REPORT OF INVESTIGATION: OGLALA SIOUX TRIBE, GENERAL ELECTION, 1974

Staff Report
U.S. Commission on Civil Rights
October 1974

U.S. COMMISSION ON CIVIL RIGHTS

The United States Commission on Civil Rights is a temporary, independent, bipartisan agency established by the Congress in 1957 to:

- Investigate complaints alleging denial of the right to vote by reason of race, color, religion, sex, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution because of race, color, religion, sex, or national origin, or in the administration of justice;
- Appraise Federal laws and policies with respect to the denial of equal protection of the laws because of race, color, religion, sex, or national origin, or in the administration of justice;
- Serve as a national clearinghouse for information concerning denials of equal protection of the laws because of race, color, religion, sex, or national origin; and
- Submit reports, findings, and recommendations to the President and Congress.

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John A. Buggs, Staff Director

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This report is issued under the clearinghouse authority of the U.S. Commission on Civil Rights.

Honorable Rogers Morton
Secretary of the Interior
Department of the Interior
Washington, D. C.

Dear Secretary Morton:

The attached report of the Commission's staff concerning the general election held on the Pine Ridge reservation on February 7, 1974, is hereby transmitted for your information and consideration. This report describes the results of extensive field investigations conducted by our Office of General Counsel and Office of Field Operations.

The attached report contains findings that widespread irregularities took place before, during and after the election, and concludes that the results of the election are therefore invalid. In a statement quoted in the report, Commissioner of Indian Affairs Morris Thompson stated that developments with respect to the election would be carefully monitored and that thorough investigation would be made if evidence were developed giving validity to charges of irregularities.

Your attention is particularly invited to the observation in the report that the Bureau of Indian Affairs has the legal authority to look behind the asserted legitimacy of tribal representatives, and that the Federal law in general owes a high degree of care to assure that mechanisms of tribal government established under Federal Law are not abused. One of the recommendations of the report is that the Bureau of Indian Affairs determine whether the present tribal representatives are entitled to recognition in the event that the Oglala Sioux Tribal Council fails to order a new election for the offices of president and vice-president.

In addition, the report suggests that the Bureau provide the necessary resources for the tribe to develop and maintain an accurate roll of those entitled to vote in elections of tribal representatives. This would appear to be essential if reasonably fair elections are to be conducted in the future.

Respectfully yours,

Arthur S. Flemming, Chairman
Stephen Horn, Vice Chairman
Frankie M. Freeman
Robert S. Rankin
Manuel Ruiz, Jr.

John A. Buggs, Staff Director

Honorable William B. Saxbe
Attorney General
Washington, D. C.

Dear Mr. Attorney General:

The attached report of the Commission's staff concerning the general election held on the Pine Ridge reservation on February 7, 1974, is hereby transmitted for your information and consideration. The Office of Indian Rights, Civil Rights Division, Department of Justice, participated in the suit filed in the Federal District Court in South Dakota challenging the results of the election.

The report does not address specific recommendations to the Department of Justice. Nevertheless, because of the Department's prior involvement and concern with this matter, the report is forwarded for whatever action may be deemed appropriate.

Respectfully yours,

Arthur S. Flemming, Chairman
Stephen Horn, Vice Chairman
Frankie M. Freeman
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John A. Buggs, Staff Director

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Introduction

On February 11, 1974, Russell Means filed a written complaint with the U.S. Commission on Civil Rights. The complaint alleged many irregularities in connection with the February 7 general election of the Oglala Sioux Tribe. Mr. Means, a member of the Oglala Sioux Tribe, was a candidate in that election for the office of President of the Oglala Sioux Tribal Council, running against the incumbent Richard Wilson. Mr. Wilson won by a vote of 1,714 to 1,514, a margin of 200 votes.

Mr. Means, a national leader of the American Indian Movement (AIM), was a prominent figure during the occupation of Wounded Knee, South Dakota, in 1973. One of the principal grievances underlying the occupation was alleged corruption, violence and other illegal activities on the part of the Tribal President, Richard Wilson, and his supporters.[1]

On February 15, 1974, a formal contest of the election was filed with the Oglala Sioux Election Board protesting the conduct and the results of the election on behalf of Hobart Keith, a member of the tribe.[2] Later a civil suit was filed by Means and others in the Federal

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1. See, American Indian Historical Society, Wassaja, Vol. 1, No. 2, pp. 1, 24 (Mar. 1973).

2. Before the Pine Ridge Indian Reservation Board of Election of the Oglala Sioux Nation, in the matter of the February 7, 1974, Election for the Designation of a Tribal Chairman and Tribal Council of the Oglala Sioux Tribe on the Pine Ridge Indian Reservation, Formal Contest Against, February 7, 1974, Election.

