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## EDUCATIONAL ASSISTANCE AND EMPLOYMENT PREFERENCE: WHO IS AN INDIAN?

*Karl A. Funke\**

If the great spirit had desired me to be a white man, he would have made me so in the first place. He put in your heart certain wishes and plans, in my heart he put other and different desires. Each man is good in his sight. It is not necessary for eagles to be crows.—*Sitting Bull, Sioux, 1883*

The United States Constitution confers upon Congress the power “to regulate commerce . . . with the Indian tribes.”<sup>1</sup> The United States Supreme Court determined a century ago that this constitutional grant embraced regulation of individual Indians as well as Indian tribes, and that congressional power could reach Indians not only within reservation areas set aside for their use, but anywhere within the United States.<sup>2</sup> In addition, the High Court has long held that federal authority over Indian affairs is plenary and thus extends beyond strict “commerce”<sup>3</sup> concepts to include any legislation that is “reasonably essential to their [the Indians’] protection.”<sup>4</sup>

In the exercise of its guardianship power over and duty to American Indians, Congress has enacted a multitude of statutes generally applicable to “Indians” and Indian tribes.<sup>5</sup> Virtually none of these laws have defined the term “Indian” or “Indian tribe” with any specificity. Thus, definition implementation of these enactments, in terms of ascertaining the class of contemplated beneficiaries, has been delegated historically to the primary federal administrative guardian or trustee of Indians, the Secretary of Interior, and his chief lieutenant, the Commissioner of Indian Affairs.<sup>6</sup>

This article will examine the Indian Reorganization Act of 1934 with regard (1) to whom it was intended to apply, particularly in the area of to whom employment preference was to apply, and (2) the extent to which the Secretary of Interior and HEW have faithfully executed the congressional will in this regard.

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## *Johnson-O'Malley Act Eligibility in Historical Perspective*

The contracting section of the Johnson-O'Malley Act (JOM) provides the following:

The Secretary of the Interior is authorized, in his discretion, to enter into a contract or contracts with any State or Territory, or political subdivision thereof, or with any appropriate State college, or school, or with any appropriate State or private corporation, agency, or institution, for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State or Territory, through the agencies of the State or Territory or of the corporations and organizations hereinbefore named, and to expend under such contract or contracts, moneys appropriated by Congress for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State or Territory.<sup>7</sup>

The language of the Act is very broad and uses the undefined phrase "Indians in such State or Territory." The Bureau of Indian Affairs' regulation in effect up until October 24, 1975, purporting to implement this language, defined the class eligible for JOM funds as follows:

"Indian" means an individual of  $\frac{1}{4}$  or more degree of Indian blood and a member of a tribe, band, or other organized group of Indians, including Alaska Natives, which is recognized by the Secretary of the Interior as being eligible for Bureau of Indians Affairs services.<sup>8</sup>

The regulations imposed a twofold eligibility requirement of one-fourth or more Indian blood and membership in a federally recognized community of Indians.<sup>9</sup> These requirements are not contained in the express language of the Act. It is my view that administrative authority to adopt such requirements cannot be reasonably inferred from the statutory language and that the regulations were inconsistent with the intent of Congress. Moreover, the legislative history of JOM is sparse in discussing to whom the funds are intended to apply.

The legislative history specifically states that the purpose of JOM funds was to service Indians in states where the "tribal life is broken up."<sup>10</sup> Indians of states where the tribal structure has been largely broken up are not very likely to be members of any federally recognized Indian community or structure. The two concepts are in reality, if not by definition, incompatible with one another.

The language, ". . . and which the Indians are to a considerable extent mixed with the general population,"<sup>11</sup> further demonstrates

that JOM funds were intended to be expended for nonreservation Indians. A 1949 opinion from the Solicitor, Department of the Interior, tended to support this view. The opinion states:

The primary purpose of the Johnson O'Malley Act is to enable this Department to enlist the cooperation of States in rendering the social services mentioned in the act to Indians who are so intermingled with the general population of a state that it is not practical or economical for the Department to maintain separate services for them.<sup>12</sup>

Because of the situation which developed as a result of the allotment policy and the Indian Service policy of dealing with Indians on an individual basis, it is very doubtful that tribal membership was intended as a requirement of eligibility. JOM was considered as a latter step in a series of steps in civilizing the Indian and attempting to dissolve the "tribal mass." It would have been incongruous for Congress to have intended Indians to be members of a tribal structure which the federal government had been designedly trying to extinguish.

