UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

Memorandum

TO : Carlton E. Stoiber
Leader
Indian Task Force

DATE: June 22, 1973

PSF:flh

FROM : Philip S. Fuoco
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SUBJECT: Indian Preference Statutes
(25 U.S.C. §§ 44-47, 472)

ISSUE

Are the Indian Preference Statutes consistent with the Equal Employment Opportunity Act of 1972 (EEOA) and the United States Constitution?

CONCLUSION

The Indian Preference Statutes are not violative of the Fifth Amendment to the United States Constitution and were not repealed by §717 of the 1972 Equal Employment Opportunity Act.

DISCUSSION

I. Recent Cases

Three recent cases have considered the Indian Preference Statutes and have reached varying results.

A. Mescalero Apache Tribe v. Hickel, 432 F.2d 956 (1970)

In this decision the Tenth Circuit Court of Appeals held that the Indian Preference Statutes did not require that Indians be given preferential treatment by the Bureau of Indian Affairs (BIA) when agency

reductions in force were made. The three judge panel after review of the legislative history of the Preference Statutes, interpreted the statutes to not require that the Indian preference be considered during a reduction in force:

> Appellants now urge us to adopt an interpretation of the preference statutes that would undoubtedly further employment of Indians in the B.I.A. but at the expense of discharging an indeterminate number of non-Indians whenever there is a reduction in force. This was clearly not within the original intent of Congress.
>
> Congress intended to promote Indian employment in the B.I.A. but also to provide job security for non-Indian employees by giving Indians only a preference in "appointment to vacancies." This security is lost if the Indian preference statutes are applied to reductions in force since inevitably all non-Indian employees would be "ousted" by such reductions. Besides posing a threat to non-Indians now employed by the B.I.A., the loss of job security would also constitute a significant deterrent in recruiting non-Indians for B.I.A. jobs.

B. Freeman v. Morton, Civil Action No. 321-71 United States District Court, District of D.C. (December 21, 1972)

Here the issue presented was whether the Indian Preference Statutes required BIA to give Indian employees preference in promotions, reassignments to vacant positions

and assignments to available training positions. The defendant (Secretary of the Interior) urged the court to adopt the position that the mandatory use of the preference applied only in the initial hiring of employees to fill vacancies. This court, too, considered the legislative history of the subject statutes and concluded that:

> All initial hirings, promotions lateral transfers and reassignments in the Bureau of Indian Affairs as well as any other personnel movement therein intended to fill vacancies in that agency, however created, be declared governed by 25 U.S.C. Sec. 472 which requires that preference be afforded qualified Indian candidates. . . .

The court did not however require the BIA to grant such preference to candidates for training programs.

C. Mancari v. Morton, Civil Action No. 9626, United States District Court, District of New Mexico, (June 1, 1973)

In the two previous cases the plaintiffs were Indian employees of the BIA attempting to have the agency extend its preferential treatment. In neither case was the validity of the statutes challenged, although the courts in both cases recognized the issue in footnotes at the out set of their opinions. The Mescalero court in footnote number one:

> The parties accept the basic constitutional validity of these statutes as an unquestioned premise for the limited issue which they here present. By considering the case in its present posture we do not give judicial comfort to that premise. No constitutional issue is before us.

The Freeman court in footnote number three:

> Since neither party has raised the constitutional questions that such racially discriminatory legislation brings to mind, the Court will not treat them. Certainly not all classifications based on race are invalid. Contractors Ass'n of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971); and Congress has broad powers to ". . . do all that [is] required . . . to prepare the Indians to take their place as independent, qualified members of the modern body politic." Board of County Commissioners v. Seber, 318 U.S. 705 (1943). These Indian preference statutes appear to be a rational exercise of that power.

The Mancari court faced the question squarely. This action was brought by non Indian employees of the BIA for themselves and on behalf of all other employees of less than 1/4 Indian blood. */ The plaintiffs sought to enjoin the BIA from enforcing the Indian Preference Statutes alleging that they were being denied rights guaranteed them under the Fifth Amendment of the United States Constitution and under the Civil Rights Acts of 1964 and 1972, the Equal Employment Opportunity Act, 42 U.S.C. §§ 2000e et seq. The case was considered as appropriate for a three judge panel.

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*/ The BIA Indian Affairs Manual which governs operation of the Preference Statute states: "1. Indian Preference. Employees eligible for Indian preference are those with 1/4 or more degree Indian blood. . . ."

After a cursory discussion of the legislative history of the Preference Statutes and a synopsis of the two preceding cases the Mancari court reached the issue before it and the basis of its decision:

> We turn now to the asserted conflict between the Indian Preference statute and the Civil Rights Acts of 1964 and 1972 (Equal Employment Opportunity Act, 1972, Public Law 92-261). As indicated above plaintiffs assert that the Indian Preference Policy adopted and implemented by the Bureau is in direct conflict with the Civil Rights Acts of 1964 and 1972, and more specifically with Title 42 United States Code, §2000e-2 and as amended by Public Law 92-261. Plaintiffs in their challenge to the preference acts thus assert that the Bureau, by refusing to obey the Congressional mandate set forth in section 717 of Public Law 92-261 [42 U.S.C. 2000e-16], is violating the rights given them under that added section.

