

VOTING RIGHTS IN INDIAN COUNTY

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From the very earliest period of Euro-American settlement, there have been disputes over the civic status of indigenous peoples within the country. Although the 1924 passage of the Indian Citizenship Act resolved the citizenship question, it did not ensure the right to vote. In the years immediately following the passage of the ICA, states with large Native populations passed a range of laws designed to disenfranchise American Indians and Alaska Natives and many were still in place when the Voting Rights Act was passed in 1965. Despite widespread and egregious voting rights abuses against Native Americans, there was little initial interest in challenging voting rights abuses against Native Americans. In a similar vein, more recent commentaries about the Shelby County v. Holder (2013) decision have largely ignored its impact on Native American voting rights. In this paper, we consider the unique aspects of Native American voting rights litigation in the post-Shelby era.

Introduction

On June 25th, 2013---the 137th anniversary of Custer’s defeat at the Battle of Little Big Horn---the Supreme Court in a 5-4 decision in *Shelby v. Holder* (2013) rendered Section 5, one of the most important provisions of the 1965 Voting Rights Act, unenforceable. Unlike other parts of the Act, Section 5 was designed to proactively stop political jurisdictions with histories of voting rights abuses from implementing new laws and provisions that could undermine equal access to voting. In *Shelby v. Holder*

(2013), the Court ruled that Section 4(b), which provided the mechanism for implementing Section 5, was unconstitutional because it violated “the equal sovereignty of the states” by treating them differently based on “40 year old facts.”¹ This ruling meant that the previously “covered” jurisdictions were no longer required to pre-clear changes to their election laws and procedures with the Department of Justice or the Circuit Court for the District of Columbia.²

In his decision, Chief Justice Roberts wrote, “Regardless of how to look at

the record no one can fairly say that it shows anything approaching the ‘pervasive,’ ‘flagrant,’ ‘widespread,’ and ‘rampant’ discrimination that faced Congress in 1965.”³ This decision reversed lower court rulings that stated discrimination still was widespread,⁴ but the Justices argued that large increases in African American elected officials showed pre-clearance was no longer needed. While accurate, this ignored that most scholars attribute the increase to the protection provided by Section 5.⁵ Pundits immediately began to consider the ruling’s implications.

¹ *Shelby County v. Holder*, 570 U.S. ____ (2013).

² A county or state would be covered under section 4(b) if:

- a) As of November 1, 1964, 1968, or 1972, the jurisdiction used a "test or device" to restrict the opportunity to register and vote; and
- b) Less than half of the jurisdiction's eligible citizens were registered to vote on November 1, 1964, 1968, or 1972; or less than half of eligible citizens voted in the presidential election of November 1964, 1968, or 1972

Section 4(b) was struck down in the 2013 Supreme Court case *Shelby County v. Holder* forbidding this test for restrictions under section 5. The Court did not rule however on the constitutionality of section 5 itself meaning that if Congress were to establish a new test, the affected states and counties could still be limited under section 5.

³ *Shelby County, supra*.

⁴ In reaching this decision, the *Shelby* majority went against rulings by a district court and the U.S. Court of Appeals for the District of Columbia Circuit; the latter which had favorably cited House Report No. 109-478 that had been submitted as part of the 2006 re-authorization of the

Voting Rights Act. The House Report focused on “second-generational tactics” that dilute minority voting clout in ways that are “more subtle than the visible methods used in 1965,” but stated their “effects and results are the same, namely a diminishing of the minority community’s ability to fully participate in the electoral process and to elect their preferred candidates of choice.”

⁵ For an early example of this research, see Davidson, Chandler and Bernard Grofman. 1994. *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990*. Princeton, NJ: Princeton University Press. For more recent research, see Bentele, Keith Gunnar and

Liberals raised concerns about what they saw as a growing voter dilution problem among African American and Latino communities. Whereas conservatives saw the decision as a victory for federalism and states' rights, returning what they saw as a constitutionally protected power back to the states where it belonged.

