

VOTING RIGHTS IN INDIAN COUNTRY

A Special Report of the Voting Rights Project
of the American Civil Liberties Union

September 2009



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THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION

The Voting Rights Project (VRP) was founded by the American Civil Liberties Union (ACLU) in 1965. Its purpose is to enforce the constitutional amendments and federal statutes enacted by Congress protecting the rights of minority and other voters. It seeks to accomplish its goals through litigation, public education, participation in local and national conferences, testifying before Congress and state legislatures, and working with and providing advice and assistance to local community groups and lawyers throughout the country.

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INTRODUCTION AND SUMMARY

This report highlights the litigation the Voting Rights Project of the American Civil Liberties Union brought, or participated in, on behalf of American Indians in five western states—Colorado, Montana, Nebraska, South Dakota, and Wyoming.¹ The litigation challenged a variety of discriminatory election practices, including: at-large elections; redistricting plans that diluted Indian voting strength; the failure to comply with one person, one vote; unfounded allegations of election fraud on Indian reservations; discriminatory voter registration procedures; onerous identification requirements for voting; the lack of minority language assistance in voting; and the refusal to comply with the preclearance provisions of Section 5 of the Voting Rights Act.

It gives special attention to the Voting Rights Act of 1965 and its subsequent amendments, since a full understanding of the protection the act affords Indians and other covered minorities is central to realizing the goal of equal political participation. One of the most important of those provisions is Section 2, which prohibits the use of voting practices and procedures that deprive minorities of the equal opportunity to participate in the political process and elect candidates of their choice. Another important provision is Section 5, which requires “covered” jurisdictions

to secure federal approval of any proposed changes in voting and demonstrate that they do not have a discriminatory purpose or effect. Section 203 of the act requires that minorities in certain designated jurisdictions be given assistance in voting in their native languages.

The report gives an overview of the volatile and often contradictory federal policy toward Indians, from treating them as independent nations, to placing them on reservations, to assimilating them and allotting their lands to whites, to giving them rights of U.S. citizenship, to terminating the reservations and tribal governments, and in more recent times to protecting the tribal system and giving Indians maximum opportunities for self-development and self-determination.

Indians have been the victims of systematic discrimination in the past, which has included the taking of Indian land, the destruction of the bison herds and the Indian way of life, the denigration of Indian language and culture, the isolation of Indians on reservations, the denial of rights of citizenship, and efforts to remove or exterminate various tribes. The effects of this discrimination continue. One consequence is a depressed socio-economic status that limits the ability of tribal members to participate effectively in local, state, and national elections

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and to enforce the anti-discrimination provisions of the Voting Rights Act and other federal laws protecting minority voting rights. Voting is significantly polarized along racial lines, and little meaningful interaction exists between the Indian and non-Indian communities, especially in the towns and communities that border the reservations. This lack of interaction and access to the majority community makes it very difficult for Indians to elect candidates of their choice to office in jurisdictions in which they are a numerical minority.

Indian political participation is further diminished by the disproportionate number of tribal members disfranchised for commission of criminal offenses. There is a pattern of racial profiling of Indians by law enforcement officers, the targeting of Indians for prosecution of serious crimes, and the imposition of lengthier

prison sentences upon Indian defendants. These injustices result in the higher incarceration of Indians and dilute the overall voting strength of Indian communities.

Despite these obstacles, and in large measure as a result of enforcement of the Voting Rights Act and increased Indian office holding, Indian political participation has advanced significantly in recent years. To ensure that these gains continue, the ACLU calls upon local and state jurisdictions to remove barriers to equal political participation, including at-large voting, to encourage and facilitate Indian registration and voting, to conduct redistricting in a way that allows meaningful participation by the Indian community and avoids the dilution of Indian voting strength, to provide language assistance in voting, and to comply with Section 5 of the Voting Rights Act.



White settlers rushing to claim Cherokee land in the Oklahoma Territory. The land rush resulted from the Dawes Act of 1887 which had robbed the Cherokee of their rights to the land known as The Cherokee Strip. *Photo courtesy of MPI/Getty Images*

ONE PERSON, ONE VOTE

In one of the most blatant schemes to disfranchise Indian voters, Buffalo County in central South Dakota had a decades-old plan in place for electing its three-member county commission. Despite the fact that 83% of its population is Indian, the plan packed nearly all of them—some 1,500 people in a county of 2,000 inhabitants—into one district. Whites, though only 17% of the population, controlled the remaining two districts, and thus controlled the county government. The system was not only

in violation of “one person, one vote,” but had clearly been implemented and maintained to dilute the Indian vote and ensure white control of county government.

Tribal members, represented by the ACLU, brought suit in 2003 alleging that the districting plan was malapportioned—that it inequitably divided its population for representation—and had been drawn intentionally to discriminate against Indian voters. In a settlement, the county



President Lyndon Johnson signs the Voting Rights Act of 1965.

Photo courtesy of Library of Congress

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admitted its plan was discriminatory and agreed to submit its future plans to federal supervision.²

Indians have long faced discriminatory actions. From unfair redistricting plans to discriminatory voter registration procedures, they have continued to be denied their constitutional right to vote, even long after those rights were re-affirmed by the 1965 Voting Rights Act. Today they still face unnecessary identification requirements, discrimination by poll workers, and a lack of language assistance. Courts have found that Indians who had registered to vote had their names removed from voting lists and that those who voted in primary elections have had their names removed from the list in subsequent general elections. They have been refused registration cards and subjected to laws banning precincts on reservations. “Indians have lost land,” a court in Big Horn County, Montana, found, “had their economies disrupted, and been denigrated by the policies of the government at all levels.”³

THE RIGHT TO VOTE

STEP ONE: THE PATH TO CITIZENSHIP

U.S. policy toward American Indians has long been volatile and contradictory. Indians have been regarded as independent nations; as political communities that should be removed or placed on reservations; as dependent wards of the federal government; and as a race that should be assimilated, suppressed, or allowed to vanish, and whose lands should be sold or allotted to whites. In more modern times, Congress has mandated that Indians be given the rights of citizenship; that tribes be firmly established as viable units of self-government; that the reservation system be maintained; that it be terminated and tribal governments dissolved with states assuming jurisdiction over Indians; and, most recently, that the federal/tribal system be upheld, traditional Indian religions and culture and family units protected, and Indians given maximum opportunities for self-development and self-determination.⁴

Deemed not to be citizens, Indians had no federally protected right to vote for many years. In 1884 the Supreme Court declared that Indians “are not citizens,” and, in the absence of being naturalized, were not entitled to vote.⁵ Assimilation was one of the only ways Indians could become citizens. The General Allotment Act of 1887,⁶ also known as the Dawes Act,

authorized the federal government to survey tribal reservation lands and allot plots to individual Indians. The plots were then held in trust by the government for 25 years, and the remaining lands sold to the public. The act granted citizenship to any Indian allotted land, following termination of the trust, but only on condition that he reside “separate and apart from any tribe of Indians therein and has adopted the habits of civilized life.” The purpose of the act, the Supreme Court explained, was the “eventual assimilation of the Indian population” and the “gradual extinction of Indian reservations and Indian tribes.”⁷

Indians could also become citizens by serving in the armed forces. More than seven thousand, most of whom were not citizens, served during World War I;⁸ in recognition, Congress passed legislation in 1919 that all Indians who had served honorably in the armed forces were eligible for American citizenship.⁹ A few years later, Congress enacted the Indian Citizenship Act of 1924, which gave Indians born in the United States citizenship, as well as—at least in theory—the right to vote.¹⁰ Many states, however, blunted the impact of the Indian Citizenship Act by making registration more difficult, canceling all voter registration, requiring re-registration, or denying registration altogether.

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Segregated outhouse - INDIANS and WHITES - at railroad depot, Arapahoe, Wyoming, circa 1930s.

CITIZENSHIP WITHOUT REPRESENTATION: 20TH CENTURY POLICIES

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 for the plight of Indians and set the stage for passage of additional federal legislation affecting the tribes.

The Indian Reorganization Act of 1934,¹¹ enacted during the administration of President Franklin Roosevelt, was designed to restore Indian tribes as viable units of self-government. It repudiated the prior policy of allotment, extended existing periods of trust until otherwise directed by Congress, restored surplus land to tribal ownership, provided for the creation of new reservations for landless tribes, gave Indians preference in Bureau of Indian Affairs

hiring, and, after a long period of attempts at suppression and assimilation, established the tribal unit as a viable self-determining authority. The tribes which elected to participate in the reorganization program gained the power of local self-government as federal corporations with the right to organize for the common welfare and negotiate with federal, state, and local governments. Overall the act emphasized modernization of tribal government, made them equivalent to other local governmental units, and initiated greater contact between Indians and other parts of the government and private sector. According to Commissioner of Indian Affairs John Collier, the act's true significance was that it emphasized responsible democracy, "of all experiences, the most therapeutic."¹²

The period following World War II, however, saw a dramatic change in policy. In 1953, the House of Representatives terminated the federal/tribal

CITIZENSHIP DEFIANCE

Despite passage of the Citizenship Act of 1924, South Dakota continued to deny Indians the right to vote and hold office until the 1940s.¹ Even after the repeal of a state law denying the right to vote, the state—as late as 1975—prohibited Indians from voting in elections in counties that were “unorganized” under state law.² The three unorganized counties were Todd, Shannon, and Washabaugh, whose residents were overwhelmingly Indian. The state also prohibited residents of these counties from holding county office until as recently as 1980.³

Five other states (Idaho, Maine, Mississippi, New Mexico, and Washington) prohibited “Indians not taxed” from voting, although the states imposed no similar disqualification of non-taxpaying whites.⁴ Arizona denied Indians living on reservations the right to vote because they were “under guardianship” of the federal government and thus disqualified from voting by the state constitution. The practice continued 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.⁵ Utah denied Indians living on reservations the right to vote because they were non-residents under state law. The state supreme court upheld the law, but the legislature repealed it in 1957, after the Supreme Court, at the request of the state attorney general, agreed to review the case.⁶

Montana also disfranchised Indians after the Citizenship Act by amending its constitution in 1932 to require that a person, in order to vote, not only be a “citizen” but also a taxpayer—unless, that is,

a person had the right to vote at the time the state constitution was first adopted.⁷ The state enacted a statute in 1937 requiring all deputy voter registrars to be “qualified, taxpaying” residents of their precincts.⁸ Since Indians living on reservations were exempt from some local taxes, the requirement excluded almost all Indians from serving as deputy registrars and denied them access to voter registration in their own precincts. This provision remained in effect until its repeal in 1975.⁹ Another statute enacted in 1937 cancelled the registration of all electors and required re-registration.¹⁰ Indian voter registration remained depressed after the purge until the 1980s. In Colorado, Indians residing on reservations were not allowed to vote until 1970.¹¹

¹ *Buckhanaga v. Sisseton Independent School Dist.*, 804 F.2d 469, 474 (8th Cir. 1986).

² *Little Thunder v. South Dakota*, 518 F.2d 1253, 1255-57 (8th Cir. 1975).

³ *United States v. South Dakota*, 636 F.2d 241, 244-45 (8th Cir. 1980).

⁴ Jeanette Wolfley, “Jim Crow, Indian Style: The Disenfranchisement of Native Americans,” 16 *Am. Indian L. Rev.* 167, 185 (1991).

⁵ *Harrison v. Laveen*, 67 *Ariz.* 337, 196 P.2d 456, 463 (1948).

⁶ *Allen v. Merrell*, 352 U.S. 889 (1956), and Act of Feb. 14, 1957, ch. 38 1957 Utah Laws 89-90. See also *Allen v. Merrell*, 353 U.S. 932 (1957) (vacating the state court decision as moot).

⁷ Article IX, Section 2, Constitution of Montana (1932).

⁸ *Mont. L.* 1937, p. 527.

⁹ *Mont. L.* 1975, ch. 205.

¹⁰ *Mont. L.* 1937, p. 523.

¹¹ *Cuthair v. Montezuma-Cortez, Colo. School Dist.*, 7 F.Supp.2d 1152, 1161-62 (D. Colo. 1998).



President Coolidge stands with four Osage Indians at a White House ceremony (Indian Citizenship Act 1924) *Photo courtesy of the Library of Congress*

In 1906, Congress passed the Burke Act, which allowed the Secretary of Interior to bypass the trust period restrictions of the Dawes Act. As a result of allotments under these acts, sales of their allotments by impoverished Indians, and tax foreclosures, the number of acres of land owned collectively by Indian tribes shrank from

140 million in 1887 to 50 million by 1934. The allotment system was described by the American Indian Policy Review Commission "as an efficient device for separating Indians from their land and pauperizing them." American Indian Policy Review Commission, Final report (Wash., D.C., 1977), 66-7.



Indian Land Cessions shown by different time periods, including modern Indian lands and Indian land claims.
Photo courtesy of Special Collections Dept., J. Willard Marriott Library, University of Utah

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relationship and declared that federal benefits and services to various Indian tribes be ended “at the earliest possible time.”¹³ Central to the policy were two aims: relocating Indians from reservations to urban areas for job training and education, and transferring federal responsibility and jurisdiction to state governments.

Indians, in general, and some legislators as well, opposed the termination policy. Congressman Lee Metcalf of Montana described it as a “most persistent and serious attack” on Indians and their property.¹⁴ Despite such opposition, Congress terminated its assistance to more than 100 tribes over the next decade and required them to distribute their land and property to members and dissolve their tribal governments.¹⁵ The policy, noted the U.S. Commission on Civil Rights, “was aggressively carried out by Dillon Myer, former director of detention camps for Japanese Americans, who became the Commissioner of Indian Affairs in 1950.”¹⁶

Federal Indian policy changed abruptly, once again, during the administration of President Lyndon Johnson. In 1968, in the wake of the Great Society and the War on Poverty, Congress amended the 1953 act to require the consent of the affected tribes to the proposed changes.¹⁷ Johnson also articulated a national policy of “maximum choice for the American Indian: a policy expressed in programs of self-help, self-development, self-determination.”¹⁸

In the 1960s and 70s, numerous congressional and Civil Rights Commission reports documented the extent and continuing effects of discrimination against Indians, setting the stage for further remedial federal legislation.¹⁹ In a 1970 message to Congress, President Richard

Nixon summarized the plight of American Indians:

The First Americans—the Indians—are the most deprived and most isolated minority group in our nation. On virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom. This condition is the heritage of centuries of injustice. From the time of their first contact with European settlers, the American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny.

