In the

# Supreme Court of the United States

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| ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL., and Appellants, | ) | No. 73-362 |
| AMERIND, Intervenor-Appellant, | ) | No. 73-364 |
| v. | ) | |
| C. R. MANCARI, ET AL., Appellees. | ) | |

Washington, D.C.
April 24, 1974

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| ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL., Appellants, v. C. R. MANCARI, ET AL., Appellees. | No. 73-362 |
| AMERIND, Intervenor-Appellant, v. C. R. MANCARI, ET AL., Appellees. | No. 73-364 |

Washington, D. C.
Wednesday, April 24, 1974

The above-entitled matter came on for argument at 1:38 o'clock p.m.

BEFORE:

WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

HARRY R. SACHSE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C., For the Secretary of the Interior, Appellant

HARRIS D. SHERMAN, ESQ., LL#) Capitol Life Center, Denver, Colorado 80203; For the Intervenor-Appellant Amerind

GENE E. FRANCHINI, ESQ., $)& Seventh Street, N. W., Albuquerque, New Mexico 87101; for the Appellees.

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# C O N T E N T S



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P R O C E E D I N G S

MR. JUSTICE DOUGLAS: We will hear argument next in 73-362, Morton v. Mancari.

Mr. Sachse?

ORAL ARGUMENT OF HARRY R. SACHSE, ESQ., ON BEHALF OF THE SECRETARY OF THE INTERIOR, APPELLANT

MR. SACHSE: Mr. Acting Chief Justice, and may it please the Court:

This case is here on appeal from decision of a three-judge District Court for the District of New Mexico enjoining the Secretary of the Interior from enforcing the employment preference for Indians in the Bureau of Indian Affairs required by the Indian Reorganization Act of 1934, and other preference acts.

The appellees are non-Indian employees of the Bureau of Indian Affairs, acting individually and as bring a class action, who claim to have been denied promotion because of the preference. They argue that preference laws are unconstitutional under the Firth Amendment, that they have been tacidly, I suppose, repealed by the Equal Employment Opportunities Act of 1972, and that in any event they are being interpreted too broadly by the Secretary of the Interior.

The court held that the acts had been repealed by the Equal Employment Opportunity Act of 1972. The court said that it could hold that the acts were also unconstitutional but that

it did not so hold and, because of its holdings on these points, it didn't have to reach the issue of the breadth of the application of the acts.

The intervenor in this case is Amerind, an association of Indian employees of the Bureau of Indian Affairs who have the preference that is under attack here.

This case concerns the exercise by the federal government, by the Congress of the United States, of its trust responsibility to tribal Indians, and its effort to provide them an opportunity for self-determination and self-help. I think that I can show to you that it is not a racial discrimination involved in this case at all, but a determination to have the people whose property and lives are affected by the Bureau of Indian Affairs have prominent roles in the Bureau of Indian Affairs.

Since we are talking about a preference in the Bureau of Indian Affairs, I think it is important for both issues of the case to give some facts about the Bureau of Indian Affairs. I think it is not well understood.

There are only some 300 employees of the Bureau of Indian Affairs in Washington. There are some 2,000 others in offices in Indian areas of the country, in Denver, Albuquerque, Billings, Montana, Phoenix, Muskogee, Oklahoma, and other places. These are the administrative --

Q Isn't there some on the reservations?

MR. SACHSE: Yes, I was about to get to that. That takes -- this is some 2,300 that I have spoken of. Then there are 11,500 employees of the Bureau of Indian Affairs who actually work on the reservations, and these are not people in some sort of high administrative jobs; these are the policemen on the reservations, the foresters who tend the Indian forests, irrigation workers, engineers, teachers -- a good number of them are teachers -- bus drivers, social workers, employment assistance personnel, house builders -- there is a housing program going on -- and then there are a lot of employees who are in a kind of work program as a substitute for welfare program where simply things that need to be done are done through hiring the people who live there to do it.

Q Do you have any statistics on the comparison of the number of Indians with the number of employees in the Bureau of Indian Affairs?

MR. SACHSE: Yes. In the record, the total number of Indian employees of the Bureau of Indian Affairs is 57 percent, I believe it is, which is a rise from some 40-some-odd percent twenty or thirty yearrs ago.

Q Well, what I meant was the total number of employees of the Bureau of Indian Affairs as compared to the total number of Indians.

MR. SACHSE: Oh, in the Nation?

Q Yes.

MR. SACHSE: Well, there are about 600,000 Indians under direct regulation or supervision or assistance from the Bureau of Indian Affairs, and there may be another 400,000 who would say that they are Indians but who are not affected by the Bureau of Indian Affairs. Those are rough figures, about 600,000.

Q The total is a million?

MR. SACHSE: I think there are about a million people who answered the last census and said that they were Indians. But there was no precise definition for that --

Q 600,000 are reservation Indians?

MR. SACHSE: About 600,000 who are members of federally recognized tribes, either live on reservations or off reservations but have property that is being managed by the Bureau of Indian Affairs.

Q And I think that those 600,000, as you see it, are entitled to the preference in this case?

MR. SACHSE: That is correct. It is not just as I see it. The Chief Personnel Officer of the Bureau of Indian Affairs testified in the trial of this case. He testified that the preference is limited to Indians who are members of federally recognized --

Q That is the way they are administering it?

MR. SACHSE: That's right, but it is not contested this time, that that is the way they are administering it.

Q But the statute may be broader?

MR. SACHSE: The statute is capable of a broader interpretation but we think that this is the correct interpretation.

Q But whether it is or not, that issue isn't here, is that right?

MR. SACHSE: That is correct.

Q There was one sentence you didn't quite finish. Was the last word tribe?

MR. SACHSE: I am not sure which sentence it was. The last word was probably "tribe."

Q Okay. I wanted to be sure what your position was, and it --

MR. SACHSE: Our position is that an Indian does not have preference unless he is a member of a federally recognized Indian tribe and also is of at least one-fourth Indian blood.

Q Incidentally, while I have you interrupted, the Equal Employment Opportunity Act has some exceptions in it, doesn't it, Mr. Sachse?

MR. SACHSE: Yes, it does.

Q But it makes no exception for Indians or the Indian preference laws. Do you have any explanation for that?

MR. SACHSE: I do and I would like to say this, though, that I would like to spend most of my time, if I can, on the statement of the case and the constitutional issues here, and Mr. Sherman is prepared to deal in detail with the Equal

Employment Opportunities Act of 1972. But rather than leave this hanging, the Act describes in some detail the outer limits of section 717 of the Act, which is the issue here, describes in some detail the outer limits of the Civil Service Commission's authority, and it is this agency but not that agency to trace that.