District Court for South Dakota seeking to overturn the election.[3] On motion by Means, the District Court took custody of the ballot boxes containing the ballots and materials used in the election. A hearing was held in July, and on September 20 the Court dismissed the suit without deciding the legality or fairness of the election.[3a]

In March, the U.S. Commission on Civil Rights sent staff to the Pine Ridge Reservation to investigate the conduct of the election and the role of Federal agencies in that election. Interviews were conducted and other investigation done from March 11, 1974, to March 20, 1974. A second trip was made June 5 through June 8 to examine the materials contained in the ballot boxes which were in the custody of the U.S. District Court. The ballot boxes contained the voter lists, registration sheets, and other materials in addition to the marked and unmarked ballots. Additional interviews were conducted on the reservation, and copies of all the election materials (except ballots) were obtained.

The information which was collected and analyzed shows a pattern of widespread abuses and irregularities in the conduct of the election. In addition, the procedures followed in conducting the election were inadequate and haphazard. An examination by Commission staff of about one-fourth of the names on the voting records has shown some 380 individuals who voted but who were not legally qualified to do .

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3. Means v. Wilson, Civil No. 74-5010 (D.S.D., filed Mar. 29, 1974).

3a. Memorandum opinion, Means v. Wilson, Civil No. 74-5010 (D.S.D., filed Sept. 20, 1974).

so. This is discussed in detail below. In addition to this number, about 600 voters were not technically qualified to vote because of failure to submit a properly completed affidavit with attesting signatures. In all, almost one-third of all the votes cast appear to have been in some manner improper. Such irregularities, whether intentional or not, nevertheless affected the fairness of the election. Whether there was fraud or intentional wrongdoing has not been established although both may have taken place. The procedures for insuring the security of the election were so inadequate that actual fraud or wrongdoing could easily have gone undetected. It was not the purpose of this investigation, however, to determine criminal responsibility for the irregularities which were found.

Enforcement of Eligibility Requirements

The most striking and significant abuse during the election was the failure of the tribal election officials to enforce the tribe's voting eligibility requirements. The tribal election ordinance requires that a voter be an enrolled member of the tribe,[4] 21 years of age, and

4. Oglala Sioux Tribe, Ordinance No. 85G (1973). According to Article II of the Oglala Sioux Constitution the members of the tribe are those whose names appear on the official census roll of the tribe as of April 1, 1935, and "All children born to any member of the tribe who is a resident of the reservation at the time of the birth of said children." All such members are assigned an enrollment number and are known as "enrolled members." However, there does not exist any actual enrollment list as such.

a resident of the reservation for a period of one year immediately prior to the primary election. The ordinance provides for the preparation of an official voting list, that is, a list of eligible voters for each precinct. An otherwise eligible voter whose name is not on the list may qualify to vote by completing an affidavit supported by the signatures of two qualified voters. Irregularities in the preparation of the official voting lists are discussed below.

Many of those who voted were not enrolled members of the tribe and therefore not entitled to vote. In the town of Pine Ridge alone a check of 217 of the 842 voters revealed 66 whose names are not shown as enrolled members of the tribe according to records supplied by the Bureau of Indian Affairs (BIA).[5] In the district of Eagle Nest (Wanblee) 21 voters were found to be not enrolled after checking only 89 of the 259 voters in that district. In Potato Creek, six of the 83 voters were

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5. The only available record showing who are the members of the tribe is the List of Eligible Voters prepared by the Bureau of Indian Affairs. This list was compiled for purposes of voting in federally supervised elections to amend the tribal constitution. All adult members of the tribe are entitled to vote in such elections. The list was compiled as of March 1973 and includes the names of members of the tribe 18 years of age and older. Thus, the names of all persons eligible to vote in the tribal election should appear on this list.

This list was used by staff for purposes of determining whether particular voters were members of the tribe. The names of the voters who signed the register at the polling place were checked against the BIA list. The census records of the BIA (showing both members and non-members) were not used because they could not be removed from the agency office. These could be used at a later time as a cross-check for membership. It is possible that a few persons whose names could not be found on the list are in fact members of the tribe. In some cases individuals are known by two or even three names, and some women may have assumed married names since the records were compiled.

not enrolled according to the BIA records. In seven of the smaller precincts[6] all the voters' names were checked by staff who found that 31 of the 306 voters in these precincts were not enrolled. In the Pass Creek precinct, 67 of the 182 voters' names were checked; 21 were found not enrolled. Nine of the 34 voters whose ballots were cast in the "Mixed Returns" box were found to be not enrolled. In all, 793 names (about one-fourth of all the voters) were checked, including some or all of the voters in 11 of the 21 precincts. Of the names checked, 154 apparently were not enrolled members of the tribe.