The "added section" referred to by the Court is §717 of Title VII, 42 U.S.C. §2000e-16 which was added as part of the 1972 amendments to the employment statute. Section 717 provides in part as follows:

> "Sec. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies (other than the General Accounting Office) as defined

> in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

This section in effect makes the employment statute and its remedies applicable to the Federal Government. The three judge panel after considering the legislative history of §717 and the relevant case law on statutory construction reached the decision that Congress impliedly repealed the Indian Preference Statutes with its passage of the 1972 employment statute amendments.

> The Equal Employment Opportunity Act of 1972 is a clear, emphatic directive by Congress that all positions in the competitive civil service of the federal government should be filled without regard to race, religion, sex, color, or national origin. It is subject to no other interpretation, and as indicated, there were exceptions placed in it, so Congress considered limitations on its scope, but none was included as to the Bureau of Indian Affairs. Thus, the several preference statutes were overridden, and the Bureau must conform to the broad sweep of section 717.

Holding that §717 takes preference over the Indian Preference Statutes the Court did not find it necessary to reach the constitutional question of whether the Preference Statutes conflicted with the Fifth Amendment. The Court nevertheless pointed out that the defendant (Secretary of the Interior) had not met its burden of producing evidence of a reasonable governmental purpose for such a preference and "[u]nder these circumstances, we could well hold that the statute must fail on constitutional grounds. . . ." */

All of the above decisions concern themselves with statutory interpretation. Two (Mescalero and Freeman) attempt to determine the perimeters of the Indian preference, the third attempts to ascertain the intent of Congress in passing two seemingly contradictory measures. In all three instances, there is no clear Congressional intent expressed and the courts were left to fashion their own solution for the problems unresolved by the legislature.

II. Legislative History of the Statutes Involved

A. The Indian Preference Statutes

Little relevant legislative material is available concerning the early Indian preference statutes; 25 U.S.C. §44 (1894); 25 U.S.C. §45 (1834); 25 U.S.C. §46 (1886). There is however substantial legislative history pertaining to 25 U.S.C. §472 (1934). This section is the broadest of the preference statutes and requires that a preference be given to Indians in filling vacancies in the BIA. Section 472 was enacted as part of the Indian Reorganization Act of 1934, the broad purpose of which was to give the right of self government back to the Indian tribes. This theme was

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*/ Mancari v. Morton, supra at 11 (slip opinion).

exemplified in the discussions concerning §472. The legislative history leaves no doubt that the purpose of §472 was to encourage and facilitate Indian participation in the BIA. The ultimate goal of the supporters of this section was the eventual takeover of the BIA by Indian employees.

> Our examination of the legislative history relevant to the passage of §472 supports appellants' contention that it was intended to integrate the Indian into the government service connected with the administration of his affairs. Congress was anxious to promote economic and political self-determination for the Indian. Specific concern was directed to reforming the B.I.A., which exercised vast power over Indian lives but was staffed largely by non-Indians. Through the preference given to Indians by §472, it was hoped that the B.I.A. would gradually become an Indian service predominantly in the hands of educated and competent Indians.

Mescalaro Apache Tribe v. Hickel, supra at 960.

> The legislative history of the Indian Reorganization Act of 1934 reveals that the Congressional intent was that the B.I.A. become an agency staffed with Indians performing services for Indians. While the "present employees" of the agency were not to be dismissed from their jobs because of the preference, it goes without saying that a choice was made between their future prospects and the Congressional purpose that the B.I.A. became an "Indian" agency in the sense that it was to be staffed by Indians wherever possible.

Freeman v. Morton, supra at 6 (slip opinion).

B. Title VII of the Civil Rights Act of 1964

Title VII of the 1964 Civil Rights Act requires non-discrimination in employment. In its introductory sections however the statute exempts Indian tribes from the requirements of the statute (§701(b)). In addition there is a special exception in the statute that exempts employers of Indians on or near a reservation:

> Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

§703(i) Title VII 1964 Civil Rights Act.

Both of these provisions were proposed by Senator Mundt from South Dakota. In his remarks to the Senate he catalogued the reasons for exempting application of Title VII to Indians:

> The amendment involves the welfare of our oldest and most distressed American minority, the American Indians, the original landlords of America.
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> . . .
>
> If my present amendment is approved by the Senate, we shall have done an excellent job in this civil rights bill of protecting and promoting the

> welfare and opportunities of our American Indians - the one minority group in the United States which has suffered the largest and the most poor judgment of Americans generally.
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> . . .
>
> That Amendment [703(i)], Mr. President, together with the one I now have on the desk and which I trust will be approved will assure our American Indians of the continued right to protect and promote their own interests and benefit from Indian preference programs now in operation or later to be instituted.

