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# ARTICLE

## **EIGHTY YEARS OF INDIAN VOTING: A CALL TO PROTECT INDIAN VOTING RIGHTS\***

**Danna R. Jackson\*\***

*Shiprock, New Mexico*

*May 6, 1946*

*I, Mrs. Julia Denetclaw C#22698, hereby certify that on May 6, 1946 I appeared at the Shiprock Public School, Shiprock, New Mexico for the purposes of registering to vote in the coming elections. I was there refused permission to register. I have been a resident of the State of New Mexico 48 years; the County of San Juan, 48 years, the voting precinct #13, 48 years.*

*Signed Mrs. Julia Denetclaw*

*Witnesses: E. G. Jones*

*Allison S. Dodge<sup>1</sup>*

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\*\* A 1996 graduate of the University of Montana, School of Law, Jackson has worked in private practice and served as a staff attorney for the National Indian Gaming Commission (NIGC). Jackson currently works for Senator Tim Johnson (D-SD), handling his Indian Affairs and Judiciary portfolio. During the 2002 election and 2004 South Dakota Special Election, Jackson volunteered for the Get Out the Vote Project on the Pine Ridge Indian Reservation. The views and analysis presented here do not necessarily represent the views of Senator Tim Johnson.

1. FOR OUR NAVAJO PEOPLE; DINE' LETTERS, SPEECHES & PETITIONS 1900-1960 148 (Peter Iverson ed., University of New Mexico Press 2002).

## I. INTRODUCTION

Fifty-four years after the 15<sup>th</sup> Amendment granted all citizens, regardless of race, color, or previous condition of servitude the right to vote, the "Citizenship Act," made Indians citizens, thus granting them protection under the 15<sup>th</sup> Amendment.<sup>2</sup> Despite their U.S. citizenship and accompanying right to vote, historically Indians were prevented from participating in elections.<sup>3</sup> Indians were treated in a similar fashion to disenfranchised blacks in the pre-Civil Rights Act South. Unfortunately, situations such as that described by Mrs. Denetclaw were far too numerous. Indians were among the last group of people to secure the right to participate in federal, state, and local elections.<sup>4</sup> During the 2004 election season, Indians will observe eighty years since the passage of the Citizenship Act.

In 1965, in hopes of correcting voter disenfranchisement, primarily of blacks in the South, President Johnson signed into law the Voting Rights Act.<sup>5</sup> After several amendments, the Voting Rights Act continues to provide protection from voter disenfranchisement. However, the Voting Rights Act, as amended, expires in 2007.<sup>6</sup>

In certain states, Indians make up a significant voting bloc and have proven that their votes can determine the fate of national races. For example, in 2002, Senator Tim Johnson (D-SD) was re-elected to the Senate largely because of the increase in Indian voter turnout.<sup>7</sup> Tribal governments, organizations and

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2. U.S. CONST. amend. XV. The 15th amendment of the United States Constitution states in full: Section. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation.

3. 8 U.S.C. § 1401(b). The "Citizenship Act" states: -BE IT ENACTED by the Senate and house of Representatives of the United States of America in Congress assembled, That all non citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided that the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property. (Approved June 2, 1924).

4. Jeannette Wolfley, *Jim Crow, Indian Style: The Disenfranchisement of Native Americans*, 16 AM. INDIAN L. REV. 1967 (1991).

5. 42 U.S.C § 1973 (1965).

6. An Act to Amend the Voting Rights Act of 1965, Pub. L. 97-205; 96 Stat. 131 (1970); *Congressional Quarterly Almanac*, 97<sup>th</sup> Cong. (2<sup>nd</sup> sess., 1982) v. 38 (Washington: Congressional Quarterly, Inc., 1983), p. 373-74).

7. Barone, Michael, Grant Ujifusa, & Douglas Matthews, *The Almanac of American Politics 1468* (2004). "This election [Johnson-Thune 2002 US Senate race] turned out to

individuals are pledging to increase Indian voter participation in 2004.<sup>8</sup> In light of the 80<sup>th</sup> anniversary of the Indian right to vote and the increased attention placed on Indian voter participation, a re-examination of Indian voter rights is in order.<sup>9</sup> This article reviews the political context into which the Voting Rights Act was born, describes its amendments, and highlights litigation that arose pursuant to the Act. This article also summarizes the Helping Americans Vote Act of 2002.<sup>10</sup> Finally, this article concludes that because Indian voters continue to need the protection of the Voting Rights Act, the Act must be strengthened and reauthorized before it expires in 2007.

## II. CONGRESS RESPONDS TO PRACTICES DESIGNED TO PREVENT MINORITY PARTICIPATION IN ELECTIONS.

### *A. Minority Disenfranchisement*

Elections in the United States are administered at the state and local level. Prior to the Civil Rights movement, many state and local governments, mainly in the South, passed laws designed to keep blacks from participating in elections. These laws included poll taxes, literacy tests, and requirements that voters had vouchers of "good character" and were free from

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be the closest in the nation. During most of election night and into the morning Thune led in the counting. Then the last two precincts came in, from Shannon County, which includes most of the Pine Ridge Indian Reservation. Those two precincts put Johnson over the top, by a margin of 524 votes - in percentage terms, 50.1%-49.9%. In Shannon County, 3,118 votes were cast, as compared to 1,953 in the 2000 presidential election. The county voted 92%-8% for Johnson. In the six main reservation counties, turnout was 11,275, up from 7,500 in 2000. These six counties voted 78%-21% for Johnson. In 43 of the other 60 counties, Johnson's percentage declined from 1996, when he won 51% statewide." The above numbers show a 60% increase in turnout in Shannon County and a 32% increase in the other five for a combined increase of 50% in all six reservation counties.

8. President Tex Hall, Address on the State of the Indian Nations (Jan. 21, 2004) (Copy on file with author). Tex Hall, President of the National Congress of American Indians (NCAI), called for one million Indian voters for the 2004 election.