In addition, a great number of people voted whose names did not appear on the official voting lists and who did not supply the necessary affidavit to qualify to vote. According to the tribal election ordinance,[7] any voter whose name is not on the official voting list must supply an affidavit of eligibility. Nevertheless, the voting records show that some 283 individuals were permitted to vote whose names were not on the lists and who did not supply any affidavit at all. Of these, 57 were also not enrolled.

Some 636 people voted in the election after supplying an affidavit of eligibility. However, the pre-printed affidavit form did not have lines or blanks for the two legally required attesting signatures. As

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6. Slim Buttes, Wakpamni Lake, Wolf Creek, Red Shirt Table, Red Cloud, Batesland, and No. 4 Community.

7. Oglala Sioux Tribe, Ordinance No. 85G, Sec. 2(e)(1973): "Any eligible voter whose name does not appear on the official voting list, may qualify to vote by signing a proper affidavit, supported by the signatures of two qualified voters attesting to the fact."

a result, the attesting signatures were not required by the election judges except in one precinct. Almost 600 affidavits were accepted without witnesses or attesting signatures. In some cases, the affidavits were not even signed by the voter, and in other instances, the judge failed to sign.

No procedure at all was established to permit the later disqualification of the ballot of one voting by affidavit should the voter later be found to be ineligible. Ballots of those voting by affidavit were simply placed in the ballot box, without an envelope, along with all the other ballots.[8] Election Board members told Commission staff that only two voters who submitted affidavits were found later to be ineligible. However, an examination of the records by staff showed that many such voters were not listed as enrolled members of the tribe. The Election Board members said that when a voter was later disqualified, a vote was deducted from the total votes for each candidate.[9] The logic of that procedure was not explained by the Board.

In interviews with staff, Election Board members conceded that unknown numbers of people voted who were not residents of the reservation as required by the ordinance. The explanation offered for this was that there was no way to enforce that provision of the ordinance.[10] Allegations

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8. Interviews with David Brewer, Election Board member, Mar. 12, 1974, and Moses Two Bulls, Chairman of the Election Board, Mar. 13, 1974, in U.S.C.C.R. files.

9. Interviews with David Brewer and Moses Two Bulls, supra, n. 8., in U.S.C.C.R. files.

10. Interview with Frank Crazy Thunder, Mar. 14, 1974, in U.S.C.C.R. files.

were received from attorneys for Russell Means that some 47 named individuals had been identified and confirmed as nonresidents, and that 50 or more others were apparently nonresidents.[11] It has not been possible for staff to investigate the actual residence of voters.

No procedure was established for checking the identity of one presenting himself or herself at the polls. Voters were not required to produce identification of any sort.[12] Furthermore, the official voters list does not show the individual's signature, so it is impossible to compare signatures for identification as would normally be done. One judge complained that he could not determine the age (and hence the eligibility) of some of the younger persons who voted, since many individuals on the reservation carry no cards or identification of any sort.[13] A few election judges in smaller precincts reported that they personally knew most of those who voted in their precincts, but apart from the personal recognition of the election judge and clerk, there was no assurance whatever that the person who voted was the person whose name appeared on the voter list.

Compilation of Proper Voter Lists

Perhaps the most far-reaching and incalculable of the irregularities found was the failure of the Election Board to compile and distribute an

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11. A list of individuals so identified was forwarded to staff by attorneys for Russell Means.

12. See, e.g., interviews with election judges Francis Two Crow and Bernard Shot With Arrow, Mar. 16, 1970, in U.S.C.C.R. files.

13. Interview with Bernard Shot With Arrow, Mar. 16, 1974, in U.S.C.C.R. files.

up-to-date voter list for each precinct as required by the election ordinance. In many precincts, the election judges complained that the lists they were sent were outdated and incomplete. Some judges estimated that the lists they were supplied may have been more than 15 years old. Outdated lists were even sent to some precincts which had earlier prepared and forwarded new lists to the Election Board. It is impossible to calculate how this may have affected the outcome of the election, how many people were effectively disenfranchised, or how many were permitted to vote who no longer lived on the reservation.

The election ordinance provides that the list of voters be distributed to the appointed election judge for that "district" at least 20 days prior to the primary election which was January 22, 1974. The ordinance then permits individuals to petition to have their names added to the lists and it permits challenges to names on the lists. However, the ordinance does not specifically require that the voter lists be publicly posted or made available for public inspection and, in fact, this was not done, even though that would seem to be what was intended.[14] In many cases the

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14. The tribe's election ordinance states:

> (c) Not less than twenty (20) days before the primary election, the Board shall compile a final list and distribute that particular precinct eligible voter list to the appointed election judge of that district. (d) Not less than ten (10) days prior to the primary election, any person whose name does not appear on such list may appear before the Board, and by sworn statements of himself and others petition to add such person's name to the list. Oglala Sioux Tribe, Ordinance No. 85G, Sec. 2 (1973).

voter lists were not distributed in advance to the election judges at all, and in other cases the voter list was sent to the Chairman of the District Council (the local governing body) with a request that the list be corrected and returned to the Election Board. Members of the Election Board said that the lists had been mailed to the District Chairmen for updating but that few lists were returned to the Board. Some election judges stated in interviews that they were sent voter lists and asked to update and return them to the Board. Although they did so, they said that at the time of the election the old lists were returned to them instead of updated ones.

