the covered language, even if they are in a precinct without any bilingual poll workers.

Best practice # 14: Solicit LEP voter feedback

Election officials who do not actively solicit feedback from voters remove an important component of a successful language program: community involvement. Feedback from voters helps to identify ways in which the language program is ineffective or could be improved. The feedback might identify the lack of voting materials, inadequate bilingual poll worker staffing, bilingual poll workers who do not speak the covered language proficiently, rude or hostile poll workers, long lines, among other things.

All voter complaints should be promptly investigated. If election officials receive a complaint that voters are being disenfranchised, they must respond immediately to address the issue. Consistent with the need for good customer service, election officials should notify the voter about the status of their complaint and follow up to see if the voter's concern has been adequately addressed.

⁵³ Tucker & Espino, *supra*, at 201.

Best practice # 15: Conduct post-election assessments

Effective language assistance is a work in progress. Election officials must regularly evaluate each component of their program to determine if it is effective and, if not, steps that must be taken to make it effective. Part of this recurring assessment should come after each election and should include a review of voter comment cards or feedback.

Conclusion

Our Republic is only as strong as its electoral process. Recent elections, including the 2012 Election, show that election administration remains vibrant, despite suffering from many challenges. NARF looks forward to working with the Commission in identifying the cures to the remaining barriers to political participation for language minority voters, including Native Americans. Thank you very much for your attention. I will welcome the opportunity to answer any questions you may have.