But neither the Justices, nor the pundits, considered the ruling's impact on Native Americans.⁶ At the time of the *Shelby* decision, there were two states (Alaska and Arizona), as well as two counties in South Dakota, which were covered due to their past histories of discriminatory electoral practices against Native Americans. Alaska and Arizona had become "covered" in late 1975. The South Dakota counties, with borders were entirely within the boundaries of Indian reservations had been "covered" since early 1976.⁷

In the post-*Shelby* era, most voting rights cases are argued as violations of Section 2, which prohibits laws and other practices that "deny or abridge the right of any citizen of the United States to vote on account of race or color."⁸ Given that American Indians generally were not covered by Section 5 prior to the 1975 renewal of the Voting Rights Act, their experiences with litigation using Section 2 and the Fourteenth and Fifteenth Amendments during those early years are of particular interest, as well as recent cases arguing Section 2 violations in Indian Country. But we believe these current voting rights disputes are best understood within an historical context that situates them as an outgrowth of long-established practices designed to deny civic equality to Native Americans. For this reason, we have divided our research into the following three sections: 1).

The Historical Context, 2). The Voting Rights Act comes to Indian Country, and 3). Recent Section 2 Litigation.

The Historical Context

Throughout the nineteenth century, there were extensive discussions among the nation's elites over the civic status of indigenous peoples within the United States. During the 1820s and 1830s, the Supreme Court issued three very important, albeit confusing rulings, the "Marshall Trilogy," that left ambiguous the question of whether Native peoples had any recognizable American civic status.⁹ A quarter of a century later, the question was still unresolved. In 1856, Attorney General Caleb Cushing rejected any possible route to citizenship through naturalization, stating that only applied to "white men."¹⁰ One year later, Chief Justice Taney in his infamous

Erin E. O'Brien. 2013. "Jim Crow 2.0? Why States Consider and Adopt Restrictive Voting Access Policies." *Perspectives on Politics* 11(4): 1088-1116.

⁶ A content analysis of the more than 300 articles published in the immediate aftermath of the *Shelby* ruling and using Major World Publications as the source, failed to uncover a single one that mentioned the impact on American Indians. A subsequent Google search found two articles: one that briefly mentioned "Indians" in a general discussion of the ruling and another in *Huffington Post* that focused on Native Americans. For more, see Schroedel, Jean and Ryan Hart. 2015. "Vote Dilution and Suppression in Indian Country." *Studies in American Political Development* 29: 1-28.

⁷ The geographic reach of Section 5 was expanded as a result of the 1975 renewal of the non-permanent provisions of the Voting Rights Act. Alaska, Arizona and Shannon County (recently renamed Oglala Lakota County) and Todd County in South Dakota were subjected to pre-clearance almost immediately after the 1975 renewal (41 Fed. Reg. 783, 784 Jan.5, 1976). These two counties, as well as Bennett, Charles Mix, Corson, Lyman, Mellette and Washabaugh Counties, also were subjected to pre-clearance due to 1975 minority language provisions in 1976 (41 Fed. Reg. 29,998, 30,002, July 20, 1976).

⁸ *Voting Rights Act of 1965*, 79 Stat. 437, 42 U.S. Code § 1973.

⁹ In the first ruling, *Johnson v. McIntosh* (1823), Chief Justice Marshall, drew upon the "discovery principle" to argue that

American Indians were "merely occupants of the land" upon which they and their ancestors had dwelled for millennium, thereby abrogating any legal claim that they might have to owning the land. Then in *Cherokee Nation v. Georgia* (1831), Marshall stated that Native Nations were "dependent nations" whose relations with the United States government resembled that of a "ward to his guardian." However, one year later in *Worcester v. Georgia* (1832), Marshall seemed to reverse his earlier positions, stating that the United States considers "Indian nations as distinct political communities having territorial boundaries within which their authority is exclusive."