None of the members of the Election Board knew where or how the voter lists were originally compiled. Election Board member David Brewer stated that one of the former members of the Election Board turned them over to him.[15] The Administrative Assistant to the Executive Committee of the Tribe, Leo Vocu, said that the lists were "sort of slapped together."[16] It should be pointed out that there is no registration procedure for members of the tribe, apart from the individual's right to have his or her name included on the list. Significantly, the Bureau of Indian Affairs' List of Eligible Voters does not show actual residence of individuals on or off the reservation since that is not a factor for voting in federally supervised elections.

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15. Interview with David Brewer, Mar. 19, 1974, in U.S.C.C.R. files.

16. Interview with Leo Vocu, Mar. 12, 1974, in U.S.C.C.R. files.

Security of the Ballots After Close of the Polls

The election ordinance makes no provision for the counting of ballots in the precincts immediately after the close of the polls. The written instructions from the Election Board to the judges do call for such a count, but do not require the results to be verified or signed by the precinct judge. As a result, there is no documentary evidence to show whether improper ballots were or were not substituted for proper ballots prior to the official count which was made later after the ballots were moved to Pine Ridge. Interestingly, judges in seven of the 22 precincts did make a signed record of the count in their precincts. In those precincts the results correspond substantially with the official count. None of the other precincts supplied signed records of the results of the precinct count. The instructions to the judges state that the results of the count at the precinct are to be written on a sample ballot and included in the ballot box. The instructions do not suggest that the results be signed or witnessed. Unsigned sample ballots appearing to show the precinct count were found in four of the ballot boxes when they were examined by staff, all from smaller precincts.

Establishing the correspondence between the unofficial results as tallied at the polls immediately after the close of voting and the final, official result is important to assure that the ballots were not tampered with after the ballot boxes were taken to Pine Ridge. The ballots and boxes were transported from the precincts to Pine Ridge by the BIA police. The security of the ballots was called into question because the ballot boxes were placed in the basement of the tribal office building on

election night immediately below the office of Richard Wilson. In fact, Mr. Wilson along with a number of other people was seen by at least one credible witness in the basement of the building as the ballot boxes were being returned. Election Board member David Brewer said that the ballot boxes were opened election evening in the basement of the tribal office building by Mr. Myron Rock, clerk to the Election Board, allegedly for the purpose of removing the unofficial tally sheets. United States Deputy Marshall Bruce Jacob, who later supervised the moving of the ballot boxes to the tribal court house, said in an interview that the tribal office building was a "very insecure" place for the storage of the ballot boxes prior to the completion of the official count. In this regard it should be noted that there were no poll watchers or observers present at any time during the official count.

Accounting For All Official Ballots

No procedures are established by the ordinance or by the Election Board to account for all of the marked and unmarked official ballots. Failure to account for unmarked official ballots leaves open the possibility that fraudulently marked ballots might be substituted for validly marked ballots at some point prior to the final, official count. The ballots were printed by a small concern in Rushville, Nebraska. In fact different ballots were ordered and printed for each of the 10 different electoral districts on the reservation.[17] The order for the ballots simply specified a total of 5,000 copies. The printer told staff

17. The ballot for each district listed the candidates for Tribal Council membership from that district as well as the candidates for president and vice-president.

that it is standard practice to print somewhat more than the number of copies actually ordered. He estimated that 10 to 25 extra copies may have been made of each of the 10 different ballots. The printer's records show that the ballots were picked up and signed for, but no one recalls who picked up the ballots. An employee of the shop reports that the signature on the receipt for the ballots is illegible.

No exact record was ever made of the number of ballots originally printed or in existence at any time during the election process. Both Mr. Brewer and Mr. Rock agreed that there were a number of extra ballots which were not sent out to the precincts, but which were kept in the tribal office building in a cupboard. No one has been able to account for the whereabouts of those ballots. Staff counted a total of 5,114 marked and unmarked official ballots inside the ballot boxes in the custody of the U.S. District Court.

Each ballot box contained a form which was to show the number of ballots and the other supplies which were to have been included in the box. After the close of voting,the numbers of marked, unmarked, and spoiled ballots were to be recorded and verified on the form by the election judge. However, in many precincts this procedure was done incorrectly and incompletely. In several of the boxes, there were large discrepancies between the numbers recorded on the form and the actual number of ballots in the box. One precinct was missing 91 ballots, and two precincts had more than 150 extra unmarked ballots each.

