



U.S. Department of Justice
Office of Legal Counsel

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cc: files
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Office of the
Assistant Attorney General

Washington, D.C. 20530

March 19, 1990

Read. File
Ret. [mcginnis
Indians.1]

MEMORANDUM FOR DICK THORNBURGH
Attorney General

Re: Indian Racial Preferences

This memorandum is to bring to your attention a potential dispute with the Interior Department concerning racial preferences for Indians. I understand that the Secretary of Interior will soon be writing you to ask for the withdrawal of an opinion that my predecessor Douglas Kmiec issued in November of 1988 at the request of the Department of Education (DOE), concerning a statutory preference for Indians in all personnel actions taken by DOE's Office of Indian Education.

The OLC opinion concluded that the employment preference granted by statute to members of Indian tribes was constitutional, but that the preference that depended solely on possessing a certain percentage of Indian blood was an unconstitutional racial classification. This distinction is based on the proposition -- advanced by the Department of Justice for some time -- that Congress may freely legislate to benefit members of Indians tribes, which are political entities recognized by the Constitution, but that strict scrutiny must apply to purely racial classifications, regardless of whether they favor Indians or any other racial group. The distinction is based directly on Morton v. Mancari, 417 U.S. 535 (1974), the leading Supreme Court case in the area. The Civil Rights Division concurred in the OLC opinion. (A copy of the opinion is attached).

At DOE's request the Department of Justice communicated these conclusions in January of 1989 to Congress by sending a letter to Senator Daniel Inouye, Chairman of the Select Committee on Indian Affairs. The congressional reaction to the analysis was quite muted and staff members of the Committee stated that they understood even if they did not necessarily agree with our opinion. Congress appears to recognize that our opinion permits continued legislation to benefit Indian tribes and their members.

The current controversy flows from the application of a woman to the Office of Indian Education. She claimed a preference both on the basis of membership of an Indian tribe and on Indian blood quantum. DOE denied the tribal preference on the ground that the tribe was Canadian and not recognized by the United States, and, relying on the OLC opinion, denied her claim for racial preference on the ground that it was unconstitutional. The applicant then complained to the Department of Interior.

Interior has not offered any objections to OLC's legal analysis. Rather, Interior believes that the OLC opinion should be withdrawn because the opinion directly questions the validity of one section of an Interior Department regulation that provides racial preferences for Indians, and Interior was not consulted before the opinion was issued. In my view, the OLC opinion should not be withdrawn. The Department of Education had the right to ask for our opinion on a statute that directly affected its operations, and any lack of consultation with Interior does not undercut the reasoning of our analysis. Indeed, OLC is frequently asked by the White House or OMB to evaluate the constitutionality of an agency's statute or regulation without consulting that agency. Moreover, in this case our opinion cannot have come as a surprise to Interior: for the last three years the Department has been objecting in bill comments to the constitutionality of Indian racial preferences, and these comments are circulated to Interior in the OMB process. Furthermore, high officials in the Solicitor's Office at Interior have previously been informed of our views on Indian racial preferences.

Thus I believe the proper response to the Secretary's letter (if it arrives in the form described to OLC) would be to offer to reconsider the opinion only if Interior believes it is incorrect as a matter of law. Reconsideration can begin as soon as we receive a statement of Interior's legal views.



William P. Barr
Assistant Attorney General
Office of Legal Counsel

Attachment