9. "Like my race in 2002, U.S. Senator Patty Murray (D-WA), U.S. Representative Brad Carson (D-OK) and former Alaska Governor Tony Knowles (D-AK) are running for the Senate in states with significant Native American populations. All have committed to participate in efforts to reach out to, organize, empower and turnout Native American voters. In South Dakota, my colleague and friend Senator Tom Daschle is running for reelection. He has made a strong commitment to working with Native Americans to ensure their voice is heard in the electoral process." Letter from Senator Tim Johnson (D-SD), *Indianz.com*, (Jan. 23, 2004), at <http://www.indianz.com/News/archive/001240.asp>.

10. Help American Vote Act of 2002, Pub. L. No. 107-252, 2002 H.R. 3295 (2002).

"crimes of moral turpitude."<sup>11</sup> Congress reacted by passing legislation in 1957, 1960, and 1964 that contained voting-related provisions.<sup>12</sup> The 1964 Civil Rights Act also contained several voting-related provisions.<sup>13</sup> Thus, as a result of these new laws, some unenlightened states began to use other means to disenfranchise black voters. To circumvent the laws, some states changed political boundaries and election structures to minimize the impact of black re-enfranchisement. The courts responded in two ways: First, by striking down state efforts to suppress voters, and second, by opting to avoid addressing challenges that were deemed "political questions."<sup>14</sup>

By 1965, it was clear that additional efforts were necessary to ensure that minorities could vote without fear. The murder of voting-rights activists in Philadelphia and Mississippi gained national attention.<sup>15</sup> The March 7, 1965 unprovoked attack on peaceful marchers by state troopers in Selma, Alabama finally persuaded President Johnson and Congress to overcome Southern resistance to stronger voting rights legislation.<sup>16</sup> A series of congressional hearings began.<sup>17</sup>

### *B. Indian Disenfranchisement*

Many of the same barriers that kept Southern blacks from the polls also kept Indians from voting.<sup>18</sup> Because of their extra-

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11. United States Department of Justice, *Introduction to Federal Voting Rights Laws* at [http://www.usdoj.gov/crt/voting/intro/intro\\_a.htm](http://www.usdoj.gov/crt/voting/intro/intro_a.htm) (accessed February 29, 2004).

12. Pub. L. No. 83-315, 71 Stat. 634; Pub. L. No. 86-449, 74 Stat. 86.

13. 42 U.S.C. § 2000 (1964).

14. See *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (Alabama violated the 15<sup>th</sup> amendment by changing the political boundary of the voting district); *Baker v. Carr*, 369 U.S. 186 (1962) (declining to decide constitutional challenges to legislative apportionment scheme, on the grounds that this "political question" was not within the federal court's jurisdiction). See also *Reynolds v. Sims*, 377 U.S. 533 (1964) (finding under the Equal Protection Clause a claim of debasement of the right to vote through malapportionment presents a justiciable controversy; and the Equal Protection Clause provides manageable standards for lower courts to determine the constitutionality of a state legislative apportionment scheme.); *Wesberry v. Sanders*, 376 U.S. 1 (1964) (establishing one-person, one vote principle.); *Fortson v. Dorsey*, 379 U.S. 433 (1965) (holding certain types of apportionment might unconstitutionally dilute the voting strength or racial minorities.).

15. United States Department of Justice, *Introduction to Federal Voting Rights Laws* at [http://www.usdoj.gov/crt/voting/intro/intro\\_a.htm](http://www.usdoj.gov/crt/voting/intro/intro_a.htm) (accessed February 29, 2004).

16. *Id.*

17. *Id.*

18. David Wilkins, *An Inquiry into Indigenous Political Participation: Implications for Tribal Sovereignty* 9 KAN. J.L. & PUB. POL'Y 732, 737 (2000).

constitutional political status, Indians encountered a variety of additional and unique obstacles placed before them by state officials.<sup>19</sup> Some states, well aware of treaty rights that exempt tribal lands and their members from most state regulations and taxation, coupled with language in some state constitutions specifying that state governments cannot extend their jurisdiction or taxing authority over Indians or tribes inside Indian Country, erroneously concluded that they had the authority to exclude Indians from the political process.<sup>20</sup> States relied on the language of their constitutions to keep Indians from voting. For example, it was not until 1948 that the Arizona Supreme Court struck down a provision of its state constitution that denied Indians the right to vote because they were “under guardianship.”<sup>21</sup>

In 1962,<sup>22</sup> the New Mexico Supreme Court determined that for voting purposes, nothing exists in its constitution or statutes prohibiting an Indian from voting in a proper election, provided he fulfills the statutory requirements required by any other voter and that polling places can be located on the reservation.<sup>23</sup> In determining such, the New Mexico Supreme Court stated:

The seriousness of the problem, namely that of allowing persons to elect officials to whom they owe no allegiance and whose laws or directions they are not bound to obey, is a matter for legislative consideration. The fact that a person living on a reservation may not be subject to the process of the courts or the directions of state or country officials is of serious moment, but so is the refusal of the right to vote.<sup>24</sup>

Until 1975, the state of South Dakota restricted unorganized counties, Todd, Washabaugh, and Shannon, from choosing candidates for state, national, and local offices and from voting on questions submitted to the electors of the whole state.<sup>25</sup> The state argued that since “a majority of the residents of the unorganized counties are reservation Indians, they do not share the same interest in county government as the residents

19. *Id.*

20. *Id.* (citing Daniel McCool, *AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY* Deloria, Vine Jr., ed., University of Oklahoma Press 1985).

21. *Harrison v. Laveen*, 196 P.2d 456 (Ariz. 1948).

22. *Montoya v. Bolack*, 372 P.2d 387 (N.M. 1962); *see also Prince v. Board of Educ. of Cent. Consol. Indep. School District No.22*, 543 P.2d 1176 (N.M. 1975); *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975).

23. *Montoya*, 372 P.2d 387 (N.M. 1962); *see also Prince*, 543 P.2d 1176 (N.M. 1975).

24. *Montoya*, 372 P.2d at 394.