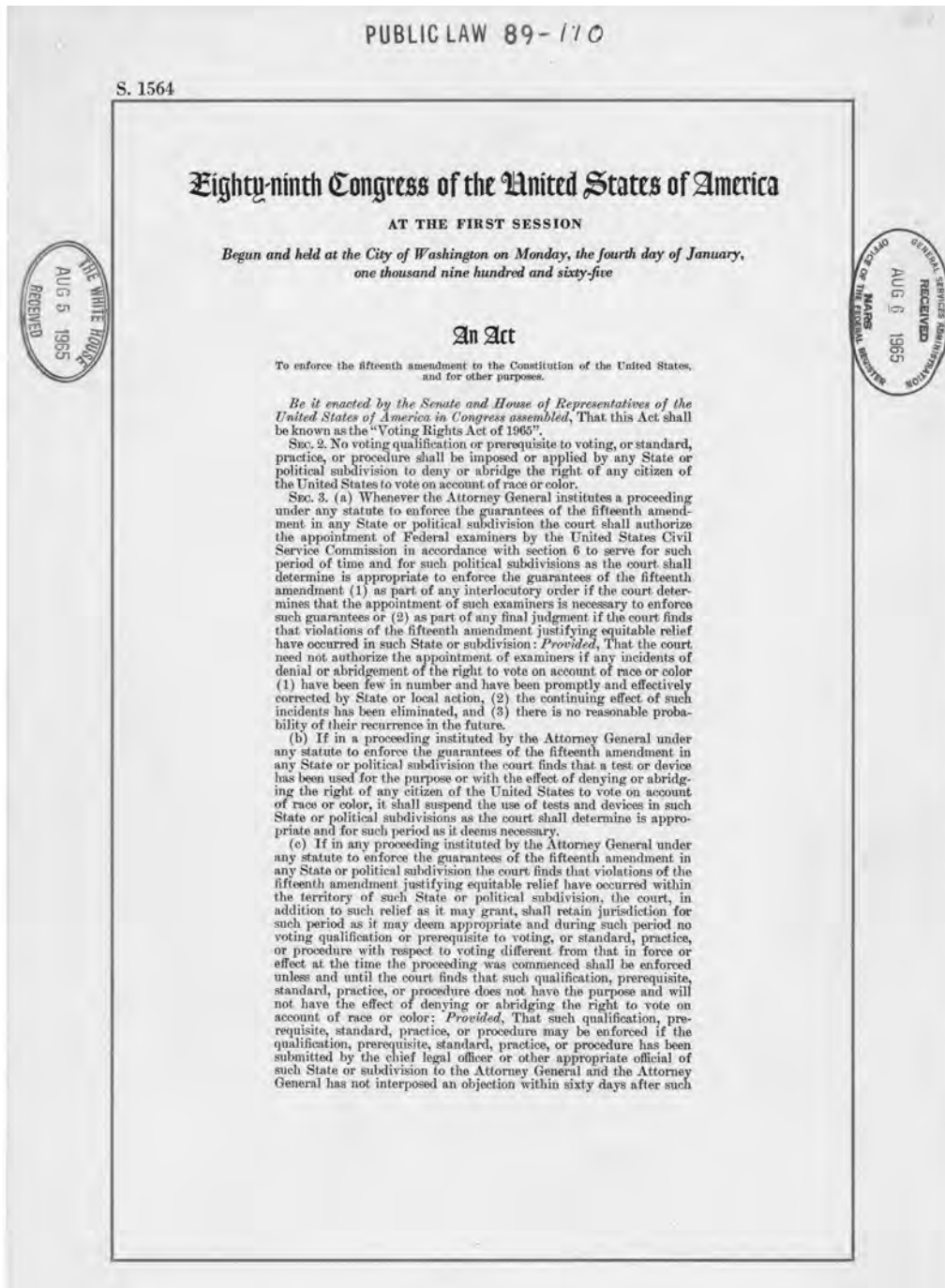
Nixon proposed to “break decisively” with past policies of termination and excessive dependence on the federal government and “create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”²⁰

THE LANDMARK 1965 VOTING RIGHTS ACT

Congress enacted a number of laws to implement policies outlined by Johnson and Nixon, including the Indian Financing Act (1974), the Indian Self-Determination and Education Assistance Act (1975), the Indian Health Care Improvement Act (1976), the American Indian Religious Freedom Act (1978), and the Indian Child Welfare Act (1978).

But one of the most critical enactments by Congress was the Voting Rights Act of 1965 and its extension to language minorities, including

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The Voting Right Act. Photo courtesy of the Library of Congress

American Indians, in 1975. The act was first passed by a united Congress four months after 500 people marching peacefully on behalf of disfranchised voters, were attacked outside of Selma, Alabama, by law enforcement on national television. And of all the modern congressional enactments addressing the problems of American Indians, the Voting Rights Act was designed to give Indians a more active voice in the adoption of national, state, and local laws. In the years since its passage, it has guaranteed millions of minority voters a chance to have their voices heard and their votes counted.

VOTING RIGHTS ACT EXPLAINED

The Voting Rights Act is a complex, interlocking set of permanent provisions that apply nationwide, together with special provisions that apply only in jurisdictions with aggravated histories of discrimination.

The permanent provisions include: (1) a nationwide ban on the use of any “test or device” for voting, such as literacy, understanding, or good character tests, or educational requirements; (2) Section 2, which prohibits the use of any voting practice or procedure that “results” in a denial or abridgement of the right to vote on account of race or membership in a language minority (defined as American Indians, Asian Americans, Alaskan Natives, and those of Spanish heritage); (3) the right of any voter to receive assistance in voting; and (4) civil and criminal penalties on those who interfere with the right to vote or commit voter fraud.¹

SPECIAL PROVISIONS: SECTION 5 PRECLEARANCE

The special provisions, scheduled to expire in 2031, include Section 5, which requires “covered” jurisdictions—defined as those that used a test or device for voting and in which voter participation was depressed—to preclear any changes in their voting practices or procedures and prove that they do not have a discriminatory purpose or effect.² Preclearance can be obtained from the U.S. Attorney General or the federal court in the District of Columbia. The purpose of this requirement, as explained by the Supreme Court, was “to shift the advantages of time and inertia from the perpetrators of the evil [of discrimination in voting] to its victims.”³ The majority of the Court acknowledged that Section 5 was an uncommon exercise of congressional power, but found it was justified by the “insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.”⁴

The covered jurisdictions are: Alabama, Alaska, Arizona, California (5 counties), Florida (5 counties), Georgia, Louisiana, Michigan (2 towns), Mississippi, New Hampshire (10 towns), New York (3 counties), North Carolina (40 counties), South Carolina, South Dakota (2 counties), Texas, and Virginia. A court can require a non-covered jurisdiction to comply with Section 5 if it has found a violation of voting rights protected by the Fourteenth and or Fifteenth Amendments.⁵ The Attorney General can also send federal observers to monitor elections in the covered jurisdictions.⁶

SPECIAL PROVISION, LANGUAGE ASSISTANCE

Section 203 of the Voting Rights Act requires certain states and political subdivisions to provide voting materials and oral assistance in languages other than English.⁷ While there are several tests for “coverage,” the requirement is imposed upon jurisdictions with significant language minority populations who are limited-English proficient and where the illiteracy rate of the language minority is higher than the national literacy rate. Covered jurisdictions are required to furnish voting materials in the language of the applicable minority group as well as in English.

Jurisdictions covered by the bilingual election requirement include the entire states of California, New Mexico, and Texas, and more than four

thousand local jurisdictions in twenty-seven other states, from Alaska to Florida and New York to Arizona.⁸ Eighty counties in seventeen states were covered because of their American Indian populations. The bilingual voting materials requirement, like Section 5, is scheduled to expire in 2031.

¹ 42 U.S.C. §§ 1973aa, 1973, 1973aa-6, 1973i & j.

² 42 U.S.C. § 1973c.

³ South Carolina v. Katzenbach, 383 U.S. 301, 328 (1965).

⁴ Id. at 309.

⁵ 42 U.S.C. § 1973a(c).

⁶ 42 U.S.C. § 1973f.

⁷ 42 U.S.C. § 1973aa-1a.

⁸ 67 Fed. Reg. 48872 (2002)

TABLE 1: AMERICAN INDIAN LANGUAGES: Currently there are 80 local jurisdictions across 17 states required to provide minority language assistance in voting pursuant to Section 203 because of their American Indian populations.

<u>STATE</u>	<u>JURISDICTION COVERED BY SEC. 203</u>
1. Alaska	6 census areas or boroughs (Bethel, Dillingham, Kenai, North Slope, Wade Hampton, Yukon Koyukuk)
2. Arizona	9 counties (Apache, Coconino, Gila, Graham, Maricopa, Navajo, Pima, Pinal, Yuma)
3. California	2 counties (Imperial and Riverside)
4. Colorado	2 counties (La Plata, Montezuma)
5. Florida	3 counties (Broward, Collier, Glades)
6. Idaho	5 counties (Bannock, Bingham, Caribou, Owyhee, Power)
7. Louisiana	1 parish (Allen)
8. Mississippi	9 counties (Attala, Jackson, Jones, Kemper, Leake, Neshoba, Newton, Scott, Winston)
9. Montana	2 counties (Big Horn and Rosebud)
10. Nebraska	1 county (Sheridan)
11. Nevada	5 counties (Elko, Humbolt, Lyon, Nye, White Pine)
12. New Mexico	11 counties (Bernallilo, Catron, Cibola, McKinley, Rio Arriba, San Juan, Sandoval, Sante Fe, Socorro, Taos, Valencia)
13. North Dakota	2 counties (Richland and Sargent)
14. Oregon	1 county (Malheur)
15. South Dakota	18 counties (Bennett, Codington, Day, Dewey, Grant, Gregory, Haakon, Jackson, Lyman, Marshall, Meade, Mellette, Roberts, Shannon, Stanley, Todd, Tripp, Ziebach)
16. Texas	2 counties (El Paso and Maverick)
17. Utah	1 county (San Juan)

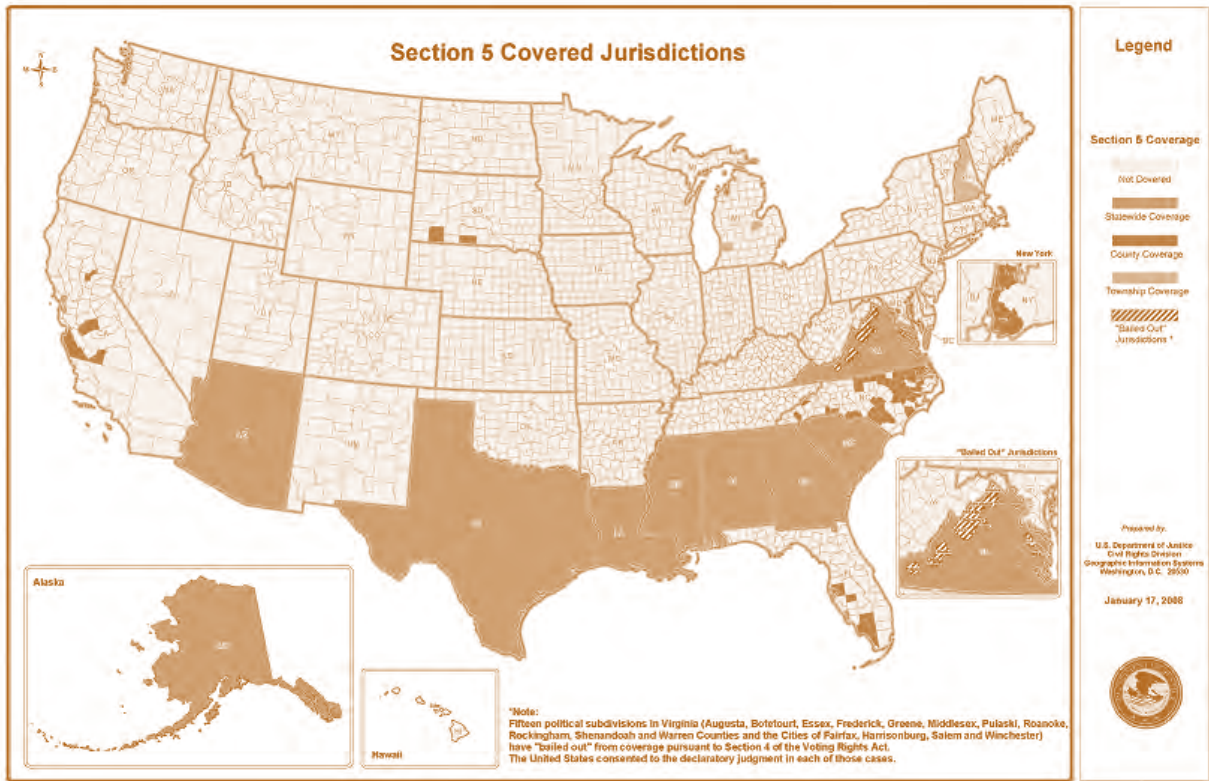


Figure 1: Section 5 Covered Jurisdictions

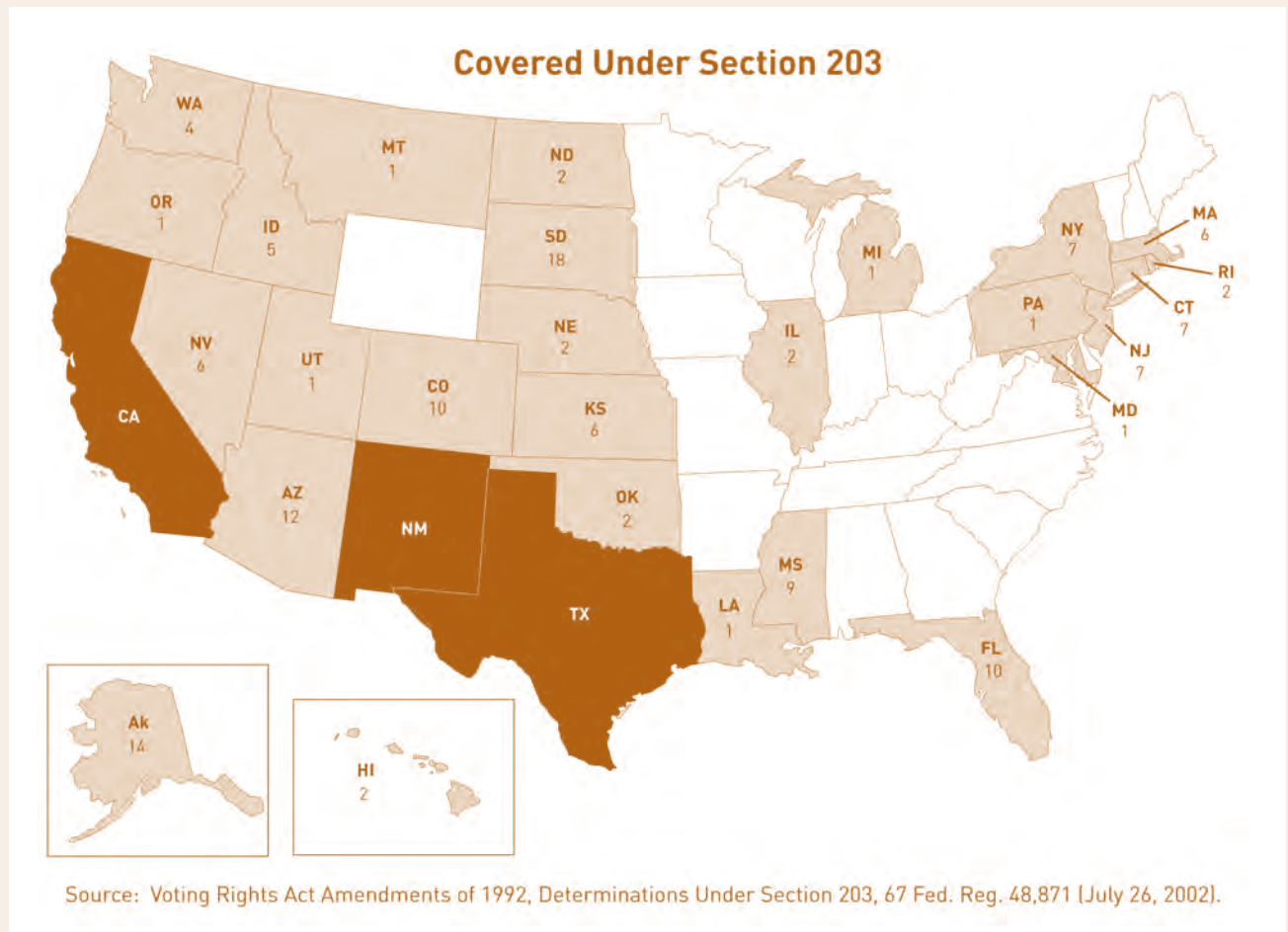


Figure 2: States, or Parts of States, Required to Provide Minority Language Assistance.

