Denial and Suppression of the American Indian Vote

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

February 26, 2008

Laughlin McDonald
American Civil Liberties Union
Voting Rights project
2600 Marquis One Tower
245 Peachtree Center Avenue
Atlanta, GA 30303
(404) 523-2721
lmcdonald@aclu.org

The Denial and Suppression of the Indian Vote

Introduction

Mr. Chairman and members of the subcommittee, I want to thank you for providing me an opportunity to submit this statement on denial and suppression of the American Indian vote. The examples discussed below are taken mainly from litigation brought by the ACLU Voting Rights Project in Indian Country. Techniques for vote denial and suppression have included the maintenance and manipulation of discriminatory election procedures, the refusal to provide access to registration and
voting, the adoption of discriminatory ID requirements for voting, and unwarranted allegations of voter fraud.

The Long History of Discrimination Against Indians in Voting

The United States has a long history of denying and suppressing the Voting Rights of American Indians. Throughout the nineteenth century Indians were regarded as non-citizens, and in the absence of being naturalized were not entitled to vote.¹ With passage of the Dawes Act of 1887 and the Burke Act of 1906, citizenship was granted to any Indian who accepted an allotment of reservation land, on condition that he or she reside “separate and apart from any tribe of Indians therein and has adopted the habits of civilized life.”² A substantial number of Indians became citizens, but only by ceasing to be Indians.³

More than 7,000 Indians, most of whom were not citizens, served in the armed forces during World War I.⁴ In recognition of that service, Congress provided in 1919 that all Indians who had served honorably in the armed forces were eligible for American citizenship.⁵ Subsequently, Congress passed the Indian Citizenship Act of 1924 which gave Indians as a group United

¹Elk v. Wilkins, 112 U.S. 94, 102 (1884).
²Draper v. United States, 164 U.S. 240, 246 (1896).
⁴Id. at 179 n. 72.
⁵Act of Nov. 6, 1919, ch. 95, 41 Stat. 350.
States citizenship, and thus, at least in theory, the federally protected equal right to vote.⁶

Some commentators, taking a page from the history of black disfranchisement in the South after passage of the Fifteenth Amendment, which prohibited discrimination in voting "on account of race, color, or previous condition of servitude," suggested that it would still be proper for the states to "discriminate" in voting between tribal Indians on reservations and other citizens. They argued that states could enact literacy tests or poll taxes or deny the franchise absolutely to Indians living on reservations and enjoying immunity from state authority.⁷ Many states did in fact blunt the impact of the Indian Citizenship Act by making registration more difficult, requiring reregistration,⁸ or simply denying registration altogether.

South Dakota, despite passage of the act, continued to deny residents of unorganized counties, which had substantial Indian populations, the right to vote and hold office until the 1940s.⁹ Five other states (Idaho, Maine, Mississippi, New Mexico, and Washington), prohibited "Indians not taxed" from voting, although

⁸See, e.g., Mont. L. 1937, p. 527 (requiring deputy voter registrars to be "taxpaying" residents of their precincts); Mont. L. 1937, p. 523 (requiring reregistration of all voters).
there was no similar disqualification from voting by non-taxpaying whites.\textsuperscript{10} Arizona denied Indians living on reservations the right to vote on the ground that they were "under guardianship" of the federal government and thus disqualified from voting by the state constitution. The practice was not struck down until 1948, when the state supreme court ruled that the language in the state constitution referred to a judicially established guardianship, and had no application to the status of Indians as a class under federal law.\textsuperscript{11} Utah denied Indians living on reservations the right to vote on the ground that they were non-residents under state law. The law was upheld by the state supreme court, but was repealed by the legislature in 1957 after the Supreme Court, at the request of the state attorney general, agreed to review the case.\textsuperscript{12}

The Indian Citizenship Act did not translate into significant Indian participation in the federal and state political processes. It did, however, reflect an increasing awareness and concern by Congress of the plight of Indians and set the stage for passage of additional federal legislation protecting Indian rights, including voting rights.