25. *Little Thunder*, 518 F.2d at 1254-55.

of the organized counties.”<sup>26</sup> Also, the state argued that “unorganized counties can organize at any time and thereby divest the organized county governments of power and that this contingency justifies restriction of the franchise.”<sup>27</sup> The South Dakota Supreme Court saw the argument as “too simplistic” and determined that the state may not, through residency requirements, disenfranchise citizens who have a substantial interest in the choice of those who will function as their elected officials.<sup>28</sup>

State by state, governments questioned whether Indians could be loyal Americans given their fidelity to their own tribal governments.<sup>29</sup> In 1937, in direct violation of the Citizenship Act of 1924, Colorado denied voting rights to Indians claiming that they were not yet citizens.<sup>30</sup> In Utah, Indians living on a reservation were not considered residents of Utah until 1956.<sup>31</sup> In Minnesota, the Supreme Court required that voters be “civilized” before they could vote.<sup>32</sup> Tribal Indians, the justices explained, might demonstrate their eligibility “by taking up [their] abode outside the reservation and there pursuing the customs and habits of civilization.”<sup>33</sup>

North Carolina discriminated against Indians under color of a state election law provision declaring that before a person could register to vote he or she must be able to read and write any section of the U.S. Constitution in the English language to the satisfaction of the registrar.<sup>34</sup> Even though Maine had granted tax-paying Indians the right to vote in its 1819 state constitution Indians were not constructively permitted to vote until the mid 1960s.<sup>35</sup>

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26. *Id.* at 1255.

27. *Id.*

28. *Id.* at 1256-57.

29. *See* *Elk v. Wilkins*, 112 U.S. 94 (1884).

30. OPINIONS OF THE SOLICITOR, 778, at [http://thorpe.ou.edu/sol\\_opinions/p776-800.html#sdai08131937](http://thorpe.ou.edu/sol_opinions/p776-800.html#sdai08131937) (accessed May 24, 2004).

31. *Allen v. Merrell*, 305 P.2d 490 (Utah 1956).

32. *Opsahl v. Johnson*, 163 N.W. 988 (Minn. 1917).

33. *Id.* at 991.

34. OPINIONS OF THE SOLICITOR, 779, at [http://thorpe.ou.edu/sol\\_opinions/p776-800.html#sdai08131937](http://thorpe.ou.edu/sol_opinions/p776-800.html#sdai08131937) (accessed May 24, 2004).

35. Library of Congress, *The Learning Page, Elections the American Way* at <http://memory.loc.gov/learn/features/election/voters9.html> (accessed February 29, 2004).

### C. Voting Rights Act

In addition to not receiving the same high profile attention blacks did for their overall disenfranchisement, Indians were also alienated from the electoral process at the national level. However, it was ultimately the widespread evidence of disenfranchisement of black citizens in Southern states that drove Congress to pass the Voting Rights Act of 1965.<sup>36</sup>

The 1965 Voting Rights Act strengthened the 15<sup>th</sup> Amendment by prohibiting any individual action or enactment of any election law which denies or abridges voting rights on account of race or color.<sup>37</sup> The Voting Rights Act temporarily suspended literacy tests nationwide,<sup>38</sup> required certain states to obtain "pre-clearance" for new voting practices and procedures from either the District Court for the District of Columbia or the United States Attorney General,<sup>39</sup> assigned federal examiners to list qualified applicants to vote and to serve as poll watchers,<sup>40</sup> and authorized the Attorney General to institute civil actions to seek enforcement of the Act.<sup>41</sup>

Shortly after its passage, the United States Attorney General used authority granted by the Voting Rights Act to

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36. United States Department of Justice, *Introduction to Federal Voting Rights Laws* at [http://www.usdoj.gov/crt/voting/intro/intro\\_a.html](http://www.usdoj.gov/crt/voting/intro/intro_a.html) (accessed February 29, 2004).

37. 42 U.S.C. § 1973 (1965).

38. *Id.* at § 1973(b). (Section 4(a)). Release from Coverage. Section 4(a) requires that to obtain release from federal regulations a state or subdivision must obtain a declaratory judgment to the effect that for the preceding 5 years no literary tests or similar devices were used to deny the right to vote for racial reasons.

39. *Id.* at § 1973(c). (Section 5). Preclearance of Changes in Election Laws. Section 5 requires federal preclearance of every change in election laws, not only laws affecting procedural requirements that individuals must observe in order to register and vote, but laws setting up electoral systems.

40. *Id.* at § 1973(d)-(f). (Sections 6, 7, and 8). Federal Election Observers. Section 6. Section 6 authorizes the Attorney General to request the U.S. Office of Personnel Management to send federal examiners to list eligible voters for registration in any political subdivision of a state is the political subdivision is covered by Section 4 (a). Section 7. Section 7 prescribes procedures for the listing of voter registrants by federal examiners. Section 8. Section 8 authorizes the Attorney General to request the Office of Personnel Management to send election observers to any political subdivision where an examiner has been assigned.

41. *Id.* at § 1973(j). (Section 12(d)). Civil Actions to Enforce Compliance. Section 12(d) provides the Attorney General of the United States the ability to institute civil actions in federal district courts to seek enforcement of the provisions of the Act – suspension of tests and devises, abolition of English literacy tests for citizens educated in foreign-language American schools, preclearance of election-law changes, and prohibition of discriminatory election laws.

challenge Virginia's poll tax.<sup>42</sup> The Supreme Court held Virginia's poll tax was unconstitutional under the 14th Amendment.<sup>43</sup> This was not the only litigation resulting from the Act's passage; the constitutionality of the Voting Rights Act itself was challenged in other legal proceedings.<sup>44</sup> The Supreme Court upheld the constitutionality of Section 5, the Preclearance of Changes in Election Laws, and affirmed the broad range of voting practices for which pre-clearance was required.<sup>45</sup>

### 1. The 1970 Amendments

Following the 1965 Act, nearly one million blacks registered to vote.<sup>46</sup> As a result, some voting districts used various devices to circumvent protections required by the 1965 Act. Voting districts switched to at-large elections when black voting strength was concentrated in a particular district, extended the terms of incumbent white officials, made certain offices appointive rather than elective, changed suddenly the dates of elections, changed the qualifications for candidates, increased the filing fees for election, and gerrymandered the election districts.<sup>47</sup>

In 1970, Congress extended the Voting Rights Act for five more years and added several new provisions.<sup>48</sup> Congress used the reauthorization process of the Voting Rights Act to correct exclusory devices. The 1970 amendments extended the period of time for which an area covered by the Act must abstain from the use of any literacy test or similar device from five to ten years, added districts that were covered under Section 4, suspended the use of literacy tests, provided that any person could vote in a Presidential election if he or she had established residency 30 days prior to a Presidential election, and lowered the voting age to 18.<sup>49</sup> Most importantly, with these changes, Congress

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42. See *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

43. *Id.* at 671.