For instance, there is a problem with the General Accounting Office. There is no question that the Act intends to have its broad outer scope cover everything in Civil Service, but there is a specific exception to the Civil Service law, which I will explain, for this Indian preference. In fact, the Indian preference statute itself says this shall be so without regard to the Civil Service law, and was done quite deliberately that way and has been handled that way.

Now, I want to go back for a minute and talk about the reason for the Indian preference statute. When -- the sort of romantic period of Indian law is the period before 1880, but by 1880 Indian wars were about over, the Indians had been confined to reservations, they had been put on reservations generally that didn't give them enough water or land or resources to provide for their livelihood, so they became, in fact as well as in legal theory, the wards of the federal government. If the federal government didn't feed them in those days, they didn't eat. There simply wasn't enough to go around. And there was an increasing period of federal responsibility for

the Indian tribes, though the Indians had been promised in every treaty that they would have a certain level of independence and that though we can't say today that they are sovereign nations, there is some concept of sovereignty behind that, as Mr. Justice Marshall said in the McClanahan case.

But what happened under this period of federal supervision and care was devastating to the Indian tribes, and by 1934 it had become one of the greater national scandals. In the 1930's, after fifty years of guardianship, both the administration and Congress decided that there had to be some completely new system for handling Indian affairs. The Commissioner of Indian Affairs, Colliers, testifying in Congress in 1934, pointed out that during the years between 1880 and 1934, during the years when the federal government had the most responsibility, the wars were over, that the Indians had been -- and these are his words -- "drifting towards complete impoverishment, that they had been disorganized as groups, literally disorganized by the federal government, as groups, and pushed to lower social status as individuals, and that their land holdings had diminished" -- and this is after they had given up most of the country -- "their land holdings had diminished from 138 million acres in 1887 to 48 million acres in 1934," and something had to be done.

The purpose of the Indian Reorganization Act was to reverse the trend towards destruction, to use not too strong a

word, by ending the Indian allotment policy, which had let land go first to Indian hands and then out of Indian hands.

Q Did that reduction that you just mentioned in land holdings, does that -- was that a totally a reduction in all lands held by any Indians in any capacity, or was that a reduction in tribal land holdings?

MR. SACHSE: No, I think it was the latter. This was lands that had passed out of any kind of Indian --

Q The former then.

MR. SACHSE: The former. I know it is not tribal holdings --

Q It is not?

MR. SACHSE: What he was referring to is the amount of land that had been lost after allotment, where the land was allotted and then everything that wasn't allotted was considered surplus land and then was just openly sold off to non-Indians.

Q Well, it is not vital anyway.

MR. SACHSE: Anyway, to end this abuse was to terminate the allotment act, to encourage Indian governments on the reservation, and there was a third part, and that was to make the Indian role a prominent role in the Bureau of Indian Affairs. It was an attempt at the classic problem of who guards the guardian, and the federal government had failed as a plain guardian, and it was felt necessary to have Indians

participate strongly in guarding the guardian and self-help in doing their own work.

A more radical proposal was discarded. A more radical disposal was to give the tribes an absolute veto, or virtually an absolute veto of any Bureau of Indian Affairs person who would be sent to reservations. But, rather than do that, Congress decided on this proposal of giving preference to Indians in the Bureau of Indian Affairs.

I have some nice examples of language from the Congressional Record pointing out the purpose of this, but I don't think I will read them to you. We have it in our brief. One of the pithier and shorter ones was by Senator Norbeck, who simply said, "I think we have utterly fallen down in the present system. The Indian has been excluded. The reservation is filled up with white people who live off the Indians." And other statements attribute this directly to the workings of the Civil Service law. And as Mr. Collier pointed out, there are actually less Indians working for Indian progress in 1934 than in 1930 -- excuse me, than in 1900, less percentage of Indians, because the Civil Service law had served to weed out qualified Indians who may not have been able to compete with hundreds of non-Indian applicants. And there are many statements that the Indians should not have to compete with non-Indians for the jobs in their own service and in controlling their own property.

Q Does the Bureau, Mr. Sachse, have much responsibility outside of the administration of tribal affairs?

MR. SACHSE: Well, it does in this instance. It has responsibility for the -- it has the trust responsibility for all trust property. Some of the trust property is allotted trust property, so in that sense you might say it is outside of tribal affairs, but other than members of tribes of allotted property it only has jurisdiction where its view -- its view is that it only has jurisdiction where it is dealing with tribal Indians.

Q And an allottee, if he meets the other requirements, could qualify under the preference?

MR. SACHSE: That is correct. That is correct.

I want to point out also that this is not -- well, before I get to this, the Act itself, of course, says specifically that the preference is to be without regard to Civil Service laws, is to be competent Indians without regard to Civil Service laws. And it is a preference in the administration of functions or services affecting any Indian tribe, and that is the way it has been handled by the Bureau of Indian Affairs.

I want to point out also that there are many Indians, many people who racially could be considered an Indian who don't get this preference. For instance, if someone is a member of a terminated tribe, such as the Klamaths of Oregon,

their property is no longer being administered by the Bureau of Indian Affairs. They don't get the preference. Somebody who is a member of a tribe that has never been, whose property has never been handled by the Bureau of Indian Affairs, such as Passamaquoddy Indians in Maine. They don't -- if someone is racially a pure-blooded Indian from Canada, from Mexico, though they have lived here for three generations, he doesn't get the preference. The preference is not a racial preference. It is a preference for the people whose property and lives are affected by the Bureau of Indian Affairs to serve in that bureau. That is undisputed in the record of this case, the testimony.

Now, we think it is clear that the statute was not repealed by the Equal Employment Act of 1972. As we demonstrate in our brief -- and I point out also the letter from the Civil Service Commission that makes this point, that is in the record of the case, the Civil Service Commission, which has the primary responsibility for enforcement the Equal Employment Act of 1972 in government service, fully agrees with this.

There is not a word in the Act -- they also had a role in drafting it -- there is not a word in the Act that sets out to abolish this Indian preference. Certainly, the broad language about racial preference or national origin doesn't do it itself. The legislative history shows not any intention to change the Indian preference. And it is inconceivable to us that Congress, in an act setting out to increase minority

participation in government, would have abolished the Indian preference without a word saying that they are doing it. I think if they had intended to do that, they would have done it. And they had the right to rely on principles of statutory construction that this broad act would not repeal the more specific act.

Q Of course, the other side of that same coin is that if they had intended otherwise, they would have read it into the exceptions, written it into the exceptions --

MR. SACHSE: Well --

Q -- so the thing cuts both ways, really, which brings me to my question before.

