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Mancari v. Morton: A Discussion of Preference

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MANCARI v. MORTON: A DISCUSSION OF PREFERENCE*

The Bureau of Indian Affairs has long been a subject of controversy. The most recent maelstrom to agitate the bureaucratic waters is the court battle of *Mancari v. Morton,*[1] in which the long-standing tradition of preferential hiring of Indians for jobs within the Bureau of Indian Affairs was struck down.

For many years the principle of Indian preference remained static, applying only to initial hirings. Within the past few years, however, Indian preference has become a controversial and hotly contested issue. Whether spurred by the social climate of increased demands from other minority groups, or perhaps initiated by the growing number of educated, ambitious young Indians, Indians have recently sought to enlarge the concept of Indian preference. These demands have met with resistance from non-Indian society. The demands of each side have legal and moral justification. The arguments of each side are reasoned and worthy of consideration. The ultimate decision will not be easy to make, and the results of that decision will have far-reaching effects on the lives of all the employees of the Bureau.[2]

STATUTORY DEVELOPMENT

As with so many areas of the law which concern the Indian, the concept of preferential hiring of Indians, for positions which pertain to Indians, began in another century. The first statutory statement of preference appeared in 1834:

> In all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties.[3]

Many years were to pass before the next statutory references to Indian preference appeared:

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1. Civil No. 9626 (D.N.M., June 1, 1973).
2. Morton v. Mancari, No. 73-364, Supreme Court, October Term 1973, was argued in April, 1974.
3. 25 U.S.C. § 45 (1834).

> In the Indian Service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian Service. And it shall be the duty of the Secretary of the Interior and the Commissioner of Indian Affairs to enforce this provision.[4]
>
> Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies.[5]

The Bureau did not effectively enforce Indian preference, and by the time of the Indian Reorganization Act of 1934 (also known as the Wheeler-Howard Act),[6] the percentage of Indians employed in the Bureau was lower than it had been in 1900.[7] To remedy this situation, a firmer mandate on Indian preference was included in the Indian Reorganization Act as part of the "Indian New Deal."[8] Section 12 of this Act provides:

> The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws, to the various positions maintained, now or hereafter, by the Indian Office, in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions.[9]

The doctrine of Indian preference does not apply to all of the federal civil service, but only to employment within the Bureau of Indian Affairs and the Indian Public Health Service.[10] The term "qualified Indian" has been held to apply only to those who are of one-quarter or more Indian ancestry who are enrolled in a federally-recognized tribe.[11] Thus, the doctrine of Indian preference has had a limited effect within the federal civil service, involving only the Indian Services and advancing the interests of a limited group. Only one-half of one percent of the jobs within the federal government are affected by the Indian preference statutes. This means that ninety-

4. 25 U.S.C. § 44 (1874).
5. 25 U.S.C. § 46 (1884).
6. 25 U.S.C. § § 461-479 (1934).
7. J. Collier, *Memorandum on S. 2755, submitted to the Senate Committee on Indian Affairs, Commissioner for Indian Affairs, Hearings on S. 2755 before Senate Committee on Indian Affairs,* 73rd Congress 2d Sess., pt. 1 at 19 (1934).
8. J. Collier, From Every Zenith: A Memoir, 169 (1963).
9. 25 U.S.C. § 472 (1934).
10. F. Pipestem, Indian Preference, 7 (Staff Paper prepared for U.S. Commissioner of Indian Affairs 1970).
11. F. Cohen, Handbook of Federal Indian Law, 159, Citing Executive Order No. 8043 of January 31, 1939.

nine and one-half percent of all federal jobs are unaffected by these special statutes.[12]

Although Indian preference has had minimal impact on the employment picture of the civil service as a whole, this policy has been extremely important to the Indians. Under the program, approximately 50% of the Bureau employees are Indians,[13] making the Bureau the largest single employer of Indians.