\textbf{Continued Denial and Suppression of the Indian Vote}

\textsuperscript{10}Wolfley (1991), 185.

\textsuperscript{11}Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456, 463 (1948).

Despite the protections afforded by federal law, non-Indians in the west, particularly in areas containing or adjacent to reservations, have continued to deny and suppress the Indian vote. They have done so through the maintenance and manipulation of discriminatory election procedures, the refusal to provide access to registration and voting, and unwarranted allegations of voter fraud.

In a case involving Big Horn County, Montana, decided in 1986, the federal court made extensive findings of past and continuing discrimination against Indians residing on the Crow and Northern Cheyenne Reservations. Following a lengthy trial, the court held that at-large elections for the county commission and school board diluted Indian voting strength in violation of Section 2 of the Voting Rights Act. In doing so, the court found:

- There was “substantial probative evidence that the rights of Indians to vote has been interfered with, and in some cases denied, by the county.”
- The evidence “tends to show an intent to discriminate against Indians.”
- “[T]here has been discrimination in the appointment of deputy registrars of voters and election judges limiting Indian involvement in the mechanics of registration and voting.”
- “[I]n the past there were laws prohibiting voting precincts on Indian reservations.”
- Politics in Big Horn County was “race conscious” and “racially polarized.”
- “[T]here is racial bloc voting in Big Horn County and . . .
there is evidence that race is a factor in the minds of voters in making voting decisions.”

• “[D]iscrimination in hiring has hindered Indian involvement in government, making it more difficult for Indians to participate in the political process.”

• “[R]ace is an issue and subtle racial appeals, by both Indians and whites, affect county politics.”

• There was “a strong desire on the part of some white citizens to keep Indians out of Big Horn County government.”

• "Indians who had registered to vote did not appear on voting lists."

• "Indians who had voted in primary elections had their names removed from voting lists and were not allowed to vote in the subsequent general elections."

• Indians were "refused voter registration cards by the county."

• "When an Indian was elected Chairman of the Democratic Party, white members of the party walked out of the meeting."

• "Unfounded charges of voter fraud have been alleged against Indians and the state investigator who investigated the charges commented on the racial polarization in the county."

• A depressed socio-economic status makes it "more difficult for Indians to participate in the political process and there is evidence linking these figures to past discrimination."\(^{13}\)

Efforts to suppress the Indian vote in Big Horn County did not end with the federal court decision. Members of two organizations which support termination of the reservation system, Citizens Equal Rights Alliance (CERA) and Montana

\(^{13}\)Windy Boy v. County of Big Horn, 647 F.Supp. 1022, 1008-09, 1013, 1016-18, 1022 (D. Mont. 1986).
Citizens Rights Alliance (MCRA), filed suit in June 2007 alleging that various forms of voter fraud took place on the Crow Reservation – double voting, insecure ballot boxes, and the endorsement of candidates by the tribal government. One of the remedies the groups sought was the removal of all polling places from the reservation, which would have effectively disfranchised large numbers of Indians and facilitated control of county elections by whites.

Tribal and county election officials insisted the charges were baseless, and noted that one of the plaintiffs, Christopher Kortlander, made similar allegations of fraud in the past. When the charges were proven to be groundless, he apologized and sent the Clerk and Recorder a bunch of roses.

Nellie Little Light, a member of the Crow Tribe, works for the Big Horn County Clerk and Recorder, where she has been employed for 16 years. “No double voting took place,” she said. “That is just not true. I am personally familiar with about everybody at Crow, and there was no double voting.” “This is a very prejudiced place,” she added. “We have grown up with it. When it comes to the elections, the whites are sore losers. That’s why they brought this suit.”

On November 5, 2007, the federal court granted a motion to dismiss filed by county and state election officials, and held

the plaintiffs failed to state a violation of federal law. The court also held the plaintiffs failed to show the defendants acted with any discriminatory intent or racial animus towards the plaintiffs or white voters. The litigation, however, is not yet over. The plaintiffs were granted leave to file an amended complaint which adds additional defendants and claims.