¹⁰ For more on the differences that Taney saw between American Indians and people of African Descent, see Horsman, Reginald. 1981. *Race and Manifest*

Dred Scott v. Sandford (1857) ruling, which stated people of African descent could never become citizens, suggested that American Indians, who took on the customs of white people could become citizens.¹¹ This confusion continued during the post-bellum era with the 1866 Civil Rights Act explicitly excluding “Indians not taxed” from citizenship, a phrase that was not included in the Fourteenth Amendment, but only after the bill’s sponsors assured other members of Congress that the amendment would not apply to “Indian savages.”¹² The possibility of citizenship was further undermined by the Supreme Court’s *Elk v. Wilkins* (1884) decision that American Indians were not citizens; instead their status was akin to that of foreign ambassador’s U.S. born children.¹³ Shortly thereafter, Congress provided a path for U.S. citizenship through the Dawes Act (also known as the General Allotment Act) and subsequent acts in 1901 and 1906, which allowed American Indians to gain citizenship after they gave up reservation lands

in exchange for taking on individual allotments of land.¹⁴ A federal court, however, in 1901 held that the citizenship status of those who had gained it through these congressional acts was not the same as the citizenship of other Americans. The court ruled they were still “wards” of the federal government.¹⁵

By the early 1920s, nearly two-thirds of American Indians had gained citizenship through congressional action or their military service in World War I and the remainder gained it in 1924, when Congress passed the Indian Citizenship Act.¹⁶ In keeping with the earlier judicial decision that the citizenship status of American Indians did not eliminate their status as “wards” of the federal government, political leaders in states with large Native populations refused to extend the right to vote to these “new” citizens. Indian Affairs Commissioner Charles Burke was quite aware of this and sent a letter to local Indian superintendents pointing out that citizenship did not

necessarily include the right to vote.¹⁷

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When the Indian Citizenship Act was signed into law, there were clauses in at least seven state constitutions that statutorily disenfranchised Native Americans.¹⁸ Following the passage of the Indian Citizenship Act, a number of states reacted by passing additional laws to ensure the disenfranchisement of Native Americans. Some of these laws closely resembled those employed in the Jim Crow South, while others were uniquely related to the existence of Native Nations and reservations. Six western states instituted literacy tests that required American Indians to prove to registrars that they were able to read and write

Destiny: The Origins of American Racial Anglo-Saxonism. Cambridge, MA: Harvard University Press: 253.

¹¹ *Dred Scott v. Sandford* 60 U.S. 393 (1857).

¹² Schroedel and Hart, *supra* note 7, at 7.

¹³ *Elk v. Wilkins* 112 U.S. 994 (1884).

¹⁴ The reservations of Native Nations that accepted provisions of these Acts were divided up into individual allotments (160 acres for heads of household, 80 acres for single adults, and 40 acres for minors) with the remaining lands sold off to non-Indians. Between 1890 and 1901, nearly

155,000 American Indians were granted U.S. citizenship through the Dawes Act. Wolfey, Jeanette. 1991. “Jim Crow, Indian Style: The Disenfranchisement of American Indians.” *American Indian Law Review* 16: 167-202. The price in terms of the land lost was very steep. For example, the Arapaho and Cherokee lost over 80% of their reservation lands as a result of their being made “surplus.” Wilkins, David E. and Heidi Kiiwetinepinesik Stark. 2011. *American Indian Politics and the American Political System*, 3rd edition. Lanham, MD: Rowman & Littlefield, 127-128.

¹⁵ *Farrell v. United States* 110 Fed. 942 (1901).

¹⁶ See Bruyneel, Kevin. 2004.

“Challenging American Boundaries: Indigenous Peoples and the ‘Gift’ of U.S. Citizenship.” *Studies in American Political Development* 18: 30-43 for a discussion of how Native Americans viewed the “gift” of citizenship.

¹⁷ Schroedel and Hart, *supra* note 7, at 8.

¹⁸ Cohen, Felix. 1942. *Handbook of Federal Indian Law*. Washington, DC: Government Printing Office: 157-158.