44. *South Carolina v. Katzenbach*, 383 U.S. 301, 327-28 (1966). See also *Allen v. State Board of Elections*, 393 U.S. 544 (1969) (recognizing that gerrymandered district boundaries or at-large elections could be used to dilute minority voting strength).

45. *Katzenbach*, 383 U.S. at 327-28.

46. GARRINE P. LANEY, *THE VOTING RIGHTS ACT OF 1965, AS AMENDED: ITS HISTORY AND CURRENT ISSUES*, C.R.S. REPORT at 18 (Feb. 2002).

47. U.S. COMMISSION ON CIVIL RIGHTS REP. NO., *POLITICAL PARTICIPATION*, page 256 (Washington: GPO: 1968).

48. *Voting Rights Act Amendments of 1970*, Pub. L. No. 91-285, 84 Stat. 314 (1970).

49. *Id.*; CONGRESSIONAL QUARTERLY ALMANAC, 91<sup>st</sup> Cong. (2<sup>nd</sup> Sess. 1970) 192-93.

validated the Supreme Court's broad interpretation of the scope of the Section 5 pre-clearance requirements.<sup>50</sup>

## 2. *The 1975 Amendments*

In 1975, the Voting Rights Act again came up for reauthorization. During the reauthorization hearings, Congress heard extensive testimony about voting discrimination suffered not just by blacks, but also by Hispanics, Asian Americans and American Indian citizens.<sup>51</sup> At the conclusion of the hearings, Congress again extended the Voting Rights Act.<sup>52</sup> This legislation extended the Act's provisions and the method by which jurisdictions could remove themselves from coverage for another seven years.<sup>53</sup> The 1975 amendments also made permanent the previously temporary nationwide ban on the use of literacy tests or similar devices.<sup>54</sup>

Significant to many Indian communities, Congress added protections from voting discrimination for minority-language citizens.<sup>55</sup> Congress required jurisdictions to provide election materials in the language of the applicable language minority for a ten year period.<sup>56</sup> Congress mandated that some jurisdictions pre-clear election-law changes enacted after November 1, 1972<sup>57</sup> be subject to assignment of examiners under Section 6<sup>58</sup> and election observers under Section 8.<sup>59</sup> Congress forbade any jurisdiction in the country to enact an election law that denied or abridged voting rights on account of race or color.<sup>60</sup> Congress added language classifying language minorities as a protected class.<sup>61</sup> Finally, Congress added

50. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (1970).

51. LANEY, *supra* note 46, at 18.

52. *Id.* at 17.

53. *Id.*

54. *Id.* at 18.

55. An Act to Amend the Voting Rights Act of 1965, Pub. L. No. 94-73, 89 Stat. 400 (1965).

56. 42 U.S.C § 1973(aa) (1975). (Section 1(a)(c)). Applicable jurisdictions include those that 1) the Census Bureau determined that 5% of the jurisdiction's voting age citizens were of a single language minority, and 2) the illiteracy rate in English of the language minority was greater than the national English illiteracy rate. Illiteracy was defined as failure to complete the 5<sup>th</sup> grade.

57. *Id.* § 1973(c).

58. *Id.* § 1973(d).

59. *Id.* § 1973(f).

60. *Id.*

61. *Id.* § 1973(e). (Section 2(f)). Language Minority Section. Section 2(f). The 1975

Section 207, placing accountability requirements upon the Census Bureau.<sup>62</sup>

During the 1970s, the Supreme Court reviewed important minority vote issues. In 1973, the Supreme Court declared certain legislative multi-member districts unconstitutional under the 14th Amendment on the grounds they systematically diluted the voting strength of minority citizens in Bexar County, Texas.<sup>63</sup> The Texas case of *White v. Regester* strongly shaped litigation through the 1970s against at-large systems and gerrymandered redistricting plans.<sup>64</sup> However, in *Mobile, Alabama v. Bolden*, the Supreme Court required that any constitutional claim of minority vote dilution must include proof of a racially discriminatory purpose, a requirement that was widely seen as making such claims far more difficult to prove.<sup>65</sup>

### 3. The 1982 Amendments

In 1982, Section 5 was renewed for twenty-five years.<sup>66</sup> Congress adopted a new standard in which jurisdictions could terminate coverage under the special provisions of Section 4.<sup>67</sup> Further, Congress, adopting the same factors articulated in *White v. Regester*, decided that Section 2 should be amended to prohibit vote dilution.<sup>68</sup>

The 1982 amendments to the Act adversely affected some Indians. Since Indians did not exceed five percent of most counties, the five percent threshold required by Section 203 of the 1982 amendments did not apply, and counties were no longer required to provide language assistance to affected Indians.<sup>69</sup> In response, Indians argued that Section 203's definition of a "political subdivision" as a county or parish did not appropriately identify Indians who had limited English-

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amendments added language minorities to Section 2 as a protected class. As originally enacted, Section 2 forbade any jurisdiction in the country to enact an election law that denies or abridges voting rights on account of race or color.

62. 42 U.S.C. § 1973(aa). (Section 5).

63. *White v. Regester*, 412 U.S. 755 (1973).

64. 412 U.S. 755 (1973).

65. 446 U.S. 55 (1980).

66. An Act to Amend the Voting Rights Act of 1965, Pub. L. No. 97-205, 96 Stat. 131; CONGRESSIONAL QUARTERLY ALMANAC, 97<sup>th</sup> Cong. (2<sup>nd</sup> sess., 1982) 373-74.

67. 42 U.S.C. § 1973(aa). (Section 1(a)(a)).

68. 42 U.S.C. § 1973(b).