THE POLITICAL LANDSCAPE TODAY

Despite the conflicting changes in federal and state policies over the years, Indians have made undoubted progress in participating in local and state politics. The National Indian Youth Council published a directory of Indian Elected Officials in November 1986 showing that 852 Indians held non-tribal elected office, more than 90% serving on school boards, 49 in state-level positions, and one in Congress. But Indians today still face barriers to effective political participation, including a depressed socio-economic status, the pervasive myth that Indians care only about politics on the reservation, and the lack of enforcement of the Voting Rights Act.

DEPRESSED SOCIO-ECONOMIC STATUS AND REDUCED POLITICAL PARTICIPATION

One of the many legacies of discrimination against Indians is a severely depressed socio-economic status. The median family income for Indians and Alaskan Natives was \$33,144, based on the last census, while it was \$54,698 for whites.²¹ Per capita income for Indians and Alaskan Natives was half that of whites. More than one in four American Indians and Alaskan Natives live below the poverty line compared to less than one in 10 whites.²² The unemployment rate for Indians was 12.4%, and 4.3% for whites.²³ Indeed in every socio-economic factor reported

by the U.S. Census in 2000, American Indians and Alaskan Natives lagged far behind their white counterparts.

Unemployment rates on reservations were even higher. In 1997, the unemployment rate on the Cheyenne River Sioux Reservation was 80%. At the Standing Rock Indian Reservation it was 74%. Life expectancy for Indians is shorter than for other Americans. According to a report of the South Dakota Advisory Committee to the U.S. Commission on Civil Rights, "Indian men in South Dakota . . . usually live only into their mid-50s." Infant mortality in Indian country "is double the national average."²⁴

The link between a depressed socio-economic status and reduced political participation is direct. As the Supreme Court has recognized, "political participation tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes."²⁵

THE "RESERVATION DEFENSE"

Defendants in Indian voting rights cases frequently argue that Indians are mainly loyal to their tribes and simply do not care about

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participating in state and federal elections. In one lawsuit over an interim redistricting plan in South Dakota, the state conceded Indians were not equal participants in elections but argued it was the “reservation system” and “not the multimember district which is the cause of [the] ‘problem’ identified by Plaintiffs.”²⁶ The argument overlooked the fact that the state, by historically denying Indians the right to vote, had itself been responsible for denying Indians the opportunity to develop a “loyalty” to state elections. As the trial court subsequently concluded in striking down the state’s 2001 legislative plan, “the long history of discrimination against Indians has wrongfully denied Indians an equal opportunity to get involved in the political process.”²⁷

South Dakota also used an alleged lack of Indian interest in state elections to justify denying residents of some counties the right to vote or run for county office. In one case the state argued that a majority of the residents were “reservation Indians” who “do not share the same interest in county government as the residents of the organized counties.” The court rejected the defense noting the claim that a particular class of voters lacks a substantial interest in local elections should be viewed with “skepticism.” The court concluded that Indians living on the reservation had a “substantial interest” in the choice of county officials, and held the state scheme unconstitutional.²⁸

The “reservation” defense has been similarly raised—and rejected—in other voting cases brought by Native Americans in the West.²⁹ It may be convenient and self-reassuring for a jurisdiction to blame the victims of discrimination for their condition, but it is not a defense under the law.

Some Indians have undoubtedly felt their participation in state and federal elections would undermine their tribal sovereignty. But the importance of the Indian vote in recent elections has convinced most that there is no downside to participating in elections that affect the welfare of the Indian community. In the 2002 election in South Dakota for U.S. Senator, Democrat Tim Johnson defeated Republican John Thune by only 524 votes, a margin of victory credited to the increase in the number of Indian voters. The increasing awareness of the importance of their vote is reflected in the dramatic growth in Indian participation in recent elections. In the 2000 presidential election, the average turnout for Buffalo, Dewey, Shannon, and Todd Counties in South Dakota was 42.7%. In the 2004 election, turnout in those same counties grew to 65.2%, an increase of 22.5%, driven almost exclusively by Indian voters (turnout for the state as a whole grew by only 9.9%).³⁰ Reservation areas in other states, including Arizona, Minnesota, Montana, New Mexico, and Wisconsin, reported similar increases.

Both the National Congress of American Indians (NCAI) and the National Conference of State Legislatures (NCSL) have been collaborating to promote cooperation between states and tribes through a State-Tribal Relations Project. According to the NCAI:

States and Indian tribes have a range of common interests. Both states and tribes have a shared responsibility to use public resources effectively and efficiently; both seek to provide comprehensive services such as education, health care and law enforcement to their respective citizens;

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and both have interconnected interests in safeguarding the environment while maintaining healthy and diversified economies.

The parallel and sometimes overlapping responsibilities involved in implementing these mutual objectives has created jurisdictional disputes that have led to lawsuits. This project strives to improve upon and facilitate more effective state-tribal cooperation so that litigation is not necessary.

In this country, 50 state governments and more than 550 tribal governments are expected to protect the health, safety and welfare of their citizens. By keeping these objectives in mind, both entities may realize that they have more in common than in conflict and that coordination and cooperation between states and tribes can be beneficial to all.³¹

Numerous studies show that concern for political participation is critically important for Indian voters. One reported that although Indian elected officials had mixed opinions about whether they were able to impact laws and regulations in their jurisdictions, a number “believed they were able to have input, advocate for the Native American issues, and make others aware of problems facing the Native American community.” Most Indian elected officials also “believed that they had an impact on the delivery of services in their jurisdiction.” County commissioners believed they had a positive effect on fire stations, road maintenance, health issues, trash disposal, and bringing resources and funds to address

the concerns of the reservations. School board members believed they had a positive impact “on the curriculum, particularly the incorporation of Native American languages, history, and culture.” Most Indian elected officials also believed they had “a positive impact” on Indian people’s access to government and perception of government.³²

LACK OF ENFORCEMENT

Despite the application of the Voting Rights Act to American Indians, relatively little litigation to enforce the act—or the constitution—was brought on behalf of Indian voters in the West until fairly recently. At-large elections are one way that jurisdictions dilute minority voting strength, but from 1974 to 1990, for example, plaintiffs brought only one lawsuit in Montana challenging the method, despite its widespread use.³³ In Georgia, by contrast, during the same period, African Americans brought lawsuits against 97 counties and cities.³⁴ The extensive voting rights litigation campaign being waged elsewhere largely bypassed Indian country.

A lack of resources and access to legal assistance by the Indian community, lax enforcement by the Department of Justice, the isolation of the Indian community, and the debilitating legacy of years of discrimination by the federal and state governments contributed to the lack of enforcement of the Voting Rights Act. But where litigation has occurred, courts have invariably found patterns of widespread discrimination against Indians in the political process.

2006 RENEWAL OF THE VOTING RIGHTS ACT

The Voting Rights Act of 1965 was never meant as a quick fix. Recognizing that many states, counties, and cities continued to erect barriers to minority political participation, no fewer than four presidents—Nixon, Ford, Reagan, and George H.W. Bush—supported the expansion of key parts of the law. But three crucial sections of the act were set to expire in 2007, and the persistent and pervasive voting discrimination that American Indians continue to face factored heavily in Congress’s decision to renew the special provisions of the Voting Rights Act in 2006. During lengthy hearings before the U.S. Senate and the House of Representatives, dozens of individuals, including elected officials, tribal leaders, and ACLU lawyers, testified and presented evidence that American Indians continue to face substantial barriers to equal opportunities for political participation.³⁵

The participation of tribal members in the fight for reauthorization was crucial. Gwen Carr, a member of the Heron Clan of the Cayuga Nation of New York, and the founder of the Wisconsin American Indian Caucus, a statewide voter education and empowerment project, explained that because of local legislative barriers in many states, “the only remedy for American Indians and the only means by which we can exert our right to vote has been the Voting Rights Act



President George W. Bush signs the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006. *White House photo by Paul Morse*

of 1965.” She testified that the sections of the Voting Rights Act that provide for federal election examiners and observers are vital in ensuring Indian voters have the knowledge and tools necessary to exercise their right to vote.³⁶

Elected officials representing Indian constituencies also helped make the case for renewal of the act by documenting discrimination against Indian voters. Carol Juneau, a member of the Montana Legislature who represents an area that includes most of the Blackfeet Reservation, and herself a member of the Hidatsa and Mandan Tribes, has been committed to the political empowerment of Indian people for many

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Left to right: Gwen Carr; Carol Juneau; Laughlin McDonald; Bryan Sells

years. While voting rights litigation has helped Montana move toward greater representation of American Indians in state government, Juneau testified, “Indian people are far from equitably represented in county government systems, school boards, city governments, and all those other policy making bodies that make decisions that impact all people in the state, including tribal communities.” Juneau detailed voting discrimination experienced by members of the Crow, Northern Cheyenne, and Confederated Salish and Kootenai Tribes. Indian voters continue to be disfranchised, she said, by discriminatory voter registration procedures, unnecessary identification requirements, discrimination by poll workers, and the lack of language assistance.³⁷

The ACLU also played an important role in the successful effort to extend and amend the Voting Rights Act, and much of the evidence presented to Congress was specific to the issues affecting American Indian voters. Director of the ACLU’s Voting Rights Project Laughlin McDonald testified before both the U.S. Senate and House, presenting some of his articles regarding the protection afforded Indian voters by the Voting Rights Act. In his Senate testimony, McDonald

highlighted findings of intentional discrimination against Indians in the South Dakota case of *Cottier v. City of Martin*. “The history of discrimination reported in that decision and other decisions in Indian country really underscore the ongoing nature of discrimination,” he said.³⁸ Bryan Sells, another attorney for the ACLU’s Voting Rights Project, presented evidence of some state officials’ complete disregard of Native American voting rights. “Until those attitudes change,” he testified, “Native Americans will continue to need every bit of protection that the Voting Rights Act affords to them.”³⁹

Indians continue to face voting discrimination throughout our country. The ACLU is proud to have been a partner with tribal leaders and elected officials in telling that story before Congress. And we are pleased that legislators heard the evidence and renewed the special provisions of the Voting Rights Act, an important step in continuing to combat voting discrimination against Indians and others. The challenge now is to utilize the legal protections preserved in the Voting Rights Act and enhance Indian political participation at all levels of government.

ENFORCING THE LAW: VOTING RIGHTS ACT SECTION 2

A key provision of the Voting Rights Act, known as Section 2, prohibits any voting practice that results in discrimination, that is, any practice that provides minorities with “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”⁴⁰ Section 2 reaches both vote denial and vote dilution on the basis of race, color, or membership in a language minority.⁴¹

DENYING INDIANS THE RIGHT TO VOTE

The hallmark of vote denial is, of course, any practice that actually prevents minority voters from casting a ballot or having their votes counted.

A classic example of vote denial is the case of *United States v. Day County, South Dakota*.⁴² In 1993, officials in Day County decided to create a sanitary district near the Enemy Swim Lake. (A sanitary district is a special, limited-purpose government charged with constructing and maintaining sewers and storm drains.) The county drew the district’s boundaries so that the district included only 13% of the land around the lake—all of it owned by non-Indians. The county intentionally excluded the remaining 87% of the land, which was owned by the Sisseton-

Wahpeton Sioux Tribe and approximately 200 of its members. As a result, all of the voters in the district were white. The United States sued the county, and the case was eventually settled. As part of the settlement agreement, both the county and the district admitted the district’s boundaries unlawfully denied Indian citizens’ right to vote, and they agreed to redraw them to include the Indian land.⁴³

AT-LARGE ELECTIONS: DILUTING INDIAN VOTING STRENGTH

The practice of switching from district to at-large elections was widespread in the South following passage of the Voting Rights Act. At-large elections are those in which candidates are elected by the entire electorate rather than by district; in such a case, a minority group may have its votes diluted because the majority group will usually have enough votes to defeat the minority group’s candidates of choice. But if the same jurisdiction is divided into smaller election districts, a minority group may be able to comprise a majority in one or more of the districts and be able to elect its candidates of choice.

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The Supreme Court interpreted Section 2 in the 1986 landmark case of *Thornburg v. Gingles* and identified three factors, now commonly known as the *Gingles* factors, which are used to determine whether the composition of an election district violates the law. Under this test, a court must consider: (1) whether the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) whether the “minority group ... is politically cohesive,” that is, whether it tends to vote as a bloc and support the same candidate(s); and (3) whether “the majority votes sufficiently as a bloc to enable it—in the absence of special circumstances ... usually to defeat the minority’s preferred candidate.”⁴⁴

The ultimate determination under Section 2 is whether, based on “the totality of the circumstances,” there has been a violation of the statute.⁴⁵ It would be “the very unusual case” in which plaintiffs established the three *Gingles* factors but still failed to establish a violation.⁴⁶

BIG HORN COUNTY, MONTANA

The first Section 2 challenge in Montana was brought in Big Horn County in 1983. When the plaintiffs, members of the Crow and Northern Cheyenne Tribes represented by the ACLU, filed the complaint, no Indian had ever been elected to the county commission or school board, despite the fact that Indians constituted 41% of the county’s voting age population.

The plaintiffs contended that the at-large election of county commission and school board members allowed the white majority to control the outcomes and prevented Indian

voters from electing candidates of their choice. Following a lengthy trial, the district court issued a detailed order in 1986 finding that the at-large system diluted Indian voting strength in violation of Section 2. After making extensive findings regarding the level of discrimination and polarization in Big Horn County—a short sample includes: “racial bloc voting in” the county, “laws prohibiting voting precincts on Indian reservations,” and “discrimination in hiring”—the court concluded that “this is precisely the kind of case where Congress intended that at-large systems be found to violate the Voting Rights Act.”⁴⁷ Following the implementation of single-member districts, an Indian (from a majority Indian district) was elected to the county commission for the first time.

BLAINE COUNTY, MONTANA

Located in north central Montana, Blaine County is 45% Indian and home to the Fort Belknap Reservation (Gros Ventre and Assiniboine). In November 1999, the United States sued the county for its use of at-large elections, which were alleged to dilute Indian voting strength.⁴⁸ Both the district court and court of appeals agreed that the system violated Section 2 of the Voting Rights Act. Indians were geographically compact and politically cohesive, and whites voted as a bloc to defeat the candidates preferred by Indian voters.

The courts concluded: (1) there was a history of official discrimination against Indians, including “extensive evidence of official discrimination by federal, state, and local governments against Montana’s American Indian population;”

(2) there was racially polarized voting that “made it impossible for an American Indian to succeed in an at-large election;” (3) voting procedures, including staggered terms of office and “the County’s enormous size [which] makes it extremely difficult for American Indian candidates to campaign county-wide,” enhanced the opportunities for discrimination against Indians; (4) depressed socio-economic conditions existed for Indians; and (5) there was a tenuous justification for the at-large system, in that state law did not require at-large elections, and the county government depended heavily on its districts for other purposes including “road maintenance and appointments to County Boards, Authorities and Commissions.”⁴⁹

Tribal members, represented by the ACLU, were permitted to intervene at the remedy stage of the case. The court adopted a single member district plan, and at the next election an Indian was elected from a majority Indian district.

The Mountain States Legal Foundation represented Blaine County on the condition the defendants allow it to challenge the constitutionality of Section 2 as applied in Indian country. Both the district court and the court of appeals rejected the foundation’s arguments and held Section 2 was a valid exercise of congressional authority to enforce the Fourteenth and Fifteenth Amendments.