Appointment of the Election Board

One of the complaints made by Means supporters was that the Election

Board was improperly appointed and was biased in favor of Mr. Wilson.[18] According to minutes supplied by Mr. Lloyd Eagle Bull, Tribal Secretary, the members of the Election Board and two alternates were duly elected by the Tribal Council on November 28, 1973, at a meeting over which Mr. Wilson presided. Two members and one alternate later resigned from the Board, leaving one vacancy. This vacancy was filled by Frank Crazy Thunder who was appointed by three members of the Executive Committee of the tribe, one of whom was Mr. Wilson.[19]

The election ordinance provides that the members of the Election Board will be elected by the Tribal Council,[20] but the Oglala Sioux Constitution provides that the Executive Committee "shall act on behalf of the council at such times as the council is not in session and shall have charge of all routine matters which shall arise during such recess . . . "[21] The issue therefore arises whether the Executive Committee had the authority to make the appointment.

The Executive Committee is composed of five members.[22] The appointment of Frank Crazy Thunder apparently was not made at a meeting of the

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18. See, Amended Complaint at 10, Means v. Wilson, Civil No. 74-5010 (D.S.D., filed Mar. 29, 1974).

19. Memorandum from the Oglala Sioux Tribe, Executive Committee to Moses Two Bulls, Chairman, OST Election Board (Jan. 12, 1974).

20. Oglala Sioux Tribe, Ordinance No. 85G, Sec. 1 (1973).

21. Constitution and By-Laws of the Oglala Sioux Tribe, Section 5, as amended (1969).

22. Ibid.

Committee, but was done by three members who individually signed a memorandum of appointment. The former Vice-President of the Tribe, who was then a member of the Committee, said that he had no prior knowledge of the appointment.[23] The participation of Mr. Wilson, a candidate, in the appointment, raises clear questions of propriety and impartiality. Apart from Wilson, only two members of the Committee acted to appoint Crazy Thunder.

Though supporters of Mr. Means made numerous allegations of bias on the part of the Election Board, substantial evidence of actual bias was not found. Commission staff attempted to learn whether the Board had been "stacked" with members favoring one of the candidates. Nothing conclusive was learned. The Administrative Assistant, Leo Vocu, told staff that he felt it was impossible to find "non-partisan" people on the reservation, but that appointments had been made in an effort to "balance" the membership of the Board. He did not say how it was determined what political balance meant.

Selection of Election Judges and Clerks

The election ordinance contains two different and conflicting provisions for the selection of judges and clerks.[24] One section provides that they will be appointed by the Election Board, while the other section provides that they will be elected by their districts. In fact both methods were used. Certain of the appointments, however, seem to

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23. Interview with David Long, Mar. 18, 1974, in U.S.C.C.R. files.

24. Oglala Sioux Tribe, Ordinance 85G, Secs. 6, 17 (1973).

have been improper. Some judges reported that they were "appointed" by the Election Board clerk. Another individual, who was appointed as a clerk in Pine Ridge, was not an enrolled member of the tribe and was appointed only the night before the election.

Ballots Removed from Polling Places

Numerous ballots were taken out of the polling places and marked and later placed in ballot boxes under an unusual and unwritten procedure. The election ordinance establishes a procedure for absentee voting whereby an absentee ballot may be requested in advance by a voter and delivered back to the Election Board in a sealed envelope.[25] This procedure was not followed at all. Instead, a member of the Election Board took a ballot box and a supply of ballots to the reservation hospital and to the old age home where individuals apparently were permitted to mark ballots and place them in the ballot box.[26] Thirty-three marked ballots were contained in the "mixed returns" box when examined by staff. A check of the signatures on the registration sheet showed that 9 of the 34 names do not appear as enrolled members of the tribe. For unexplained reasons there were no unmarked, unused ballots in the mixed returns box.

In addition to this, several of the precincts permitted ballots to be marked away from the polling places. In the LaCreek District, the election judge permitted a well-known supporter of Mr. Wilson to take

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25. Id., Sec. 16.

26. Interview with David Brewer, Election Board Member, Mar. 19, 1974, in U.S.C.C.R. files.

a number of ballots out of the polling place, so that they could be marked by "shut-ins" who could not come to the polls. There were no envelopes provided for the return of the ballots; they were returned by the Wilson supporter to the polling place without any envelopes or cover. There is no way to determine the number of such ballots marked outside the polls. The election judge said he recalled that about 12 such ballots were later placed in the box. Instances of ballots being taken out of the polling places occurred also in Kyle, Potato Creek, Porcupine, and Pine Ridge.