69. LANEY, *supra* note 46, at 33. Two counties in New Mexico, six out of eight counties in South Dakota, four out of five in North Dakota, twenty-four out of twenty-five counties in Oklahoma, and six out of seven counties in Montana no longer were required by federal law to provide language assistance to Indians.

speaking skills. Many reservations encompassed two or more counties and sometimes crossed state boundaries. Therefore, the artificial lines imposed over reservation boundaries kept Indians who spoke limited English from receiving help at the polls. Indians argued that the 1982 amendments exempting counties from applying language assistance to needy Indians needed to be corrected.<sup>70</sup>

#### 4. *The 1992 Amendments*

In a contested reauthorization, Indians and their advocates argued that a strengthened Section 203 ensured that no citizen would be denied the fundamental right to vote because of a lack of fluency in English.<sup>71</sup> Opponents of the strengthened Section 203 argued that required ballot translation would be too expensive and complicate the process.<sup>72</sup> Other opponents focused on the premise that English is the “national language” of the United States.<sup>73</sup> They argued that persons who did not speak English could not advance, and thus concluded that bilingual ballots delayed the progress of certain ethnic groups.<sup>74</sup>

After the Indian lobby proved the extended need for language assistance for selected minority populations and dispelled the myth that bilingual information was “too costly,” Congress passed the Voting Rights Language Assistance Act of 1992.<sup>75</sup>

Set to expire in 2007, the post-1992 Act requires election officials in certain states and political subdivisions to provide bilingual services to significant populations of non-English speaking citizens of voting age.<sup>76</sup> The triggering mechanism of Section 203<sup>77</sup> was strengthened by adding a numerical threshold provision and by more effectively identifying Indians who need language assistance. Pertaining to Indians, a state or political subdivision is covered if the political subdivision contains all or any part of an Indian reservation where more than five percent of the American Indian or Alaska Native citizens of voting age

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70. LANEY, *supra* note 46, at 33.

71. LANEY, *supra* note 46, at 29.

72. LANEY, *supra* note 46, at 33.

73. LANEY, *supra* note 46, at 33.

74. LANEY, *supra* note 46, at 33.

75. LANEY, *supra* note 46, at 33.

76. LANEY, *supra* note 46, at 29.

77. LANEY, *supra* note 46, at 29.

are members of a single language minority and have limited English proficiency.<sup>78</sup>

### III. THE EFFECT OF THE VOTING RIGHTS ACT

“The cumulative effect of the Supreme Court’s decisions, Congress’ enactment of voting rights legislation, and the ongoing efforts of concerned private citizens and the Department of Justice, has been to restore the right to vote guaranteed by the 14th and 15th Amendments.”<sup>79</sup> Congress called the Voting Rights Act the single most effective piece of civil rights legislation ever passed.<sup>80</sup>

#### A. *Effect of the Voter Rights Act on Indians*

Vote dilution has been an ongoing struggle in Indian Country. In Arizona, state lawmakers in the early 1980s attempted to create an all-Indian county, a proposal one state senator called the “Arizona Apartheid Act.”<sup>81</sup> In *Windy Boy v. County of Big Horn*,<sup>82</sup> Wyoming was found to have committed “official acts of discrimination [that] have interfered with the rights of Indian citizens to register and vote” in the form of an at-large scheme that denied the plaintiffs’ right to participate in elections and to elect representatives of their choice to county and school board offices.<sup>83</sup>

In *Buckanaga v. Sisseton School District*, the Sisseton Wahpeton Sioux tribe challenged its local school district’s voting system after many years of unsuccessful attempts to elect Indians to the school board.<sup>84</sup> “On remand in 1985, a cumulative voting system was adopted that gave voters the option of casting their allotted votes in any combination they wished, thereby providing Indian voters with a more meaningful opportunity for political participation.”<sup>85</sup> In May of 1990, three of the nine

78. LANEY, *supra* note 46, at 29.

79. U.S. Department of Justice, *Introduction to Federal Voting Rights Laws*, at [http://www.usdoj.gov/crt/voting/intro/intro\\_a.htm](http://www.usdoj.gov/crt/voting/intro/intro_a.htm) (accessed February 29, 2004).

80. *Id.*

81. Glenn A. Phelps, *Mr. Gerry Goes to Arizona: Electoral Geography and Voting Rights*, 15 AM. INDIAN CULTURE AND RES. J 73 (1991).

82. 647 F. Supp. 1002 (D. Mont. 1986).

83. Svingen, *supra* note 4, at 275-86.

84. 804 F.2d 469 (8th Cir 1986).

85. Suzanne E. Evans, *Encyclopedia of American Indians: Voting*, at [http://college.hmco.com/history/readerscomp/naind/html/na\\_041800\\_voting.htm](http://college.hmco.com/history/readerscomp/naind/html/na_041800_voting.htm) (accessed Feb. 29,

school-board members elected were Indians.<sup>86</sup>

In April of 2004, the United States Court of Appeals for the Ninth Circuit ruled on a case involving Blaine County, Montana. The United States brought a Section 2 action against Blaine County, Montana, alleging that the county's at large voting system prevented Indians from participating equally in the country's political process.<sup>87</sup> The district court determined that Section 2 was a constitutional exercise of Congress's powers under the Fourteenth and Fifteenth Amendments, and that Blaine County's at large voting system violated Section 2. On Appeal, Blaine County lost – the Ninth Circuit affirmed the district court's decision.

More recently, the United States and advocates for Indians in South Dakota, Montana, and New Mexico filed several lawsuits alleging violations of the Voting Rights Act.<sup>88</sup> Many minority language cases involving American Indians were also filed.<sup>89</sup>

### *B. Voting in the New Millennium*

Many charge that not every vote counted in the 2000 Presidential election.<sup>90</sup> Florida received most of the attention, although voting irregularities were reported in other states.<sup>91</sup> After the Florida election, civil rights groups, the state of

2004).

86. *Id.*

87. *U.S. v. Blaine County*, 157 F.Supp 2d 1145 (D. Mont. 2001), *aff'd*, 2002 WL 1263941 (9th Cir. 2002) (Not selected for publication in the Federal Reporter).