TOTALITY OF CIRCUMSTANCES

The most important factors a court considers when assessing “the totality of circumstances” include the extent to which minorities have been elected to public office, and the extent to which elections are racially polarized.¹ Other factors to consider include:

a history of voting-related discrimination in the state or political jurisdiction;

the use of racial appeals in political campaigns;

the exclusion of minorities from slates of candidates;

the degree to which past discrimination in such areas as education, employment, and health has hindered the ability of minorities to participate effectively in the political process;

and the use of voting practices that may enhance the opportunity for discrimination against minorities.²

¹ Thornburg v. Gingles, 478 U.S. 30, 48 n. 15 (1986).

² Id. at 36-37.



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ROSEBUD COUNTY AND RONAN SCHOOL DISTRICT 30, MONTANA

Indians, represented by the ACLU, sued Rosebud County and Ronan School District 30 in Flathead County for their use of at-large elections. Rather than face prolonged litigation, the two jurisdictions entered into settlement agreements adopting district elections.⁵⁰

The difficulty Indians have experienced in getting elected to office was particularly evident in Ronan School District 30. From 1972 to 1999, seventeen Indians had run for the school board, and only one, Ronald Bick, had been elected. With no formal or announced tribal affiliation at the time, Bick was elected to the board in 1990. But he was defeated for reelection in 1993, after it became known he had joined the Flathead Nation.

The settlement plan agreed to by the parties called for an increase in the school board size from five to seven members and the creation of a majority-Indian district that would elect two members to the board. In the election held under the new plan, two Indians were elected from the majority-Indian district.

MONTEZUMA COUNTY, COLORADO

Members of the Ute Mountain Ute Tribe in Montezuma County, Colorado, represented by the ACLU, brought a successful challenge in 1989 to the at-large method of electing their local school board. During this case the court made extensive findings of past and continuing discrimination against Indians in voting and other areas.

Throughout much of the 19th Century, the court found, "[t]he battle cry in Colorado seemed to be

to exterminate the Indians." The governor issued an appeal on August 10, 1864, for "the people to defend themselves and kill Indians." This anti-Indian sentiment precipitated a surprise attack three months later by the state volunteers on a Cheyenne and Arapahoe village at Sand Creek in eastern Colorado. "Newspapers of the day greeted reports of the massacre with unanimous approval." Citing the persistent efforts of whites to exterminate and remove the Utes and expropriate their land, the 1989 court said "[i]t is blatantly obvious" that Native Americans "have been the victims of pervasive discrimination and abuse at the hands of the government, the press, and the people of the United States and Colorado."⁵¹

Anti-Indian attitudes persisted in Colorado and Montezuma County into the 20th Century. Communities surrounding the Ute Reservation "treated Indians as second-class citizens. They were discouraged from attending public schools. Discrimination was rampant against Ute children. They were perceived to be unhealthy, unsanitary, and most of all, unwelcome." Among Indian tribes, the plight of the Ute Mountain Utes was especially dire. In the 1960s "there were only just over 900 tribal members and their infant mortality rate was so high that their death as a viable cultural group could be predicted."⁵²

But the attitude of whites changed somewhat after the tribe began to receive funds from oil and gas leases, as well as revenue from various federal programs and judgments before the U.S. Court of Claims reimbursing the tribe for land that had been ceded to the federal government in the late 19th Century at prices "so inadequate as to be unconscionable." Despite the economic benefit to the surrounding community from this influx of new funds, "[s]harply divided interests and attitudes over Indian rights remained . . .

and abuses abounded such as discrimination in law enforcement, health care, and employment as well as incidents of double pricing and disputes over hunting rights.” Disputes over land claims also remained. “Water rights and tribal sovereignty issues were hotly contested and the local populous made clear their continuing objections to the nonpayment of taxes by Indians. . . The public generally still harbored attitudes that Indians were lazy and not to be trusted.” The numerous and existing divides “made it extremely difficult for the Indians to establish any alliances with the whites in the cultural and political arena.”⁵³

Indians were not allowed to serve on juries in Montezuma County until 1956. And not until 1970 did the state amend its constitution to allow tribal members living on the reservation to vote. Until the late 1980s or early 1990s, Utes were not allowed to register to vote at the tribal headquarters at Towaoc, despite the fact the non-Indian population had satellite registration at several communities in the county. Prior to the trial of the case in 1997, no Indian had ever been elected to public office in Montezuma County.⁵⁴

The court concluded that the case met the three *Gingles* factors for violation of the law: Indians were geographically compact, politically cohesive, and candidates favored by them were usually defeated by whites voting as a bloc. The court also found “a history of discrimination—social, economic, and political, including official discrimination by the state and federal government,” and a depressed socio-economic status caused in part by the history of discrimination. As a remedy for the Section 2 violation, it ordered the creation of a single-member district plan for electing school board members, containing a majority-Indian district encompassing the reservation.

WAGNER COMMUNITY SCHOOL DISTRICT, SOUTH DAKOTA

Indian plaintiffs filed another Section 2 case in March 2002 against the at-large method of electing Wagner Community School District’s education board in Charles Mix County, S.D. The parties eventually agreed to replace it with cumulative voting—an election system in which voters are allowed to vote for the same person more than once when multiple people are running for multiple open seats. The court entered a consent decree on March 18, 2003.⁵⁵ At the next election, John Sully, an Indian, was elected to the board of education.

CITY OF MARTIN, SOUTH DAKOTA

Martin, the seat of Bennett County, has a population of just over 1,000 people, nearly 45% of whom are Indian. Like many border towns, the city, near the Pine Ridge and Rosebud Reservations, has had its share of racial conflict. In the mid-1990s, deep racial divisions occurred over the homecoming ceremony at the local high school in which male students designated as the “Big Chief” and “Little Chief” selected a “Princess” in a mock Indian ceremony while wearing traditional Indian regalia. Also in the mid-1990s, the federal government successfully sued the local bank for systematic lending discrimination against Indians.⁵⁶ In early 2002, Indians organized two peaceful marches in Martin to protest what they viewed as racial discrimination and police brutality by the non-Indian sheriff and his deputies.

Just weeks after the 2002 march, the ACLU sued the city on behalf of two Indian voters,

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Indian Protestors in the City of Martin, South Dakota, 2002.

alleging that its recently adopted redistricting plan violated the constitutional principle of one person, one vote.⁵⁷ The city responded by changing its plan, but it did so in a way that fragmented the Indian community and gave white voters an overwhelming supermajority in all three council wards. The city also refused to reopen the candidate qualification period so that prospective candidates could decide whether to run under the new redistricting plan.

After a hearing in May 2002, the district court held on technical grounds that the plaintiffs could not challenge the city's decision not to reopen the candidate qualification period because none of the plaintiffs had expressed an intention to run for office under the new plan. The court did, however, allow the plaintiffs to amend their complaint to allege the new plan violated Section 2 of the Voting Rights Act as well as the Constitution.

After more than two years of discovery, the case went to trial in June 2004. The plaintiffs demonstrated, among other things, that no Indian-preferred candidate had ever been elected to the city council under the challenged plan. The court nonetheless ruled against the plaintiffs in March 2005, finding on the basis of county elections that the plaintiffs had not satisfied the third *Gingles* factor, that the majority votes sufficiently as a bloc. While Indians are a minority in Martin, they are the majority in Bennett County.

The plaintiffs appealed and, on May 5, 2006, the Eighth Circuit reversed the decision of the district court. It held that "plaintiffs proved by a preponderance of the evidence that the white majority usually defeated the Indian-preferred candidate in Martin aldermanic elections." The court described this evidence as "striking proof of vote dilution in Martin." The court also noted

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the history of ongoing discrimination against Indians in Martin:

For more than a decade Martin has been the focus of racial tension between Native-Americans and whites. In the mid-1990s, protests were held to end a racially offensive homecoming tradition that depicted Native-Americans in a demeaning, stereotypical fashion. Concurrently, the United States Justice Department sued and later entered into a consent decree with the local bank requiring an end to 'redlining' loan practices and policies that adversely affected Native-Americans, and censuring the bank because it did not employ any Native-Americans. Most recently, resolution specialists from the Justice Department attempted to mediate an end to claims of racial discrimination by the local sheriff against Native-Americans.

Finding that the plaintiffs had established all three factors for violation, the Eighth Circuit remanded the case to the district court to determine whether the plaintiffs were entitled to relief.⁵⁸

On remand, the district court found the city's redistricting plan "fragments Indian voters among all three wards, thereby giving Indians 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'"⁵⁹ The court concluded the plan diluted Indian voting strength and violated the law.

The district court gave the defendants the first opportunity to propose a remedy. The city refused, arguing instead that no remedy was possible. The district court disagreed and, in February 2007, issued a remedial order requiring the city to hold future elections using a cumulative voting system.⁶⁰

The city appealed, and that appeal remains pending.⁶¹ Notwithstanding the appeal, the city held its first round of elections under the remedial plan in June 2007. Three pro-Indian candidates ran unopposed and now sit on the Martin City Council.

FREMONT COUNTY, WYOMING

Eastern Shoshone and Northern Arapaho members living on the Wind River Indian Reservation in Fremont County, Wyoming, filed suit in 2005 challenging at-large elections for the five-member county commission.⁶² Although Indians account for 20% of county's population, none had ever been elected to the commission, despite numerous Indian candidates who had the overwhelming support of Indian voters. At the next election in 2006, however, an Indian, Keja Whiteman, won election with 42% of the white vote, more white support than any Indian candidate had ever received. Whiteman was a qualified candidate and enjoyed the support of Indian voters, but it was her strong opposition to district elections that apparently earned her a lot of white votes.

Whiteman did not initially take a position on district versus at-large elections for the county commission. But during the course of the campaign, she said, some candidates talked

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about a “division of Fremont County, and that did not appeal to me at all, and so I took, I think, a real open stand that I was running to unify rather than divide the county.”⁶³

Her support of at-large elections got her “a lot of attention,” she said, “from people at the grocery store, from people at forums. Whenever I was out and about people were really interested in the idea of unifying the county.”⁶⁴ James Large, one of the plaintiffs in the vote dilution lawsuit, said the case “had a lot of impact” on Whiteman’s election. He believes her election was going to be used “to defuse the issue of the lawsuit.”⁶⁵

Whiteman admitted that the issue of district elections in Fremont County was racially charged. She said the objections to district elections she heard have come from the “non-Indian community,” and that “the majority of the racism that I see is coming from the non-Native community.”⁶⁶

At the trial in February 2007, plaintiffs produced evidence of geographic compactness, political cohesion, racially polarized voting, few Indian elected officials, racial campaign appeals, past and continuing discrimination against Indians, and the deep racial divide that exists in Fremont County. The case is awaiting decision.

ENFORCING SECTION 5 OF THE VOTING RIGHTS ACT

One of the temporary provisions of the Voting Rights Act, Section 5 applies to a limited number of jurisdictions in the United States (see side bar, page 13). Due to a history of inequitable voting practices, these jurisdictions must submit proposed changes in voting laws or procedures. Local federal courts have the power and duty to prohibit the use of any voting practice that has not been precleared, but they cannot determine whether a change should be approved.⁶⁷ That decision is reserved for the District of Columbia court or the U.S. Attorney General. Section 5 also places the burden of proof on the jurisdiction to show that a proposed voting change does not have a discriminatory purpose or effect.⁶⁸ This shifts the advantages of inertia and the delay associated with litigation from the victims of discrimination to the jurisdictions that practiced it.

ONE STATE'S REFUSAL TO COMPLY WITH SECTION 5

As a result of the 1975 amendments of the Voting Rights Act, two South Dakota counties, Shannon and Todd, home to the Pine Ridge and Rosebud Indian Reservations respectively, became subject to preclearance.⁶⁹ Eighteen counties in the state, because of their significant Indian populations, were also required to conduct bilingual elections:

Bennett, Codington, Day, Dewey, Grant, Gregory, Haakon, Jackon, Lyman, Marshall, Meade, Mellette, Roberts, Shannon, Stanley, Todd, Tripp, and Ziebach.⁷⁰

This outraged South Dakota's attorney general, William Janklow. 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 rights movement, he condemned the Voting Rights Act as an unconstitutional federal encroachment that rendered state power "almost meaningless." He quoted 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." And he 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."⁷¹ When a U.S. Commission on Civil Rights report confirmed that South Dakota has violated the civil rights of Native Americans, Janklow called the report "garbage."⁷²

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Indian tribes' dislike for South Dakota Attorney General William Janklow goes back to the early '70s, when he prosecuted American Indian Movement activists. He told reporters at the time: "The only way to deal with these AIM leaders is to put a bullet in their heads."

Complying with Janklow's opinion, state officials 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 effecting elections or voting in Shannon and Todd Counties but submitted fewer than ten for preclearance.

The Department of Justice, which has primary responsibility for enforcing Section 5, was aware of South Dakota's failure to comply with its preclearance requirement. It had sued the state in 1978 and 1979 for its failure to submit for preclearance reapportionment and county reorganization laws affecting the covered counties.⁷³ But after that, the department turned a blind eye to the state's failure to comply.

A number of the voting changes that South Dakota enacted after it became covered by Section 5, but which it refused to submit for pre-clearance, had the potential for diluting Indian voting strength. One was authorization for municipalities to adopt numbered seat requirements, which, as the Supreme Court has noted, disadvantages minorities because it creates head-to-head contests and prevents a cohesive political group from single-shot voting, or "concentrating on a single candidate."⁷⁴ Another change was the requirement of a majority vote for nomination in primary elections for U.S. Congress and state governor. Such a requirement can "significantly" decrease the electoral opportunities of a racial minority by allowing the numerical majority to prevail in all elections.⁷⁵

The state also refused to submit its 2001 legislative redistricting plan for preclearance, despite the fact that it effected Todd and Shannon Counties. Alfred Bone Shirt and three other Indian residents from Districts 26 and 27, with the assistance of the ACLU, sued the state in December 2001 for its failure to do so.

A three-judge court was convened to hear the plaintiffs' claim. The state argued that since district lines had not been significantly changed insofar as they affected Shannon and Todd Counties, there was no need to comply with Section 5. The court disagreed. It held "demographic shifts render the new District 27 a change 'in voting' for the voters of Shannon and Todd counties that must be precleared."⁷⁶ The state submitted the plan to the U.S. Attorney General who precleared it, apparently concluding the additional packing of Indians in District 27 did not have a retrogressive effect. But as

discussed below, a federal court later found the precleared plan in violation of Section 2 of the Voting Rights Act.

As for the other 600-odd unsubmitted voting changes, Elaine Quick Bear Quiver and several other members of the Oglala and Rosebud Sioux Tribes in Shannon and Todd Counties, represented by the ACLU, brought suit against the state in August 2002. Following negotiations among the parties, the court entered a consent order in December 2002, in which it immediately forbid implementation of the numbered-seat and majority-vote requirements absent preclearance and directed South Dakota to develop a comprehensive plan “that will promptly bring the State into full compliance with its obligations under Section 5.”⁷⁷ Under the plan, the state made its first submission in April 2003, and completed the process in the summer of 2006.

INDIAN TESTIMONY

Some of the most compelling testimony in the *Bone Shirt* case came from tribal members who recounted numerous incidents of mistreatment, embarrassment and humiliation by whites. Their testimony illustrated the animosity that continues to exist between the Indian and white communities in South Dakota and demonstrates how such divisions are manifest in many ways, including patterns of racially polarized voting.