English.¹⁹ New Mexico, Utah, and Arizona had provisions stating that Native peoples living on reservations were not actually residents of the states and therefore could not vote.²⁰ The legal justification for these laws came from an early Minnesota Supreme Court ruling that the Red Law Chippewa, living on a reservation could be excluded from the voting rolls because they had not “yielded obedience and submission” to the state, as shown by the payment of property taxes on reservation lands.²¹

Minnesota, South Dakota, and North Dakota, required Indians to prove they were no longer “Indian” by self-terminating their tribal affiliations in order to vote.²² Registrars in Arizona argued that the guardianship clauses that kept the mentally incompetent from voting in their state constitutions applied to Native Americans even though those provisions had been struck down by a North Dakota court.²³

The Voting Rights Act Comes to Indian Country

Many of these discriminatory provisions were still in place when the Voting Rights Act was passed, but in the 1965 *Congressional Record*'s nearly 1,000 pages of debates and reports over the Act, there are only two very brief mentions of American Indians.²⁴ Even though most parts of the country with large Native populations initially were not covered by Section 5, the Voting Rights Act became an important tool in Native Americans' struggle for the franchise. During the decade prior to Congress' decision to extend the geographic reach of Section 5, Native American claims about voting rights abuses had to be litigated using Section 2 that prohibits any “qualification or prerequisite to voting or standard, practice, or procedure [that] shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color...”,

along with the Fourteenth and Fifteenth Amendments.²⁵

There were only a handful of these Section 2 voting rights cases, involving American Indian populations, prior to the Act's 1975 renewal, but the egregious nature of these cases figured prominently in discussions over extending the reach of the Act's non-permanent provisions.²⁶ The U.S. Civil Rights Commission 1975 report, *The Voting Rights Act: Ten Years After*, focused attention on practices in Arizona that were designed to systematically deny Navajo representation within county governments.²⁷ The report paid particular attention to Apache County, which is located in the northeastern corner of the state, and includes a land mass of more than 11,200 miles. The upper half of the county is part of the Navajo Reservation, and American Indians (mostly Navajo, but also Hopi and Apache) comprised roughly three-quarters of the county's residents, but they had never gained representation on the three-person Board of Supervisors. In 1973, Tom

¹⁹ McCool, Daniel, Susan M. Olson, and Jennifer L. Robinson. 2007. *Native Vote: American Indians, the Voting Rights Act, and the Right to Vote*. Cambridge: Cambridge University Press: 11-12.

²⁰ *Id.*

²¹ *Opsahl v. Johnson*, 1917. 163 N.W. 988 (Minn.). This provision in the New Mexico constitution was ruled unconstitutional in *Trujillo v. Garley*, 1948. Civ. No. 1353 (D.N.M.).

²² McCool et. al. *supra* note 20.

²³ *Swift v. Leach*, 45 N.D. 437 (1920).

²⁴ Schroedel and Hart, *supra* note 7, at 10.

²⁵ 42 U.S.C. § 1973 : US Code - Section 1973: Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation.

²⁶ Courts generally have required a higher standard of proof in Section 2 cases than in Section 5 litigation---sometimes requiring the proof of intentional discrimination rather than discriminatory outcomes. While direct evidence of intent to discriminate is desirable, that is difficult to obtain. Plaintiffs typically are

left piecing together circumstantial evidence to show a “totality of circumstance” that strongly points to discriminatory intent. See, for example, *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 49 U.S. 252 (1977).

²⁷ United States Commission on Civil Rights. 1975. *The Voting Rights Act: Ten Years After*. Washington, DC: Government Printing Office.

Shirley, a member of the Navajo Nation, got three times as many votes as a white candidate running for the District 3 seat that included the reservation. The Board of Supervisors refused to seat Shirley, arguing that his failure to pay property taxes, because he lived on a reservation, rendered him ineligible for elected office. The fact that Shirley paid a full range of other taxes and was a military veteran was irrelevant in the eyes of the Board. Shirley fought the case all the way up to the Arizona Supreme Court, which ordered the Apache County Board of Supervisors to seat Shirley.²⁸

“This up to 10:1 population disparity in the electoral districts was challenged in a case filed in 1973, and eventually resulted in the county being found to have violated the Fourteenth and Fifteenth Amendments and Section 2.”