88. *See, e.g.*, *U.S. v. Day County*, (D.S.D.); et al No. CV99-1024 (1999); *US v. Bernalillo County*, (D.N.M.), CV-98-156 BB/LCS (1998); *Boneshirt v. Hazeltine* (S.D.) CV-01-3032 (2001); *Wilcox v. City of Martin* (S.D.) 02-5021 (2002); *Kirkie v. Buffalo County et al* (S.D.) 03-5024 (2003). *See also Old Person v. Cooney*, (M.T.) No. CV-96-00004-GF-PGH (1998).

89. *See, e.g.*, *Consent Decree, U.S. v. San Juan County*, (D.N.M. Apr. 8, 1980) (No. 79-508-JB); *Consent Decree, U.S. v. San Juan County*, (D. Utah Jan.11, 1984) (No. C-83-1287); *Consent Decree, U.S. v. San Juan County*, (D. Utah Oct. 11, 1990) (No. C-83-1287); *Consent Decree, U.S. v. McKinley County*, (D.N.M. Feb. 4, 1986) (No.86-0028-M); *Consent Decree, U.S. v. McKinley County*, (D.N.M. Oct. 9, 1990) (No. 86-0028-M); *Consent Decree, U.S. v. State of New Mexico and Sandoval County* (D.N.M. May 17, 1990) (No. 88-1457-SC); *Consent Decree, U.S. v. Sandoval County* (D.N.M. Sep. 9, 1994) (No. 88-1457-SC); *Consent Decree, U.S. v. Socorro County* (D.N.M. Apr. 25, 1994) (No. 93-1244-JP); *Consent Decree, U.S. v. Cibola County* (D.N.M. Apr. 25, 1994) (No. 93-1134-LH/LFG); *Consent Decree, U.S. v. Bernalillo County* (D.N.M. July 1, 2003) (No. 98-156-BB/LCS); *Consent Decree, U.S. v. Arizona* (D.Ariz. May 22, 1989) (amended Sept. 27, 1993) (No. 88-1989-PHX EHC); *Consent Decree, Apache County High School District No. 90 v. U.S.* (D.D.C. June 12, 1980) (No. 77-1815).

90. LANEY, *supra* note 46, at 42.

91. LANEY, *supra* note 46, at 42.

Florida, the federal government, and the media conducted investigations of such claims.<sup>92</sup> The investigations identified problems pertaining to registration processes, election procedures, election equipment, training of election staff, and discriminatory practices at polling precincts.<sup>93</sup> At the federal level, both the Department of Justice and the U.S. Commission on Civil Rights (CCR) reviewed the complaints. The CCR issued a report verifying many of the identified complaints.<sup>94</sup> Other civil rights organizations verified the CCR findings.<sup>95</sup> The Department of Justice's review of the presidential election of 2000 is ongoing.

Various civil rights groups filed lawsuits in state and federal courts challenging voting policies and practices in Florida's electoral processes. The lawsuits allege violations of the 14<sup>th</sup> Amendment, the Voting Rights Act, and state law.<sup>96</sup> The American Civil Liberties Union filed lawsuits in Illinois and Georgia alleging that both the Equal Protection clause of the 14<sup>th</sup> Amendment and the Voting Rights Act were violated in the 2000 election.<sup>97</sup>

In an attempt to resolve some of the concerns, Congress held hearings and ultimately passed the Helping Americans Vote Act (HAVA).<sup>98</sup> President Bush signed HAVA into law in

92. LANEY, *supra* note 46, at 42.

93. LANEY, *supra* note 46, at 42.

94. LANEY, *supra* note 46, at 46 (Robert E. Pierre and Peter Slevin, *Florida Vote Rife with Disparities, Study Says Rights Panel Finds Black Penalized*, WASH. POST, June 5, 2001, at A01).

95. Julian Borger, *Jeb Bush Blamed for Unfair Florida Election*, GUARDIAN, June 6, 2001, at 1.10, available at [http://www.guardian.co.uk/US\\_election\\_race/Story/0,2763,502216,00.html](http://www.guardian.co.uk/US_election_race/Story/0,2763,502216,00.html). Barbara Arnwine of the Layers Committee of Civil Rights Under Law said that the action of state authorities was "a violation of the fundamental trust that we all give to state-elected officials to protect our right to vote." *Id.* Kweisi Mfume of the NAACP commented that the report "underscores officially what most of us have known all along." *Id.*

96. NAACP v. Katherine Harris, et al (FL) Case No: NVKH120715 (2002). *See also*, Gordon v. Albert Gore, Jr., (FL) 1:00CV03112 (2002). On January 4, 2001, Judge Royce C. Lamberth ruled the plaintiffs lacked standing to maintain the action and therefore were unlikely to have success based on the merits of the case. Further, he questioned whether the ultimate relief that plaintiffs sought was a political question because Congress would have to provide the relief.

97. *See, e.g.* Black v. McGuffage (U.S. District Court for the Northern District of Illinois) Case No. 01C0796 (2001), Tully v. Orr (Circuit Court of Cook County, Illinois, County Department, Chancery Division) 01 CH 00959 (2001), Andrews v. Cox et al. (State of Georgia, Superior Court of Fulton County) 2001CV32490 (2000).

98. Help America Vote Act of 2002, 42 U.S.C.S. §§ 15301-15545 (Lexis Supp. 2003), U.S.C.S. §§ 152601-152612 (Lexis Supp. 2003).