110 Cong. Rec. 13701-03.

C. The Equal Employment Opportunity Act of 1972

The relevant part of this statute is §717 of Title VII (42 U.S.C. 2000e-16) which makes the non-discrimination requirements of Title VII applicable to the Federal Government. In the 1964 Act the Federal Government was specifically excepted from the requirements of Title VII. The legislative history of §717 reveals that Congressional concern was focused on the lack of minority hiring and advancements within the federal agencies. This section was added to insure equal treatment to minority employees by the Federal Government. Various charts submitted throughout the discussions on §717 show that American Indian employment in the Federal government comprises only .7 per cent of the federal work force. (Legislative History of the EEOA of 1972, (prepared and printed by the Committee on Labor and Public Welfare, United States Senate, Nov. 1972)). Nowhere in the discussions on §717 was there any mention of the Indian preference statutes; nor any consideration to repeal these statutes.

D. Statutory Construction

To decide that Congress intended by §717 to impliedly repeal the Indian preference acts appears erroneous.

Repeal by implication is not favored and should be avoided unless the statutes are irreconcilable. Where there are two acts on the same subject effect should be given to both if possible. Lynch v. Household Finance Corp., 405 U.S. 528, 549 (1971); Posadas v. National City Bank, 296 U.S. 497, 503 (1935).

If the Indian preference statutes were repealed by §717 it would result in the incongruous position that Title VII permitted private employers to give preference to Indians (§703(i)) but not the BIA. The result of repeal has to be reached over the considerations that the Indian preference statutes were specific statutory provisions, having considerable Congressional debate on the issue and an identifiable and clear purpose; while §717 is silent on the issue of Indian preference and was intended to increase and insure minority hiring in the Federal government.

It is inconceivable that Congress would impliedly repeal an Indian preference in the BIA (an agency whose sole purpose is Indian advancement) and specifically permit private employers to give such a preference (§703(i)) in the same statute. It is apparent that even if Congress intended to repeal the Indian preference statutes by passage of §717 they would have taken the opportunity to delete the Indian exceptions in §701(b) and §703(i). The goal of §717 and that of the Indian preference statutes are identical - the employment by the Federal government of minority group members. The Indian Preference Statutes were not impliedly repealed by §717 of Title VII.

III. Constitutional Question

The final question to be considered is whether the Indian Preference Statutes violate the Fifth Amendment. They are obviously intended to create a racial classification - all Indians are to be given preference in employment in the BIA. Is this consistent with the motions of equal protection which have been read into the due process clause of the Fifth Amendment Bolling v. Sharpe, 347 U.S. 497 (1954)?

At the outset it must be recognized that all statutes dealing with Indians are necessarily based on a racial classification. But not all racial classifications are unconstitutional. See Contractors Ass'n. v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971); cf. Katzenbach v. Morgan, 384 U.S. 641 (1966); see generally Note, Developments in the Law - Equal Protection, 82 Harv. L. Rev. 1065, 1109-20 (1969). In the case of the Indian Preference Statutes Congress has expressed the purpose of eventually having Indians take over operation of the Bureau of Indian Affairs. The BIA's sole function is the ". . . management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. §2 (1970). Clearly there is a rational purpose in giving Indians a preference in employment concerning Indians Affairs. In addition Congress and the courts have continued to recognize the duty assumed by the United States to protect, educate and oversee the Indian peoples. Board of Commissioners v. Seber, 318 U.S. 705 (1943); United States v. Kagama, 118 U.S. 375 (1885). The United States has established a special trust relationship with the Indians and as a result of this special relationship has promulgated various laws relating specifically to Indians. They are not so arbitrary as to violate the Fifth Amendment. See Katzenbach v. Morgan, */ supra; Note, Developments in the Law - Equal Protection, supra.

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*/ In this case the Supreme Court upheld section 4(e) of the Voting Rights Act of 1965 which in effect set up special classifications for persons who had attended public school in Puerto Rico. The Court did so on the basis of the special historical relationship between Congress and Puerto Rico.

In a case that should be determinative of this issue the United States Supreme Court affirmed per curiam a three judge court decision upholding a restriction on alienation of tribal property based solely on a racial criteria (percentage of Indian blood). Simmons v. Eagle Seelatsee, 384 U.S. 209, (1966) affirming per curiam 244 F. Supp. 808 (E.D. Wash. 1965). The three judge lower court catalogued various instances in which Congress had dealt with Indians on a racial basis, granting or taking away benefits on a percentage of Indian blood, and concluded that there was a rational basis for such classification. Simmons v. Eagle Seelatsee, 244 F. Supp. 808, 809 (E.D. Wash. 1965).

Benign racial classifications are not given the strict review normally required of "suspect" racial classifications. In this instance the Indian Preference Statutes are intended to benefit a "dependent people," whose very existence is controlled by the BIA. Clearly the Congressional purpose of eventual self sufficency and self-government was not an arbitrary or capricious one:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.

Board of Commissioners v. Seber, 318 U.S. 705, 715 (1942).