MR. SACHSE: Well, unless you focus on the purpose for those exceptions, which are not really exceptions at all but simply a delimitation of the Executive Branch of the government and the outer limits of the Civil Service Commission's authority. But I would like to stay out of that so that Mr. Sherman can get into that.

Q It seems to me you are cutting right into it when you made the opposing statements here.

MR. SACHSE: I am afraid I did, and I know you are unhappy with me for saying it at all. I promise not to do too much of that. But I want you to know that this is also the position of the United States.

Now, to the constitutional issue --

Q You mean the United States is speaking here with one voice?

MR. SACHSE: For a change.

In Board of Commissioners v. Seber, upholding an Indian tax immunity against a constitutional attack on equal protection grounds, the Court said this, and I think it is the key to this case. It said: "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." Okay. "Of necessity, the United 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."

Then, actually in an earlier case, Perrin v. United States, in upholding the laws as to sale of liquor to Indians on land next to a reservation, the Court said that in determining what is reasonably essential to the protection of the Indians, Congress is invested with wide discretion, and its actions, unless purely arbitrary, must be accepted and given full effect by the courts.

Now, I don't know that I would argue for that broad a standard, but certainly that kind of standard is the test for

this case, that this is an area that Congress has to deal with, it is a difficult area, Congress has dealt with it in good faith and to a great extent successfully with the 1934 reorganization act. And the Court should be loath to un-do that on constitutional grounds.

Now, I want to make one other point, and that is the way we analyze this case, this is not really an equal protection case at all, because equal protection refers to people who essentially are in the same relationship to the government, that the government then has passed laws that treat them in different ways, and then the court uses its equal protection analysis to decide whether the difference in that treatment is justifiable.

But here there is an essential different relationship between a tribal Indian, whose tribal property is being managed by BIA, and --

Q It isn't quite as simple as if they had had a preference for farmers in the Agriculture Department, you know, that that presumably would raise very few equal protection arguments? Perhaps I don't --

MR. SACHSE: Well, I would put this the other way. I think this --

Q You think you have got an easier case?

MR. SACHSE: I think I have an easier case than that because of the special treatment in the Constitution itself of

Indians, the commerce clause, and the long history of special legislation in dealing in Indian affairs.

And I point out, in light of the recent decision of the Court in Arnette, too, that perhaps a non-Indian employee doesn't have a vested right in this job in the BIA or, if he does, it is under the terms that he comes in under. But I say that only to you, Mr. Justice.

[Laughter]

MR. JUSTICE DOUGLAS: Mr. Sherman?

ORAL ARGUMENT OF HARRIS D. SHERMAN, ESQ.,

ON BEHALF OF THE INTERVENOR-APPELLANT AMERIND

MR. SHERMAN: Mr. Justice Douglas, and may it please the Court:

I would like to concentrate my comments on the question of whether the 1972 Civil Rights Act repealed by implication the Indian preference statutes which the lower court so held.

Section 717(a) of that Act, by its express terms, barred discrimination based on race in the federal government. Although nowhere in the terms of the legislative history of that Act is there any intention expressed by Congress to repeal the Indian preference statutes, the District Court held that the BIA must come under the broad terms of the Act and thereby repealed by implication those statutes.

Now, in my argument, I would first like to analyze

the legislative background of the '72 Act, which we believe, without question, shows that Congress could not have intended such a repeal.

Secondly, I would like to explain why the BIA is not listed as an exception in that Act. And, lastly, I would like to touch on why we believe the District Court failed to apply basic rules of statutory construction regarding repeal by implication.

Now, if I may first turn to the legislative background of the '72 Act, because I think this is extremely important: The 1972 Act amended the 1964 Act, and by section 717(a) merely codified preexisting nondiscrimination statutes -- excuse me -- Executive regulations that existed in the federal government.

The language of these preexisting regulations in section 717(a) of the 1972 Act are virtually identical. Now, we believe this is important because these nondiscrimination measures have stood side by side with the Indian preference statutes over the years, and neither the Executive Branch nor the Legislature viewed Indian preference on the one hand and nondiscrimination on the other hand as being inconsistent. And for this very reason, Congress may well have thought it was not necessary to make an exception for the BIA in the 1972 Civil Rights Act.

Now, let me give some examples of this. Beginning in

the Roosevelt administration, there were executive regulations which bar discrimination in the federal government, and there have been successive executive regulations up to the present time.

At the same time, because of the 1934 Indian preference statute, both the BIA and the Civil Service Commission have given special preferential rights to Indians as opposed to non-Indians upon initial entry into the Bureau of Indian Affairs. Neither the bureau nor the Civil Service Commission have seen these non-discrimination policies and Indian preference policies as being inconsistent.

Now, another example of this is in 1964 when Congress passed the 1964 Civil Rights Act. In barring discrimination in private employment, Congress reaffirmed its belief in Indian preference by exempting from the Act Indian tribes and private employers on or near Indian reservations to allow preferential employment treatment for Indians. Congress did not view Indian preference on the one hand and nondiscrimination on the other hand as being inconsistent.

Even in 1972, three months, only three months after the 1972 Civil Rights Act was passed, Congress passed new Indian preference statutes giving preferences to Indian teachers and Indian educators and special Indian education programs. Congress in no way saw any inconsistency between these new preference acts in 1972 and the Civil Rights Act that it had

just passed.

Now, I want to turn for a moment to the legislative history of the 1972 Act. Mr. Sachse has pointed out that nowhere in the terms of the Act or in its legislative history, which is voluminous, did Congress in any way say anything about its desire to repeal 138 years of special Indian preference programs. Surely, had Congress intended to do so, it would have said something, especially in view of its recent affirmation in 1964 and in 1972 with these new Indian preference laws. I think at the very least, Congress would have amended the 1964 Indian preference statute to do away with the private preferential right it had given to Indians if it intended to take away the right that it had given in the Bureau of Indian Affairs.

Now, the logical question to all of this is why didn't Congress include an exemption for the BIA in the 1972 Act. Well, we can only speculate on that since there is nothing in the legislative history to indicate one way or the other. But I think the most plausible explanation is that Congress simply felt that Indian preference was not inconsistent with the general nondiscrimination prohibitions and therefore it wasn't necessary to create an exemption.

Now, one reason for this, and I stress that this is for the same reason Mr. Sachse brought out, these Indian preference statutes, as we interpret them, are basically not racial

statutes. The thrust of the Indian preference act was to give self-determination to Indian people, people whose lives are controlled by the Bureau of Indian Affairs.

Now, as Mr. Sachse has pointed out, there are many Indians whose lives are not controlled by the Bureau of Indian Affairs. Those Indians, even if they are full-blooded Indians, don't qualify for Indian preference. So in that sense, the Indian preference laws are more based on a federal tribal recognition or tribal affiliation, not on the fact that one is or is not an Indian. And in that sense we do not believe that Congress thought that these statutes were based on a racial classification.