Elsie Meeks, a tribal member at Pine Ridge reservation in South Dakota, is the first Indian to serve on the U.S. Commission on Civil Rights. In her testimony, she detailed her first exposure to the non-Indian world, her first realization “that there might be some people who didn’t think well of people from the reservation.” While riding the bus to a predominantly white school in Fall River County, where she and her sister had enrolled, “somebody behind us said . . . the Indians should go back to the reservation. And I mean I was fairly hurt by it,” Meeks recounted, “it was just sort of a shock to me.” She also noted a “disconnect between Indians and non-Indians” in the state. “[W]hat most people don’t realize is that many Indians . . . experience this racism in some form from non-Indians nearly every time they go into a border town community,” she said. “[T]hen their . . . reciprocal feelings are based on that, that they know, or at least feel, that the non-Indians don’t like them and don’t trust them.”¹

When Meeks was a candidate for lieutenant governor in 1998, she felt welcome “in Sioux Falls and a lot of the East River communities.” But in the towns bordering the reservations, the reception “was more hostile.” There, she ran into “this whole notion that . . . Indians shouldn’t be allowed to run on the statewide ticket and this perception by non-Indians that . . . we don’t pay property tax . . . that we shouldn’t be allowed [to run for office.]” A member of the state legislature even expressed such views, saying he would be “leading the charge . . . to support Native American voting rights when Indians decide to be citizens of the State by giving up tribal sovereignty and paying their fair share of the tax burden.”²

Craig Dillon, an Oglala Sioux Tribal Council member and member of the Bennett County Civil Rights Commission, told of his experience playing on the county high school’s varsity football team. After practice, team members would hang out at the home of the mayor’s son. The mayor, however, interviewed Dillon in his office to see if he was, according to Dillon, “good enough” to be a friend of his son’s. He flunked the interview. “I guess I



Elsie Meeks

didn’t measure up because . . . I was the only one that wasn’t invited back to the house after football practice after that.” The experience, Dillon testified, was “pretty demoralizing.”³

Lyla Young, who grew up in Parmelee, said the first contact she had with whites was when she attended high school in Todd County. The Indian students lived in a segregated dormitory at the Rosebud boarding school and were bussed to the high school, then bussed back for lunch at the dorm, then bussed again to the high school for the afternoon session. The white students referred to the Indians as “GI’s,” for “government issue.” “I just withdrew. I had no friends at school. Most of the girls that I dormed with didn’t finish high school,” Young said. “I didn’t associate with anybody.” Even today, Young has little contact with the white community. “I don’t want to. I have no desire to open up my life or my children’s life to any kind of discrimination or harsh treatment. Things are tough enough without inviting more.” Testifying in court was particularly difficult for her. “This was a big job for me to come here today,” she said. “I’m the only Indian woman in here, and I’m nervous. I’m very uncomfortable.”⁴

1 *Bone Shirt v. Hazeltine*, 336 F.Supp.2d. 976, 1032, 1036 (D.S.D. 2004).

2 *Id.* at 1035-36, 1046 (comments of Rep. John Teupel).

3 *Id.* at 1032.

4 *Id.* at 1033.

“CRACKING, STACKING, AND PACKING”: DILUTING VOTING STRENGTH THROUGH REDISTRICTING

Redistricting refers to the process of redrawing the lines of voting districts. This process usually takes place after each ten-year census and is required for all jurisdictions and legislative bodies that use districts, including U.S. Congress, state legislatures, county commissions, school boards, and city or town councils. In the past, many jurisdictions have refused to redistrict because it would reduce the over-representation enjoyed by rural areas under existing malapportioned plans. In a series of cases in the 1960s, the Supreme Court held that the Fourteenth Amendment guarantees “equality” of voting power (“one person, one vote”) and electoral systems that do not secure such population equality violate the constitution.

For state and local districts, the principle of one person, one vote requires the jurisdiction to make “an honest and good faith effort” to construct electoral districts of as nearly equal population as is practicable.⁷⁸ Congressional districts are held to even stricter population equality standards than other legislative districts and must be “as mathematically equal as reasonably possible.”⁷⁹ But the process of determining inequality is the same: by calculating a district’s deviation, in terms of a percentage, from an ideal district size. The deviation of the smallest district is then added to the deviation of the largest district to determine

a plan’s total deviation. For non-Congressional districts, legislative plans with a total deviation greater than 10% are generally regarded as unconstitutional, unless they can be “based on legitimate considerations.”⁸⁰ Congressional districts can be drawn with virtually no deviation at all and deviations of less than 1% have been found to be in violation of “one person, one vote.”

Though correcting malapportionment is the primary concern for redistricting, jurisdictions are still required to comply with the Voting Rights Act’s mandate that the new district plan not dilute minority-voting strength. Three techniques frequently used to dilute minority-voting strength are “cracking,” “stacking,” and “packing.” “Cracking” refers to fragmenting concentrations of minority population and dispersing them among other districts to ensure that all districts are majority white. “Stacking” refers to combining concentrations of minority population with greater concentrations of white population, again to ensure that districts are majority white. “Packing” refers to concentrating as many minorities as possible in as few districts as possible to minimize the number of majority-minority districts. All of these techniques may result in a districting plan that violates the Voting Rights Act as well as the Fourteenth Amendment.⁸¹

CHARLES MIX COUNTY, SOUTH DAKOTA

In 2005 the ACLU filed suit against Charles Mix County on behalf of four members of the Yankton Sioux Tribe, alleging that the three districts for county commission were malapportioned and had the purpose and effect of diluting Indian voting strength. According to the 2000 Census, the population of the districts deviated from equality by almost 20%—twice the presumed unconstitutional limit—and no Native Americans had ever been elected from the districts even though the county’s population was approximately one-third Indian.⁸²

In response to the lawsuit, and in an effort to avoid compromise with the Indian plaintiffs, the county first asked state lawmakers to pass special legislation to allow the county to redraw its districts without court intervention.⁸³ When that effort stalled, the county then tried to defend the inequality by claiming the deviation was necessary to avoid splitting townships between districts.⁸⁴

The district court rejected the defendants’ explanation. Pointing to maps produced by the plaintiffs, the court found the county could have achieved almost perfect population equality among the districts without splitting any townships. The court then ruled in the plaintiffs’ favor and gave the defendants an opportunity to redraw the districts.⁸⁵

The county ultimately adopted a redistricting plan the ACLU had proposed on behalf of the Yankton Sioux Tribe in 2001. The plan created one majority-Indian district out of three, with an Indian voting-age population of just over 60%.⁸⁶

The county held its first election under the new plan in 2006. Sharon Drapeau, a tribal member and one of the plaintiffs in the lawsuit, defeated a non-Indian challenger in the democratic primary and went on to win unopposed in the general election. She took office in January 2007.

Shortly after the court ruled in the plaintiffs’ favor, however, voters who had opposed Indian representation on the county commission began circulating a petition to increase the number of commissioners from three to five. Circulators gathered enough signatures to put the measure on the ballot, and county voters approved the measure in November 2006. The county subsequently redrew its districts in early 2007, creating one majority-Indian district out of five, thus diluting Indian voting strength and minimizing the presence of Indians on the commission. The first election under the five-member plan was scheduled for 2008.

Even though the court ruled in the plaintiffs’ favor on their malapportionment claim, the plaintiffs’ other claims remained pending. They were settled by an agreement that the county would be subject to Section 5 until 2024.⁸⁷ Pursuant to the agreement the county submitted its five member plan for preclearance, which was objected to by the Department of Justice. It concluded that the county failed to show that the plan did not have a discriminatory purpose. As a result of the objection, the three member plan remains in effect.

THURSTON COUNTY, NEBRASKA

Thurston County in eastern Nebraska is home to members of the Omaha and Winnebago Tribes, who in 1975 made up approximately 28% of the county's population. In the past, the county had elected its board of supervisors from districts. But after the election of an Indian in 1964, and passage of the Voting Rights Act the following year, the county abandoned its district system and, in 1971, adopted at-large elections.

Seven years later, in 1978, the United States sued Thurston County alleging that its adoption of at-large elections diluted Indian voting strength. While specifically denying liability, the county entered into a consent decree in which it returned to district voting and adopted a plan containing two (out of seven) majority-Indian districts. The county also consented to being placed under Section 5 for five years so that its compliance with the court's order could be "more effectively monitored."⁸⁸

The 1990 census showed the Indian population in Thurston County had grown to nearly 44% and that the districts were malapportioned. The county adopted a new plan, but it still contained only two majority-Indian districts. Indians were "packed" in those two districts at 88% and 97% respectively, leaving the other districts majority white. Tribal members, with the assistance of the ACLU, sued the county in 1993 alleging that the new plan diluted Indian voting strength in violation of the Voting Rights Act and the constitution. They sought the creation of a third majority-Indian district to reflect the county's increase in Indian population.

In ruling for the plaintiffs, the district court found: "Native Americans vote together and choose Native American candidates when given the opportunity;" "whites vote for white candidates to defeat the Native American candidate of choice;" "it is obvious that Native Americans lag behind whites in areas such as housing, poverty, and employment;" and there was evidence of "overt and subtle racial discrimination in the community."⁸⁹ The court invalidated the at-large plan and held that plaintiffs were entitled to a new plan creating a third majority-Indian district. The court, however, dismissed similar challenges brought by the plaintiffs against a county school board and the board of trustees of the Village of Walthill because Indians were not sufficiently compact to form a majority in a single-member district. Both sides appealed, but the court of appeals affirmed the decision of the trial court.⁹⁰

1990 LEGISLATIVE REDISTRICTING IN MONTANA

Earl Old Person, chair of the Blackfeet Indian Tribe, and other tribal members in Montana brought suit in 1996 challenging the 1992 redistricting plans for the state house and senate. In *Old Person v. Cooney*, they contended that the plans diluted Indian voting strength in the area encompassed by the Blackfeet and Flathead Reservations where additional majority-Indian house and senate districts could be drawn.⁹¹

The preexisting plan contained only one majority-Indian district, and it fragmented the Indian population in other parts of the state by dividing the Fort Belknap Reservation between

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Earl Old Person

two senate districts, the Fort Peck Reservation among three senate districts, the Rocky Boy Reservation between two house districts, and the Blackfeet Reservation among four house districts. The Flathead Reservation was divided among *eight* house districts.

Based on the 1990 census, Indians comprised 6% of the total population and 4.8% of the voting age population of Montana. While the state population increased 1.6% between 1980 and

1990, the Indian population increased 27.9%. Approximately 63% of the Indian population lived on the state's seven Indian reservations. As a result of this growth, three majority-white districts under the 1982 plan had become majority Indian. Another district was approximately 50% Indian in light of the new census.⁹²

The Districting and Apportionment Commission appointed in 1990 consisted of five non-Indians. They held twelve hearings, preceded by work sessions, all of which were recorded on audiotapes and later transcribed for use at trial. The statements the commissioners made during their planning sessions, as opposed to those made during the public meetings, can only be described as overtly racial and showing an intent to limit Indian political participation.

Commission members ridiculed the redistricting proposals submitted by tribal members as "idiotic" and "a bunch of crap." As one commissioner said when he looked at a plan that would have created a majority-Indian district, "I can feel anger coming on and I might as well spew it here tonight . . . before tonight, I mean." They called the tribes' demographer, whom they had never met, a "jackass," "some turkey from God-Knows-Where," a "dingaling," and an "S.O.B." One commissioner said, if "that bugger" shows up at a meeting I'll toss him in the trees someplace." When a staff member mistakenly gave some of the commissioners blank pieces of paper instead of a tribal redistricting proposal, one commissioner remarked, "I got a blank one too . . . [t]his is typical of them Indians."⁹³

In response to requests from tribal members that any districting plan provide equal electoral

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opportunities to Indian voters, commission members suggested that all Indians in the state be packed in one district to minimize their voting strength. “Give them one District and we go from there,” said a commissioner. The Indians, according to another, didn’t know what was going on: “you get somebody that’s getting in there and stirring them up, yeah, they’ll get to thinking hell’s an icebox.” Another commissioner declared, “[i]f the federal government wants to redistrict Montana according to the Indian Tribes and the Reservations, they are going to have to do it. I am not going to do it.” When the commission felt obligated to draw a majority-Indian district, one commissioner lamented, “[w]e’re being had here, ladies and gentlemen.” Another added, “[a]nd we can’t do anything about it.” Placing white residents in a majority Indian district would, according to one, “emasculate” white voters.⁹⁴

Because of such polarization, white politicians are often reluctant to campaign openly or solicit votes on reservations for fear of alienating white voters. According to Joe MacDonald, one of the plaintiffs in the *Old Person* case and president of the Salish-Kootenai College at Flathead, when U.S. Representative Pat Williams, chair of a house education committee, visited the tribal college, he didn’t want any publicity and did not even want to attend a reception to meet faculty members. “He slid in the side door, he and I went around the campus, [he] went to his car and he was gone,” said MacDonald.⁹⁵ Another plaintiff, Margaret Campbell, echoed his comments:

Non-Indians come to the Native Americans for their support, but they would prefer that . . . we do not support them publicly among the non-Indian

community. For example, they don’t bring us bumper stickers and huge yard signs, that sort of thing. . . . If a non-Indian candidate were to make it known that they had the broad support of the Native American community, it would be the kiss of death to their campaign.⁹⁶

The plan ultimately adopted by the commission maintained the existing majority-Indian districts and created an additional one. It did not, however, create the additional house and senate seats in the area of the Flathead and Blackfoot Reservations sought by the plaintiffs.

Following a trial, the district court dismissed the complaint. The white bloc voting was not legally significant, it declared, and the number of legislative districts in which Indians constituted an effective majority was proportional to the Indian share of the voting age population of the state. It did note, however, a “history of official discrimination against American Indians during the 19th century and early 20th century by both the state and federal government.”⁹⁷

As for plaintiffs’ claim of intended discrimination, the court held that the plan had not been adopted with a discriminatory purpose, and it dismissed the derisive and condescending comments commissioners made about Indians as “moment[s] of levity.”⁹⁸

The plaintiffs appealed, and the court of appeals reversed the decision. It held that plaintiffs did establish the *Gingles* factors of vote dilution, and that “in at least two recent elections in Lake County . . . there had been overt or subtle racial appeals.”⁹⁹

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As for the anti-Indian comments made by the commissioners, the appellate court acknowledged they were “inflammatory,” but declined to reverse the ruling of the district court that there was no discriminatory purpose in the adoption of the commission’s plan.¹⁰⁰ An unwillingness of many local federal judges—who are, after all, political appointees—to find that members of their state or community committed acts of *purposeful* discrimination, and the unwillingness of appellate judges to reverse those decisions, underscore Congress’s wisdom in dispensing with any requirement of proving racial purpose to establish a violation of Section 2.

Prior to the decision of the court of appeals in 1999, however, the legislature appointed a new commission to redistrict the state in anticipation of the 2000 census. The four appointed members could not agree on the fifth member, who would serve as chair, so according to Montana law, the state supreme court made the appointment, choosing Janine Windy Boy, a Crow Indian who had been the lead plaintiff in the Big Horn County voting rights lawsuit. Having an Indian for the first time on the commission would ensure that the commissioners’ language would not be as “inflammatory” as it had been in the past. It would also help to ensure that Indians be treated fairly in the redistricting process.