RECENT DEVELOPMENTS IN INDIAN PREFERENCE POLICY

In 1970, the plaintiffs in *Mescalero Apache Tribe v. Hickel*[14] contended that the principle of Indian preference dictated by § 472 applied to reductions in force of the Bureau as well as in initial hiring. Although the court rejected this claim, the decision acknowledged Indian preference in initial hiring.

Pressures to change Indian preference continued,[15] until on June 26, 1972, Secretary of the Interior Rogers C. B. Morton declared that Indian preference extended to "original appointment, reinstatement and promotions,"[16] and area officers were directed to implement this policy:

> The new policy provides as follows: Where two or more candidates who meet the established requirements are available for filling a vacancy. If one of them is an Indian, he shall be given preference in filling the vacancy. This policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program.[17]

The expanded version of Indian preference received judicial blessing with the decision in *Freeman v. Morton.*[18] Enola Freeman sued

12. Pipestem, *supra* note 10, at 7-8.

13. Pipestem, *supra* note 10, at 25.

14. 432 F.2d 956 (10th Cir. 1970), *cert. denied,* 401 U.S. 981 (1971).

15. Memorandum on Indian preference from Louis R. Bruce, Commissioner of Indian Affairs, to the Secretary of the Interior, September 23, 1971:

> Indian preference is becoming a matter of ever increasing concern to the Bureau, its employees, and the Indian people. It has on several occasions been the basis for formal complaints of discrimination wherein complainants have alleged failure on the part of Bureau management to comply with the interests of the Indian preference statutes. . . .
>
> . . . .
>
> [A]t the time the various statutes were enacted Congress intended that Indian preference be applicable to the filling of all vacancies in the Indian Service whether by initial appointment, promotion, or reinstatement.

16. Teletype message from the Commissioner of Indian Affairs, quoted in Personnel Management Letter No. 72-12 (300, 335, 410), June 28, 1972, Subject: Indian Preference, Albuquerque Area Office, U.S. Bureau of Indian Affairs, Dep't of Interior.

17. *Id.*

18. Civil No. 327-71 (D.D.C., Dec. 21, 1972).

on behalf of herself and other Indian employees of the Bureau, asserting that Indian preference, as dictated in § 472, applied to promotions, lateral transfers within the Bureau, and assignments to available training programs. The court, in discussing promotion, said:

> [A]s to the assertion that "vacancy" applies only to initial hiring there is nothing either in the statute itself or its legislative history to support such a claim. A "vacancy" is a "vacancy" no matter how created. Congress drew no distinctions–as it could easily have done had it so intended.
>
> And, as to the assertion that there must be administrative discretion in the implementation of the preference policy, again we must turn to the statute. It does not say the "Indians . . . *may* have preference." It says: ". . . qualified Indians *shall* hereafter have . . . preference." And this Court so holds.[19] [Emphasis and omissions from quote in original.]

Continuing in this vein, the court held that Indian preference applies also to lateral transfers within the Bureau, where a vacancy is filled by an employee without any change in that employee's status in the Bureau's personnel ranking. While the defendant argued that this created only one vacancy, the court stated:

> The plaintiff's argument suggests that two "vacancies" are created–one in Office A when the first employee resigns or retires and another in Office B when the second employee is transferred–and that the preference statute applies to both.
>
> Again the Court must agree with the plaintiff. While it is obvious that this strict interpretation of § 472 will leave the non-Indian employees of the BIA in a relatively frozen position and will undoubtedly dim their promotional prospects within the agency, the Court cannot say that such a result lies outside the intent of Congress.[20]

MANCARI V. MORTON: THE CASE

In response to Secretary Morton's directive of June 26, 1972, a few non-Indian employees of the Bureau, located in Albuquerque, formed DART (Dedicated Americans Revealing the Truth), an organization dedicated to the purpose of preventing the federal government from practicing a policy of racial discrimination. On August 10, 1972, DART voted to institute a suit against the extended Indian preference policy.[21] Four days later a civil suit was filed by a repre-

19. *Id.*, Opinion and Order, at 4.