Up until 1957 off-reservation Indians were receiving JOM assistance as the Act had originally intended. However, in the 1950's the policy of the federal government began to shift. The BIA and the Congress began to look to the eventual termination of the special trust relationship between the federal government and the Indian tribes. The BIA began terminating its services to Indians. In 1957 the JOM regulations, reflecting this change in policy, began to limit eligibility for JOM assistance to reservation Indians.<sup>13</sup>

The BIA also, by past and present regulation, imposes a  $\frac{1}{4}$  or more Indian blood requirement for entitlement to JOM funds.<sup>14</sup> There is nothing in the legislative history which indicates such an intent. The prevailing administrative practice at the time of enactment of JOM, and for some time thereafter, was to "consider a person who is of Indian blood and a member of a tribe, regardless of degree of blood, an Indian."<sup>15</sup>

Other statutes enacted around the same time that JOM became law specifically provided a minimum Indian blood quantum if one was intended. For example, the Indian Reorganization Act<sup>16</sup> of 1934 (IRA) defined three categories of Indian for purposes of the Act. The first two categories concerned tribal Indians and did not contain any minimum blood quantum, while the third category concerned nontribal Indians and nonfederally recognized Indians and specified a one-half or more Indian blood quantum.<sup>17</sup>

IRA and JOM were enacted within two months of one another by

the same Congress. It would seem logical that if this Congress, which had very carefully provided a definition for IRA, had intended a blood quantum definition for JOM, it would have provided one in the Act. As just discussed, the practice at the time of enactment of the JOM and the IRA was to define “Indian” without regard to blood quantum unless the statute specifically provided one.<sup>18</sup>

Based on the historical evidence and the legislative history of JOM, the BIA regulations which restricted the class of eligible beneficiaries did not appear to be consistent with the intent of the Act. The historical evidence and legislative history strongly indicate that Congress had recognized a trust responsibility to those individual Indians who had, as a result of the allotment policy, lost their tribal relations and were dispersed into the general white population.

The historical climate in which the original JOM Act was enacted and its legislative history both strongly suggest that JOM funds were not to be limited to reservation Indians or Indians who retained their tribal ties. The evidence indicates that JOM funds were principally directed to nonreservation Indians—Indians who had once been members of tribes but now were dispersed into the general population.

### *The New Definition for JOM Funding*

In January of last year, the Indian Self-Determination and Education Assistance Act<sup>19</sup> was signed into law. This Act is designed to implement Indian self-determination by allowing tribes and tribal organizations to contract for and oversee the planning, conduct, and administration of educational and other federal services provided to Indians by the federal government.

The Act contains a definition of “Indian” for purposes of the Act: “‘Indian’ means a person who is a member of an Indian tribe.”<sup>20</sup> Also included in the Act is a definition of an “Indian tribe”:

“Indian tribe” means any Indian tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.<sup>21</sup>

A plain reading of the Act indicates that the definition of “Indian” used therein is intended to define who is eligible for JOM funding. However, the BIA has recently indicated that it does not view the definition used in the Act as binding in terms of defining who is an “Indian” for purposes of JOM funding. The Deputy Commissioner of Indian Affairs for Education has indicated that the BIA Education

Office views the definition as binding only in terms of defining who is an "Indian" for purposes of determining to whom a contract to provide the services may be awarded and not for purposes of determining who is eligible to receive those services.<sup>22</sup> However, a BIA Task Force prepared regulations to implement Public Law 93-638. The regulations contain a one-fourth or more Indian blood quantum requirement for eligibility for JOM funds.

Because contracts are to be awarded to tribes or tribal organizations and because tribal membership may or may not be limited to Indians of one-fourth Indian blood, there is no way to effectively limit the awarding of contracts to Indians of one-fourth or more Indian blood. If a one-fourth or more Indian blood quantum is imposed as an eligibility requirement upon the recipients of the services, problems are almost sure to result. The Indian employees of the contractor (Indian tribe or organization) may be less than one-fourth blood Indian. If this occurs, the Indians planning and administering the program may be ineligible for the very programs they are running. Another difficulty would be presented by placing the tribe in the position of providing services to some of its members and denying services to others.

The definition of "Indian" in Public Law 93-638 should be applied across the board for both contracting and eligibility for the JOM educational funds. The Act specifically amends JOM and it would be inconsistent with the plain language of Public Law 93-638 and common sense to administratively impose a one-fourth or more Indian blood requirement on eligibility for JOM educational funds.