Failure to Determine Contest to the Election

After the election, a formal contest supported by numerous affidavits was filed with the Election Board by Hobart Keith, a member of the Tribal Council, alleging a great many irregularities in the election. The Election Board made a reply to most of the allegations of the contest, but made no report or recommendation to the Tribal Council as required by the election ordinance.[27] The Tribal Council is legally responsible for making the final decision on any contest to the election,[28] but the Election Board never submitted Keith's contest to the Council for decision. No reason was given by the Board for failing to do so, except that the Council was not then in session. Richard Wilson, as incumbent President, was the only person legally empowered to call

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27. Oglala Sioux Tribe, Ordinance No. 85G, Sec. 12 (1973).

28. Ibid.

the Council into session. The reason he gave for not calling the Council into session was that Council members would have had a conflict of interest in determining the contest since some of them were candidates in the same election.[29]

The Campaign

The election was held in a climate of fear and tension. Wilson was widely reported to have made a statement that he would run all AIM members off the reservation after the election.[30] Various people were rumored to be stockpiling arms and planning to firebomb homes. Other allegations of assaults on AIM members or Means supporters and on Wilson supporters were received. Because of limited time and resources it was not possible to confirm the allegations. It is clear, however, that many members of the tribe believed the rumors and threats and were fearful of taking part in the campaign or election.

Certain campaign abuses were noted. On at least one occasion, Mr. Wilson used the tribal station wagon to travel to a political rally in his behalf.[31] According to witnesses, another station wagon covered with pro-Wilson leaflets was left parked immediately outside the polling place in the town of Martin. Several unconfirmed allegations of bribery

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29. Interview with Richard Wilson, Mar. 19, 1974, in U.S.C.C.R. files.

30. Mr. Wilson refused to confirm or deny these reports in an interview, Mar. 19, 1974.

31. See interview with Leo Vocu, Administrative Assistant to the Executive Committee of the Oglala Sioux Tribe, Mar. 12, 1974, in U.S.C.C.R. files.

were received, one from a woman who claims to have been bribed to vote for Wilson. Allegations that large amounts of tribal funds were appropriated for Wilson's campaign[32] could not be investigated because of the hopelessly inadequate bookkeeping of the tribe. In 1973 a consulting firm retained by the BIA reported that the records of the Tribal Treasurer were inadequate to account for the expenditure of tribal funds.[33] Allegations were confirmed that two people associated with the Means campaign lost their jobs, without apparent cause, immediately after the election, but it was not possible to determine whether the actions were actually politically motivated.

The Role of the Bureau of Indian Affairs

The role of the Bureau of Indian Affairs in the election was very limited in terms of direct, visible involvement. Under the Oglala Sioux Constitution and the tribal election ordinance, the Bureau had no express responsibilities or duties with respect to the election. Federal laws and regulations place general responsibility in the BIA for the "management of all Indian affairs,"[34] but impose no specific responsibilities with respect to the election of tribal leaders. Prior to the election the Bureau had been requested by some tribal members to help oversee the election under the Bureau's general responsibility,

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32. Interview with David Williams, Attorney, Mar. 11, 1973, in U.S.C.C.R. files.

33. Touche Ross and Co., Review of Financial and Management Functions of the Oglala Sioux Tribal Government and the Pine Ridge Agency of the Bureau of Indian Affairs (July 25, 1973) (unpublished report).

34. 25 U.S.C. §2 (1970).

but it declined to do so.[35]

The BIA did take responsibility for transporting the ballot boxes, ballots, and voting records from the polling places to Pine Ridge on election night. This was done by the BIA police who were regarded by some tribal members as strongly pro-Wilson.[36] The transportation of the ballots by the BIA police has raised serious questions because poll watchers were not permitted to ride in the cars with the ballot boxes. As discussed earlier, no means had been established for assuring that ballots were not tampered with in transit or that the vote count made at the precinct was substantially the same as the official count made in Pine Ridge.

Staff sought to identify any other activity on the part of the BIA which may have affected the election, but little specific information was found. The agency Superintendent told staff that Mr. Wilson had publicly claimed a large degree of credit for having him appointed to the position of Superintendent at Pine Ridge, his home reservation, a few months before the election. Though probably not improper, the impression may have been created that the Bureau would favor Mr. Wilson. Such an impression may have been given credibility when the Superintendent made known a grant of $60,000 to the tribe a short time prior to the election. The grant was not made until after the election, but according to the agency Superintendent the promise of the money could have been

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35. Interview with Albert Trimble, Superintendent, Pine Ridge Agency, BIA, Mar. 12, 1974, in U.S.C.C.R. files.

36. See, for example, interviews with Eugene and Bernice White Hawk, Mar. 18, 1974, in U.S.C.C.R. files.

used to enhance the campaign of the incumbent President, Mr. Wilson. The political impact of Bureau activities and policies cannot be minimized in light of the heavy dependence of the tribal members on Bureau programs and the pervasive nature of the BIA on the reservation.