In addition to that, as I just --

Q Mr. Sherman --

MR. SHERMAN: Yes?

Q -- I am not sure that I understand what you say is being the same as what Mr. Sachse said about who qualifies for the preference. If you are not on a reservation, say you are an Alate, but you do trace your origins back to a federally recognized tribe. Do you qualify for the preference?

MR. SHERMAN: My understanding as to the way the bureau interprets this statute, you do not qualify for Indian preference unless you are a present member of a federally recognized tribe.

Q But that doesn't mean that you have to be on a

reservation?

MR. SHERMAN: It doesn't mean you have to be on a reservation, that is correct.

Q And you have to be also at least one-quarter Indian blood?

MR. SHERMAN: And you must be one-quarter Indian blood.

Q You must be both?

MR. SHERMAN: You must be both, that is correct.

Q That is my understanding.

MR. SHERMAN: That is the way the bureau is interpreting the statute.

Now, I think, in addition to what I have just said, I think an additional reason for the BIA not being part of this 1972 Act was that the thrust of the 1972 Act was to strengthen Civil Service Commission's antidiscrimination measures; and this 1934 Act, as Mr. Sachse has said, was instituted, giving Indians preferences "without regard to Civil Service laws."

We don't think Congress meant to do away with those preference statutes when it passed the 1972 Act. Now, I want to say that there is an alternative explanation as to why the bureau doesn't appear in the Act, and that is simply because it is very, very possible that Congress overlooked the bureau or overlooked Indian preference when it considered the Act. I think there is good evidence to that in the sense that there is not one word anywhere in the legislative history that

mentions the Bureau of Indian Affairs or the Indian preference statutes.

Q I don't know whether you have covered it or not, but this Indian, this person who is a member of a recognized tribe and one-quarter Indian blood, in an ordinary job he has the protection of OEO?

MR. SHERMAN: Well, I think he would also have the protection of the Office of Economic --

Q So he has both?

MR. SHERMAN: So he would have both protections, I presume, because he is a member of a minority, that is correct.

Q Well, he has more than the protection of OEO. A private employer can discriminate in his favor under OEO?

MR. SHERMAN: Only the private employer who is on or near a reservation.

Q Right.

MR. SHERMAN: But that is in the private sector. We are dealing here with the Bureau of Indian Affairs and the Indian Health Service, which is an off-shoot of the bureau.

I also want to deal briefly with the issue of statutory construction as it applies to "repealed by implication." Appellees have contended that the terms of the Indian preference statute and the Civil Rights Act of 1972 are in conflict, and thus the Indian preference statutes, because they are earlier statutes, must give way to the latter statute.

Now, quite to the contrary, the rules of this Court generally have been that repealed by implication of a special statute by a general statute will not take place. Now, I want to stress that in our view these Indian preference statutes, without question, are special statutes. They only apply to the Bureau of Indian Affairs and the Indian Health Service and only in a very limited way.

On the other hand, the 1972 Civil Rights Act, without question, is a general statute, it applies to virtually the entire federal government. Now, if the terms of the special and general statutes are in conflict, the prior special statute will only be an exception to the general statute unless the legislative history of the general statute could be demonstrated to have expressly intended to repeal the earlier statute, which is clearly not the case here because we don't have one word relating to intention of repeal Indian preference, or if the basic goal of the general statute would be entirely defeated, if the earlier legislation were to stand.

Now, the 1972 Civil Rights Act stands almost in its entirety intact. It applies to virtually all agencies of the federal government. As a matter of fact, it applies to the Bureau of Indian Affairs. Racial discrimination, sex discrimination, religious discrimination in the Bureau of Indian Affairs, this is precluded. Only when an Indian and a non-Indian compete for a vacancy and the Indian is qualified for

that job, and he is from a federally recognized tribe, does he receive the preference. Otherwise the 1972 Civil Rights Act in all other respects applies to the Bureau of Indian Affairs.

Now, lastly, I would like to just comment on what concerns the appellant Amerind greatly in this case. If Indian preference is to be repealed, or if it is to be found unconstitutional, we believe this would have a devastating effect on the Bureau of Indian Affairs and on Indian employment. And I would like to briefly explain this.

Our brief does go into the fact that almost all Indians in the Bureau of Indian Affairs enters the Indian service through what is called the acceptance service. This is a special exemption by which Indians, they have to be qualified, but they don't have to take Civil Service examinations, and they don't have to place their names on federal employment registers. Now, the reason for this accepted service was that the 1934 Congress realized that Civil Service examinations had long excluded qualified Indians. They simply didn't measure Indian ability, Indian potential. So the accepted service was service was set up and the authority for the accepted service in the BIA was none other than this 1934 Indian preference act.

So what concerns us is if you take away Indian preference then you in turn take away the accpeted service and that has been the major vehicle by which literally

thousands of Indians have been able to come into their own service and work for their own people. And as Exhibit A of our reply brief shows, that is a study by the Civil Service Commission of Indians in other federal Indian agencies in two populous states, Arizona and New Mexico. Indians have been virtually shut out of those agencies and, as that report explains, one of the reasons is that Indians have not been able to compete successfully for Civil Service examinations which don't measure their true ability.

We are very worried this same thing would happen to the BIA if preference were taken from Indians and if the accepted service were taken from Indians, and that clearly would defeat the congressional intent of allowing Indians self-determination in their own affairs.

So in sum, we believe that if the lower court had carefully considered the legislative background of the 1972 Act, which it did not, and if the lower court had applied basic rules of statutory construction relating to special and general statutes, which it did not, Indian preference would have been allowed to stand. And we believe that the decision of the lower court should be reversed.

I have nothing unless the Court has some questions.

Thank you.

MR. JUSTICE DOUGLAS: Thank you.

Mr. Franchini?

ORAL ARGUMENT OF GENE E. FRANCHINI, ESQ.,

ON BEHALF OF THE APPELLEES

MR. FRANCHINI: Mr. Justice Douglas, and may it please the Court, Your Honors:

There are still basically two issues presented before this Court here today, Your Honors, the first one being whether or not the 1972 Equal Employment Opportunity Act repealed the 1934 Indian preference acts by implication, or whether it tacitly did so.

The second question I think that is presented to the Court is whether or not the Indian preference acts passed some forty years ago -- I am talking specifically about the 1934 Act, Yours Honors -- is violative of the Fifth Amendment of the Constitution of the United States of America.

Now, with regard to the statement of the case presented to you here this afternoon, Your Honors, by Appellant, I would like to bring out a couple of factors with regard to BIA that the Court may or may not be aware of.

