



U.S. Department of Justice

Office of Tribal Justice

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Dear Tribal Leader:

To address some of the unique and persistent challenges that American Indian and Alaska Native voters face, the Attorney General would like to initiate formal consultation between officials of federally recognized Indian tribes and Department of Justice officials to discuss whether the Department of Justice should recommend to Congress new legislation that would require any state or local election administrator whose territory includes part or all of an Indian reservation, an Alaska Native village, or other tribal lands to locate at least one polling place in a venue selected by each tribal government.

The attached framing paper outlines the Department of Justice's intent to hold consultations on this matter and raises several questions and issues for your consideration. The consultation schedule will be circulated within the next 30 days.

If you have questions in the meantime, please contact the Office of Tribal Justice at (202) 514-8812 (not a toll-free number) or OTJ@usdoj.gov. We look forward to consulting with you on this important issue.

Sincerely,

Tracy Toulou
Director, Office of Tribal Justice
U.S. Department of Justice

TRIBAL CONSULTATION ON WHETHER TO PROPOSE FEDERAL LEGISLATION TO SAFEGUARD NATIVE AMERICAN VOTING RIGHTS

The Department of Justice places a high priority on protecting the voting rights of American Indians and Alaska Natives. The Department plans to consult with tribes to determine whether this effort might be significantly advanced by new federal legislation and is providing this framing paper to facilitate the consultation and frame the discussion with the tribes. The framing paper begins by presenting some background on the problem, and then focuses on whether federal legislation to guarantee that American Indian and Alaska Native voters have access to polling places on Indian reservations and in Alaska Native villages can contribute to solving that problem.

Tribal recommendations in these areas, and others, are of course most welcome. This framing paper is designed merely to raise questions about options for tribal leaders to consider. It is not intended to be, nor should it be construed as, a statement of Department policy.

BACKGROUND ON VOTING BY AMERICAN INDIANS AND ALASKA NATIVES AND GAPS IN CURRENT LAW

American Indians and Alaska Natives have faced a distinctive history of discrimination affecting their right to vote. Even after Reconstruction had dramatically expanded the franchise, the U.S. Supreme Court held that Indians living on reservations could not invoke the protections of the Fourteenth and Fifteenth Amendments. *See Elk v. Wilkins*, 112 U.S. 94, 101-03 (1884). And although the Indian Citizenship Act of 1924 conferred U.S. citizenship on all American Indians born within the United States, many states continued to disenfranchise Indians, either by refusing to treat them as state residents or by imposing literacy tests that American Indians and Alaska Natives with limited English proficiency — often the result of the state's failure to provide adequate education — were unable to pass. As recently as 1948, Indians, including veterans who recently had returned from the battlefields of World War II, were barred from voting in Arizona and New Mexico.

In 1975, recognizing the barriers to full participation that American Indians and Alaska Natives continued to confront, Congress not only permanently prohibited literacy tests throughout the United States but also expressly included American Indians and Alaska Natives within the special protections of the Voting Rights Act. As a result, certain jurisdictions with large American Indian or Alaska Native populations were placed

under the preclearance regime of Sections 4 and 5 of the Act and were prohibited from making any changes to their voting laws until they could prove to the Department of Justice or to a three-judge federal court that the change neither had a discriminatory purpose nor would have a retrogressive effect. A number of other jurisdictions with large Native American populations were also covered by Section 203 of the Voting Rights Act, which requires bilingual election materials and assistance in areas with large numbers of citizens with limited English proficiency.

Despite these reforms, participation rates among American Indians and Alaska Natives continue to lag far behind turnout rates among non-Native voters. Estimates suggest that nationwide, while nearly 64% of non-Native adult citizens cast a ballot in the 2008 presidential election, less than 48% of Native American adult citizens voted. Part of that gap is attributable to differences in registration rates; but even among registered voters, the turnout among American Indians and Alaska Natives nationwide falls 5 to 14 percentage points below that of other racial and ethnic groups. And the gap with respect to Alaska Natives is especially large: Turnout among Alaska Natives often falls 15 to 20 or more percentage points below the non-Native turnout rate.

The causes of these disparities are complex. Lingering effects of prior overt discrimination play a role, as do socioeconomic conditions: Among all Americans, political participation is positively correlated with income and education, and Native communities are disproportionately poor. But two factors stand out. The first is that many American Indians and Alaska Natives live far from established polling places. The second is that, in some tribal communities, Native American voters have significant rates of limited English language proficiency. These two factors, alone and in combination, create special barriers to effective political participation by citizens living on Indian reservations and in Native villages.

There are myriad examples of the problems American Indian and Alaska Native voters have faced getting to the polls. Residents of the Cheyenne River Sioux Reservation in South Dakota had to travel up to 150 miles roundtrip to vote until a federal court ordered the establishment of polling places on the reservation. There is ongoing litigation in Montana over several counties' refusal to set up satellite early-voting sites on reservations far from the county seat. And in Alaska, polling places to which Alaska Natives have been assigned are sometimes located across a river or other body of water or across a mountain range that is impassable on Election Day. The Alaska Division of Elections has assigned some Native villages to polling places that are 75 miles away and accessible only by air or boat.

Moreover, although jurisdictions with large numbers of limited English proficiency voters are often covered by Section 203, many jurisdictions with large numbers of American Indian or Alaska Native citizens have failed to provide those materials or adequate assistance at the polls. In Cibola County, New Mexico — the subject of a

decade's worth of enforcement litigation by the Department of Justice — the Department was again required to intervene earlier this year to prevent the county's planned elimination of voting-rights coordinators to train poll-workers and provide election information to Navajo- and Keres-speaking voters.

