



Written Statement of Sara Frankenstein

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Hearing on “Restoring the Voting Rights Act: Protecting the Native American and Alaska Native Vote.”

Subcommittee on The Constitution

My name is Sara Frankenstein and I am a private practice attorney and partner in the law firm of Gunderson, Palmer, Nelson & Ashmore, in Rapid City, South Dakota. I practice voting rights and election law. I advise and defend cities, counties, and school boards when they are sued, and frequently advise election administrators in the Midwest in all aspects of elections and voting rights. I was lead counsel in numerous federal Voting Rights Act cases and other election disputes, including redistricting, vote denial, and felon voting issues. These matters often involve issues unique to American Indian voting as well as tribal and county governmental concerns. I, as well as county election administrators in reservation counties that I work with, have a number of concerns with the proposed Native American Voting Rights Act.

The bill prohibits in-precinct only voting. Section 6(a)(2)(G). Counties must, under the bill, allow reservation residents to vote in any precinct they choose rather than in the person’s correct precinct. Such a mandate requires every single precinct polling place to have every single style of ballot that any voter in the county may be eligible to receive. For instance, Voter A lives in precinct 12 and is to get a Democrat ballot style listing federal and state races, but also those races for his county district 3, city ward 2, school district area F, water district area 5, and other local office districts/wards/areas encompassing that particular voter’s precinct. If Voter A walks into the precinct 3 polling place instead of his precinct 12 polling place, precinct 3 must have the particular ballot style for that voter on hand. Prohibiting in-precinct only voting means every polling place must have sufficient numbers of every ballot style that can exist for any and every voter. In the alternative, each polling place must have a ballot-on-demand machine that can print out, on demand, the correct style of ballot for every potential voter that may walk in. The costs for such machines are high, and the training, transportation, and maintenance required of such machines are considerable.

The same section of the bill also mandates early or in-person absentee voting in, at minimum, one location in every precinct. Section 6(a)(2)(G). The bill also requires each federal office governed under the National Voter Registration Act to become a polling site. Many states, such as mine, require poll workers to be deputized as assistant county election administrators to provide in-person absentee balloting. At a minimum, any person working a polling site,

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including those at, for instance, a Department of Social Services office or a Department of Motor Vehicles office, needs training, equipment, and access after business hours. If a reservation county has 15 precincts and five NVRA polling sites, and therefore 20 polling places in total, election workers must be trained, deputized, paid, and equipped to offer balloting in all 20 polling places.

The bill does not define “early voting”. Those who study and work in this field recognize that early voting is separate and distinct from in-person absentee voting, but others use the terms interchangeably. Section 6(g) of the bill will surely be advocated by some to include both early balloting and in-person absentee voting. Under such an interpretation, every single precinct must offer in-person voting for the full range of early voting or absentee voting allowed in that state. For those states with 45 days of absentee or early voting, every precinct on reservation land must be staffed and equipped to offer in-person voting for 45 days. Polling places are often schools, churches, community halls, and other such locations that have a daily use. It is often difficult to find suitable locations which will voluntarily give its facility up for voters’ use on one day. Requiring every polling place on reservations to be open 30 or 45 days will make finding such locations even more difficult. Moreover, the bill allows the tribe to select the location, yet provides no guidance on how an election administrator is to deal with a tribe’s selection being that of an unwilling private business owner. Each of these early voting polling places must, under the bill, be open 15 days or more, including weekends. These 15 days or more of early voting are mandated even if the rest of the county or state has only seven days of early voting, for example. All such locations must be open for a minimum of 10 hours a day, which in order to avoid overtime, requires at least two workers per polling place. The cost of training and paying this extraordinary number of county employees cannot be overstated. Employees need to be hired who are otherwise unemployed or whose regular jobs can afford to lose them for 14, 30, or even 45 days, depending on the state’s early voting period.

The bill allows voters to use a public building as their place for receiving and dropping off absentee or mail-in ballots. Section 6(e). Under this provision of the bill, a tribe may designate, for example, a recreational center as one precinct’s tribally-designated building. A voter may apply for an absentee ballot to be sent to the rec center, along with a hundred others doing the same thing. There are no provisions in the bill to safeguard those absentee ballots. They may come in to the rec center’s mail drop, with no person in charge of ensuring that all ballots are ultimately received only by the correct and individual voter who requested the ballot. The bill also allows tribes to demand that absentee ballots be sent without the voters requesting those ballots, resulting in hundreds or thousands of unsolicited ballots being sent to a public address.

Allowing tribes to force election administrators to send out thousands of unsolicited ballots, even when illegal under state law, creates numerous problems. One tribal residence may receive 10 ballots, for example. Without each voter requesting each ballot, one person at that residence could vote all 10 ballots without the other nine individuals even knowing.

In addition to the ballot integrity issues invoked in such a situation, this is a solution in search of a problem. While it is true that some reservation residents have no physical mailing address, we

do not need to designate public buildings to serve as mailing receptacles. Post office boxes already do that. It is common for tribal members to have post office boxes, and they are very commonly indicated on voter registration applications and absentee ballot applications. PO boxes allow individual voters to receive their mail themselves, and those ballots are not accessible to others.

In many ways, counties and states would, under the bill, have to hold elections under two different sets of law. Those living off reservation land would vote according to state law. Those living on reservation land would vote according to this federal law. Election administrators would have the burden of conducting the same election in two, often drastically, different manners. One example is the section of the bill that allows a state, county, or any court, including potentially tribal courts, to require absentee balloting even when prohibited by state law, or mail-in balloting even though prohibited by state law. Section 6(e)(8). This would result in, for instance, half a county engaging in only in-person Election Day voting, and the other half of the same county being sent unsolicited mail-in ballots. This provision is bound for litigation, as a Secretary of State may make a different determination on whether mail-in ballots should be required than the county election administrator. A tribal court may make a different decision than a state court or federal court. Any court may make a different determination than the Secretary of State or county election administrator.

The bill also mandates ballot drop boxes on the reservation, even if prohibited under state law. Section 6(f). There are no requirements for drop box security. The election administrator is not allowed any say in where they are placed. Rather, the tribes select where the drop boxes will be placed. Such takes the control over elections out of the hands of the election administrator, for which she is trained and elected, and instead allows tribes to control the federal, state, and county election process.

The bill also legalizes ballot harvesting on the reservation when the practice is prohibited otherwise by state law. The bill allows “any person” to engage in unlimited ballot harvesting. “Any person” may include a paid campaign worker or a convicted felon, whether authorized by the voter or not. Section 9.

In some states such as mine, a voter may be challenged on Election Day as having moved or being otherwise ineligible to vote. In my state, the challenge method is the only way a non-resident voter can be kept from voting in the wrong state or county. Under Section 12 of the bill, a challenger exercising that important statutory duty may be detained and removed by tribal law enforcement. This would, in effect, allow tribal law enforcement to determine who is eligible to vote by residence rather than the election administrator. Or, it will simply prohibit any challenges whatsoever to those living out of the state or county voting in the wrong elections.

I have worked numerous other election matters, particularly federal litigation regarding reservations, and am happy to answer questions regarding any such issues.