The Attorney General of Montana, Mike McGrath, who was also counsel for the defendants, appeared before the commission at its meeting in April 2001 to discuss the *Old Person* case. He publicly acknowledged that the existing redistricting plan violated Section 2. According to McGrath:

I think ultimately that we will not prevail in this litigation; that the Plaintiffs will indeed prevail in the litigation . . . I think the Ninth Circuit opinion is fairly clear and I think it’s ultimately the state of Montana is going to have to draw a Senate district that is at least somewhat similar to that that the Plaintiffs have requested.¹⁰¹

Joe Lamson, another member of the commission, shared McGrath’s views. The 1992 plan “did result in voter dilution of our Native American population in Montana. And,” he said, “when you look at proportionality, they’re certainly entitled to another Senate district.”¹⁰²

After holding a series of hearings around the state, the commission agreed. It adopted a resolution to create additional majority-Indian house and senate districts in the region of the Blackfeet and Flathead Reservations.¹⁰³ It submitted its redistricting plan to the legislature for comments on January 6, 2003. The plan provided for 100 house districts, six of which were majority Indian, and 50 senate districts, three of which were majority Indian.¹⁰⁴

Both the house and senate immediately condemned the proposed plans and demanded that the commission adopt new ones. The house, in a resolution passed on February 4, 2003, charged that the plan was “mean-spirited,” “unacceptable,” and that “the legislative redistricting plan must be redone.” It also condemned the creation of majority-Indian districts as being “in blatant violation of the mandatory criterion that race may not be the predominant factor to which the traditional discretionary criteria are subordinated.”¹⁰⁵ The

senate leveled almost identical charges and concluded: “the legislative redistricting plan must be redone.”¹⁰⁶ The legislature then enacted a house bill, HB 309, which the governor signed into law on February 4, 2003, that sought to invalidate the commission’s plan and alter or amend provisions of the state constitution.

On February 5, 2003, the commission formally adopted its plan for legislative redistricting and filed it with the secretary of state Bob Brown. He, however, refused to accept it and on the same day filed a complaint against the commission in state court for declaratory judgment that the plan was unconstitutional and unenforceable for failure to comply with the population equality standard of HB 309.¹⁰⁷ Following a hearing, the state court ruled on July 2, 2003, that HB 309 was unconstitutional and that the secretary of state was required to accept the commission’s plan. Brown did not file a notice of appeal but accepted the commission’s plan. It thus became the state’s redistricting plan, superceding the 1993 plan and rendering the plaintiffs’ challenge to the prior plan moot.

As a result of the litigation, which spanned eight years, and despite the concerted opposition of the legislature and the secretary of state to the commission’s redistricting plan, following the 2004 election eight tribal members served as members of the Montana state house and senate, the most Indian members of any state legislature. A recent report by the First American Education Project described their success as “a testament [to] the power of Native voters at the smaller geographic and jurisdictional levels.”¹⁰⁸

WHITE RIGHTS: THE CONSTITUTION PARTY

So called “White rights” groups have proliferated in Montana, including Montanans Opposed to Discrimination (MOD), Citizens Rights Organization (CRO), Interstate Congress for Equal Rights and Responsibilities (ICERR), and Citizens Equal Rights Alliance (CERA). In general, these organizations advocate that the states should have exclusive jurisdiction over all non-Indians and non-Indian lands wherever located. The organizations are also interested in eliminating or terminating the Indian reservations and have clashed with the tribes over such specific issues as taxation, tribal sovereignty, hunting and fishing rights, water rights, and appropriation and development of tribal resources. Joe Medicine Crow, a Crow tribal historian and anthropologist, says the mentality of MOD is “do not give the Indians the opportunity to enjoy those rights that have been traditionally the white man’s rights, don’t let them have it.”¹

One political party gaining a foothold in Montana is the Constitution Party, which has a controversial, distinctly anti-Indian platform. According to its website,² its 2000 National Platform included: repeal of the Voting Rights Act; opposition to bilingual ballots; an end to all federal aid, except to military veterans; repeal of welfare; and abolishing the U.S. Department of Education.

In the 2000 General Election for the Montana legislature, eleven Constitution party candidates appeared on the ballot. They did poorly where they faced candidates from both major parties. But where they faced only one major-party candidate, they did better, with one candidate getting 25% of the vote. And in House District 73 in Lake County, home of the Flathead Reservation where the only major-party candidate was an Indian, the Constitution Party candidate got 49% of the total vote, 62% of the white vote, and came within 54 votes of being elected.³

¹ Windy Boy v. County of Big Horn, 647 F.Supp. 1002 (D.Mont. 1986), Tr. Trans. 113.

² See <http://www.constituionparty.com/ustp-p1.html>.

³ Old Person v. Cooney, No. CV-96-004-GF (D.Mont.), Report of Steven P. Cole, p. 18, Table 1; p. 20, Table 3.

REDISTRICTING BATTLES IN SOUTH DAKOTA

In the 1970s, a special task force consisting of the nine tribal chairs, four members of the legislature, and five lay people undertook a study of Indian/state government relations. One of its reports concluded that “[w]ith the present arrangement of legislative districts, Indian people have had their voting potential in South Dakota diluted.” It recommended creating a majority-Indian district in the area of Shannon, Washabaugh, Todd, and Bennett Counties.¹⁰⁹ Under the existing plan, there were 28 legislative districts, all majority white, none of which had ever elected an Indian. Thomas Short Bull, executive director of the task force and a member of the Oglala Sioux Tribe, said the plan gerrymandered the Rosebud and Pine Ridge Reservations by dividing them “into three legislative districts, effectively neutralizing the Indian vote in that area.” The legislature, however, ignored the task force’s recommendation. According to Short Bull, “the state representatives and senators felt it was a political hot potato. . . . [T]his was just too pro-Indian to take as an item of action.”¹¹⁰

After the 1980 census, the South Dakota Advisory Committee to the U.S. Commission on Civil Rights made a similar recommendation that the legislature create a majority-Indian district in the area of the Pine Ridge and Rosebud Reservations. In a report, the committee said the existing districts “inherently discriminate against Native Americans in South Dakota who might be able to elect one legislator in a single member district.”¹¹¹ And the Department of Justice, in its oversight capacity under Section 5, said it would not preclear any legislative redistricting plan that did not contain a majority-Indian district in

the Rosebud/Pine Ridge area. The state bowed to the inevitable and in 1981 drew a redistricting plan creating for the first time in its history a majority-Indian district, District 28, which included Shannon and Todd Counties and half of Bennett County.¹¹² Thomas Short Bull ran for the district’s senate seat the following year and was elected, becoming the first Indian to serve in South Dakota’s upper chamber.

After the next census in 1990, the South Dakota legislature adopted a new redistricting plan that divided the state into 35 districts and retained the majority-Indian district, renumbered as District 27, in the Todd/Shannon/Bennett Counties area. The plan also provided that each district—with one exception—would be entitled to one senate member and two house members elected at-large from within the district. The exception was new House District 28. The 1991 legislation determined that “in order to protect minority voting rights, District No. 28 shall consist of two single-member house districts.”¹¹³ District 28A included the Cheyenne River Sioux Reservation and portions of the Standing Rock Sioux Reservation. Indians, according to the census, comprised 60% of the voting age population in House District 28A and less than 4% of House district 28B.

Five years later, despite its pledge to protect minority voting rights, the legislature abolished House Districts 28A and 28B and required candidates for the house to run in District 28 at-large.¹¹⁴ The repeal took place after an Indian candidate, Mark Van Norman, won the Democratic primary in District 28A in 1994. A chief sponsor of repealing the legislation was Eric Bogue, the Republican candidate who defeated Van Norman in the general election.¹¹⁵

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The reconstituted House District 28 contained an Indian voting-age population of 29%. Given the prevailing patterns of racially polarized voting, which members of the legislature were surely aware of, Indian voters could not realistically expect to elect a candidate of their choice in the new district.

In 2000 Steven Emery, Rocky Le Compte, and James Picotte, residents of the Cheyenne River Sioux Reservation and represented by the ACLU, filed suit challenging this interim legislative redistricting plan.¹¹⁶ They claimed the changes in District 28 violated Section 2 of the Voting Rights Act, as well as the South Dakota Constitution, which mandated reapportionment every tenth year, but prohibited it in between. The South Dakota Supreme Court had expressly held “when a Legislature once makes an apportionment following an enumeration no Legislature can make another until after the next enumeration.”¹¹⁷ Before deciding the plaintiffs’ Section 2 claim, the district court certified the state law question to the South Dakota Supreme Court, which held that “the Legislature acted beyond its constitutional limits” in enacting the 1996 redistricting plan.¹¹⁸ It declared the plan null and void and reinstated the preexisting 1991 plan. At the ensuing special election ordered by the district court, Tom Van Norman was elected from District 28A, the first Indian in history to be elected from the Cheyenne River Sioux Indian Reservation to the state house.

Following the 2000 census, the South Dakota legislature divided the state into 35 state legislative districts, each of which elected one senator and two members of the House of Representatives.¹¹⁹ No doubt due to the litigation involving the 1996 plan, the legislature continued



Tom Van Norman

the exception of using two subdistricts in District 28. But the boundaries that included Shannon and Todd Counties, District 27, while altered only slightly, substantially changed its demographic composition. Indians were 87% of the population of District 27 under the 1991 plan, and the district was one of the most underpopulated in the state. Under the 2001 plan, Indians were 90% of the population, but the district was one of the most overpopulated in the state. Indians were more “packed,” or over concentrated, in the new District 27 than under the former plan. Had Indians been “unpacked,” they could have been a majority in a house district in adjacent District 26.

James Bradford, an Indian representative from District 27, proposed an amendment reconfiguring Districts 26 and 27; it would have

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retained the latter as majority Indian and divided the former into two house districts, one of which, District 26A, would have had an Indian majority. Bradford's amendment was voted down 51 to 16.¹²⁰

So the plaintiffs claimed the plan unnecessarily packed Indian voters in violation of Section 2 and deprived them of an equal opportunity to elect candidates of their choice. The district court, sitting as a single-judge court, heard plaintiffs' Section 2 claim and, in a detailed 144-page opinion, invalidated the state's 2001 legislative plan. The court found that 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." Local officials have regularly accused Indians involved in voter registration drives of engaging in voter fraud, accusations that, while proved to be unfounded, "intimidated Indian voters." According to Dr. Dan McCool, director of the American West Center at the University of Utah and an expert witness for the plaintiffs, the accusations of voter fraud were "part of an effort to create a racially hostile and polarized 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."¹²¹

The district court also found that "[n]umerous reports and volumes of public testimony document the perception of Indian people that they have been discriminated against in various ways in the administration of justice." Thomas Hennies, Chief of Police in Rapid City, said, "I personally know that there is racism and there

is discrimination and there are prejudices among all people and that they're apparent in law enforcement." Don Holloway, the Sheriff of Pennington County, concurred that prejudice and the perception of prejudice in the community were "true or accurate descriptions."¹²²

There was also "a significant lack of responsiveness on the part of elected officials to Indian concerns." Rep. Van Norman said, "when it comes to issues of race or discrimination, people don't want to hear that." One member of the legislature even accused Van Norman of "being racist" for introducing a bill requiring law enforcement officials to keep records of people they pulled over for traffic stops. The court concluded: "Indians in South Dakota bear the effects of discrimination in such areas as education, employment and health, which hinders their ability to participate effectively in the political process."¹²³

PERMITTED TO VOTE NOW: LANGUAGE PROTECTION FOR INDIAN VOTERS

Providing minority language assistance is one of the most important ways the Voting Rights Act ensures equal opportunities for Indian voters. Congress enacted the language assistance provisions of the act in 1975, realizing that “through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process.”¹²⁴ The provisions apply to persons who are American Indian, Alaska Natives, Asian American, or of Spanish heritage.¹²⁵ Congress also recognized “the inextricable relationship between educational disparities and voting discrimination. Even though a literacy test or other practice may be racially neutral on its face . . . it may disproportionately disadvantage minorities when applied to persons denied equal educational opportunities. That reasoning is fully applicable to English-only elections which, while racially neutral, may have an impermissible discriminatory impact.” Yet, while the language assistance provisions of the act seek to remedy the denial of voting rights, the purpose “is not to correct the deficiencies of prior educational inequality[;] it is to permit those persons disabled by such disparities to vote *now*.”¹²⁶

Jurisdictions covered by Section 203 (see side bar, page 12) are specifically required to provide

“any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots,” in both English and the applicable minority language. In the case of Indian communities with oral or historically unwritten languages, the jurisdiction must provide “oral instructions, assistance, or other information relating to registration and voting.”¹²⁷

Many Alaskan Natives and Indians, particularly the elders, continue to speak and conduct business in tribal languages, and historically, voter turnout by Alaskan Natives and Indians has been the lowest of any minority group in the United States. But the minority language provisions have helped dramatically increase registration and turnout by American Indians. Together with focused voter registration efforts, they have also resulted in a substantial increase in the number of Indian elected officials in many parts of the country.¹²⁸

The U.S. Department of Justice has so far brought most of the lawsuits to enforce the language provisions, bringing dozens over the last 25 years, including several on behalf of American Indians.¹²⁹ In *United States v. Bernalillo County, New Mexico*, for example, the Justice department brought suit to enforce language

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assistance provisions on behalf of Navajo Indians on the Cañoncito Reservation. The county had failed to comply with the Voting Rights Act in the areas of “dissemination of election information, voter registration, voter registration cancellation procedures, absentee voting, language assistance at the polls, and the training of polling officials.” The county admitted its liability and entered into a consent decree with the government, agreeing to undertake various measures to remedy its violations, including providing information, publicity, and assistance in the Navajo language, and employing a Native Language Coordinator to work for the county and implement its Navajo language election procedures. The remedial measures included making available audio tapes of Navajo language translations so that Navajo people using their language in its historically unwritten form would be assisted in making their voices heard at the polls.¹³⁰

The ACLU has been involved in using the language provisions to protect Indian voting rights both in its advocacy work and most recently in a new lawsuit filed in Alaska. In the case of *Nick v. Bethel, Alaska*, the ACLU of Alaska and the National ACLU’s Voting Rights Project joined forces with the Native American Rights Fund to challenge Alaska’s failure to comply with the language assistance provisions to the detriment



Yup'ik Fisherman. Photo by Roz Goodman.

of Alaska Natives who read and speak the Yup'ik language.¹³¹ It is well known that Yup'ik is widely used by more than 10,000 people in the Bethel area. The state has even provided translations of information about government services, but it has failed to comply with the Voting Rights Act by furnishing complete language assistance for Yup'ik speakers in elections.

Many of the Yup'ik have only a grade school education and are unable to read or speak English at all, let alone participate meaningfully in a voting process conducted exclusively in English. The language provisions are essential in ensuring that they have the assistance necessary to exercise their right to cast a meaningful ballot.

Prior to the 2008 election, the court granted plaintiffs a preliminary injunction requiring the state to provide language assistance to Yup'ik voters, including translators, sample ballots in Yup'ik, and a Yup'ik glossary of election terms. The ACLU is committed to enforcing equal voting rights on behalf of Alaskan Natives and American Indians.



Yup'ik Sled Builder. Photo by Roz Goodman.

FELON DISFRANCHISEMENT & INDIAN VOTERS

Despite the tremendous gains Indians have made in the area of voting rights, felon disfranchisement laws pose a threat to that progress due to the overrepresentation of Indians in the criminal justice system. Statistics from 2000 show that, although American Indians made up only 1.5% of the U.S. population, 4% of American Indians were under correctional supervision as opposed to 2% of whites.¹³² Such states as Washington, California, Arizona, and New York, all of which deny voting rights to a person convicted of a felony, are four of the ten states with the highest percentages of American Indians.¹³³ The issue of felon disfranchisement is therefore one that touches the American Indian community as much as any other racial minority group.