Even though Shirley succeeded in gaining a place on the Board, the

county still engaged in a range of vote denial and dilution strategies that prevented Native Americans in the county from equal representation.²⁹ The Board of Supervisors, which established the geographic boundaries of the three supervisory districts, used that power to create districts with enormous population disparities. The overwhelmingly Navajo District 3 had a population of 26,700, but Districts 1 and 2, which were nearly all white, had populations of 1,700 and 3,900 respectively.³⁰ This up to 10:1 population disparity in the electoral districts was challenged in a case filed in 1973, and eventually resulted in the county being found to have violated the Fourteenth and Fifteenth Amendments and Section 2.³¹ These actions paved the way for increased registration and voting among Navajo and led to the Board of Supervisors gaining a Navajo majority, as well as the first Navajo being elected to the state legislature.³²

There were a range of the early voting rights cases involving denial of the franchise, such as the South Dakota law challenged in *Little Thunder v. South Dakota* (1975) and *U.S. v. South Dakota* (1980).³³ The law stated that residents of “unorganized counties,” such counties that included the Pine Ridge and Rosebud Sioux reservations, could not vote nor run for county political office. Instead

all of those governmental functions were handled by adjacent counties with nearly all white populations. The extension of Section 5 coverage to the “unorganized” counties made it possible for Native Americans to have access to the ballot box and elect representatives of their choice to political office.³⁴ But that did not mean that places with long histories of vote denial were going to quietly acquiesce to Native voting. There were number of other vote denial cases in South Dakota during the 1980s, such as *American Horse v. Kindert* (1984) and *Fiddler v. Sieker* (1986) that involved county registrars refusing to accept voter registration cards from reservations, arguing they had to be fraudulent.³⁵

Recent Section 2 Litigation

Most contemporary Section 2 cases have involved vote dilution (e.g., voters are fully able to cast votes, but do not have an equal opportunity to elect representatives of their choice), such as occurs when there is mal-apportionment of districts. The question of voting abridgement, however, has become an increasingly important element in recent Section 2 litigation, and one that particularly affects Native Americans. Forty years ago, nearly all voting took place at local precincts on Election Day, but in 2016 nearly 40%, over 47 million, of all the votes cast were done via early in-person or absentee voting.³⁶

²⁸ *Shirley v. Superior Court*. 1973. 513. P. 2d 939 (Ariz.): 109 Ariz 510.

²⁹ The county used literacy tests to prevent Navajo, many of whom had limited English proficiency, from being added to the voting rolls. For more on the barriers faced by Shirley and others in the 1970s, see Yurth, Cindy. 2009. “A Leader with Backbone: 35 Years Later, Apache County’s First Dine Supervisor Speaks Out.” *Navajo Times* September 3. <http://navajotimes.com/politics/2009/09/09/supe.php>. Accessed 2/15/2017.

³⁰ *Goodluck v. Apache County* 1975. 417 F. Supp. 13 (D. Ariz.); 1976. Aff’d 429 U.S. 976.

³¹ *Id.*

³² United States Commission on Civil Rights, *supra* note 28.

³³ *Little Thunder v. South Dakota*. 1975. 518 F. 2d 1253 (8th Cir.); *U.S. v. South Dakota*. 636 F 2d. 241 (8th Cir.).

³⁴ Prior to the extension of Section 5 to two South Dakota counties, no American Indians had ever been elected to the state

legislature, despite comprising large population majorities in reservation districts. They also had been excluded from electing their own to county council seats. See Schroedel, Jean and Artour Aslanian. 2015. “Native American Vote Suppression: The Case of South Dakota.” *Race, Gender & Class* 22(1-2): 308-323.

³⁵ *American Horse v. Kindert*. 1984. Civ. No. 84-5159 (D.S.D.); *Fiddler v. Sieker*. 1986. Civ. No. 86-3050 (D.S.D.).

³⁶ The United States Election Project. electproject.org.

As early voting becomes more prevalent, Native American populations, especially those concentrated on reservations, have had to fight to establish access to forms of early voting. The recent cases, involving Native Americans are Section 2 voting abridgement cases, where the electoral practices include material limitations that affect the minority community more heavily than the white community.³⁷ If that type of a limitation is found, the court then examines the “totality of circumstances” in the local community to ascertain whether the practices under dispute work in combination with historical circumstances and the political, social and economic conditions (e.g., the Senate Factors) to produce a result that is discriminatory.³⁸ The four cases outlined in the next section are example of Section 2 voting abridgement violations.