20. *Id.* at 5. In this decision, however, the court refused to extend Indian preference to assignment to training programs. *Id.* at 8.

21. ACLU Torch, August, 1973, at 1, col. 2.

sentative collection of non-Indian employees against the Secretary of the Interior and various officers of the Bureau.

The plaintiffs invoked the jurisdiction of the court ". . . under Title 28, United States Code, § 1346(a)(2) and Public Law 92-261, § 717(c) and § 706." Since the matter concerned certain Acts of Congress and the application of these Acts, the plaintiffs asked for and received a three-judge court. The court accepted the plaintiffs' arguments with regard to jurisdiction, holding, despite defense objections, that the court had the power to try the case.[22] [23]

The plaintiffs charged that 25 U.S.C. §§ 44, 46, and 472, the Indian preference statutes, were unconstitutional on their face and as applied in the new policy because they deprived the plaintiffs of their rights to property without due process of law in violation of the Fifth Amendment. The second major argument of the complainants was

> . . . that the new Indian preference policy being implemented by defendants is in direct conflict with and violates the rights of plaintiffs as federal employees, under the Civil Rights Acts of 1964 and 1972, said rights being guaranteed in Title 42 U.S.C. § 2000e-2 and Public Law 92-261, § 717.[24]

The court agreed that there is a conflict between the expanded Indian preference statutes and the Civil Rights Acts of 1964 and 1972. The court quoted § 717 of Public Law 92-261, the Equal Employment Opportunity Act of 1972:

> 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 deaprtments 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 fron 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

22. Mancari v. Morton, Complaint at 1. The cited sections of Public Law 92-261, the Equal Employment Opportunity Act of 1972, 86 Stat. 104, 111, were amendments to the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. 2000e et seq., and are now codified as 42 U.S.C. 2000e-5(a)-(g) and 2000e-16(c) (1974).

23. Mancari v. Morton, Memorandum opinion at 3:
> The issue is not an interpretation of policy statements or their application, but is a direct challenge to the validity of the statute on which the departmental policy is based.

24. *Id.*, Complaint at 3.

> 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.[25]

In defining the directives of the Equal Employment Opportunity Act of 1972, the court quoted persuasively from remarks made by Senator Byrd of West Virginia during discussion of the bill:

> I do not favor special treatment or special consideration or favored employment of any individual on the basis of that person's being black or white, male or female . . . Notwithstanding what I have just said, the fact remains that discrimination in employment, on the basis of race, does exist, and discrimination against sex does persist. Wherever there is such discrimination in employment, it is violative of the Constitution of the United States . . . .
>
> In other words, he should rise or fall on the basis of merit, not on the basis of race or religion or sex. Every qualified individual–black, white or else–should be given an equal chance–not preferential treatment–at employment.[26]

The court refused to find that Indian preference is protected from the 1972 Act by the principle that general legislation does not overrule earlier specific legislation. The court called the 1972 Act 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,"[27] and contended that the expanded Indian preference statutes had been overriden:

> This is not a simple instance of a relationship of a general statute to a special subject statute which often occurs. Each statute purports to cover the same particular subject of personnel action . . . .One Act applies to all but some excepted bureaus or agencies and the other to the "Indian Office." This is not a sufficient difference in the scope to bring into consideration the doctrine relating to conflicts between special and general statutes. Further by the nature of the subject matter and scope, the two cannot exist side by side.[28]

The court noted the issue of the validity of job qualifications, citing *Griggs v. Duke Power Co.*,[29] a case which held that job requirements set by the employer must be rationally related to the

25. *Id.*, Memorandum Opinion at 7-8, quoting from 86 Stat. 111 (codified as 42 U.S.C. 2000e-16(a) (1974).