2002.<sup>99</sup> HAVA created a new federal agency charged with reviewing voter-registration systems in an attempt to safeguard elections by requiring states to computerize, centralize and purge voter rolls prior to the 2004 election.<sup>100</sup> The implications of HAVA have yet to reveal themselves; however, HAVA has been heavily criticized. There is distrust towards the manufacturer of the leading voting machine, as well as in the software itself. Further, many express grave concern that HAVA will make balloting susceptible to political manipulation, fraud, and racial bias.<sup>101</sup> Some are concerned that a lack of independent testing of the voting machines allows security flaws of the software to stand uncorrected, potentially allowing for manipulation of election outcomes.<sup>102</sup>

Florida, Illinois, and Georgia were not the only states in which elections were scrutinized in recent years. Intimidated by Indian voter clout, conservatives accused Indians of stealing the 2002 South Dakota Senate election. Bob Novak of CNN Crossfire referenced the upcoming race between Senator Daschle (D-SD) and John Thune by discrediting the 2002 race:

Daschle should have been saved the trouble of opposing Thune. In 2002, Thune would have been elected to the state's other Senate seat but the election was stolen by stuffing ballot boxes on the Indian reservations. Now Tom Daschle may have to pay for that theft.<sup>103</sup>

Equally inflammatory, the Wall Street Journal characterized Tim Johnson's win as "highly suspicious, if not crooked."<sup>104</sup> In response, South Dakota Attorney General Mark Barnett, a Republican, called the allegations of ballot stuffing false.<sup>105</sup> Others, including Senate Minority Leader Tom Daschle (D-SD)<sup>106</sup> responded to the allegations of voter fraud.<sup>107</sup>

99. *Id.*

100. *Id.*

101. Martin Luther King III & Greg Palast, *Jim Crow Revived in Cyberspace*, BALTIMORE SUN, May 8, 2003, available at <http://archives.econ.utah.edu/archives/alist/2003w18/msg00102.html>.

102. *Id.*

103. Robert Novak, *CNN Crossfire* (CNN television broadcast, Jan. 6, 2004), at <http://www.cnn.com/TRANSCRIPTS/0401/06/cf.00.html>.

104. Editorial, "The Oglala Sioux's Senator," *Review & Outlook*, Wall St. J., Nov. 14, 2002, available at <http://www.opinionjournal.com/editorial/feature.html?id=110002619>.

105. David Kranz, Barnett: No Illegal Ballots Found, *Argus Leader*, Oct. 31, 2002, available at <http://www.southdakotaelections.com/Story.cfm?Type=Election&ID=1198>.

106. Senator Tom Daschle, (D-SD), Editorial, Re: The South Dakota Sioux Reservation Vote, *Wall St. J.*, Nov. 20, 2002, available at <http://www.mnindiagaming>

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.org/template.cfm?view=news\_detail&releaseID=31.

Your attack on the Oglala Sioux voters in South Dakota offers a sterling example of what minorities in this country can expect from hard-right editorial politics ("The Oglala Sioux's Senator," *Review & Outlook*, Nov. 14).

Consider one close race, Florida's presidential election in 2000. The margin was 500-plus votes (out of 5.8 million votes cast), and breakdowns in the electoral machinery depressed minority voting (among other problems). A problem for you? Not at all: Your ardently supported candidate won.

Consider another close race, South Dakota's Senate election in 2002. Again we have a 500-plus margin (out of only 330,000 votes cast). A problem for you? Very much so, because on this occasion your candidate lost. Yet now minority voting, disregarded in Florida, is announced to be the culprit. You believe Oglala Sioux voting in Shannon County was "fishy." That's about it: no evidence, no basis whatsoever for the claim, and an omission of the fact that South Dakota's Republican attorney general and Republican secretary of state found no grounds for any such suggestion of fraud. What your readers are offered instead is an outright slur on our Indian voting community, complete with snide stereotypical references to "smoke signals." Missing only was some mention of "firewater."

So what can minorities expect from the editorial right in this country? To be ignored when the right's candidates win, and blamed when those candidates lose? You may wish to claim that you detect the "Chicago" way in South Dakota politics this year, but there is nothing much like the American way in its treatment of minority voters.

107. Letter from Paul Shone, reply to the Nov. 14, 2002 Wall Street Journal Editorial (unpublished) (Nov. 17, 2002) (on file with author).

I am writing in response to your November 14th editorial on the reelection of Senator Tim Johnson of South Dakota.

I was sent by the Senate Campaign Committee to work for the South Dakota Democratic Party to increase turnout on the Pine Ridge and Rosebud Indian Reservations.

I found that most of the information in your editorial was either misleading or inaccurate. Your conclusion, that Senator Johnson won and his opponent John Thune lost because the election was somehow stolen on the Indian reservations is irresponsible and is totally and demonstrably false. I will put the offensiveness of your theory aside momentarily because it is clear from your arguments that you came to it without the benefit of any facts.

Here are the facts.

First. I doubt that Mr. Thune believes the words that you put in his mouth that "the election was probably stolen". If he does, he owes it to the people to say so himself and explain clearly why he feels that way. He won't do that for the same reason that he did not ask for a recount. He lost fair and square and he knows it.

Mr. Thune and his party placed several republican lawyers as election monitors in each precinct on the Pine Ridge Reservation. The democrats did the same. Each of these

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lawyers was specially trained by their parties in state and federal election law and on the rights and duties of all concerned. The republicans were there to watch the process and to make sure that only legitimate voters voted. The democrats were there to make sure that the republicans did not intimidate legitimate voters into leaving the polling place without voting. To my knowledge there was never a moment in any polling place when either the democratic or republican monitors were not present.

Throughout the day, there was constant contact between our democratic headquarters and the people in the precincts. We monitored general turnout, used a checker system to note who had voted and who did not, and directed our organization to offer rides to the polls to those who had not yet voted. Naturally, we solicited feedback from the lawyers. Was there any intimidation? Any unregistered trying to vote? Anyone sent home for drunkenness or fighting? We wanted to know, but there was nothing, never a hint of trouble, never a whiff of illegitimacy or fraud.

In truth, it was just the opposite. A day to remember. A celebration of democracy and, perhaps unusual for the reservation, a model of decorum. In fact, the republican lawyers were in "awe" of what they were seeing. The growing tide of voters, their patience and resolve. That is what they told our lawyers. That is what they told me. And this is what they told John Thune.

His own lawyers, the people he sent to monitor the reservation precincts came back to him and told him that there was no basis for considering that this was a stolen election, no basis for implying that there was a single illegitimate vote. These lawyers can all be found. We have their names and they have ours and we've had conversations with all of them. It is true that the Shannon county votes were the last ones counted in the South Dakota elections and it is also true that these votes put Tim Johnson ahead for the first time all night.