Immediately after the election the Wounded Knee Legal Defense-Offense Committee requested the Department of the Interior to investigate the election. (The BIA is part of this Department.) On the very day following the election the Commissioner of Indian Affairs issued a statement in response, saying in part:

> Based on our present information, there does not appear to be sufficient evidence of voting fraud or irregularities to warrant Federal intervention at this time. The Federal Government intends, however, closely to monitor developments in this situation and if any such evidence is developed giving validity to these charges, we will see that a complete and proper investigation is made.

The Department and the Bureau have taken no further action with respect to the election and seem to have proceeded as though the election were valid.

The BIA has on other occasions asserted the authority and the duty to respond to abuses of tribal authority by refusing recognition to purported tribal representatives and by exercising control over Federal and tribal funds. The possibility of Federal intervention is implicit in the statement of the Commissioner quoted above.

In a 1956 opinion, the Solicitor of the Department of the Interior wrote:[37]

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37. Fort Berthold Tribal Affairs, 63 Interior Decisions 188 (June 20, 1956).

> And further the Commissioner is not without authority to deter abuses of tribal authority by virtue of his control over the expenditure of tribal funds, which authority stems from treaty and statute. The United States generally acts as guardian of the funds and assets of Indian tribes and as such trustee not only is held to a high degree of care in the handling of the funds and property of the Indians but exercises the ordinary supervisory restraint incident to such guardianship.

In two other opinions issued that same year, the Solicitor undertook to determine whether certain actions taken by a tribal government were valid and entitled to recognition by the Bureau. In one opinion it was decided that a tribal constitution had not been properly adopted and approved, and that therefore the Bureau could not recognize it nor recognize actions taken pursuant to that constitution.[38] In the second opinion it was decided that the actions taken at a Council meeting not legally convened under tribal law were ineffective and could not be recognized.[39] In that case the Council had purported to remove the members of the Council's Executive Board and elect new members. The Bureau refused recognition to the new members and continued to recognize the old members based upon the Solicitor's opinion as to the legality of the meeting and the removals. In another opinion the following year the Solicitor's Office made a determination as to

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38. U.S. Department of the Interior, Office of the Solicitor, Unpublished Decisions, 1956, 238 (Apr. 23, 1956).

39. Id. at 248 (May 1, 1956).

which of two factions to recognize as the governing authority of the Red Lake Band of Chippewa Indians.[40] This decision was reached based upon the Solicitor's analysis of the traditional law of the tribe.

The Bureau of Indian Affairs and the Department of the Interior have made similar decisions in more recent years. In 1972 the Secretary of the Interior, in deciding an appeal from action taken by the Bureau of Indian Affairs, determined that the removal of the president of the Pawnee Business Council was valid and that the Bureau would not recognize the former president of the Business Council.[41] The matter was taken to Federal court by the United States to enforce the Secretary's decision. The position taken by the United States was that members of the tribe were being denied the benefit of their duly elected governing body.[42] In another case the Commissioner of Indian Affairs undertook to suspend the constitution of the Potawatomie Tribe and withdraw recognition of its governing body. The Commissioner's action was challenged in Federal court by members of the tribe.[43] The principal

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40. U.S. Department of the Interior, Office of the Solicitor, Unpublished Decisions, 1957, 635 (Nov. 22, 1957).

41. Letter from Assistant Secretary of the Interior, Harrison Loesch, to Thomas Chapman, Jr., Aug. 3, 1972.

42. Memorandum Brief of Plaintiff in Support of its Complaint and Request for Interlocutory Relief, United States v. Pawnee Business Council, Civil No. 73-C-11 (N.D. Okla., filed Jan. 15, 1974).

43. Battese v. Bruce, Civil No. KC-3664 (D. Kan., filed Dec. 11, 1972).

argument put forth in support of the Commissioner's action was as follows:

> The Commissioner has an independent trust responsibility to the individual members of the Indian tribe to insure that those persons who hold themselves out to the Commissioner as the duly elected representatives of the band are in fact duly elected and have in fact complied with the terms of the governing document of the band. This responsibility and duty is inherent in the Commissioner's official duties as trustee for the band. Surely the Commissioner has the power to insure that he has in fact recognized the proper persons as representatives of the band. 44

In light of this history, there can be little question that the BIA has authority to look behind the asserted legitimacy of tribal representatives. Were the tribal government of the Oglala Sioux a traditional form of government the matter might be viewed differently. However, where the tribal government is established pursuant to Federal law, i.e., the Indian Reorganization Act,[45] and where the tribal constitution is subject to the approval of the Department of the Interior,[46] the Federal government owes or ought to owe a higher degree of care to assure that those mechanisms of tribal government are not abused. Certainly not every slight legal error or omission will call for BIA scrutiny. In determining whether certain tribal actions were entitled

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44. Defendants Trial Brief at 9-10, Battese v. Bruce, Civil No. KC-3664 (D. Kan., filed May 13, 1974).