For some potential voters, the inaccessibility of polling places poses only a minor barrier, since they can instead vote absentee. But that option is far less manageable for American Indian or Alaska Native voters with limited English proficiency, because they receive little or no assistance in navigating the bureaucratic process for obtaining and casting an absentee ballot. In Alaska, for example, the state has designated dozens of Yup'ik-speaking Native villages as "permanent absentee voting" sites where voters must fill out an English-language application to vote absentee in each election.

Currently, federal law does not specifically address the location of polling places, leaving the decision essentially in the hands of each state. States often devolve that responsibility to local jurisdictions, giving counties or municipalities discretion to choose how many polling places to have and where to locate them. While Section 2 of the Voting Rights Act prohibits states from using election procedures, including poll-siting, that deny minority voters an equal opportunity to participate in the political process, *see, e.g., Spirit Lake Tribe v. Benson County*, 2010 WL 4226614 (D.N.D. 2010), Section 2 cases can be complex and costly to litigate.

Until the Supreme Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), which held invalid the formula used to place jurisdictions under the obligation to preclear their voting changes, the Department of Justice used Section 5 to prevent covered jurisdictions (which included Alaska, Arizona, and two counties in South Dakota with large Indian populations) from making changes in polling places that could have a discriminatory impact on Native American voters. In Arizona, the Department of Justice used Section 5 to prevent a series of efforts by Apache County to close polling places located in the Navajo Nation. Similarly, in 2008, Alaska ultimately withdrew a request to change a number of polling places to which Native villages had been assigned after the Department of Justice issued a "more information" request, asking the state to explain why the changes would not disadvantage Alaska Native voters. Since the Supreme Court's decision last year in *Shelby County*, Alaska has apparently eliminated in-person voting for more than a dozen Native villages, forcing their residents into "permanent absentee voting."

Given the continued difficulties faced by American Indian and Alaska Native voters, the Department of Justice is consulting with the tribes about possible federal legislation to fill gaps in federal election laws to better safeguard Native Americans' voting rights.

TRIBAL DESIGNATION OF POLLING PLACES FOR FEDERAL ELECTIONS

The Central Question: Should the Department of Justice recommend to Congress legislation that would require any state or local election administrator whose territory includes part or all of an Indian reservation, an Alaska Native village, or other tribal lands to locate at least one polling place in a venue selected by each tribal government?

Background: The Constitution grants Congress “plenary” power “to legislate in respect to Indian tribes.” *United States v. Lara*, 541 U.S. 193, 200 (2004). Congress’s “unique obligation” toward Indians — in particular, its responsibility to ensure that they are included fully within the “modern body politic” — gives Congress the power to require fair treatment for American Indian and Alaska Native voters. *See Morton v. Mancari*, 417 U.S. 535, 552 (1974).

Moreover, under the Elections Clause of Article I, Section 4 of the Constitution, Congress has additional power to regulate any election conducted at least in part to select Members of Congress. That clause provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations”

The Elections Clause has traditionally been interpreted to give Congress virtually plenary power over a wide range of aspects relating to congressional elections. In *Cook v. Gralike*, 531 U.S. 510 (2001), the Court stated that the term “Manner of holding Elections” “encompasses matters like ‘notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.’” *Id.* at 523 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). The list of practices that the Supreme Court and the lower federal courts have found within the scope of Congress’s Elections Clause power is broad indeed. *See, e.g., Roudebush v. Hartke*, 405 U.S. 15, 24-25 (1972) (authority to regulate recount of elections); *United States v. Gradwell*, 243 U.S. 476, 483 (1917) (full authority over federal election process, from registration to certification of results); *In re Coy*, 127 U.S. 731, 752 (1888) (authority to regulate conduct at any election coinciding with a federal contest).

Taken together, the Indian powers and the Elections Clause authorize Congress to enact legislation to safeguard the voting rights of Native American voters, particularly in elections conducted in whole or in part to elect Members of Congress. Here, long experience with inaccessible polling places and failures to provide sufficient assistance to American Indian and Alaska Native voters support the conclusion that Congress might rationally impose affirmative obligations on state and local election authorities to enable these citizens to cast their ballots.

The Department of Justice would welcome feedback on the following questions, which may be relevant to both policy considerations and constitutional analysis.

Selection of Polling Places: Should Congress require that states permit tribes to designate a polling place on tribal land if the tribe concludes that such a location would help provide tribal members a fair and equal opportunity to participate in the political process? Should tribes be permitted to designate such polling places for voting only on Election Day itself, or should they be permitted also to designate early-voting sites in jurisdictions that permit early voting (sometimes referred to as “in-person absentee voting”)?

Should there be any requirements tied to the number of potential voters? For example, should tribes with large numbers of voters or dispersed populations be entitled to request more than one polling place? Conversely, should there be a minimum potential voter population to trigger the requirement?

Actual Operation of the Polling Place: For any polling place the location of which is determined by the tribe, how should the polling place be operated? Obviously, the state or local election administrator would be required to equip the polling place with as many ballots and voting machines (on a per-registered-voter basis) as are provided to similar polling places in non-Native communities. But should staff for the polling place be supplied by the tribe, with proper training to be supplied by the state or local election administrator? Such a proposal could help ensure that poll-workers are sensitive to the distinctive needs of tribal voters with respect to assistance in voting, and would accommodate state and local administrators’ concerns about the costs of the proposal.

Scope of the Requirement: Should the requirement apply only to elections held in whole or in part to select candidates for federal office? Or should the requirement apply to all elections for public office or in which ballot propositions are involved?

Voter Registration: Should Congress also require state or local election administrators to designate, upon the request of a federally recognized Indian tribe, a tribal office or agency as a site for voter registration? If so, what procedures should apply to this requirement?