26. Mancari v. Morton, Memorandum Opinion at 8, quoting from Congressional Record, January 26, 1972, at S.590.

27. Mancari v. Morton, Memorandum Opinion at 9.

28. *Id.* at 10.

29. 401 U.S. 424 (1971).

work required of that specific job classification. Here, the court stated, "There was no evidence introduced to show in any way that having seventy-five per cent non-Indian blood and twenty-five per cent Indian blood was in any way a job-related criterion.[30] In the early part of the opinion, the court discussed the relationship of § 472 to the other provisions in the Indian Reorganization Act of 1934, and stated that the preference section extended to all Indians as individuals. Drawing on this earlier discussion, the court concluded:

> It is apparent that Indian tribes have been the subject of particular legislation from time to time. But this of itself is no reason for a different treatment of Indians generally. Indians as such are not considered to have rights, so far as here pertinent, different from other citizens; they are citizens and are obviously entitled to all rights, privileges, and burdens thereof.[31]

The court therefore held that the new application of Indian preference statutes must give way to the Civil Rights Acts.

In closing, the court stated that although it was possible to hold the Indian preference statutes unconstitutional, the court chose not to do so.[32]

There is some confusion as to exactly what the *Mancari* decision has done to the Indian preference statutes. The plaintiffs contended that only the new extended policy violated their civil rights, but they also pled that the statutes were unconstitutional on their face. The court's decision does not specify exactly which form of Indian preference it dealt with. The opinion says at one point that the court does not intend to challenge the application of the preference statutes in initial hiring, but all subsequent discussion speaks not of the new application, but of the Indian preference statutes as such. The closing sentence does not speak of an expanded Indian preference policy, but says only that the Indian preference statutes must give way to the Civil Rights Acts. A standard reading must assume that the opinion speaks only to those matters asserted by the plaintiffs. Such a reading would mean that only the new expanded application was struck down. However, the order clearly states:

> . . . the named defendants are hereby permanently enjoined from implementing any policy in the Bureau of Indian Affairs which would *hire,* promote, or reassign any person in preference to another

30. Mancari v. Morton, Memorandum Opinion at 10.

31. *Id.* at 10-11.

32. *Id.* at 11. The court chose this course of action because: "The defendants had the burden of coming forward with evidence of an important governmental objective but put no evidence directed to this matter." *Id.*

> solely for the reason that such person is an Indian . . . .[33] (Emphasis added)

The Indian preference statutes and their application will shortly receive a final review. An appeal from the District Court's decision was accepted by the United States Supreme Court,[34] and the case was heard in April. Because of the uncertainty created within the Bureau by the apparent conflict between the *Mancari* and *Freeman* decisions, the Supreme Court (Justice Thurgood Marshall) issued an order staying the enforcement of the District Court's judgement, pending disposition of the appeal.[35]

SPECIAL STATUS OF THE INDIAN

The genesis of *Mancari v. Morton* lies in the fact that Indians occupy an unique position in the legal and social structure of the United States.

The most obvious testimony to the special relationship between the United States Government and its Indian citizens is the existence of Title 25 of the United States Code, dealing solely with matters pertaining to Indians. The Indian preference statutes are only a small part of this complex legal code dealing with Indians in collective tribal groups and as individuals. No other segment of American society can claim the special status granted in Title 25. The very institution of the Bureau of Indian Affairs itself is a special discriminatory service granted by the Government to the Indians, a deviation from the strict application of equality to all citizens. The Bureau is the only federal agency with the purpose of serving a single racial group.

Not all Indians need be designated as Indians. In *United States ex rel. Standing Bear v. Crook,*[36] for example, the leader of a group of Indians was granted the right to disassociate himself from his tribe. All Indians do not receive the benefits of the Indian services. Over 800,000 Indians were reported in the 1970 census, and, of these, over 330,000 were excluded from Bureau services.[37] Indian benefits, like Indian preference, accrue only to a member of a federally-recognized tribe who has one-fourth or more Indian blood.