South Dakota: A Case Study

For most of the twentieth century, voters in South Dakota were required to register in person at the office of the county auditor.\(^{15}\) Getting to the county seat was a hardship for Indians who lacked transportation, particularly for those in unorganized counties who were required to travel to another county to register. Moreover, state law did not allow the auditor to appoint a tribal official as a deputy to register Indian voters in their own communities. There was one exception, however. State law required the tax assessor to register county property owners in the course of assessing the value of their land. Thus, taxpayers were automatically registered to vote, while nontaxpayers, many of whom were Indian, were required to make the trip to the courthouse to register in person.\(^{16}\) Mail-in registration was not fully implemented in South Dakota until

\(^{15}\)S.D. Codified Laws §§ 16.0701-0706 (Michie 1939).

The disdain of some state officials for Indian voting rights was apparent from the state’s refusal to comply with Section 5 of the Voting Rights Act. Ten years after its enactment in 1965, Congress amended the Voting Rights Act to cover American Indians, to expand the geographic reach of the special preclearance provisions of Section 5, and to require certain jurisdictions to provide bilingual election materials to language minorities. As a result of the amendments two counties in South Dakota, Shannon and Todd, which are home to the Pine Ridge and Rosebud Indian Reservations respectively, became subject to preclearance. Eight counties in the state, because of their significant Indian populations, were also required to conduct bilingual elections – Todd, Shannon, Bennett, Charles Mix, Corson, Lyman, Mellette, and Washabaugh.

William Janklow, at that time the Attorney General of South Dakota, was outraged over the extension of Section 5 and the bilingual election requirement to his state. In a formal opinion addressed to the secretary of state, he derided the 1975 law as a "facial absurdity." Borrowing the States' Rights rhetoric of southern politicians who opposed the modern civil right movement, he condemned the Voting Rights Act as an unconstitutional federal

---

encroachment that rendered state power "almost meaningless." He quoted with approval Justice Hugo Black's dissent in *South Carolina v. Katzenbach* (which held the basic provisions of the Voting Rights Act constitutional) that Section 5 treated covered jurisdictions as "little more than conquered provinces."  

Janklow expressed the hope that Congress would soon repeal "the Voting Rights Act currently plaguing South Dakota." In the meantime, he advised the secretary of state not to comply with the preclearance requirement. "I see no need," he said, "to proceed with undue speed to subject our State's laws to a 'one-man veto' by the United States Attorney General."  

Although the 1975 amendments were never in fact repealed, state officials followed Janklow's advice and essentially ignored the preclearance requirement. From the date of its official coverage in 1976 until 2002, South Dakota enacted more than 600 statutes and regulations having an effect on elections or voting in Shannon and Todd Counties, but submitted fewer than ten for preclearance. The state did not comply with Section 5 until it was sued in 2002 by Elaine Quick Bear Quiver and other members of the Oglala and Rosebud Sioux Tribes in Shannon and Todd Counties.  

---

20383 U.S. 301, 328 (1966).


Unfounded allegations of voter fraud have also frequently been made against Indians in South Dakota, and have been used as a pretext for limiting Indian access to registration. In 1978, a coalition of Indian and civic organizations sponsored a voter registration drive focused on members of the state’s Indian Tribes. Just before the election, allegations surfaced that some Indians who might be convicted felons were registering voters and that federal dollars were being used illegally by the tribes to finance the registration effort. Both the South Dakota Division of Criminal Investigation and the Federal Bureau of Investigation sent agents to investigate the allegations of fraud on the Pine Ridge and Rosebud Reservations. The investigations, however, ended without any charges being brought.\textsuperscript{23}

Charlene Black Horse, who worked on the registration drive, believes the allegations of fraud were racially motivated. “We felt that,” she said. “We always feel that because we’re always being intimidated by somebody. And when you grow up there, that’s just how you live with things.”\textsuperscript{24}

Joe American Horse, a tribal member and resident of the Pine Ridge Indian Reservation in Shannon County, attempted to register to vote prior to the November 1984 general election. His application was rejected, however, on the ground that it was received after the deadline for registration, despite the fact it

\textsuperscript{23} Bone Shirt v. Hazeltine, 336 F.Supp.2d at 1026.