The new definition provided by Public Law 93-638 requires membership in a federally recognized Indian tribe or group. In this sense, the new definition modifies considerably the class of eligible Indians entitled to JOM. The membership requirement makes ineligible many Indians who would have qualified under the originally expressed intent of the 73d Congress back in 1934. The 93d Congress apparently passed the more restrictive definition without knowledge of the educational history leading up to enactment of JOM in 1934.

### *Preference in Employment Under the Indian Reorganization Act of 1934*

At the present time there are a number of federal statutes which provide for preference in the employment of Indians within the Bureau of Indian Affairs and the Indian Health Service (IHS).

The principal statute concerned with implementing Indian preference is the Indian Reorganization (Wheeler-Howard) Act of 1934<sup>23</sup>

(IRA). The IRA was one of the most important pieces of legislation affecting Indians ever passed by the United States Congress. The enactment of the IRA reflected a major reversal of the federal governmental policy and approach to Indian affairs.<sup>24</sup>

The current practice of both BIA and IHS is to restrict preference to Indians who are both one-fourth or more Indian blood and who are members of a federally recognized tribe. It is my opinion that the current administrative practice is not in compliance with the statutory language or the legislative intent of the Act.

At the present time there are three administrative appeals on this very issue being reviewed by the Solicitor's Office in the Department of the Interior. As a consequence of these appeals, the Solicitor's Office is reviewing in depth the issue of who is entitled to IRA preference. The probable result will be a complete revision of the Indian preference standards presently used by BIA and IHS. It is uncertain at the present time what the new standards will be and to what degree they will comply with the congressional intent of the IRA.

### *Federal Indian Policy Prior to the IRA*

Prior to the passage of the IRA, the Indian was virtually controlled by a federal bureaucracy which attempted to destroy the tradition and culture of Indians and assimilate them into the mainstream of American society. This discretionary power was often excessively abused by administrators within the Indian Office. Congressman Howard, Chairman of the House Committee on Indian Affairs and sponsor of the IRA House bill, recounted the effects of this abuse of power:

Although many thousands of Indians are living in tribal status on the various reservations, their own native tribal institutions have very largely disintegrated or been openly suppressed, and the entire management of Indian affairs has been more and more concentrated in the hands of the Federal Indian Service. The powers of this Bureau over the property, the persons, the daily lives and affairs of the Indians have in the past been almost unlimited. It has been an extraordinary example of political absolutism in the midst of a free democracy—absolutism built up on the most rigid bureaucratic lines, irresponsible to the Indians and to the public; shackled by obsolete laws; resistant to change, reform, or progress; which, over a century, has handled the Indians without understanding or sympathy, which has used methods of repression and suppression

unparalleled in the modern world outside of Czarist Russia and the Belgian Congo.<sup>25</sup>

During this pre-IRA period the federal government, through a course of legislative, executive, and administrative action, had usurped the sovereign powers of the Indian tribes<sup>26</sup> and had pursued policies which forced the disintegration of the political, social, and cultural existence of Indian people.

The general attitude of the federal officials is reflected in this passage written by a former Chief Counsel of the Indian Office:

When the Indian Reorganization Act was enacted in 1934 a large number of Indian Service officials, including superintendents and chiefs of divisions in the agencies and central office, were skeptical of its success; in fact there were some who did not believe in Indian self-government. During several previous decades some important officials of the Service were luke warm, or even unfriendly to many tribal councils. These employees, consciously or unconsciously, relegated Indian organization to the background. They absented themselves from council meetings. Indian leaders frequently were not advised of reservation programs and other important facts. Often they were not consulted in the formulation of reservation plans. The attitude of the local administration in such cases may be likened to that of a colonial administrator who feels a keen sense of duty as a superior over an inferior people whose lives he controls. The feeling that Indians are not prepared to handle their own affairs, though prompted by high motives, may result in a display of paternalism towards the Indians which they will deeply resent. Any mistakes of tribal governments, which supported the pre-conceived idea that Indians were unfit, loomed large. Achievements, by the same mental process were forgotten. Fear was manifest among a few that their own power would be to a great extent jeopardized by another body having something to say about the management of the reservation. They betrayed an obvious annoyance when the council made recommendations concerning matters which they regarded as peculiarly a governmental responsibility, one within their purview, of course. While there has been great progress, there is still room for improvement.<sup>27</sup>