The status of Indian tribes is so controlled by the Government that Congress can determine that a tribe of Indians are no longer

33. *Id.*, Judgment.
34. Morton v. Mancari, No. 73-364, Supreme Court, October term 1973.
35. *Id.*, Order of August 16, 1973.
36. 25 F. Cas. 695 (No. 14,891) (C.C.D. Neb. 1879).
37. Federal Policies and Programs for American Indians, Staff Report No. 2, Albuquerque-Phoenix Hearings, U.S. Commissioner on Civil Rights (November, 1972).

considered Indians within the definition of federal legislation. This power can be noted with the termination of the Klamath tribe and the termination of the Menominee tribe and the later reinstatement of the Menominees, this year, as a federally-recognized tribe.

The singular relationship between the Government and the Indian tribes was described by Justice John Marshall:

> They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession, when their right of possession ceases. Meanwhile, they are in a state of pupilage; their relation to the United States resembles that of a ward to a guardian.[38]

The instances of special privilege granted to the Indians are benefits received by no other citizens. These benefits are not given, however, to right the memory of wrongs done against the Indians. Nor are these benefits to be deemed affirmative action programs designed to compensate for the many discriminatory actions Indians have encountered in the past. The entire special relationship is based on Indian land. The federal government holds in trust certain lands belonging to the Indians. Apart from the lands held by the U.S. Government, Indians are the largest single landholders in this country. The relationship is based on many treaties, and appears in the Constitution.[39] Under this aegis, the Government holds and administers a trust for the Indian people.

It is apparent, therefore, that there has been much "particular legislation"[40] concerning the Indians, comprising a multifaceted body of statutory law and an equally complex body of judicial opinions, separating Indian tribes and individuals from other Americans.

INDIAN PREFERENCE STATUTES AND THE CIVIL RIGHTS ACTS

The *Mancari* decision struck down the Indian preference statutes, saying:

> Should section 717 of Public Law 92-261 take precedence over the Indian Preference Statutes? Although we are reluctant to hold that Congress has overriden by subsequent legislation long existing statutes without specific reference to them, we must conclude that this was done in this instance.[41]

The court did not, however, fully explore the idea that where there

38. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).
39. U.S. Const. art. I, § 8.
40. Mancari v. Morton, Memorandum Opinion at 10.
41. *Id.* at 9.

are two acts upon the same subject, the accepted rule is to permit both to stand if possible.[42] Another rule of statutory construction holds that a later general statute which does not expressly repeal an earlier specific statute will not strike down the earlier statute. This concept, permitting the particular statute to remain as an exception to the general statute, appears in *Ex Parte Crow Dog.*[43]

The justification permitting the two statutes to coexist in such a case is found in legislative intent.[44] In exploring the legislative intent behind these two apparently conflicting statutory mandates, the difference becomes manifest. The charge in *Mancari* that "this is not a sufficient difference in the scope to bring into consideration the doctrine relating to conflicts between special and general statutes"[45] can be answered. The legislative intent of Congress regarding Indian preference has been expressed many times over a period of years, with each statutory directive becoming stronger and more emphatic. The most recent and most inclusive statement of Indian preference was found in the Indian Reorganization Act of 1934. As the *Mancari* decision notes, the 1934 Act encompassed many aspects of Indian life, and the Indian preference provision was only one portion of this complicated Act. The clear intent of Congress, however, concerning the section of the 1934 Act which was to become § 472 of the United States Code, was expressed by Congressman Howard, one of the sponsors:

> It should be possible for Indians to enter the service of their own people without running the gauntlet of competition with whites for these positions. . . . [T]he Indian Service shall gradually become, in fact as well as in name, an Indian Service predominantly in the hands of educated and competent Indians. . . . It [means] . . . an opportunity to rise to the higher administrative and technical posts.[46]