\textsuperscript{24} Id.
was received by the auditor, who is in charge of county elections, prior to the deadline that had been agreed upon by various county officials and publicly announced. In a lawsuit filed by American Horse on his own behalf, and on behalf of others whose applications had been similarly rejected, the court ordered the rejected applications be accepted and that the applicants be allowed to vote in the upcoming elections.\textsuperscript{25}

In 1986, Alberta Black Bull and other Indian residents of the Cheyenne River Sioux Reservation brought a successful Section 2 suit against Ziebach County because of its failure to provide sufficient polling places for school district elections. Prior to the lawsuit, Indians had to travel up to 150 miles round trip to vote. The district court ordered the school district to establish four new polling places on the reservation.\textsuperscript{26}

In 1986 Indian residents of the Cheyenne River Sioux Reservation in South Dakota launched a campaign to register Indian voters. The auditor of Dewey County, however, limited the number of application forms given to voter registrars, who had to travel approximately 80 miles round trip to the auditor's office in the courthouse, to ten or 15 apiece. The Indians filed suit under the Voting Rights Act and the court concluded the county auditor had discriminated against Indians by limiting the number


of application forms, ordered that more forms be provided, and extended the deadline for voter registration for an additional week.\textsuperscript{27}

The United States sued officials in Day County in 1999 for denying Indians the right to vote in elections for a sanitary district in the area of Enemy Swim Lake and Campbell Slough. Under the challenged scheme, only residents of several noncontiguous pieces of land owned by whites could vote, while residents of the remaining 87% of the land around the two lakes, which was owned by the Sisseton-Wahpeton Sioux Tribe and about 200 tribal members, were excluded from the electorate. In an agreement settling the litigation, local officials admitted Indians had been unlawfully denied the right to vote, and agreed upon a new sanitation district that included the Indian owned land around the two lakes.\textsuperscript{28}

In another suit in South Dakota, the district court invalidated the state's 2001 legislative plan as diluting Indian voting strength. It found there was "substantial evidence that South Dakota officially excluded Indians from voting and holding office." Indians in recent times have encountered numerous difficulties in obtaining registration cards from their county auditors, whose behavior "ranged from unhelpful to hostile."


\textsuperscript{28}United States v. Day County, South Dakota, No. CV 99-1024 (D. S.D. June 16, 2000).
Indians involved in voter registration drives have regularly been accused of engaging in voter fraud by local officials, and while the accusations have proved to be unfounded they have "intimidated Indian voters."\textsuperscript{29}

Bennett County did not comply with the provisions of the Voting Rights Act requiring it to provide minority language assistance in voting until 2002, and only then because it was directed to do so by the Department of Justice.\textsuperscript{30}

Indians launched another major voter registration drive before the 2002 election, and it too was hit with allegations of voter fraud. Susan Williams, the auditor of Bennet County, announced publicly that Indians doing voter registration were committing fraud. Once again investigators fanned out on the Pine Ridge and Rosebud Reservations, but again no one was ever charged with registering or attempting to register anyone illegally. After the investigation, Attorney General Mark Barnett announced there was "no basis" for the claimed widespread Indian voter fraud.\textsuperscript{31}

Dr. Dan McCool, the director of the American West Center at the University of Utah and who has written extensively about Indian voting rights, said the accusations of voter fraud were "part of an effort to create a racially hostile and polarized


\textsuperscript{30}Id. at 1028.

\textsuperscript{31}Id.
atmosphere. It's based on negative stereotypes, and I think it's a symbol of just how polarized politics are in the state in regard to Indians and non-Indians."