Section 2 of the Fourteenth Amendment of the U.S. Constitution provides that states may not deny voting rights to citizens who meet a state's voting qualifications (age and residence, for example) "except for participation in rebellion, or other crime," and it is up to the states to determine their own restoration process if they choose to enact one. The seminal case regarding felon disfranchisement is *Richardson v. Ramirez*.¹³⁴ In it, the Supreme Court held that California could exclude convicted felons from voting because "the exclusion of felons from

the vote has an affirmative sanction in § 2 of the Fourteenth Amendment."¹³⁵ But courts since have recognized that there are fundamental constitutional parameters states cannot overstep and have struck down disfranchisement laws that states enacted with racial animus or that resulted in gender discrimination.¹³⁶

Although felon disfranchisement litigation spans more than 100 years, only one case so far has been brought specifically on behalf of American Indians. In *Farrakhan v. Gregoire*,¹³⁷ Native American, African-American, and Hispanic plaintiffs sought to strike down Washington state's felon disfranchisement law as racially discriminatory. The plaintiffs produced evidence showing that: (1) law enforcement officials are more prone to racially profile and search minorities during traffic stops; (2) minorities are targeted for prosecution of serious crimes; and (3) minorities receive lengthier sentences than whites and, therefore, are overrepresented in prison populations. The plaintiffs maintained that the state's felon disfranchisement scheme results in minorities being denied the right to vote at much greater rates than whites and thus dilutes the overall voting strength of minority communities.

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A sign on the U.S. Penitentiary on Alcatraz Island, California.

During the first phase of the case, the district court dismissed the plaintiffs' constitutional claims and later found they failed to establish a violation.¹³⁸ The Ninth Circuit Court of Appeals, however, reversed the district court's ruling on the claim and held that a court must consider "how a challenged voting practice interacts with external factors such as 'social and historical conditions' to result in denial of the right to vote on account of race or color," and that "evidence of discrimination within the criminal justice system can be relevant to a Section 2 analysis."¹³⁹

On remand, the district court found that, even though racial bias existed in the state's criminal justice system, the plaintiffs failed to show a history of official discrimination against minorities in other areas of voting and, thus, still failed to support their Section 2 claim.¹⁴⁰ The plaintiffs have appealed the case, and the Voting

Rights Project filed an amicus brief arguing that the district court's finding of racial discrimination in the criminal justice system and its finding that such discrimination was inextricably tied to the overrepresentation of people of color who are disfranchised, was sufficient to establish a violation.¹⁴¹

Many states, including Washington, require ex-felons to pay all court-imposed legal financial obligations before being eligible for restoration of voting rights. Those obligations can include docket and filing fees, court costs, restitution, and costs of incarceration. In Washington State, more than 90% of felony defendants are indigent at the time of their charge.¹⁴² Nationally, 31.2% of American Indians—compared with 11% of whites—live below the poverty line.¹⁴³ It is not surprising, then, that many American Indians who accrue these legal financial obligations remain disfranchised long after having concluded their prison terms.

In 2006, the ACLU filed a lawsuit in Washington state court on behalf of indigent plaintiffs challenging the state practice of requiring such payment prior to restoring a felon's voting rights.¹⁴⁴ The lower court struck down the law as unconstitutional under the equal protection clause, reasoning that "there is simply no rational relationship between the ability to pay and the exercise of constitutional rights. There is no logic in the assumption that a person in possession of sufficient resources to pay the obligation immediately is the more law-abiding citizen."¹⁴⁵ The Washington Supreme Court, however, in a divided opinion, reversed the lower court's decision and held that, once convicted, felons no longer have a fundamental right to vote even upon completion of their sentences.

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The court also rejected the plaintiffs' argument that the financial requirement constituted wealth discrimination, finding that the law did not distinguish between rich and poor people but is applicable to all felons. Finally, the court ruled that there was a rational relationship between the requirement that obligations be fully paid and the state's interest in ensuring that felons complete all of the terms of their sentence before participating in the electoral process.¹⁴⁶

In addition to Washington and California, litigants have filed felon disfranchisement suits in New York, which, according to the 2000 Census, has an American Indian population of 82,461.¹⁴⁷ In *Hayden v. Pataki*, the court addressed the issue of whether New York's law disfranchising felons in prison or on parole had a disparate impact upon African-Americans and Hispanics in violation of the U.S. constitution, customary international law, and the Voting Rights Act.¹⁴⁸ During the litigation, the ACLU, along with several other organizations, filed an amicus brief on the plaintiffs' behalf. The court rejected all of the plaintiffs' arguments, reasoning that "Congress did not intend to apply the Voting Rights Act to felon disfranchisement statutes," and that such application "would alter the constitutional balance between the States and the Federal Government."¹⁴⁹ The court remanded the case, however, for further proceedings to determine whether the plaintiffs properly raised equal protection and Voting Rights Act claims challenging New York's policy of counting prisoners where they are incarcerated instead of the communities from which they come for census purposes.

Although the plaintiffs in *Hayden* decided not to pursue the census issue, it is one on which the

Census Bureau and such groups as the Prison Policy Initiative have been focusing. The federal government counts prisoners where they are incarcerated rather than the city or town from which they come and, in many instances, to which they plan to return after their release. Because census data is used to plan government programs and distribute grants, many have argued that this policy damages minority communities, which often lack sufficient funds to address problems with their educational systems and high unemployment rates.¹⁵⁰ One article estimated that some counties with prisons—which are not, of course, financially responsible for the maintenance of state and federal correctional facilities—have received millions more dollars than they would have had prisoners been counted in their own communities.¹⁵¹

One can also see the ramifications of the government's census policy in such states as South Dakota. There, 8.8 % of the population is of Native American descent, while they comprise 26.8 % of the state prison population.¹⁵² Because all of the six adult correctional facilities in South Dakota are located in counties that have a 90 % or greater white population, American Indian communities are losing money to predominately white ones.¹⁵³ By counting incarcerated American Indians as members of districts in which they are unwilling residents, and at the same time not allowing them to cast a vote in either their place of residence or where they have been counted in the census, the ability of Native American communities to influence elections in their districts is being artificially reduced.

The ACLU has not taken a position on the counting of prisoners because more research needs to be done regarding the national impact

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of changing this government policy. One area that needs more research, for example, is the current apportionment schemes for states with significant minority populations and the effect that prison populations had on the drawing of those schemes.



Photograph of a typical jail cell.

ELECTION DAY DISCRIMINATION

The 2000 presidential election in Florida showed the many things that can go wrong in an election. People were wrongly purged from the voter rolls. Voting machines failed. People who were registered were not allowed to vote. Centralized voter registration records were not accessible at the precinct level. People were not allowed to cast provisional ballots. Some of the polls did not open on time, some closed too early, and many were understaffed. People who were in line before the polls closed were not allowed to vote. Complications on election day, however, did not end in 2000. Similar mishaps and errors have been reported during subsequent elections, underscoring the continued need to scrutinize the electoral process.

ID REQUIREMENT

To much fanfare, Congress enacted the Help America Vote Act (HAVA)¹⁵⁴ in October 2002, containing a number of provisions designed to avoid a recurrence of the fiasco that took place during the 2000 presidential election in Florida. Despite a number of positive measures, HAVA unfortunately contains provisions that have enhanced opportunities for future harassment and intimidation of minorities through ballot security programs.

One section of HAVA requires anyone who has registered by mail and has not previously voted to present photo identification at the polls on election day or, as an alternative, a copy of a utility bill, bank statement, government check, or other government document that shows the voter's name and address. Those who fail to provide such identification must vote by special "provisional" ballot.

The act's ID requirement is problematic for several reasons. First, those who are minorities, poor, disabled, and elderly are less likely than other residents to have photo identification. Second, no evidence exists, other than anecdotal, that the new identification requirement is needed to reduce voter fraud. States with no such requirements prior to HAVA reported no greater incidence of voter fraud than states that had them. The new identification requirement is, in effect, a solution in search of a problem. It doesn't make it harder to commit fraud; it just makes it harder to vote. Third, the identification requirement provides another opportunity for ballot security proponents to single out minority and other voters at the polls. Unfortunately, many states have followed the lead of HAVA and enacted legislation requiring persons voting at the polls (as opposed to voting absentee) to produce a government issued photo

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identification. Lawsuits have been filed in many of these states, although the Supreme Court in 2008 upheld a challenge to Indiana's photo ID law.¹⁵⁵

BALLOT SECURITY

One of the recurring, but little reported or understood, scandals in American politics since passage of the Voting Rights Act is the discriminatory targeting of minority voters through so-called "ballot security" programs. Defenders of ballot security measures say they are necessary to prevent voter fraud and ensure that only those who are legally registered cast a ballot. But such initiatives have regularly been designed to suppress minority voting and have been driven not by concern for purity of the ballot, but by partisanship.

Prior to and during the 2002 elections, a flurry of allegations of discriminatory ballot security initiatives erupted around the country. Poll watchers in Pine Bluff, Arkansas, allegedly used bullying tactics—demanding identification and taking photos of voters—to keep early voters away from the polls in predominantly black precincts. In Michigan, there were complaints of "spotters," or party operatives, at heavily minority precincts who intimidated voters and suppressed turnout. In South Carolina, a lawsuit was filed the day before the election alleging that officials in Beaufort County had adopted a new, and unauthorized, policy of challenging voters solely on the basis that their registration address was a rural route or box number.

Federal and state officials in South Dakota issued a statement before the 2002 elections

that they were investigating alleged voter fraud in counties with significant Indian populations. The investigation was in response to a registration and get-out-the-vote campaign launched on the state's Indian reservations, where registration has historically been depressed. The state attorney general, working with the FBI, announced plans to send state and federal agents to question almost 2,000 new Indian registrants, many of whom were participating in the political process for the first time. County auditors cooperated in the investigation and subjected Indian registration to a special level of scrutiny. No similar effort was made to investigate new registrations in the other counties that had few Indian residents, even though they contained most of the new registrations in the state. No one was ever charged or convicted of voter fraud in South Dakota.

Following the 2002 elections, which saw a surge in Indian political activity, the legislature passed laws for additional voting requirements, including one requiring photo identification at the polls. Rep. Van Norman 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."¹⁵⁶ During the legislative debate on a bill that would have made it easier for Indians to vote, representatives made open hostile comments about 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."¹⁵⁷ Bennett County did not comply with the Voting Rights

PARTISANSHIP

In 1990, Republicans launched a comprehensive ballot security program in North Carolina during the heated U.S. Senate contest between Jesse Helms (R) and Harvey Gantt (D). The state board of elections released figures showing a significant increase in black voter registration throughout the state, and the Charlotte Observer published a poll showing that Gantt had an eight point advantage over Helms. To counter Gantt's lead, the Republicans adopted a ballot security program targeting minority voters.

In late October, party operatives mailed approximately 81,000 postcards to households with at least one registered Democrat in some 86 precincts throughout the state. Black voters comprised nearly 94% of the registered voters within the selected precincts. The cards were marked "address correction requested," and advised voters—falsely—that in order to vote they must have lived in the precinct for the previous 30 days. The card further warned that it was a federal crime punishable by up to five years in prison to give false information about residence to election officials.

A week later, the Republican Party mailed 44,000 similar postcards exclusively to black voters. As part of the ballot security scheme, they planned to use cards that were returned to challenge voters on election day.

After the election, the U.S. Department of Justice sued the North Carolina Republican Party and the Helms for Senate Committee over their ballot security program. The defendants, without admitting any wrongdoing, entered into a consent decree in which they agreed not to undertake similar ballot security programs without the express approval of the court.

Republicans, of course, are not the only party to engage in ballot security and minority-vote suppression. Democrats in the aftermath of Reconstruction raised minority vote suppression to an art form through adoption of such devices as the white primary, the poll tax, literacy and good character tests, property ownership requirements, felon disfranchisement, and onerous durational residency requirements. More recently, Demo-

crats have excluded blacks from party leadership positions, conducted elections on a racially segregated basis, and implemented discriminatory full slate ballot requirements to deprive black voters of the opportunity to single shot vote (which allows a minority group to concentrate its votes on one or two candidates in a multi-seat contest and thus maximize their chances for election).

Prior to the 2002 general election, the U.S. Department of Justice announced that it had formed a Voting Integrity Initiative to deal with voter fraud, which raised concerns among civil rights groups that the initiative might be used for partisan purposes or might unfairly target minority voters. Republican officials in Florida, New Mexico, Pennsylvania, Washington, Ohio, Wisconsin, and South Dakota made similar claims of widespread fraud and abuse in voting. But in April 2007, the New York Times reported that five years after the Bush administration began its crackdown on voter fraud, it had turned up virtually no evidence of any organized effort to skew or corrupt federal elections¹ While a few instances of individual wrongdoing existed, most were the result of confusion about eligibility to vote. And most of those charged were Democrats.

¹ New York Times, "In 5-Year Effort, Scant Evidence of Voter Fraud," April 12, 2007.

Act provisions requiring it to provide minority language assistance to Indian voters until the 2002 elections. It did so then only because it was directed to by the Department of Justice.¹⁵⁸

Existing federal laws make it a crime to intimidate or harass minority voters. But given the lax enforcement of those laws—there is no record of the purveyors of any ballot security programs ever being federally prosecuted for interfering with the right to vote—a more promising way to deal with the excesses of ballot security initiatives may be private-damage actions brought by those who have been victims. A federal court in Arkansas recently awarded damages ranging from \$500 to \$2,000, payable by individual poll officials, to seven black voters who had been unlawfully challenged, harassed, denied assistance in voting, or purged from the rolls in the Town of Crawfordsville.¹⁵⁹ Making poll officials and others pay when they interfere with the right to vote could prove to be the best guarantee of real ballot security.

The goal of the nation's voting laws should be that everyone who is entitled to vote can vote. Ballot security programs and special identification requirements that disproportionately target or affect Indians and other minorities are fundamentally inconsistent with that goal.

THE RIGHT TO USE TRIBAL IDENTIFICATION IN VOTING

Shortly before the 2004 presidential election, several Indians, joined by the National Congress of American Indians and the ACLU of Minnesota, challenged Minnesota's restrictions on the use of tribal photo identification cards at the polls.¹⁶⁰ At issue was a statute prohibiting election officials from accepting a tribal identification card, which bore a picture of the member, as identification at the polls unless the tribal member lived on a tribal reservation. After a brief hearing, the district court issued a temporary restraining order requiring election officials to accept tribal identification cards regardless of where the member lived.¹⁶¹ Some tribal identification cards contained addresses and others did not; some did not have a current address. On October 29, 2004, the court issued a preliminary injunction that tribal identification cards with addresses "are sufficient proof of identity and residency" in order to register and vote. The court further ruled that a tribal ID that did not contain a current address could, consistent with the state's treatment of other photo identification (for example, passports, military, and student IDs), be used to register if accompanied by a current utility bill.

In 2005, Minnesota amended its registration statute to eliminate the requirement that American Indians live on their tribe's reservation before their tribal ID could serve as a valid ID for voting.¹⁶² The change in state law resolved one of plaintiffs' claims, but it did not resolve the claim that rejecting tribal photo identification for registration, while accepting other identification, violated the equal protection clause, as well as HAVA. On September 12, 2005, the parties agreed

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to a final consent judgment: it directed that tribal IDs that did not have an address, coupled with a utility bill, were also sufficient to meet state law standards for registering and voting on election day.

UNFOUNDED ALLEGATIONS OF FRAUD

The Citizens Equal Rights Alliance (CERA) is an organization whose web site notes: “Federal Indian Policy is unaccountable, destructive, racist and unconstitutional. It is therefore CERA’s mission to ensure the equal protection of the law as guaranteed to all citizens by the Constitution of the United States of America.”¹⁶³ It filed a case, *CERA v. Johnson*, contending that widespread “election fraud and/or voting rights abuses” took place on the Crow Indian Reservation in Big Horn County, Montana, during the November 2006 election.¹⁶⁴ One of the alleged examples of “fraud” was the endorsement by the Crow Tribal Legislature of Crow Tribal members running for Big Horn County offices, endorsements no different from those by plaintiffs CERA or MCRA (Montana Citrizens Rights Alliance), or the Republican or Democratic parties. In fact, the right of an organization or group to endorse candidates for public office is protected by the First and Fourteenth Amendment of the Constitution. The ACLU Voting Rights Project represented Tracie Small, Ada White, Sidney W. Fitzpatrick, Jr., Kennard Real Bird, and Elvira “Nellie” Little Light—all Indians and residents and voters of Big Horn County who sought to intervene in the lawsuit to defend Crow Reservation elections.