First of all, the Bureau of Indian Affairs, Your Honors, has a dual function, and that dual function are these: Number one, it acts as a trustee for certain properties for the Indian nations; and, secondly, it provides services to Indians through other federal and state agencies. Now, when I say provide services, I am talking about such things as school construction, maintenance of schools, some teachers, providing

power or water for irrigation and for lights. There are some health services that are put through HEW --

Q Mr. Franchini, those programs are all limited to Indians, aren't they?

MR. FRANCHINI: They are limited to Indians, yes, Your Honor, but they are services rendered to Indians.

Q But to nobody else?

MR. FRANCHINI: To nobody else, no, Your Honor, through the Bureau of Indian Affairs.

Q And would you suggest there is also a constitutional question about those services?

MR. FRANCHINI: No, Your Honor, Justice White, I am not here to argue that point with regard to --

Q I know, but you are here to argue the constitutionality of a preference in employment to Indians.

MR. FRANCHINI: Yes, Your Honor.

Q Preference in the sense that they will hire only Indians for certain jobs.

MR. FRANCHINI: That is correct, Your Honor.

Q And you wouldn't think there would be any --

MR. FRANCHINI: And that they will promote Indians.

Q You wouldn't think there would be any constitutional question about furnishing schools only to Indians or to furnishing water or a lot of other services only to Indians?

MR. FRANCHINI: No, Your Honor, I don't, and for this

reason, Justice White. I think that it is clear, and it has been clear, that Congress' power with regard to Indians is almost plenary. They have treated the Indians as a subjugated people for very many, many years, and that their powers over the Indian nations have been plenary in this regard.

What we are dealing with in this particular case are government employees who are Indian members of the BIA as opposed to government employees in the BIA who are non-Indians, and this Court and the Congress and the President can give as many rights as they want to to these Indians, to these people. There is no question about that. What makes this illegal, what makes this particular act illegal that we are talking about, and making it unconstitutional, is that they are taking away from other government employees who are non-Indians to give the Indians the rights. They are taking the rights from the non-Indian employees of the BIA to give the rights to the Indian employees of the BIA.

Q You wouldn't say there would be anything wrong then if there is a vacancy in the BIA, and there are two applicants, one an Indian and one a non-Indian, to give the job to the Indian?

MR. FRANCHINI: Everything else being equal, if he is qualified. You have a question of qualification here, whether or not the Indian --

Q Well, I will just ask you again. You wouldn't

see anything wrong with giving the preference to the Indian in every case?

MR. FRANCHINI: Not so long as, Your Honor, the Indian is qualified and can pass the Civil Service examination.

Q Well, no, so you do see something wrong with it?

MR. FRANCHINI: Oh, yes, I do. Yes, Your Honor.

Q Well, I know, but --

MR. FRANCHINI: Yes.

Q Well, what rights has the non-employee got that is being taken away from him by giving preference to the Indians?

MR. FRANCHINI: The right that the non-Indian employee has in the BIA is his right to his job, his --

Q Well, we are talking about vacancies, that non-employees who are applying for employment, what rights have they got to object to a preference given to an Indian?

MR. FRANCHINI: If they are applying for the job and they are qualified for the job, and there are no qualified Indians available --

Q You say they have a right to --

MR. FRANCHINI: --for the job, they have a right to get the job.

Q You say they have a right under the Civil Service law?

MR. FRANCHINI: Certainly, and they have a right to

the promotions when they become available, which have not been applied as far as the way this Act is presently being applied, Your Honors.

Q What do you do with veterans' preferences?

MR. FRANCHINI: Your Honor, I am not here to argue the matter of veterans' preferences, and I am really not as familiar with veterans' preferences with regard to these kinds of --

Q Haven't you heard that they exist?

MR. FRANCHINI: Oh, I realize that they exist, Your Honor. I realize that they exist. The point that I am trying to --

Q If the two are equally qualified, the veteran automatically gets the preference?

MR. FRANCHINI: The thing that makes this matter unconstitutional, Justice Marshall, is not so much giving a qualified Indian a job over a qualified non-Indian, but when they are both already employees of a federal agency --

Q I am talking about those that are applying for the job.

MR. FRANCHINI: We are talking here in this case, Your Honor, not of people that are applying for the job but promotions within the agency itself, not initial hiring.

Q Well --

MR. FRANCHINI: We are talking about promotions,

Justice Marshall.

Q I know that, but I thought you were talking originally about -- my brother White asked you about someone applying for a job, that is why I was.

MR. FRANCHINI: If the qualifications are equal, Your Honor, from a practical standpoint, without a federal statute, probably the Indian would have preference over the non-Indian in the BIA.

Q You don't believe that the BIA could say, as a matter of policy, there is no Civil Service required?

MR. FRANCHINI: No, Your Honor, we think that that is unconstitutional as well. It is part of the same section of the Act that we are talking about here.

Q Well, we have got the BIA, we have got $100,000 -- I am using small figures because I can't understand big ones -- for water and health facilities, and $100,000 for employment, so far as the government is concerned, that is $200,000. You say they can spend $100,000 to the exclusion of everybody but Indians, the one for the water and --

MR. FRANCHINI: Well, Your Honor, I am saying that the non-Indian employees in the BIA, who are employees right now --

Q But the BIA says we are going to put $100,000 into a water purification plant on the Jacobs Reservation.

MR. FRANCHINI: Yes, Your Honor.

Q And none of that water can anybody other than the Indians touch, and that is solely for Indians. That is okay?

MR. FRANCHINI: Yes, sir.

Q And if the BIA says we are going to put $100,000 for employment of Indians only, that is wrong?

MR. FRANCHINI: Yes, Your Honor.

Q Why? It is still $100,000.

MR. FRANCHINI: The appellees in this case --

Q We are only talking about $100,000, that is all we are talking about in both cases.

MR. FRANCHINI: What we are talking about here though, Your Honor, in deference to --in deference to what your first problem was, is that in this case all of the appellees in this case are non-Indian employees of the BIA right now, and they have been denied promotions in their jobs, they have been denied advancement in their jobs even though they are qualified --

Q And they knew it when they took the jobs?

MR. FRANCHINI: No, Your Honor, they did not know that when they took the jobs. That is the reason that we are before the Court today.

Q Why did they not?

MR. FRANCHINI: What makes this unconstitutional, Justice Marshall, is what I am saying is they can have all of the rights that they want, all of the privileges that they want.

Q When was this preference act passed?

MR. FRANCHINI: 1934, Your Honor.

Q Well, aren't some of these employees hired since '34?

MR. FRANCHINI: Oh, yes, Your Honor.

Q But this promotion is a new policy, isn't it?