Following the 2002 elections, which saw a surge in Indian political activity, the legislature passed laws that added additional requirements for voting, including a law requiring photo identification at the polls. Rep. Tom Van Norman, a member of the Cheyenne River Sioux Tribe, said that in passing the burdensome new photo requirement "the legislature was retaliating because the Indian vote was a big factor in new registrants and a close senatorial race." During the legislative debate on a bill that would have made it easier for Indians to vote, representatives made comments that were openly hostile to Indian political participation. According to one opponent of the bill, "I, in my heart, feel that this bill . . . will encourage those who we don't particularly want to have in the system." Alluding to Indian voters, he said "I'm not sure we want that sort of person in the polling place." 

The county auditor admitted there had been "an Indian versus white mentality" in recent elections in Bennett County. A prime example of that was the 2002 election for the county

---

32 Id.

33 Id.

34 Id. (quoting Rep. Stanford Addelstein).

35 Id. at 1035.
commission. After three Indians won the Democratic primary, Gary Nelson, the chair of the county Democratic Party, got the county auditor to file a complaint with the Department of Justice that two of three Indian candidates, Gerald Bettelyoun and Francis Rough, were federal employees and were thus barred by the Hatch Act from seeking public office. As a result of the complaint, Rough withdrew from the election. Bettelyoun took early retirement, which cost him a significant cut in pay. The county Democratic Party, in a further attempt to avoid having Indians on the county commission, recruited a slate of three whites to run as independents in the general election against its own duly nominated candidates.

Martin, the county seat of Bennett County, has a population of just over 1,000 people, nearly 45% of whom are Native American. The city is near the Pine Ridge and Rosebud Reservations, and like many border towns it has had its share of racial conflict. The district court ruled that the at-large system diluted Indian voting strength. Among its findings were:

There is a long, elaborate history of discrimination against Indians in South Dakota in matters relating to voting in South Dakota. . . . Indians in Martin continue to suffer the effects of past discrimination, including lower levels of income, education, home ownership, automobile ownership, and standard of living. . . . Martin city officials have taken intentional steps to thwart Indian voters from exercising political influence. . . . [T]here is a persistent and unacceptable level of racially polarized voting in the City of Martin.36

36Cottier v. City of Martin, 446 F.Supp.2d 1175, 1184-88 (D. S.D. 16
The City was given an opportunity to propose a remedial plan, but refused to do so. The court then implemented a system of cumulative voting, and at the elections held in June 2007, three Indian-friendly candidates were elected. The city has filed a notice of appeal.

One of the most blatant schemes to disfranchise Indian voters was used in Buffalo County. The population of the county was approximately 2,000 people, 83% of whom were Indian, and members primarily of the Crow Creek Sioux Tribe. Under the plan for electing the three-member county commission, which had been in effect for decades, nearly all of the Indian population - some 1,500 people - were packed in one district. Whites, though only 17% percent of the population, controlled the remaining two districts, and thus the county government. The system, with its total deviation among districts of 218%, was not only in violation of one person, one vote, but had clearly been implemented and maintained to dilute the Indian vote and insure white control of county government.

Tribal members, represented by the ACLU, brought suit in 2003 alleging that the districting plan was malapportioned and had been drawn purposefully to discriminate against Indian voters. The case was settled by a consent decree in which the

---

county admitted its plan was discriminatory and agreed to submit to federal supervision of its future plans under Section 5 of the Voting Rights Act through January 2013.\textsuperscript{38}

In 2005, members of the Yankton Sioux Tribe filed suit against Charles Mix County alleging that the three districts for the county commission were malapportioned and had been drawn to dilute Indian voting strength.\textsuperscript{39} The total deviation among the districts was 19\%, and almost certainly unconstitutional. Moreover, each district was majority white, despite the fact that Indians were 30\% of the population of the county and a compact majority Indian district court easily be drawn. No Indian had ever been elected under the challenged plan.

