



Indigenous Law & Policy Center

December 4, 2006

Richard McLellan, Chairman
Michigan Law Review Commission
201 Townsend, Suite 900
Lansing, MI 48933

Re: Applicability of the Michigan Civil Rights Initiative on State Laws and Programs
Relating to Indians and Indian Tribes

Dear Chairman McLellan,

At the request of the Commission, we are writing regarding the historic and current relationship between the federal government and American Indian tribes in the context of the newly-enacted "Michigan Civil Rights Initiative," *Michigan Constitution, art. I, § 26* (2006). It is our opinion that the Michigan statutes, programs, and other governmental services related to and benefiting American Indians are not affected by the Michigan Civil Rights Initiative, which prohibits discrimination and preferential treatment by the State on the basis of "race, sex, color, ethnicity, or national origin." Statutes, programs, and other governmental services to American Indians are not based on a racial classification, but instead are based on the political relationship between the government and Indians and Indian tribes.

As a preliminary matter, the Michigan Supreme Court recently acknowledged that Indian tribes are "distinct political communities," whose sovereignty can be limited only by Congress. *Taxpayers of Michigan Against Casinos v. State*, 685 N.W.2d 221, 227 (Mich. 2004) (quoting *Worcester v. Georgia*, 31 U.S. 515, 557 (1832)), *cert. denied*, 543 U.S. 1146 (2005). *See also Kobogum v. Jackson Iron Co.*, 43 N.W. 602, 605 (1889) ("[Indians and Indian tribes] did not occupy their territory by our grace and permission, but by a right beyond our control. They were placed by the constitution of the United States beyond our jurisdiction, and we had no more right to control their domestic usages than those of Turkey or India.").

The federal government, and by extension, the State of Michigan, retains the Constitutional ability to pass laws on behalf of tribes and tribal members which, if passed for other groups, could be deemed unconstitutional under the 14th Amendment's prohibition on discrimination based on racial classifications. These laws are not based on race, but rather the political relationship between the tribes and state or federal government. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974) (federal agency regulation granting Indian preference in employment); *Means v. Navajo Nation*, 432 F.3d 924, 934 (9th Cir. 2005) (federal law affirming tribal criminal jurisdiction over nonmember Indians), *cert. denied*, 127 S. Ct. 381 (2006). State laws enacted

for the benefit of Indians and Indian tribes also derive from the political relationship between these sovereigns. *E.g.*, *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 733 (9th Cir. 2003) (state gaming law benefiting Indian tribes), *cert. denied*, 543 U.S. 815 (2004); *In re Interest of Phoenix L.*, 708 N.W.2d 786, 797 (Neb. 2006) (state adoption law granting higher burden of proof to terminate parental rights of Indian parents).

The political relationship between the tribes and the federal government can be traced to the Commerce Clause and Treaty Clause of the Constitution. *Art. I, §8, cl. 3* (“The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes); *Art. II, §2 cl. 2* (Treaty Clause); *Cohen's Handbook of Federal Indian Law*, §5.01[4] (2005) (“The commerce clause has become the linchpin in the more general power over Indian affairs recognized by Congress and the courts.”). The Commerce Clause, therefore, “anticipat[es] and affirm[s] federal law singl[ing] out Indian nations and their members for separate treatment.” *Cohen*, §14.03[2][b][i]. Tribes are pre-constitutional sovereign governments and the relationship between the federal government and tribes is a “unique” one. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 (1978); *Talton v. Mayes*, 163 U.S. 376 (1896); *Mancari*, 417 U.S. at 551 (“Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law.”). Some courts have termed this relationship as “extraconstitutional” or even “preconstitutional.” *United States v. Lara*, 541 U.S. 193, 213 (2004) (Kennedy, J., concurring) (“extraconstitutional”); *Lara*, 541 U.S. at 201 (“preconstitutional”).

The political relationship creates the impetus for what is known as the “trust relationship” between the government and Indians and Indian tribes. *Cohen*, §5.04[4][a] (“*Cherokee Nation v. Georgia*[, 30 U.S. 1, 17 (1831)] provided the basis for analogizing the government-to-government relationship between tribes and the federal government as a trust relationship with a concomitant federal duty to protect tribal rights to exist as self-governing entities.”). The trust relationship derived first from Indian treaties. For example, treaties were often an exchange of land for services. The federal government promised to provide services including health care, education, tax exemption provisions and sometimes annuities. *Cohen*, §1.03[1], nn. 162, 166, 167 (citing various treaties, including Treaty with the Miamis, art. 6, 7 Stat. 300 (1826) (health care and education); Treaty with the Kansas, art. 3, 12 Stat. 1111 (1859) (tax exemption of allotments); Treaty with the Cherokees, art. 8, 7 Stat. 203 (1816) (annuities)). Treaties involving Michigan Indian tribes included provisions that required the federal government to provide goods and services to the tribal governments. *E.g.*, Treaty of Washington, art. 4, 6 Stat. 491 (1836) (requiring the federal government to provide funds for education, agricultural necessities, and medical goods and services).