One of the “remedies” CERA sought was that “polling places for federal, state, county, and local district elections cannot be located within [the exterior boundaries of any particular Indian reservation].”¹⁶⁵ If such a measure were granted, it would effectively disfranchise many, if not most, Indian voters.

CERA further contended that the voting strength of white voters was diluted because ballot boxes at two precincts on the Crow Indian Reservation were unsecured on election day, because a poll watcher was improperly ordered to leave after the polls were closed but before the ballots were counted, and because one tribal member admitted that she voted twice. Whether or not any of these allegations were true, CERA offered no evidence that the election outcome was affected or that votes were diluted in any way. Plaintiffs did not allege any concrete and particularized injury that would afford them standing to raise such claims in a federal lawsuit. If there was voter fraud, it should be prosecuted under state law. But the complaint in *CERA v. Johnson* did not indicate that the defendants committed voter fraud or that the plaintiffs were entitled to any relief.

Notably, whites have accused Crow Tribal members of voter fraud in the past. A federal court, however, held the charges were “unfounded” and concluded there was “a strong desire on the part of some white citizens to keep Indians out of Big Horn County government.”¹⁶⁶

The suit by CERA was dismissed by the court on November 5, 2007, for failure to state a claim. The plaintiffs did not appeal.

CONCLUSIONS: NEXT STEPS

Though the movement for equal rights has led to dramatic gains for Indian voters and transformed elected bodies that serve Indian communities, much work remains. Tribal communities are some of the poorest, most remote, and underserved regions of the country. A history of shifting U.S. policy toward Indians and inconsistent enforcement of rights has left many ignorant of the rights Indians have as citizens and the services that federal, state and local governments provide tribal members. As National Congress of American Indians stated when discussing the relationship between tribal and state governments:

Although direct government-to-government relations with the federal government remains a fundamental principle of the trust relationship, it is important that tribes recognize the benefits of understanding state governmental processes and potential avenues for collaboration. In a climate of increased devolution of federal programs, the need for intergovernmental coordination is an inevitable reality.

State legislatures are responsible for appropriating funds for state programs

that may be of benefit to tribes or to tribal members who also are citizens of the state. By increasing knowledge of how a state budget is allocated and how state legislatures operate and by building an open, working relationship with legislators who represent a tribal community's district, tribes can maximize the positive effects of state programs and services. Several states (such as Oregon and Washington) have established successful models of state-tribal cooperation, and these models can provide effective tools in establishing improved intergovernmental relations with states.¹⁶⁷

Ignorance and open hostility by the non-Indian community often result in lower voter registration and turnout of Indian voters. Indian voters also may not be aware of protections available to them under federal law. These issues must be addressed with better voter education, enhanced registration efforts, and, where appropriate, with litigation.

Local and state election boards should encourage and assist Indian voters, including those who live on reservations, in registering. Polling places should be located conveniently for

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all citizens, including for those who live on Indian reservations. Indian voters should be free from harassment, intimidation, and misinformation by those who oppose their participation in elections.

Election district lines should be drawn in ways that do not dilute Indian voting strength and provide Indian voters an equal opportunity to elect candidates of their choice. Indian communities should have the opportunity to participate in the redistricting process to ensure their interests are protected. Every effort should be made to see that jurisdictions covered by Section 5 and Section 203 of the Voting Rights Act comply with these laws. Indian voters should be encouraged to participate in the Section 5 preclearance process and make their views known to the U.S. Department of Justice.¹⁶⁸

The ACLU Voting Rights Project remains committed to assisting Indian voters enforce their rights through voter outreach efforts and litigation. Please contact the ACLU for more information.

ENDNOTES

- 1 The use of the terms Indian or American Indian instead of Native American was selected for several reasons. First, most Indian organizations including the National Congress of American Indians, the American Indian Movement and the National Indian Youth Council use Indian in their titles. Second, federal laws and agencies use the term Indian. Finally, Native Americans include Hawaiians, and only the voting rights of Indians are discussed here.
- 2 *Kirkie v. Buffalo County, S.D.*, Civ. No. 03-3011 (D.S.D. Feb. 12, 2004).
- 3 *Windy Boy v. County of Big Horn*, 647 F.Supp. 1002, 1016 (D. Mont. 1986).
- 4 This history is told in many places. See, e.g., Stephen L. Pevar, *The Rights of Indians and Tribes* (New York: New York U. Press, 2002); Francis P. Prucha, *The Great Father: The United States Government and the American Indian* (Lincoln: U. of Nebraska Press, 1984); S. Lyman Tyler, *A History of Indian Policy* (Washington: Government Printing Office, 1973).
- 5 *Elk v. Wilkins*, 112 U.S. 94, 102 (1884).
- 6 25 U.S.C. §§ 331-58.
- 7 *Draper v. United States*, 164 U.S. 240, 246 (1896).
- 8 Jeanette Wolfley, "Jim Crow, Indian Style: The Disenfranchisement of Native Americans," 16 *Am. Indian L. Rev.* 167, 179 n. 72 (1991).
- 9 Act of Nov. 6, 1919, ch. 95, 41 Stat. 350.
- 10 8 U.S.C. § 1401 (a)(2).
- 11 25 U.S.C. § 461 et seq.
- 12 John Collier, *The Indians of the Americas* (New York: W. W. Norton, 1947), 226.
- 13 House Concurrent Resolution No. 108 of the 83d Congress, August, 1953.
- 14 Helen L. Peterson, "American Indian Political Participation," 311 *Annals of the Amer. Acad. of Pol. and Soc. Sciences*, 116, 126 (1957).
- 15 Pevar (2002), 11.
- 16 United States Commission on Civil Rights, *Indian Tribes: A Continuing Quest for Survival* (Washington: U.S. Government Printing Office, 1981), 23.
- 17 82 Stat. 79.
- 18 Lyndon B. Johnson, "The Forgotten American, The President's Message to the Congress on Goals and Programs for the American Indian, March 6, 1968," *Presidential Documents, Weekly Compilation*, Vol. IV, No. 10, p. 440 (Washington: U.S. Government Printing Office).
- 19 See, e.g., S.Rep. No. 501, 91st Cong., 1st Sess. 21, 53 (1969); H.R. Rep. No. 907, 93d Cong., 2d Sess. 1 (1974); H.R. Rep. No. 1026, 94th Cong., 2d Sess. 15 (1976); H.R. Rep. No. 1308, 95th Cong. 2d Sess. 4 (1978).

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- 20 Richard M. Nixon, "The President's Message to the Congress of the United States on the American Indians," (1970), 1.
- 21 Census 2000 Summary File 3 (SF 3) - Sample Data -- P155C. MEDIAN FAMILY INCOME IN 1999 (DOLLARS) (AMERICAN INDIAN AND ALASKA NATIVE ALONE HOUSEHOLDER) [1] - Universe: Families with a householder who is American Indian and Alaska Native alone ; P155I. MEDIAN FAMILY INCOME IN 1999 (DOLLARS) (WHITE ALONE, NOT HISPANIC OR LATINO HOUSEHOLDER) [1] - Universe: Families with a householder who is White alone, not Hispanic or Latino.
- 22 Census 2000 Summary File 3 (SF 3) - Sample Data -- P159C. POVERTY STATUS IN 1999 BY AGE (AMERICAN INDIAN AND ALASKA NATIVE ALONE) [17] - Universe: American Indian and Alaska Native alone population for whom poverty status is determined; P159I. POVERTY STATUS IN 1999 BY AGE (WHITE ALONE, NOT HISPANIC OR LATINO) [17] - Universe: White alone, not Hispanic or Latino population for whom poverty status is determined.
- 23 Census 2000 Summary File 3 - Sample Data -- P150C. SEX BY EMPLOYMENT STATUS FOR THE POPULATION 16 YEARS AND OVER (AMERICAN INDIAN AND ALASKA NATIVE ALONE) [15] - Universe: American Indian and Alaska Native alone population 16 years and over; P150I. SEX BY EMPLOYMENT STATUS FOR THE POPULATION 16 YEARS AND OVER (WHITE ALONE, NOT HISPANIC OR LATINO) [15] - Universe: White alone, not Hispanic or Latino population 16 years and over.
- 24 South Dakota Advisory Committee to the U.S. Commission on Civil Rights, *Native Americans in South Dakota: An Erosion of Confidence in the Justice System* 6-7 (2000).
- 25 *Thornburg v. Gingles*, 478 U.S. 30, 69 (1986).
- 26 *Emery v. Hunt*, 615 N.W.2d 590, 597 (S.D. 2000), *State Defendants' Response*, p. 26.
- 27 *Bone Shirt v. Hazeltine*, 336 F.Supp.2d 976, 1022 (D.S.D. 2004).
- 28 *Little Thunder v. South Dakota*, 518 F.2d 1253, 1255-56 (8th Cir. 1975).
- 29 See, e.g., *Windy Boy v. County of Big Horn*, 647 F. Supp. at 1021 ("[r]acially polarized voting and the effects of past and present discrimination explain the lack of Indian political influence in the county, far better than existence of tribal government"); *Cuthair v. Montezuma-Cortez, Colorado School Dist.*, 7 F.Supp.2d 1152, 1161 (D. Colo. 1998) (the alleged "reticence of the Native American population of Montezuma County to integrate into the non-Indian population" was "an obvious outgrowth of the discrimination and mistreatment of the Native Americans in the past"); *United States v. Blaine County, Montana*, 363 F.3d 897, 911 (9th Cir. 2004) (rejecting the argument that low Indian voter participation was a defense to a vote dilution claim).
- 30 First American Education Project, "Native Vote 2004: A National Survey and Analysis of Efforts to Increase the Native Vote in 2004, and the Results Achieved" (May 2005).
- 31 Tribal-State Relations, <http://www.ncai.org/index.php?id=28&print=1&type=123>.
- 32 Wolfley (1991), 170-1, 173-4, 192, fn. 158.
- 33 *Windy Boy v. County of Big Horn*.
- 34 Laughlin McDonald, Michael B. Binford, and Ken Johnson, "Georgia," in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990*, eds. Chandler Davidson & Bernard Grofman (Princeton; Princeton U. Press, 1994), 81.
- 35 Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, H.R. Rep. 109-478, 109th Cong., 2nd Sess. 2006 34, 35, 42, 45-51, 58.59 (2006).
- 36 October 18, 2005, House Judiciary Committee Hearing to Examine the Impact and Effectiveness of the Voting Rights Act, Prepared Statement of Gwen Carr before the National Commission on the Voting Rights Act, July 22, 2005, 81-86.
- 37 October 18, 2005, House Judiciary Committee Hearing to Examine the Impact and Effectiveness of the Voting Rights Act, Prepared Statement of Carol Juneau before the National Commission on the Voting Rights Act, Midwest Regional Hearing, July 22, 2005, 87-91. Ms. Juneau was a plaintiff in one of the ACLU's voting rights cases, *Old Person v. Brown*.
- 38 October 25, 2005 Hearing before the House Judiciary Committee, Voting Rights Act: The Continuing Need for Section 5, 4-7, Appendices at 101, 149; May 9, 2006, Hearing before the Committee on the Judiciary of the United States Senate, An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization, 12.

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- 39 House Judiciary Committee Hearing to Examine the Impact and Effectiveness of the Voting Rights Act, Testimony of Bryan Sells before the National Commission on the Voting Rights Act, October 18, 2005, 659-64.
- 40 42 U.S.C. §1973(b).
- 41 42 U.S.C. § 1973(a).
- 42 *United States v. Day County, S.D., Civ. No. 99-1024* [D.S.D. June 16, 2000].
- 43 *Id.* at 4-8.
- 44 *Thornburg v. Gingles*, 478 U.S. at 50-1.
- 45 *Johnson v. DeGrandy*, 512 U.S. 997, 1011-12 (1994).
- 46 *United States v. Charleston County*, 316 F.Supp.2d 268, 277 [D.S.C. 2003].
- 47 *Windy Boy v. County of Big Horn*, 647 F. Supp. at 1007-22.
- 48 *United States v. Blaine County, Montana*, No. CV 99-122-GF-DWM [D. Mont.].
- 49 *United States v. Blaine County, Montana*, 363 F.3d at 900, 909-14.
- 50 *Alden v. Rosebud County Board of Commissioner*, Civ. No. 99-148-BLG [D. Mont. May 10, 2000]; *Matt v. Ronan School District*, Civ. No. 99-94 [D. Mont. Jan. 13, 2000].
- 51 *Cuthair v. Montezuma-Cortez*, 7 F.Supp.2d at 1156-57, 1160.
- 52 *Id.* at 1159-60.
- 53 *Id.* at 1160-61.
- 54 *Id.* at 1161-62.
- 55 *Weddell v. Wagner Community School Dist.*, Civ. No. 02-4056 [D.S.D.].
- 56 *United States v. Blackpipe State Bank*, No. 93-5115 [D.S.D.].
- 57 *Wilcox v. City of Martin*, No. 02-5021 [D.S.D.].
- 58 *Cottier v. City of Martin*, 445 F.3d 1113, 1115-67, 1121-22 [8th Cir. 2006].
- 59 *Cottier v. City of Martin*, 466 F. Supp. 2d 1175, 1199 [D.S.D. 2006].
- 60 *Cottier v. City of Martin*, 475 F. Supp. 2d 932, 936, 942-43 [D.S.D. 2007].
- 61 *Cottier v. City of Martin*, No. 07-1628 [8th Cir.].
- 62 *Large v. Fremont County, Wyoming*, No. 05-CV-270J [D.Wyo.].
- 63 *Id.*, Tr. Trans. at 1500 [Keja Whiteman].
- 64 *Id.*
- 65 *Id.*, Tr. Trans. at 1065 [James Large].
- 66 *Id.* Tr. Trans. at 1526-27 [Keja Whiteman].
- 67 *Allen v. State Board of Elections*, 393 U.S. 544, 555-56 n.19 [1969].
- 68 *McCain v. Lybrand*, 465 U.S. 236, 247 [1984].
- 69 41 Fed. Reg. 784 [Jan. 5, 1976].
- 70 67 Fed.Reg. 144 [July 26, 2002].
- 71 77 S.D. Op. Att’y Gen. 175 [1977].
- 72 “Bill Janklow: Love him or hate him,” Minnesota Public Radio, September 5, 2003; http://news.minnesota.publicradio.org/features/2003/09/05_hetlandc_janklowcareer/.
- 73 *United States v. Tripp County, South Dakota*, Civ. No. 78-3045 [D. S.D. Feb. 6, 1979] [ordering state to submit reapportionment plan for preclearance]; *United States v. South Dakota*, Civ. No. 79-3039 [D.S.D. May 20, 1980] [enjoining implementation of law revising system of organized and unorganized counties absent preclearance].

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- 74 Ch. 59, 1966 S.D.Laws 104; *Rogers v. Lodge*, 458 U.S. 613, 627 (1982).
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- 168 The Attorney General is heavily dependent on information received from citizens in the communities affected by proposed voting changes in administering the statute. Section 5 comment letters can be mailed to Chief, Voting Section, Civil Rights Division, P.O. Box 66128, Department of Justice, Washington, D.C. 20035- 6128. Comments can also be made by phone by calling 1-800-253-3931 or (202) 307-2767. To learn more about the Section 5 process, you can log on the voting section's website at www.usdoj.gov/crt/voting.

www.votingrights.org