John Collier, Commissioner of Indian Affairs, expressed the intent of this provision thus: "Indians who may qualify for the jobs of Indian Service are exempted from civil-service requirements."[47]

The intent of the 1934 Act was recently given an excellent summary in *Mescalero Apache Tribe v. Hickel:*

> Our examination of the legislative history relevant to the passage of

42. United States v. Jackson, 302 U.S. 628, 631, 58 S.Ct. 390, 392 (1938); United States v. Borden Co., 308 U.S. 188, 198, 60 S.Ct. 182, 188 (1939); United States v. Zacks, 375 U.S. 59, 67-68, 84 S.Ct. 178, 183 (1963).

43. 109 U.S. 556, 570 (1883).

44. Posadas v. National City Bank of New York, 296 U.S. 497, 504 (1936).

45. Mancari v. Morton, Memorandum Opinion at 10.

46. 78 Cong. Rec. 11731 (1934) (remarks of Congressman Howard).

47. *Id.* at 11743, in letter to Congressman Frear.

> § 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 largly by non-Indians. Through the preference given to Indians by § 472, it was hoped that the BIA would gradually become an Indian service predominantly in the hands of educated and competent Indians.[48] [Footnotes in original omitted.]

There is no intent expressed in either the legislative history of the 1964 Civil Rights Act, or the 1972 amendment to it, that Congress intended to repeal the Indian preference statutes. On the contrary, there is specific information with regard to the 1964 Act which exempts certain areas governing Indians. Senator Humphrey, who sponsored § 703(i), commented: "This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians."[49] The section in question states that the prohibition is not valid in regard:

> 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.[50]

Thus the 1964 Act permitted a variety of Indian preference to be practiced in private business in a manner similar to the preference found operating in the Indian services. The 1972 legislation extended the 1964 Act, specifically in the area of employment. In the legislative history of the 1972 Act, there is no mention of any intent to repeal the preference statutes.

It is possible to find that the Indian preference statutes stand as an exception to the Civil Rights Acts as an expression of the special relationship between the Government and the Indians. The interpretative rule here ought to be the judicial precedent operating in other Indian matters:

> [I]n the Government's dealings with the Indians the rule is [that] . . . [t]he construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless

48. 432 F.2d at 960.
49. 110 Cong. Rec. 12723 (1964) (remarks of Senator Humphrey).
50. 42 U.S.C. § 2000e-2(i).

> people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years. . . .[51]

INDIAN PREFERENCE AND THE CONSTITUTION

In deciding *Mancari*, the court chose not to rule on the constitutionality of the Indian preference statutes, although it noted that the constitutionality of the statutes is questionable. It is possible to argue, however, that these statutes do not violate the rights of non-Indian employees under the Fifth Amendment because Indian preference serves a compelling government interest, i.e. helping the Bureau to better serve the Indian.

Complaints and criticisms concerning the Bureau issue from all who have dealt with the Bureau—Indian and non-Indian alike. Many of the policies instituted by the Bureau, such as termination and relocation, have worked to the detriment of tribal structure. It has been said that the Bureau often appears to be an enemy rather than an aid to the Indians. The stated governmental purpose of the Indian preference statute enacted in 1934 was that the Indian service become an organization administered by educated and competent Indians who have the opportunity to rise to administrative posts. This ideal has always been opposed by those who:

> . . . were opposed to this bill for the reason that they felt their control over the Indians was going to be lost and that they might also lose their jobs because competent Indians would be put in their places.[52]

Part of the reason for including an Indian preference statute in the 1934 Act was the revelation that the Bureau had had proportionately more Indian employees in 1900 than in 1934.[53]

There is also a compelling interest in extending this policy beyond initial hiring. In the past, Indian preference statutes have been in effect only in instances of initial hiring, and, as a result, Indians are concentrated, as they were in 1934, in the lower ranks. According to recent statistics, in the low-ranked GS-4 Category can be found 31.8% of the Indians, while only 6.33% of the non-Indians are in this category. At the higher GS-9 level, there are 33.64% non-Indians and only 9.20% Indians. Almost 80% of the non-Indians have positions above grade 6, while 75% of the Indian employees have grade 6 or less. The differences are reflected in salaries. While 14% of the Indians earn approximately $5,000, only 2% of the non-Indians receive