Brooks v. Gant (2012)

Shannon County in South Dakota is contained entirely within the Pine Ridge Indian Reservation.³⁹ In 2012 members of the Oglala Sioux Tribe, living on the western half of the Pine Ridge Reservation, sued the South Dakota Secretary of State asking for the establishment of a “full period of statutorily authorized early voting” in Shannon County.⁴⁰ When *Brooks v. Gant* (2012) was filed, residents of the county had substantially less access to early voting than was available to other South Dakota residents. State law provided

residents with the opportunity to vote at the county auditor’s office starting 46 days prior to Election Day, but Shannon County residents were only provided with an in-county site for six days. Because Shannon County was classified as “unorganized,” residents wanting vote early, apply for an absentee ballot or take advantage of late registration, had to travel to the courthouse in the neighboring Fall River County. The Fall River courthouse is located in Hot Springs, “which is between 53 minutes and 2 hours and 45 minutes from voters in Shannon County depending on the residence of the voter.”⁴¹

Facing a likely injunction, the Secretary of State agreed to provide early voting services for the 2012 election. “This decision was made in part due to the Secretary of State’s commitment to provide an additional \$12,000 through Help America Vote Act (HAVA) funds.”⁴² Because the county had voluntarily met the plaintiffs’ demands, their request for a preliminary injunction was dismissed. The motion for a permanent injunction continued, and the parties began discovery. During the discovery period Shannon County entered into an agreement with the Secretary of State, ensuring that these satellite voting offices will remain open and funded through January 1st, 2019. This agreement led to the case being dismissed without prejudice.⁴³

“While he did not take active steps to stop voters, many elderly people, with memories of violent clashes with law enforcement were too intimidated to enter and left without voting.”

Despite the agreement, there were still attempts to limit the voting of reservation residents. The Oglala Sioux Tribe asked for the early voting center to be staffed by at least one tribal member. The request was granted, but to ensure that there weren’t any “problems” the county sheriff was assigned to watch over the location during its operating hours. Anecdotal reports tell of the sheriff, a large white man, with a handle bar mustache, sunglasses, revolver, and cowboy hat standing right by the door. While he did not take active steps to stop voters, many elderly people, with memories of violent clashes with law enforcement were too intimidated to enter and left without voting.⁴⁴

Poor Bear v. County of Jackson (2015)

Residents in the eastern half of the Pine Ridge Reservation, which is part of Jackson

³⁷ See for example, *Veasey v. Abbott*, 830 F. 3d 216, 2016 WL 3923868, at *17 (5th Cir. 2016).

³⁸ *League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224, 245 (4th Cir. 2016).

³⁹ In 2015, the name of Shannon County was changed to Oglala Lakota County, which better reflects the make-up and history of the county.

⁴⁰ United States District Court District of South Dakota Western Division. *Order Denying Defendants Motion to Dismiss and Granting Defendants Motion to Extend*. Case No. CIV. 12-5003-KES. October 4th 2012.

⁴¹ *Ibid*.

⁴² *Ibid*.

⁴³ *Brooks v. Gant*, No. 5: 2012 cv05003-Doc. 66 (D.S.D.).

⁴⁴ It should be noted that Shannon County and the Pine Ridge Reservation are often seen as the epicenter of the tumultuous history between the United States Government and the Plains Indians. The Reservation is home to the site of the Wounded Knee Massacre as well as the 1973 standoff between U.S. Marshalls and American Indian Movement protesters.

County, also faced substantial travel distance barriers. The southern half of the county is part of the Pine Ridge Reservation while the northern half is mostly white.⁴⁵ The county seat of Kadoka is located in the northern half, roughly 27 miles from Wanblee, the main reservation population center. In 2013, reservation residents asked the county to establish an early voting satellite office in Wanblee, but county board of commissioners decided it would be too expensive without state assistance, which they did not believe would be available.⁴⁶

Following this vote, reservation residents filed suit against the county in *Poor Bear v. County of Jackson* (2015). They claimed that, “South Dakota’s Help America Vote Act Task Force had approved a plan in February 2014 which included a provision for Jackson County to use HAVA funds to establish a satellite office.”⁴⁷ Because the county refused to establish the office even after receiving notification from the state that HAVA funding was available, plaintiffs argued the refusal

was a violation of Section 2 and the 14th Amendment. They also filed for a preliminary injunction to establish a satellite voting office in time for the 2014 elections. Before this request could be heard before a judge, the parties reached a settlement establishing a satellite office in Wanblee for the next three election cycles.