This effort to usurp and destroy the inherent powers of tribal self-government and to obliterate the customs and culture of the various tribes was deeply facilitated by the General Allotment Act of 1887<sup>28</sup> and the numerous special allotment acts patterned thereon. These acts ratified so-called "agreements" between the federal government



and the various tribes; in fact, Indian consent to such agreements was coerced in many instances.<sup>29</sup> Under these acts individual Indians were allotted a certain parcel of the tribe's communal reservation land which was to be held thereafter in severalty. It was projected that by introducing the Indian to individual ownership of land he could be more quickly assimilated into the white culture. The lands which were not allotted were fictitiously designated "surplus" lands and were sold to whites.<sup>30</sup>

This dispossession of reservation land, coupled with the arbitrary and paternalistic governmental authority which continued to be exercised over Indians, resulted, as intended by Congress, in the continuous disintegration of the tribal structure. However, the assimilationist aims of the allotment acts were not realized. To the contrary, from 1887 to 1934, Indians became a disorganized and scattered people whose economic, cultural, and physical security was rapidly being destroyed.<sup>31</sup>

### *Employment Preference Prior to the Indian Reorganization Act of 1934*

There were a number of statutes providing for employment preference for Indians prior to 1934.<sup>32</sup> The general policy<sup>33</sup> of according employment preference to Indians in the Indian Service dates back to at least 1834,<sup>34</sup> one hundred years prior to the IRA. None of these pre-1934 statutes defined the term "Indian," but rather spoke only of "Indians" or "persons of Indian descent." Preference was also provided by presidential Executive Order.<sup>35</sup>

These early Indian preference statutes did little in the way of securing more positions for Indians in the Indian Service because, in part, Indians were forced to compete with non-Indians under Civil Service standards,<sup>36</sup> while at the same time the Indians were denied or did not have access to education and were accorded no merit for the life knowledge and skill obtained outside of the standards of formal education.

The establishment of criteria for determining who was a member of the preferred class or "Indian" was left to the federal executive and administrative officials. Apparently, these officials did not establish any definitional limitations upon who was entitled to Indian preference until 1929. The history of the early preference criteria was recently traced in an article by Anita Vogt of the Indian Civil Rights Task Force.<sup>37</sup> That history, as briefly summarized, stated:

1. On April 17, 1929, "the Civil Service Commission approved the limitation of preference to those Indians registered at some Indian

agency and to Indians of one-fourth or more Indian blood. These limitations did not, however, appear in the Civil Service rules." They appeared in the Minutes of the Civil Service Commission.

2. On January 11, 1932, the Interior Department issued regulations governing appointments in the field services which "included the limitation to Indians registered at Indian agencies but not the one-quarter blood limitation."

3. On April 14, 1934, approximately two months prior to passage of the IRA, President Roosevelt signed Executive Order 6676. That order contained "the first formal declaration of the quarter degree requirement."

That order amended the Civil Service rules, Schedule B (positions which may be filled upon noncompetitive examination) to include "[p]ositions in the Indian Service not now excepted from examination under Schedule A, where the applicants are of one-fourth blood."

The exemption of Indians from competitive examination had little effect because the qualifications under the noncompetitive examinations were generally the same as for the competitive service.<sup>38</sup> The Indians still had no access to education, and the paternalism of the Indian agents remained as strong as ever.

The Indian Reorganization Act of 1934 was designed to put an end to the absolute discretion vested in the executive and administrative officials and reconstitute the Indian tribes with the sovereign powers which the federal government had usurped from them.<sup>39</sup> The principal policy behind the Act was to terminate the system of bureaucratic superintendence over Indian affairs and to create a system of local self-government and self-determination. Indian employment preference was considered a critical element in achieving this goal.<sup>40</sup>

### *Analysis of the Legislative Intent of the IRA*

Section 12 of the Indian Reorganization Act of 1934 was the sixth statutory attempt to accord preference to Indians in the space of a century.<sup>41</sup> Section 12<sup>42</sup> of the IRA states:

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.

The bill which was finally enacted was a series of compromises between the originally drafted bill and numerous House and Senate revisions. For this reason the legislative history of the IRA must be read with great caution and with a comprehensive understanding of the bill as originally drafted and as finally enacted.

The Wheeler-Howard Bill, or IRA, was initially drafted and advanced by the Department of the Interior and the Indian Bureau.<sup>43</sup> In this sense it was an administration bill rather than a congressional bill. The chief proponent of the bill was John Collier, Commissioner of Indian Affairs. For this reason great weight shall be given to the views expressed by Interior Department and agency officials.