Because of this special relationship, the Supreme Court has held that Congress has the power to “legislate on behalf of federally recognized Indian tribes.” *Mancari*, 417 U.S. at 551 (1974). This legislation includes statutes designed to provide services to tribes and tribal members – with the trust relationship often cited by Congress when passing legislation designed for tribes or tribal citizens. *See* 20 U.S.C. § 7401 (“It is the policy of the United States to fulfill the Federal Government’s unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children.”); *Indian Child Welfare Act*, 25 U.S.C. §1901 (“recognizing the special relationship between the United States and the Indian tribes and their

members and the Federal responsibility to Indian people . . .”); *Indian Self-Determination and Education Assistance Act*, 25 U.S.C. §450 (“The Congress, after careful review of the Federal Government’s historical and special legal relationship with, and resulting responsibilities to, American Indian people . . .”). At this point in history, the trust relationship is considered a “cornerstone” of federal Indian law. *Cohen*, §5.04[4][a].

Congress can legislate on almost any matter relating to tribes and tribal members, including fish harvesting, exemption from state taxes, special procedures in adoption procedures, and federal criminal jurisdiction. *Cohen*, §14.03[2][b]. This legislation, however, need not be beneficial to tribes or tribal members to be constitutional. Congress has used the trust responsibility to pass legislation that was a great detriment for tribes and tribal members. *See U.S. v. Kagama*, 118 U.S. 375 (1886) (approving the constitutionality of the Indian Major Crimes Act); *General Allotment Act*, 24 Stat. 388 (1887) (dividing tribal lands among tribal members and selling “surplus” tribal lands without the consent of the tribes). In 1977, the Supreme Court upheld the application of the Major Crimes Act as applied against two tribal members, even though the defendants were subjected to a lower standard of proof based entirely on their status as tribal members, and would not apply to non-Indians in the same situation. *U.S. v. Antelope*, 430 U.S. 641, 644 (1977) (“a non-Indian charged with precisely the same offense . . . would have been subject to prosecution only under Idaho law, which in contrast to the federal murder statute, does not contain a felony-murder provision. To establish the crime of first-degree murder in state court, therefore, Idaho would have to prove premeditation and deliberation. No such elements are required [by the federal statute.]”). The Court held that the “respondents were not subjected to federal criminal jurisdiction because they are of the Indian race, but because they are enrolled members of the Coeur D’Alene Tribe” *Id.* at 646. *See also Fisher v. District Court*, 424 U.S. 382 (1976) (tribal members denied access to state court in an adoption proceeding because the tribal court has exclusive jurisdiction.). This legislation, which necessarily singles out tribes and tribal members, would be subject to strict scrutiny under the 14th Amendment and likely would not pass constitutional muster if targeted at other protected groups. But since Congressional classifications in this field are political rather than racial, the courts apply the rational basis test and tend to uphold these statutes. *E.g.*, *Antelope*, 430 U.S. at 646; *Mancari*, 417 U.S. at 554 (“The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.”). The Court also points out different areas where the Court upheld legislation that “singles out Indians for particular and special treatment.” *Mancari* 417 U.S. at 552; *See also American Federation of Government Employees, AFL-CIO v. United States*, 330 F.3d 513, 523-4 (D.C. Cir.) (“We therefore hold that the preference in § 8014(3), by promoting the economic development of federally recognized Indian tribes (and thus their members), is rationally related to a legitimate legislative purpose and thus constitutional.”), *cert. denied*, 540 U.S. 1033 (2004).

In addition, it has been further held that the preference need not be tied to self-governance alone, but also to any aspect of Congress’s trust responsibility. *American Federation of Government Employees, AFL-CIO v. U.S.*, 330 F.3d 513, 522-3 (D.C. Cir. 2003)(“Section 8014 of the Defense Appropriations Act for fiscal year 2000 granted an outsourcing preference for firms ‘under 51 percent Native American ownership,’ The question is whether this preference constituted racial discrimination in violation of the Fifth Amendment’s Due Process Clause . . . We . . . hold that the preference in § 8014(3), by promoting the economic development of federally recognized Indian tribes (and thus their members), is rationally related to a legitimate

legislative purpose and thus constitutional.”) (citations omitted). Even preferences based not on tribal membership but on blood quantum are generally constitutional under the equal protection clause of the United States. *See Mancari*, 417 U.S. 535, 553 n.24 (noting that for the BIA preference to be applied “an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe”) (quoting 44 BIAM 335, 3.1); *Mullenberg v. United States*, 857 F.2d 770, 772 (Fed. Cir. 1988) (“Blood quantum classification for employment is permissible for Indian status . . .”); *Alaska Chapter, Associated General Contractors of American, Inc. v. Pierce*, 694 F.2d 1162, 1168 ((9th Cir. 1982) (“If the preference in fact furthers Congress’ special obligation, then *a fortiori* it is a political rather than racial classification, even though racial criteria might be used in defining who is an eligible Indian.”)(citing *Mancari*).

Congress, therefore, has broad powers to legislate for tribes and tribal members. While this legislation can be beneficial in some areas, it need not be. These swings in federal Indian policy may at times present opportunities, but they also present hurdles for tribes and tribal members. Regardless, the relationship between the federal government and the tribes is unique and unlikely to change significantly in the near future.

We sincerely appreciate the opportunity to comment on this matter. Please do not hesitate to contact us if you have further questions.

Sincerely,

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