Wandering Medicine v. McCulloch (2014)

Similar issues affected the ability of Native Americans living on reservations in Montana, where members of the Gros Ventre, Northern Cheyenne, Crow and Assinboine Tribes in the Bighorn, Rosebud, and Blaine Counties, filed for a preliminary injunction in the weeks prior to the 2012 election. On October 30th 2012, that motion was denied by District Judge Richard F. Cebull who argued that:

It is undisputed that Native Americans living on the three Indian Reservations face greater hardships to in-

*person absentee voting than residents of the three counties who do not live on the reservations. But because the evidence also established that Montana law provides several other ways of voting and that Native Americans living on the three reservations are able to elect representatives of their choice, the Court concluded Plaintiffs were not very likely to succeed on the merits their § 2 Voting Rights Act claim.*⁴⁸

Judge Cebull went on to argue that in order to claim a violation of the Equal Protection Clause, the plaintiffs would have to prove that the counties intended to discriminate in refusing to establish these offices. Additionally, there would be “significant hardship that would be imposed on the County elections administrators to implement new procedures on short notice during what is likely to be a close election in many statewide races.”⁴⁹ The counties would not have

⁴⁵ Until the early 1980s, the eastern portion of the Pine Ridge Reservation was the “unorganized” Washabaugh County. After being part of several early voting rights cases, Washabaugh County was subsumed into Jackson County that was directly to its north.

⁴⁶ The minutes from the June 20, 2014 meeting state: “Discussion was held on the information received that Jackson County meets the criteria to establish a satellite absentee voting site through the

South Dakota HAVA plan, but that reimbursement of expenses to Jackson County through HAVA grant funding is not shown. Vicki Wilson, Auditor, reported that she had sent an email to Secretary of State Gant about reimbursement of expenses for such sites, but has not received a response. Stilwell moved, Denke seconded, that Jackson County not establish satellite voting sites due to no response on state or federal

funding for such sites, and also due to no county funding available.” United States District Court District of South Dakota Western Division. *Complaint for Injunctive and Declaratory Relief*. Case No. 14-5059. September 18th, 2014.

⁴⁷ *Id.*

⁴⁸ *Mark Wandering Medicine v. McCulloch*, 906 F. Supp. 2d 1083 - Dist. Court, D. Montana 2012.

⁴⁹ *Id.*

satellite offices opened on the reservations in time for the 2012 election, but the case moved forward to the appeals process.

In the appeal, the Department of Justice submitted a statement concurring with the plaintiffs and argued that the vastly greater travel distances faced by the Native American population in these counties when trying to cast an early in-person or absentee ballot compared to the white population amounted to a denial of equal access.⁵⁰ The amicus brief showed that Native Americans on average would have to travel from 189% to 322% more than their white counterparts to access these types of ballots. The Ninth Circuit declined to hear the case, rendering the original 2012 request for a preliminary injunction moot. The case was allowed to continue based on the additional Section 2 questions brought forward, but the parties settled on June 10th, 2014 establishing satellite offices on the three reservations in question.⁵¹

Sanchez v. Cegvaske (2016)

In 2016 the impact of differential travel distances was raised in a Nevada case, involving Paiutes and Shoshones living on the Pyramid Lake Reservation in Washoe County and the Walker River Reservation in Mineral County. After their request for an on-reservation early voting center was turned down, tribal members sought a preliminary injunction. Nixon, the population center of the Pyramid Lake Reservation is 48 miles from the Mineral County seat in Reno. Residents of the Walker River Reservation faced a similar situation in Washoe County, where the county seat, Hawthorne, is 35 miles away. The Nevada Secretary of State and the two county governments faced a public relations disaster when it was revealed that the state had established 21 early voting sites, largely in affluent white communities. On September 7, 2016, Judge Miranda Du issued a preliminary injunction and directed the state of Nevada

and the counties to provide early voting sites on the two reservations. In her decision, Judge Du strenuously rejected the state's argument that the plaintiffs "must show complete denial of the ability to vote or participate."⁵² The judge accepted the plaintiffs' argument that the differential access, combined with some of the "Senate factors," constituted "abridgement" of the defendants' right to vote in violation of Section 2.⁵³

"There is a constant cry for recognition that presses against a similarly constant movement pushing them to the fringes of American society."