The original bill was divided into four major titles.<sup>44</sup> These titles were the following: Title I—Indian Self-government; Title II—Special Education for Indians; Title III—Indian Lands; Title IV—Court of Indian Affairs. Only Title I is of direct consequence to the scope of this article. It dealt with the implementation and scope of two major policies of the Act which are really the heart of the legislation. The first policy was to allow Indians the right to organize into chartered communities for the purpose of self-government. The second policy was to transfer the administration of the functions and services from the Department of the Interior and Office of Indian Affairs to the Indian tribes themselves. Sections 7 and 8 of Title I<sup>45</sup> were the provisions designed to implement this transfer. The purposes of this proposed transfer of functions were twofold: (1) to eliminate the abuse of discretion and usurpation of power by federal administrators;<sup>46</sup> and (2) to restore to Indian tribes self-determination by allowing them to administer the service of their own people without application of the Civil Service laws that had frustrated their participation under the early preference laws.<sup>47</sup>

Sections 7 and 8 of Title I of the original bill did not specifically provide for preference for Indians and, in this sense, were not true preference provisions. They also did not specifically provide for exemption of Indians from Civil Service laws. However, they were intended to accomplish both. The way this was to be accomplished was by providing that the Secretary of Interior transfer to the Indian communities or reservations, chartered under the Act, the various functions and services formerly performed by the Interior Department and the Indian Office.<sup>48</sup>

The Indian communities or reservations would be by definition "Indian," thus Indian preference would occur de facto. In addition, because the functions and services were going to be transferred to the tribes themselves, there would be no applicability of Civil Service laws. As Commissioner Collier pointed out:

The bill goes further, and states that the Secretary of the Interior must set up the qualifications for all types of Indian service, employment on reservations, and Indians may qualify under those qualifications. It is practically a civil service for Indians. An Indian who demonstrates that he is qualified under those qualifications may then be put into the job and the white man moved out somewhere else.<sup>49</sup>

As the hearings on the original bills progressed in both the House and Senate Committees on Indian Affairs, it became increasingly apparent that many of the features of the original bill were objectionable, especially to members of the Senate Committee. The House Committee attempted a conservative piecemeal approach to amending the bill, while the Senate Committee took more drastic action and set up a subcommittee composed primarily of those Committee members opposed to many of the provisions of the original bill. This subcommittee hastily redrafted the bill and on May 17, 1934, the new bill, renumbered S. 3645, was presented to the full Committee for continued hearings.<sup>50</sup>

When the new bill, S. 3645, was initially presented to the full Committee, the transfer of functions and services provision had been altered so that instead of a simple transfer provision, Section 9 of the new bill provided that the tribes could "contract with the Secretary of the Interior for the performance of functions and services now rendered by the Office of Indian Affairs."<sup>51</sup>

Section 14 of the new bill directed the Secretary of the Interior "to establish standards of health, age . . . for Indians who may be appointed to the various positions maintained . . . by the Indian Office. . . . Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions."<sup>52</sup>

You will note that this section specifically provided for Indian preference, but did not remove the applicability of the general Civil Service laws. Presumably, there was still no need for their removal because the tribes would actually administer the functions and services by contracting with the Interior Department. Thus, this new provision would not have materially affected the goals which the original provision of Section 8 of Title I were designed to implement (*i.e.*, self-determination and avoidance of Civil Service laws).

Almost immediately after the new bill was read to the Committee, opposition to the contracting provision of Section 9 surfaced and the provision was quickly deleted from the bill. This removal of the transferral of functions and services by contracting with the tribes and the Committee discussion with regard to the same is of critical

importance because it affected the entire structure and process by which Indian preference and Indian self-determination were to be implemented. The Committee discussion follows:

SENATOR O'MAHONEY (Interposing). Just a moment, Mr. Chairman. Just what is the purpose of that last power, "to contract with the Secretary of the Interior for the performance of functions and services now rendered by the Office of Indian Affairs"?

COMMISSIONER COLLIER. Let me illustrate with a present case. We have just completed an organization with the Navajos of the tribal council, whereby they assume responsibility for cleaning up liquor, and we put at their disposal 30 Navajo Indians at a dollar a day for horse and man, and they are going to manage that and they promise to clean up the reservation. It would make it possible for such a thing to be rested on a contractual basis.

THE CHAIRMAN. Yes; but this goes much further.

COMMISSIONER COLLIER. Yes; but I am illustrating. To go beyond, there could be a contract for the maintenance of agricultural extension work.