45. 25 U.S.C. §476 (1970).

46. Ibid.

to BIA recognition in the past, one standard that has been used is the standard of "substantial compliance" with applicable laws or customs.[47] Obviously, the facts presented here do not show substantial compliance with the tribal ordinance governing the election.

The reasons why the BIA chose not to act on the allegations of massive irregularities are not yet clear, and it is not clear that the BIA has committed itself finally to one course of action. It is, at the least, unfortunate that the Bureau did not immediately undertake the thorough investigation which the evidence seems to have warranted.

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47. See, U.S. Department of the Interior, Office of the Solicitor, Unpublished Decisions, 1956, 238 et seq. (Apr. 23, 1956).

Summary of Findings

— Many people voted in the election who were not eligible to vote because they were not enrolled members of the tribe according to available records. An examination of 793 names on the official voting records identified 154 such non-enrolled voters. (pp. 3-5)

— Many people voted in the election without complying with the election ordinance requiring a proper affidavit of eligibility. Individuals whose names do not appear on the official voting list are required by the ordinance to submit an affidavit of eligibility supported by the signatures of two eligible voters. About 283 voters whose names were not on the official voting list submitted no affidavit at all. Almost 600 voters submitted affidavits without the required supporting signatures. (pp. 5-6)

— No procedure was established or followed to permit the disqualification of ballots cast by voters who submitted an affidavit but were later found to be ineligible. (p. 6)

— An undetermined number of people voted who were not residents of the reservation or who did not meet the one year residency requirement of the tribal election ordinance. No effort was made by the Election Board to enforce the residency requirements for voting. (pp. 6-7)

— No procedure or method was established or used to check the identity of individuals presenting themselves at the polls. (p. 7)

-- The voter lists distributed by the Election Board to each of the precincts were extremely inaccurate and out of date. (pp. 7-9)

-- There did not exist at the time of the election and there does not now exist any reasonably accurate list of the enrolled members of the Oglala Sioux Tribe living on the reservation and qualified to vote in tribal elections.

-- No procedure or method was established or used to verify that the unofficial count of votes as tallied at the polls immediately after the close of voting corresponded substantially with the official count made after the ballots were transported to the Village of Pine Ridge.

-- The involvement of the Federal Government in the tribal election was evidenced by the fact that after the polls had closed, the ballot boxes and ballots were transported to Pine Ridge by the Bureau of Indian Affairs police. (pp. 10-11)

-- No poll-watchers or observers were present at any time during the official count of the votes. (p. 11)

-- No procedure or method was established or used to keep an accurate account of the use or distribution of all the official ballots which were printed. Neither was there an exact record of the number of official ballots printed. (pp. 11-12)

-- The Election Board was composed of three members, two of whom

had been appointed by the Tribal Council at a meeting over which incumbent Richard Wilson presided. The third member was appointed by a memorandum signed by only three members of the tribal Executive Committee, one of whom was Mr. Wilson. (pp. 12-14)

— Certain election judges and clerks were not properly appointed by the Election Board or by the appropriate district council. (pp. 14-15)

-- Numerous ballots were permitted to be taken out of the polling places, marked, placed in the ballot boxes and counted without following any of the procedures established by the election ordinance for absentee voting. (pp. 15-16)

-- The Election Board has failed to make a report or recommendation to the Tribal Council regarding the contest to the election as required by the election ordinance. (p. 16)

— The Tribal Council was not in session at the time the election ordinance required the contest of the election to be submitted to the Council. Richard Wilson was the only person with the legal authority to call the Council into session, but he failed to do so. (pp. 16-17)

-- The election was held in a climate of fear and tension. (p. 17)

__ The Bureau of Indian Affairs refused to supervise or oversee the election and afterwards refused to investigate charges of irregularities and fraud in the election. (pp. 18-20, 24)

Recommendations

In view of the facts found here, the most appropriate course would appear to be for the Tribal Council to order a new election. At this writing, the Council has not had the opportunity to consider the allegations of irregularities in the election. Should the Council fail to order a new election, it will then be incumbent upon the BIA to determine whether the present tribal representatives are entitled to recognition. In our view, the results of the election are invalid at least so far as those candidates running on a reservation-wide basis, the president and vice-president. No attempt was made to evaluate or determine whether the election was fair with respect to the election of members of the Tribal Council.

In order for any new election to be reasonably fair, existing safeguards must be adhered to, and additional safeguards must be established by tribal ordinance. Establishing such safeguards and determining what procedures to follow is clearly the responsibility of the Tribal Council.

More importantly for the long run, an accurate list of the persons entitled to vote in tribal elections ought to be developed. At this time it appears essential that the Bureau provide the necessary records and resources to develop such a list. This task should be begun at once.

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