Your suggestion that there is something sinister in this ignores the fact that a vote is a vote. One is equal to another and each counts the same no matter where it is cast or when it is counted. Your obvious point that results were somehow held or ballots multiplied is ridiculous. You would know this if you had done any research, but since you did not it is worth exploring why these votes were counted when they were.

The votes from the Pine Ridge Indian Reservation are not counted in Shannon County where they are cast. Instead, when the polls close on Pine Ridge, the ballots are wire-sealed in official blue plastic boxes, placed in a sheriff department jeep, bracketed with armed police officers in their SUVs, monitored by a designee from each political party, and driven in a convoy the 63 miles to Hot Springs, South Dakota, where they are counted by the election official of Fall River County.

When these officials were finished counting the ballots from their own county, at about 3 am, the Shannon county ballots were unloaded, unsealed, and counted by machine. This was done under the watchful eyes of the County Auditor, (an elected republican), her staff, (appointed republicans), the State's Attorney (an elected republican), the county Sheriff (an elected republican), several heavily armed police officers, two representatives from the South Dakota Republican Party, two democratic lawyers, and me. The ghost of Mayor Daley was not present.

The Shannon County ballots were fed into the same machines that were used to count all the other ballots. The machines read these ballots and counted the votes. The computer printed what the machine had tallied and the results were made public.

In 2003, a year after Indians made the difference in the election of Senator Johnson, the Republican controlled South Dakota State Legislature passed a new voter identification law that effected Indians. The law requires voters to present a valid form of personal identification before he or she may vote.<sup>108</sup> If a person does not have a valid form of identification, he or she

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My memory is that when the last precinct was tallied at about 6:15 am Mountain Time, everyone was a little bit tired. But to suggest that there was anything untoward in the counting or in the timing of the count is totally unfair to the roomful of republican civil servants who were in charge. Your suggestion is made even more outrageous by your complete lack of interest about what actually happened in a totally public setting. All you had to do was ask.

You also write that your MIT numbers guy has discovered some "striking facts" that "should arouse suspicion". What are these striking facts? High turnout and strong support for the democrat? Hmm. He also says that this could have been a coincidence. Let me assure you it was not a coincidence. It was intentional. This is why it happened.

We began by having the superior candidate from the favored party. Native Americans in South Dakota have a long history of voting almost exclusively democratic. Results that show more than a 20% republican share reflect the presence of mixed communities on some reservations. White ranchers in Batesland live on an Indian reservation but vote republican.

Everywhere you look on the reservation, you can see the results of Tim Johnson's work. People know him and were excited to support him. While this accounts for the democrats' high vote share, the turnout can only be explained by the successful implementation of the first Pine Ridge Get Out The Vote Program. This program was meticulously planned by the South Dakota Democratic Party and implemented by hundreds of local Native Americans who knew the names and backgrounds of every voter in a land where there are no strangers, who knew where every voter lives in a place with no street addresses, and who knew how to persuade each other of the power that comes from every single vote.

Now you may think that a 50% turnout is high. And it was geometrically higher than it has ever been, but after watching Lakota teenagers working through their voter lists in Big Bats gas station on election day and hearing them tell their cousin to take the truck and go get Grandma from where she stays because she hasn't voted yet, I'll tell you this, just wait until next time.

108. South Dakota State Law, (2003), ch. 82, '1; South Dakota State Law, (2004), ch. 108, § 3. "When a voter is requesting a ballot, the voter shall present a valid form of personal identification. The personal identification that may be presented shall be either:

1. A South Dakota driver's license or nondriver identification card;
2. A passport or an identification card, including a picture, issued by an agency of the United States government;
3. A tribal identification card, including a picture; or
4. An identification card, including a picture, issued by a high school or an accredited institution of higher education, including a university, college or technical school, located within the State of South Dakota."

may complete an affidavit instead.<sup>109</sup> Many feared that because some Indians do not have a driver's license, poll workers might ignore the other identification provisions, including the affidavit, and keep otherwise registered Indians from voting.<sup>110</sup> There is evidence that during the June 1, 2004 election, just such activity may have occurred.<sup>111</sup>

#### IV. CONCLUSION

In 2007, the Voting Rights Act, particularly Section 203, must be reauthorized to ensure limited language districts receive the support they need. Congress should amend the Voting Rights Act to include penalties to discourage future violations of the Act. In light of the controversy surrounding Florida and other states, clearly much attention will go into the reauthorization of the Voting Rights Act in 2007. It is likely that part of the reauthorization will focus on the Indian vote. Now is the time to mobilize interested parties.

Recent elections demonstrate that Americans have not protected the "one person one vote" principal. Close elections are expected in November 2004 for the presidency, as well as several other Senate and Congressional seats, and there remain distinct possibilities of voter access disputes and charges of ballot-box and voter registration irregularities. Following the Florida fiasco of 2000, both Democrats and Republicans are likely to be aggressive in voter registration, get-out-the-vote efforts, and follow-up of close races. Once close elections are decided, the losing sides may once again attempt to de-legitimize the victors in an attempt to weaken their position in office and rally their own side for the next race.

For these reasons, it is crucial that the Voting Rights Act not expire and that in the meantime, monitoring of the election process is both strong and visible not only to ensure access to the ballot box, but also to prevent any doubt as to the legitimacy of the victors.

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109. South Dakota State Law, (2003), ch. 82, § 2. "If a voter is not able to present a form of personal identification as required by § 12-18-6.1, the voter may complete an affidavit in lieu of the personal identification. The State Board of Elections shall promulgate rules, pursuant to chapter 1-26, prescribing the form of the affidavit. The affidavit shall require the voter to provide his or her name and address. The voter shall sign the affidavit under penalty of perjury.

110. Adam Cohen, *Indians Face Obstacles Between the Reservation and the Ballot Box*, N.Y. Times, June 21, 2004, at A18.

111. *Id.*

Where Congress will not act, or does not have the ability to act quickly enough, it is incumbent upon the legal profession to ensure that every citizen is permitted to exercise his or her right to vote and to place the results of elections beyond reproach, doubt, or politically motivated attack by those defeated. At stake is not just the abstract principle of the right to vote, but also the confidence among the electorate that the process is in fact the fairest that can possibly be attained.