SENATOR O'MAHONEY. The thing that was in my mind—I confess it may be a little bit vague at the moment—is that Congress has imposed upon the Office of Indian Affairs the duty to perform certain services. Now, if you carry out the law under which your Bureau operates, you must perform those services.

COMMISSIONER COLLIER. But many of those services are services which really ought to be done by the Indians for themselves.

THE CHAIRMAN. You can do that at the present time by simply letting the tribe, as a matter of fact, pick the men who are going to do this particular work.

COMMISSIONER COLLIER. As we have done in this case.

THE CHAIRMAN. As you have done in this case. But I doubt seriously whether or not you should say to them that they can contract with the Secretary of the Interior for the performance of functions and services now rendered by the Office of Indian Affairs.

SENATOR O'MAHONEY. As the language is drawn, Mr. Chairman, it seems to me it will be broad enough to sustain the interpretation that the Office of Indian Affairs could charge the Indians for doing the things which Congress has required the Indian Office to do.

THE CHAIRMAN. Yes; I think that is true.

COMMISSIONER COLLIER. Of course, if we get to the legal section, it creates an Indian legal service that will help us.

THE CHAIRMAN. Yes; that will help you all you need, and I suggest that we cut out this last sentence. What you need is a civil service (so that you can appoint Indians that are competent who cannot pass your civil-service regulations) [*sic*].

COMMISSIONER COLLIER. And then remove them if they fail us.

THE CHAIRMAN. And then remove them if they fail. That is what you need; but I do not think you need this.<sup>53</sup>

Thus, the transfer of functions to the tribes by contracting was deleted from the bill.

The Committee apparently thought that transferring functions or services to a tribe would be going too far. They felt that Indians could gain control over their own affairs and thus have self-determination by merely lifting the Civil Service laws. Thus, when Section 14 of the new bill was discussed it was amended to carry out this change in structure and implementation:

THE CHAIRMAN (reading): Section 14. The Secretary is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed 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.

COMMISSIONER COLLIER. Line 21, Mr. Chairman, that has to be safeguarded by the addition in line 21 after the word "appointed," the words "without regard to civil-service laws," in order to make it perfectly certain that the laws are lifted.

THE CHAIRMAN. Yes.

COMMISSIONER COLLIER. That is simply as a safeguard.<sup>54</sup>

The Committee was fully aware that the lifting of the Civil Service laws was unprecedented, but felt the unique relationship which existed between the Indian Office and the Indian people justified such action.<sup>55</sup>

The Indian Office was to remain the centralized administrator of the services and functions. Indian self-determination was to be implemented through preferential appointment of individual Indians exempt from the general Civil Service laws rather than through transfer of the functions and services to the tribes.<sup>56</sup> Thus, the switch can

actually be characterized as a switch from “tribal preference” to “individual Indian preference.” This distinction becomes very important in the next subsection.

\* \* \*

A threshold issue in determining who is entitled to IRA preference involves the interpretation of Section 18 of the IRA,<sup>57</sup> which provides: “This act 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.”

This provision could conceivably be interpreted to exclude all Indians from IRA preference who are affiliated with a tribe which has voted to reject the Act. However, the legislative history tends to support the view that preference was to apply to the individual Indians regardless of whether the tribe voted to reject the Act.

A careful reading of the legislative history of the IRA indicates that certain provisions of the Act were directed to the individual Indian and were intended to be available to those individual Indians who sought them. Other provisions of the IRA concerned issues affecting tribal organization and related issues of what powers would be vested in a tribe organized under this Act. It is my conclusion that the provisions relating to tribal organization do not apply to any tribe which voted to reject the Act; however, the provisions relating to the rights or benefits of individuals are intended to be available to the individual Indian regardless of whether his tribe voted to reject organization under the Act.<sup>58</sup>

Little debate occurred concerning Section 18 of the IRA and that which was had was not carried through to adequate resolution. The only way to illustrate my point is to quote from the debate itself which occurred in the Senate Committee.

THE CHAIRMAN (reading): Section 18. This act shall not apply to any reservation wherein a majority of the adult resident Indians voting in a special election in July called by the Secretary of the Interior shall vote against its application.

I think instead of making it negative it should be put in the affirmative.

SENATOR THOMAS (Oklahoma). “Shall not apply unless approved by a majority vote,” the same as the other.

THE CHAIRMAN. Yes; “. . . unless approved by the Secretary.” Why do you put it in the negative What is the idea?

COMMISSIONER COLLIER. Mr. Chairman, all those parts here which

deal with the organization of the tribes have to be affirmatively adopted by the tribes.