MR. FRANCHINI: Yes, Your Honor, it is --

Q It was always thought applicable to --

MR. FRANCHINI: Just initial hiring.

Q -- just initial hiring --

MR. FRANCHINI: Not as to promotion.

Q -- but promotion is a new policy?

MR. FRANCHINI: This is a brand new thing that comes up, Justice Marshall, and --

Q But that does not seem to be confined, does it not?

MR. FRANCHINI: That is true, Your Honor.

Q I take it we do not have here any question about present employees being displaced at all? It is just the question of promotion?

MR. FRANCHINI: I don't know whether we have had any displaced employees. I doubt it, Justice Blackmun. What I am talking about are qualified non-Indian employees not being promoted and not being advanced within the BIA, although they are qualified to be advanced.

Q Mr. Franchini, did I understand you to say it would be unconstitutional for the government not to apply the Civil Service rules to the Bureau of Indian Affairs?

MR. FRANCHINI: We are saying that the entire Indian preference statute that was passed in 1934 is no longer necessary in 1974, and that it is in fact unconstitutional, Justice Rehnquist, yes. That is what we are saying.

Q But certainly one argument I assume you make is that it is close enough to a distinction based on race or color so as to come under the Fourteenth Amendment. But supposing there were no Indian preference statute but the Bureau of Indian Affairs was simply exempted from the Civil Service requirements to take a competitive examination to get in, although most other government departments require that sort of examination. There would be nothing wrong with that, would there?

MR. FRANCHINI: No, but that isn't the case that we have before the bar, Justice Rehnquist.

Q Yes, I realize that.

MR. FRANCHINI: That is really the problem that is facing this Court here today.

Now, we are saying in the first instance, Your Honors, that -- yes, Justice Blackmun?

Q Mr. Franchini, do you know what brought about the change in attitude on the part of the Bureau in 1973 as to promotions and things? What was it that triggered that?

MR. FRANCHINI: I don't know exactly what triggered it, Your Honor. In 1972 or shortly thereafter, it became a policy of the Department of the Interior and in the Bureau of Indian Affairs to advance the Indian employees of the BIA over the non-Indian employees of the BIA, and they were, as we maintain here today, subsequently discriminated against because of that reason. And this is one of the reasons why this case has come before this Court, so that this Court can determine whether or not the actions taken by the BIA at that time are in fact constitutional or unconstitutional.

With regard to the argument about the 1972 Act repealing by implication the 1934 Indian preference acts, Your Honors, I would like to point out this, that at no time, at no time, Yours Honors, during the course of the briefs or during the course of the argument that we have heard from the appellants, do the appellants at all deny that the Indian employees of the BIA are government employees and subject to the rules and regulations laid down in the statutes that we are talking about here today. There has been no objection and no exception, either in the court below or before this Court, that they are government employees.

Now, the 1964 Equal Employment Opportunity Act, which applied to private employers, contained an exception for Indians living on or near a reservation. And I have pointed that out, that this exception was made for those businesses or enterprises

operating on or near a resevation with a publicly announced policy, Your Honors, of aiding and assisting Indians.

Eight years later, in 1972, when they took the 1964 Act and applied it to federal employees, there is no exception in the Act with regard to BIA or BIA employees, none, Your Honors. It is absolutely absent.

In the briefs, I have pointed out that as a matter of congressional record, both Senator Byrd of West Virginia and also Senator Humphrey of the State of Minnesota have made extensive remarks during the course of the passage of the '72 Act applying to all federal employees. And I think that Senator Byrd's remarks are probably even more apropos here than at any other time. He said, "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 or 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 a 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 his race or religion or sex. Every qualified individual, whether he be black, white or else, should be given an equal chance and not preferential treatment in employment."

I would also like to point out to the Court that

section 105 of Title 5 of the United States Code specifically lists therein, Your Honors, Executive Department. Now, Executive Department includes the Department of the Interior and is referred to and included in section 717 of the 1972 Act. Now, if Congress had not intended to refuse to make an exception based upon race in government employment, why would they include it in the definition? In other words, Congress did not intend to exclude namely Indian preference that which they specifically included in the Act.

When the appellants argue, Your Honors, that the 1972 Act is a general statute and the Indian preference statutes are specific legislation, and that therefore the latter should be upheld in resolving conflicts, I think we are talking about semantics. They both cover the same principle that we are talking about here, Your Honors. They both cover government employment. They are of equal import. They should be read together. And if the conflict cannot be resolved between the two, then the most recent civil rights legislation giving us freedom from discrimination based upon sex, race, creed or color is the one that should be upheld and not vice versa, an Indian preference act passed forty years ago, when the situation today is much different.

Q How about the Indian Education Act that was passed in 1972?

MR. FRANCHINI: Again, Your Honor, this is an act of

Congress giving the opportunity to Indian young men and women to become educated so that they can go back to the Indian schools and teach the Indian American what life is like outside of that reservation, that non-Indian world, and that is perfectly all right. We are not talking about that kind of an action being unconstitutional, but I fail to see its applicability with regard to our first argument, the '72 act in fact entirely repeals the act of 1934. This is another action by the Congress of the United States to give to the Indian American another way out of this prison that he has been put in by virtue of this Indian preference.

What we are saying to these people are, you are American citizens, you are citizens of the United States of America. However, there is something different about you so we have to take special preferential care of you.

Q Mr. Franchini, you said there is a great difference between when the preference act was passed and the present time. Is there any record to back you up on that?

MR. FRANCHINI: Yes, Your Honor, I think there is considerable information in the record with regard to that. First of all, I would like to point to the record on page 41, with regard to the employment in the BIA. If the Court would turn to page 41, Justice Marshall, that BIA data at the top of that page indicates who are the majority and who are the minority employees of the BIA. At the present time within the

BIA, there are 8,347 Indian employees and 7,176 non-Indian employees, or a total of 15,523 human beings working within that area.

Q What was the percentage when it was passed?

MR. FRANCHINI: The percentage was much lower, as was stipulated by counsel in his opening remarks. In 1930, between '30 and '34, there were very few Indian employees in what was then called the Indian Service. But the Indian Service in those days really did have something to say about the life and politics of Indians.

Q You go ahead, but I am not interested in that. You said the Indians are so much better off now. I thought that is what you were talking about.

MR. FRANCHINI: Yes, Your Honor, they are better off than they were in 1934, much better off.

Q Sure. So are you.

MR. FRANCHINI: I hope so.

Q I hope.

MR. FRANCHINI: Justice Marshall, recently in the Bureau of Vital Statistics of the United States, where in the 1940's I think the average age of the Indian American who died was 40, it is now something like 68.

Q Is there any movement to repeal the preference act, or do you want us to repeal it?