51. Choate v. Trapp, 224 U.S. 675 (1911).
52. 78 Cong. Rec. 11125 (1934) (remarks of Senator Wheeler).
53. Pipestem, *supra* note 10, at 24.

this salary, and only 7.5% of the Indians earn more than $10,000 while more then 32% of the non-Indians do so.[54] In a report discussing employment practices of the Bureau, it was stated:

> The probability of this distribution occurring by chance is one in 10. . . . [Footnote in original omitted.]
>
> Complaints of many Indians that Non-Indians are often promoted to supervisory positions when Indians are available seem to be borne out by the statistics above as well as results shown in the Appendix. The probability of Indians being in as few supervisory positions as they actually are is one chance in 100,000.[55]

Certainly part of this vast difference between the ranking and salaries of Indian and non-Indian employees of the Bureau can be attributed to variances in education. However, the "dead-end" situation found for Indians within the Bureau has served to deter well-educated, ambitious Indians from entering Bureau service. If Indian preference is extended beyond initial hiring, as allowed by the *Freeman* decision, the Bureau might come closer to the expressed goal of an Indian service controlled by educated and competent Indians, with Indians of higher qualifications rising to superior administrative posts. A Bureau with a large percentage of Indians in positions which could affect and enforce Bureau policies would aid greatly in changing the Bureau into an instrument to better serve the Indians.

CONCLUSION

There is no easy resolution to the *Mancari* problem. Nor can there be said to be any solution which is obviously right. Any decision which the Supreme Court makes will help some employees of the Bureau and hurt the legitimate interests of others. The non-Indian employees of the Bureau advance an important national interest when they advocate hiring or promotion of all individuals solely on the basis of their qualifications. There is, however, another mandate to consider:

> The Government of the United States in fulfilling its responsibilities to the American Indians provides opportunities for Indians to develop and utilize their complete potentials and capabilities. The primary emphasis of Federal Indian programs is self-determination, assisting Indians to assume greater responsibility in planning and managing programs for the educational, economic, and social devel-

54. B.I.A. statistics cited in D. Willis and B. Cavsey, No Room at the Top (analysis of B.I.A. employment practices prepared for Congressman Arnold Olson, December, 1970), 4.
55. *Id.* at 5.

> opment of their reservations. To this end the established objective are:
>
> —To encourage and assist Indian people to plan and assume administrative responsibility for all Indian programs which they are willing and prepared to administer.[56]

Present governmental purpose and policy regarding Indians was delineated in President Nixon's Presidential Message to Congress on Indian Affairs, delivered in 1970.[57] The President asserted that federal policy was to turn over control of federal programs affecting Indians to the Indians themselves, giving them the administration of these programs. He stated that

> . . . it is essential that the Indian people continue to lead the way by participating in policy development to the greatest possible degree.[58]

Because of the unique legal status of the Indians, the issue of Indian preference is separate from the issue of civil rights in the United States. If the unique trust obligation of the United States government in relation to the Indian is to be adequately discharged, and the Bureau of Indian Affairs is the means utilized to discharge this obligation, Indian leadership will, as the Presidential Message stated, be of the utmost importance. The device by which Indian leadership can be assured in the Bureau is the effective use of the Indian preference policy. The record shows that where Indian preference is applied, Indians are hired, and where Indian preference is not applied, Indians do not advance. The Bureau of Indian Affairs is most important to the Indians—those it employs and those it serves.

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56. Bureau of Indian Affairs Manual, Introduction.
57. 116 Cong. Rec. 23131 (1970) (message from the President of the United States).
58. *Id.* at 23135.