There are two very significant take-aways from this litigation. First, unlike the earlier travel distance cases, *Sanchez v. Cegvaske* (2016) was not resolved through the parties reaching a settlement. Instead there was a judicial ruling---the first---that could be cited as precedent in Section 2 abridgement cases involving unequal access due by travel

⁵⁰ United States District Court of Montana Billings Division. *Statement of Interest of the United States of America*. Case No. 1:12-CV-135-RFC. October 24th, 2012.

⁵¹ Had the case been reheard at the district court level, there would have been a new judge, because in the intervening period, Judge Richard Cebull had taken early retirement after being found to have violated numerous ethical codes. In early 2012, right at the time when Judge Cebull was ruling in the *Wandering Medicine* case, the *Great Falls Tribune*

was running stories about the hundreds of racist emails that he had sent out from his courthouse chambers. The most provocative of these was an email suggesting that President Obama's mother had sex with a dog. Adams, John S. 2014. "Cebull Probe Finds More Emails: Hundreds are Related to 'Race, Politics, Gender.'" *Great Falls Tribune*. January 16.

<http://www.greatfallstribune.com/story/news/2014/01/17/federal-panel-releases-findings-in-cebull-misc...> Accessed

3/16/2017. Journalists from the *Great Falls Tribune* subsequently tried to gain access to these emails, after being told that many of the derogatory ones dealt with Native Americans, but their request was denied. *Adams v. Committee on Judicial Conduct & Disability*, Case No. 15-CV-01046-YGR. 165 F. Supp. 3d 911(2016).

⁵² *Sanchez v. Cegvaske*, 2016 Westlaw 5936918.

⁵³ *Id.*

distance combined with socio-demographic factors.⁵⁴ This is extremely important development. Second, the reaction of government officials to the ruling, however, suggests that those opposed to Native American voting rights will not acquiesce to enhanced access unless forced to do so. After the *Sanchez* ruling, the Inter-Tribal Council of Nevada asked the state to create satellite early-voting locations for the remaining seven tribes not covered by the ruling, but they were refused.

Conclusion

The struggle for equal voting rights for Native Americans is very much a continuation of Native Americans' ongoing struggle for civic equality. There is a constant cry for recognition that presses against a similarly constant movement pushing them to the fringes of American society. While Native Americans can no longer be statutorily prohibited from voting, achieving equal access to the ballot box is a continuing concern. As the ways available for Americans to vote have changed, new forms of discounting their vote have emerged. Does the Voting Rights Act require equality of access to all types of voting or is differential access allowed, as long as there are some means of voting?

This is what the legal dispute over abridgement concerns. We would argue that nothing less than full equality in access is the appropriate legal standard.

The Supreme Court's decision in *Shelby County v. Holder* (2013) decision has made this struggle more challenging. No longer are political jurisdictions with histories of voting rights abuses required to "pre-clear" changes to their election laws and procedures. This opens up the possibility that both old and new forms of vote denial dilution, and abridgement will have to be fought in the courts, and at great expense to litigants. Moreover, these cases will have to argue that the procedures violate the standard of proof required in Section 2 litigation. Cases, such as *Brooks v. Gant* (2012), *Poor Bear v. The County of Jackson* (2014), and *Sanchez v. Cegvaske* (2016), show that plaintiffs can get redress through Section 2 litigation, but it depends upon whether individual judges, such as Judge Miranda Du, recognize the seriousness of vote abridgement. Yet even were the Supreme Court to accept the legal test developed in *Sanchez v. Cegvaske*, the problem would still not be fully addressed. As a result of the *Shelby* ruling, American Indians (and other minority populations) still lack a way to

proactively prevent political jurisdictions from adopting procedures that make it harder for them to have access to the ballot box----and given the long history of discrimination against Native peoples, this is not likely to disappear in the near future.

⁵⁴ *Id.*