THE CHAIRMAN. Yes.

COMMISSIONER COLLIER. But to extend the trust period, to make available the educational fund, and so on, it would seem it is a thing *that ought to be operative unless the tribe does not want it*.

THE CHAIRMAN. Well, but the educational fund and these others apply.

COMMISSIONER COLLIER. It says that no part of the act shall apply if the tribe does not want it. It is comprehensive.

THE CHAIRMAN. Why did you put that in?

COMMISSIONER COLLIER. That was a House amendment proposed by the Chairman of the committee to give the Indians complete assurance that nothing was going to be railroaded through on them.

SENATOR O'MAHONEY. The question was what would be the objection to stating it in the affirmative and to say that the act shall not apply except where it has been adopted by the Indians?

COMMISSIONER COLLIER. Because we get a case like this: Take in Senator Thomas' area: Maybe the majority of the Cherokee Nation would be interested enough in this to vote on it, but there are landless Cherokees whom we would want to colonize and we ought not to make them wait until we round up the Cherokee Tribe and get them to vote. They might never vote. And insofar as the Cherokee Tribe is indifferent to the matter, its indifference ought not to prevent the help being extended to the landless Indians and educational aid being extended to the Indian young people. If the tribe is interested enough to vote against it, then that is something else.

THE CHAIRMAN. What provision have you in reference to it now? Give us an illustration on one.

COMMISSIONER COLLIER. The buying of land, for example, for landless Indians and putting them on a colony. We would not want to compel them to wait until an indifferent tribe widely scattered got together and voted in favor of a thing being done for them. We have right now hundreds of Indian young people waiting for a chance to go to college. We ought to be allowed to go ahead and put them in.

THE CHAIRMAN. You can put them in regardless of whether this provision is in or not.



COMMISSIONER COLLIER. No; but it says this act shall not apply.

SENATOR O'MAHONEY. Yes; but your election is not held until after a petition.

COMMISSIONER COLLIER. As a matter of fact, that section was put in at a time when there was controversy on different features of the bill, and the whole section could now go out.

THE CHAIRMAN. *I do not see the necessity of it. . . .* For instance, why should you want to put in this act that you could not educate these children without a majority of the Indians on the reservation voting for or against it?

COMMISSIONER COLLIER. They would not.

THE CHAIRMAN. I do not see any necessity for that at all.

COMMISSIONER COLLIER. *The whole section 18 could go out.*

THE CHAIRMAN. I think if you had it in there as you had it before this would be quite a different thing, but *I think this simply complicates your bill.*

COMMISSIONER COLLIER. *I agree with you.*

SENATOR THOMAS (Oklahoma). The only thing this does as it stands today is to provide a legal way for the Indians who do not want to get into the act to get out from under its operation.

THE CHAIRMAN. Yes; but in each instance the previous provisions provide that before the provision shall apply they shall take a majority vote. Now, they vote on the proposition of the tribal council, and so forth, and the only thing else that is left in there is the education of them, and *certainly you do not want to have a majority vote as to whether or not you are going to educate any of these; and you do not want to have a vote as to whether you are going to buy some more land, do you?*

COMMISSIONER COLLIER. No.<sup>59</sup>

The debate on Section 18 ended here as the Committee became side-tracked on another issue.

While the issue was never conclusively resolved or further debated, it seems clear that the members of the Committee were against the application of Section 18 to those provisions of the Act which provided benefits for the individual Indian. The last exchange between Chairman Wheeler and Commissioner Collier, *supra*, appears to make it clear that the educational training of individual Indians is not intended to be dependent on the tribal vote.

The educational training which is provided for under the Act is

directly tied to Indian preference. The purpose of providing the educational training is to enable Indians to be able to qualify for positions within the Indian Service. Thus, it would be absurd to educate and train Indians under the Act and then deny them preference in employment for the very positions they had trained for.