MR. FRANCHINI: No, Your Honor. I think that the

Congress of the United States has repealed it by implication.

Q Well, I thought you said you wanted us to rule it unconstitutional.

MR. FRANCHINI: That is the second argument, Your Honor, and I am going to get to that very shortly. I think that it was repealed by the 1972 Equal Employment Opportunity Act --

Q And you can't find --

MR. FRANCHINI: -- and even if it wasn't, it is still an unconstitutional act.

Q You can't find one word in that act that suggests that, right?

MR. FRANCHINI: Pardon me, Your Honor?

Q There is no one word in the act that suggests the repealing?

MR. FRANCHINI: No, Your Honor.

Q And the only words you have is the word of Senator Byrd where he said "all others," and you say that includes Indians?

MR. FRANCHINI: Yes, Your Honor.

Q You don't repeal acts that way. You don't throw them all in a big hopper and repeal the whole mess of them at the same time. Are you really serious that this repeals it?

MR. FRANCHINI: Yes, Your Honor, I am really serious that I think that it repealed it.

Q I suppose the court below was very serious when they held it was repealed?

MR. FRANCHINI: That is true, Your Honor, they were very, very specific on the point, as part of the jurisdictional statements this Honorable Court has the entire opinion of the court below. They were convinced that it was repealed.

Q Well, with two statutes, you can't obey them both, can you?

MR. FRANCHINI: No, Your Honor, you can't.

Q It says "all personnel actions affecting employees in the Executive Department shall be made without regard to race." If you obey that literally, you can't obey the preference act, can you?

MR. FRANCHINI: That is correct, Your Honor.

Q And if that --

MR. FRANCHINI: And the BIA today is in a state of upheaval --

Q This is why you say there is a repeal, I take it?

MR. FRANCHINI: That there is a conflict and they have to be read in pari materia to one another and that the '72 act being the more recent civil rights legislation, repeals the '34 act. That is exactly the point, Your Honor.

Q And you were able to convince three New Mexico federal judges to that effect?

MR. FRANCHINI: Yes, Your Honor. Justice Seth, who is the Chief Justice of the Tenth Circuit, and two District Judges from Albuquerque.

Q I can read their opinion and I can disagree with it, can't I?

MR. FRANCHINI: Yes, Your Honor, you sure can. You surely can, sir.

Q It depends on what they said in their opinion, and they just said automatically it was repealed, which is what you said.

MR. FRANCHINI: I think they went a little bit further than that, Your Honor. But this is a question of an interpretation of what the lower court held and certainly, Justice Marshall, you have the right to read it in that fashion.

With regard to the unconstitutional aspect of the 1934 Indian preference acts, Your Honor, the appellees here are a woman, a Jewish man, a Mexican-American, and a black American, all non-Indian employees of the Bureau of Indian Affairs. None of them are employed, Your Honors, on or near a reservation, none of them. They all perform technical and ministerial tasks and no claim has ever been made that they make any decisions at all involving Indian matters of participation in government. For that matter, Your Honors, our point in the brief is that the BIA today does not make decisions for the Indian tribes. Those decisions that govern their everyday lives are not made

by the Bureau of Indian Affairs, they are made in the tribal councils on the reservations.

We are contending that the Indian preference acts of 1934 discriminate against them on racial basis in promotion to positions that are likewise not on or near a reservation but, as a matter of practical fact, is the Indian Polytechnic Institute in Albuquerque, New Mexico, which is not on a reservation.

Q The Secretary of Interior though does have an extraordinary amount of authority, as I recall, over the lives of Indians. He can approve wills, he can approve payment of tribal attorneys fees, and surely in those matters he is advised by the Bureau of Indian Affairs, isn't he?

MR. FRANCHINI: I don't know, Your Honor. I don't know whether the Secretary of the Interior is ever advised by the Bureau of Indian Affairs. There are some things in this brief, Justice Rehnquist, that indicate that perhaps that may not be the case. I think that the Secretary of the Interior, Mr. Rogers C. B. Morton, realizes also that with this preference act that we now have applied, that the non-Indian employees of the BIA are in fact second-class citizens and they are not being provided with their constitutional rights in having their jobs -- in not having the ability to be advanced in their jobs and promoted in their jobs --

Q Mr. Morton, is he the one that is petitioning

in this case?

MR. FRANCHINI: Mr. Morton, Rogers C. B. Morton, the Secretary of the Interior, is one of the appellants, Your Honor. Amerind, Inc., an Indian organization, which is --

Q But he is one of the appellants?

MR. FRANCHINI: He is one of the appellants.

Q And as I understood you to say, he agrees with you?

MR. FRANCHINI: I think he does, Your Honor.

Q Well, how can he be an appellant and be on the other side, too?

MR. FRANCHINI: I believe, Your Honor, that --

Q Now, wait a minute. A minute ago I think the other side admitted that for once the United States government was in agreement on a case, and now you say they are not even in agreement on this one.

MR. FRANCHINI: I don't think they are even in agreement on this one, Your Honor.

Q I mean they are in agreement with you?

MR. FRANCHINI: I hope so. I think that is the way I read it, Your Honor.

Q On what issue?

MR. FRANCHINI: On the issue of as to whether or not, with the existence of Indian preference, Justice Stewart, the non-Indian employees that I represent are in fact second-class

citizens in this country because of their inability to be promoted, their inability to be advanced.

Q They agree that Indians are given preference in promotion?

MR. FRANCHINI: Yes, Your Honor.

Q That is what you mean?

MR. FRANCHINI: And they don't disagree that they are every bit, the Indian employees are every bit as much governmental employees as my non-Indian clients.

Q Mr. Franchini, I don't know if the United States still has mandate authority over American Samoa or not, but it did at one time. Would you think it unconstitutional for the Secretary of the Interior, governing that island, to give a preference in local employment preference in promotion to Samoans?

MR. FRANCHINI: I think so, Your Honor. You see, we are talking about two different things here with Indian preference, Your Honor. Just Rehnquist, if I could just take a moment, I will try to explain.

An Indian is defined in this series of acts, section 479 of 25 U.S.C. defines Indians for the purpose of this Indian preference as follows: "An Indian, as used in these sections, included Indian preference, shall include all persons of Indian descent who are members of any recognized Indian tribe now under federal jurisdiction, and all persons who are

descendant of such members who were on June 1, 1934 residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood."

When we are talking about whether or not an Indian person is a member of a tribe, some tribes require a blood quantum, some do not. But as far as the preference acts that we are talking about here, Your Honor, are concerned, they have to have -- they are supposed to have one-half or more Indian blood, but there is no objection, and there is no argument on the part of the appellants, that they are in fact applying a one-quarter Indian blood test to exercise these preferences. And I don't believe that there ever has been an argument by the Bureau of Indian Affairs or the Secretary that they are not applying that basis.