South Dakota law prohibited the county from redistricting until 2012.\textsuperscript{40} In an effort to avoid court supervised redistricting following a finding of a one person, one vote or Voting Rights Act violation, the county requested the state legislature to pass special legislation establishing a process for emergency redistricting. The legislature complied and passed a bill, which the governor promptly signed, allowing a county to redistrict, with the permission of the governor and secretary of state, at any time it became "aware" of facts that called into


\textsuperscript{39}Blackmoon v. Charles Mix County, CIV. 05-4017 (D. S.D.).

\textsuperscript{40}SDCL 7-8-10.
question whether its districts complied with federal or state law.\footnote{House Bill 1265.} Despite the fact that the new law applied to every county in the state, including Shannon and Todd, and was thus required to be precleared under Section 5 as well as the consent decree in the Quick Bear Quiver case, Charles Mix County immediately sought permission from the governor to draw a new plan. The plaintiffs in Quick Bear Quiver then filed a motion for a preliminary injunction before the three-judge court to prohibit the county from proceeding with redistricting absent compliance with Section 5. The court granted the motion.

In a strongly worded opinion, the court noted that state officials in South Dakota "for over 25 years . . . have intended to violate and have violated the preclearance requirements," and that the new bill "gives the appearance of a rushed attempt to circumvent the VRA."\footnote{Quick Bear Quiver v. Nelson, 387 F.Supp.2d 1027, 1031, 1034 (D. S.D. 2005).} Implementation of the new emergency redistricting bill was enjoined until the state complied with Section 5. The state submitted the bill and the Department of Justice precleared it.

The county, for its part, argued that the deviation in the challenged plan was constitutional because it was necessary to avoid splitting townships. The court rejected the contention, pointing to redistricting maps prepared by the plaintiffs that...
achieved almost perfect population equality among districts without splitting any townships. The court ruled that the challenged plan violated one person, one vote and gave the county an opportunity to propose a remedial plan.\textsuperscript{43}

The county ultimately adopted a plan proposed by the plaintiffs, which created one majority Indian district out of three with an Indian VAP of just over 60%. The first election was held under the plan in 2006, and Sharon Drapeau, a tribal member and a plaintiff in the lawsuit, defeated a non-Indian challenger in the Democratic primary. She went on to win unopposed in the general election, and took office in 2007. But the fight over redistricting in Charles Mix County was far from over.

Voters in the county, who opposed Indian representation on the county commission, circulated a petition to increase the number of commissioners from three to five. The petition garnered enough signatures to put the issue on the ballot, and it was approved in the November 2006 election. The county redrew the districts in early 2007, creating one majority Indian district out of five, thus diluting Indian voting strength as well as minimizing the Indian presence on the commission.

Even though the court ruled in favor of plaintiffs on the malapportionment issue, their claim that the challenged plan had been adopted and implemented for racially discriminatory reasons

\textsuperscript{43}Blackmoon v. Charles Mix County, 2005 WL 2738954 (D. S.D.).
remained pending. The parties were subsequently able to agree that the county would be subject to Section 5 until 2024, and that it would submit its five member plan for preclearance.\textsuperscript{44} The plan was submitted in January 2008, and a decision by the Department of Justice is pending.

\textbf{Conclusion}

Modern day efforts to deny and suppress the Indian vote have run the gamut from the maintenance and manipulation of discriminatory election procedures, to the refusal of election officials to provide access to registration and voting, to unfounded allegations of voter fraud, to the adoption of discriminatory ID requirements for voting. The examples discussed above are illustrative and not intended to be exhaustive. They are mainly taken from litigation brought by the ACLU Voting Rights Project in Indian Country. Other examples of Indian vote denial and suppression, however, can be found in the recent hearings on the extension and amendments of the Voting Rights Act,\textsuperscript{45} and other sources.\textsuperscript{46}

\textsuperscript{44}Blackmoon v. Charles Mix County, December 4, 2007, Consent Decree.


\textsuperscript{46}E.g., Daniel McCool, Susan M. Olson, and Jennifer L. Robinson, Native Vote: American Indians, the Voting Rights Act, and the Right to Vote (Cambridge; Cambridge U. Press, 2007).