Now, when they passed this Act -- and this is I think very, very interesting -- when Congress passed this act in 1934 giving Indians preference, they said, in section 478 of Title 25, U.S.C., sections 461, 462, 463, 464, 465, 466 through 470 and 471 through 473, and that includes the Indian preference, because 472 is the Indian preference of this title shall not apply to any reservation wherein a majority of the adult Indians voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within

one year of June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days notice. That election was held, Your Honors. And I think that it was clearly Congress' intent that section 472, which was the Indian preference acts, shall not apply to any reservation where the male members of the tribe voted against its application.

As a matter of practical fact, the largest Indian reservation in the United States today, namely the Navajo Reservation, that come from where I come from, New Mexico and Arizona, voted against it. And the tribal operations records within the Bureau of Indian Affairs will show that many other reservations also rejected chapter 576 in total.

The Fifth Amendment to the Constitution of the United States, Your Honors, provides in part that citizens of the United States shall not be deprived of life, liberty and property without due process of law.

Q What is your point about the vote, therefore this preference should not be -- should not obtain with respect to employment on the Navajo Reservation, for example?

MR. FRANCHINI: Yes, Your Honor.

Q Well, what about --

MR. FRANCHINI: But it seems to me to have been the intent of the law. Now, I must point out to you, though, Justice White, that in the lower court, they took a different

view of that.

Q Now, what if the preference is granted that an office of the Bureau of Indian Affairs in Albuquerque or in Santa Fe, not on the reservation, let's assume that is true, the exclusion wouldn't apply, would it?

MR. FRANCHINI: Oh, yes.

Q I mean the preference would apply?

MR. FRANCHINI: The preference --

Q It would apply and the vote on the reservation would be irrelevant?

MR. FRANCHINI: Yes.

Q Well, where are these preferences at issue in this case, where were they granted?

MR. FRANCHINI: These preferences were granted or the appellees in the case were not promoted --

Q Where do they work?

MR. FRANCHINI: -- off the reservation in Albuquerque at an Indian school, Polytechnic School in Albuquerque, New Mexico.

Q Well, then, the vote against it on the reservation is irrelevant?

MR. FRANCHINI: Probably, Your Honor. Justice White, I wanted to point out that the section was in there as part of the Indian preference act to see whether or not the reservations and the Indians, all Indians of one-half blood, really

wanted this to be effective.

Q Well, that may be so, but the act still applies off any reservation?

MR. FRANCHINI: That is true, Your Honor.

Q Yes.

MR. FRANCHINI: That is true, Your Honor. In this particular case, this failure to promote and advance qualified personnel happened off the reservation in the city in a BIA run school for Indian children.

The case of the Board of County Commissioners v. Seber, that has been quoted by counsel for the appellants, appellees do not feel decide the issue or the issues in this case. That case decided an issue of whether or not the tax exemption statutes were violative of the due process clause of the Fifth Amendment. It had to do with whether or not the rights of individual Indians and the United States as a trustee of property had anything to do with the taxation part of the matter. It did not involve a dispute between property rights of the Indians and non-Indians. It had to do with something entirely different than that.

The other cases cited by appellants in their briefs and during their argument I think, Your Honors, none go to the point in issue here. It is a proposition and they stand for the proposition that the Indians have a different and probably a very unique position with regard to other people in the

United States of America, but it does not decide whether or not you can deprive a government employee in the BIA advancement in his position when he is qualified because of an Indian preference act. We believe that is contrary to the Fifth Amendment of the Constitution of the United States and it is a distinction based upon race. We are talking about one-quarter Indian blood. When we start talking about blood, we are talking about race, Your Honors, and I think that that is clearly the issue here, that this is strictly a racial preference, and this is strictly a preference based upon race and nothing more or less than that.

Finally, Your Honors, I would like to call the Court's attention to the case of Briggs v. Duke Power Company, 401 U.S. 424. At page 400 of that opinion, the Chief Justice, who unfortunately is not with us here today, wrote an opinion, and part of that opinion I think is very, very pertinent here. It says that "Congress did not intend by title VII, however, to guarantee a job to every person, regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has prescribed. What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate insidiously to

discriminate on the basis of racial or other impermissible classification." And that is precisely I think, Your Honors, what has happened here.

If there are no further questions from this Court, we confidently submit our case to you for your consideration.

Thank you.

MR. JUSTICE DOUGLAS: Thank you.

Do you have some more to say?

REBUTTAL ARGUMENT OF HARRY R. SACHSE, ESQ.,

ON BEHALF OF THE SECRETARY OF THE INTERIOR, APPELLANT

MR. SACHSE: I have about thirty seconds. I obviously can't answer all of these things.

I ask the Court not to get into the question of the scope of the preference too much. That is in litigation elsewhere and was not --

Q Mr. Sachse, could I ask you --

MR. SACHSE: Yes.

Q Assume there had never been an Indian preference act, and then the later act was passed forbidding discrimination based on race in government employment. You wouldn't have any problem of saying that it applied to the Bureau of Indian Affairs?

MR. SACHSE: I want to answer that. I would have no problem saying that it applies to the Bureau of Indian Affairs, but I would still say --

Q If the Secretary were giving racial preferences, absent some Indian preference act --

MR. SACHSE: Let me explain this in the context it is actually in. I think your answer, can you apply both acts at the same time, the answer to that is yes. The Equal Employment Act does apply to the Bureau of Indian Affairs. That act would have been wrong if it had just said exempted, and listed in those exemptions the Bureau of Indian Affairs. Non-Indian employees have the benefit of that act, Indian employees as between each other on the basis of religion or sex had the benefit of that act. The only place it doesn't apply is it allows the Bureau of Indian Affairs, in accordance with another act of Congress, to continue to prefer qualified Indian employees for service in the Indian bureaus.

Q So it is by reason of a prior act that the later act does not forbid the practice of some -- that is now being followed?

MR. SACHSE: By reason of the prior act and the fact recognized by the prior act, I think, that this is not a racial discrimination, that this is a preference to the people whose lives are affected by this bureau to have dominance in this bureau and to do the work in support of their own welfare.

Q Again, then, I would suppose you would say that even absent the prior act, that if the practice of the Secretary was precisely what it is now, you would say it is not forbidden

by the later act because it is not a racial preference?

MR. SACHSE: I would say that. I think the case is made much easier by the existence of the other act.

Thank you.

MR. JUSTICE DOUGLAS: The case is submitted.

[Whereupon, at 2:55 o'clock p.m., the case was submitted.]

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