The policy consideration behind Section 18 as explained by Commissioner Collier, "to give the Indians complete assurance that nothing was going to be railroaded through on them," is completely assured if Section 18 is read to apply only to those provisions affecting tribal interests as opposed to individual interests. It is completely within the discretion of the individual Indian as to whether (s) he wants to take advantage of the provisions of the Act relating to education and preference.<sup>60</sup>

To interpret Section 18 to exclude those Indians who belong to a tribe which voted to reject the Act would not, however, make those Indians ineligible for preference. They would still be eligible under the earlier preference laws.<sup>61</sup> However, BIA and IHS could impose regulations restricting who is entitled to preference under these early preference laws. Also, these early laws do not exempt Indians from application of the Civil Service laws as the IRA does. This could result in one set of criteria for IRA Indians and another quite different set of criteria for Indians belonging to tribes which had rejected the IRA. This situation would make little sense and might further frustrate the overall IRA policy of getting Indians into their own service.<sup>62</sup>

### *Current BIA and IHS Administrative Standards Conflict with Language of IRA*

Section 19<sup>63</sup> of the Indian Reorganization Act made the Act different from any of the preceding Indian preference statutes (and indeed different from all but a few federal statutes up to that time) by providing within the Act a legislative definition of "Indian" for purposes of the Act. Section 19 of the IRA states in relevant part:

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants 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. For the purposes of said sections, Eskimos and other aboriginal peoples of Alaska shall be considered Indians.

Section 19 makes no reference to any one-quarter blood limitation.

The current policy of the BIA in according Indian preference is contained in the BIA Manual. It provides in relevant part: "To be eligible for preference, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe."<sup>64</sup>

The IHS policy is stated, in part, by an IHS circular issued in 1971.<sup>65</sup> The circular cites all of the general preference statutes and then cites an Executive Order issued by President Roosevelt on January 30, 1939,<sup>66</sup> as authority for imposing a one-fourth blood requirement in according preference.

In actual practice IHS, like BIA, further requires "membership in a federally recognized tribe" although this IHS membership requirement does not appear to be published. Thus, both BIA and IHS currently require the twofold standard of one-fourth Indian blood and membership in a federally recognized tribe before according Indians employment preference. These standards appear to be inconsistent with the statutory language and legislative intent of the IRA.<sup>67</sup>

Section 19 of the IRA clearly defines who is to be considered an "Indian" for purposes of IRA preference. The definition in Section 19 of the IRA established three categories or classes of "Indian" entitled to preference. The first class is "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." I shall refer to this class as the *membership class*. The second class is "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." I shall refer to this class as the *descendant class*. The third class is "all other persons of one-half or more Indian blood." I shall refer to this class as the *unaffiliated half-blood class*.

The administrative requirement of membership in a federally recognized tribe is in conflict with both the descendant class and unaffiliated one-half blood class as defined in Section 19. Section 19 imposes a membership requirement only on the first class, the membership class. However, that provision does not require membership for either the descendant class or the unaffiliated one-half blood class. Thus, by requiring membership in a federally recognized tribe, the administrative policy totally excludes the descendant and the unaffiliated one-half blood classes from preference contrary to the plain language of the Act.

In fact, the administrative requirement of one-fourth degree Indian blood is in conflict with all three classes of Indians defined in Section 19. The membership class speaks to "all members of Indian descent," the descendant class speaks of "all descendants" of the

membership class living on a reservation on June 1, 1934, and the unaffiliated one-half blood class speaks to "all other Indians of one-half or more Indian blood." Thus, the administrative practice of requiring one-fourth blood imposes an additional requirement on the membership class and would also modify the descendant and unaffiliated classes if they were not already excluded by the administrative membership requirement.

Detailed analysis of the purposes and legislative history of the Act demonstrates that, contrary to current BIA and IHS policy, Indians are entitled to IRA preference who fall within any of these classes: (1) the unaffiliated one-half blood classes; (2) the descendant class, provided, however, that they are descendants of members of a federally recognized tribe and were themselves actually residing on June 1, 1934, within the boundaries of an Indian reservation; and (3) Indians who are members of a federally recognized tribe who are less than one-fourth degree Indian blood.

### *Legislative Intent of the IRA*

The original bill did not include a comprehensive definition of "Indian," rather, each of the four titles either contained its own definition of "Indian" or specified in some descriptive fashion to whom the title was to apply.<sup>68</sup>

Section 13(b) of Title I<sup>69</sup> provided the following definition to specify to whom organizational charters could be issued:

[A]ll persons of Indian descent who are members of any recognized Indian tribe, band, or nation, or are descendants of such members and were on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-fourth or more Indian blood. . . .

This definition is substantially the same as the one finally enacted in Section 19 of the IRA.<sup>70</sup>

Section I of Title II<sup>71</sup> specified that special training and education were to be made available to "Indian members of chartered communities and other Indians of at least one-fourth blood."

Section 18 of Title III<sup>72</sup> concerning lands for "members of an Indian tribe" specified that that phrase "shall include any descendants of a member permanently residing within an existing Indian reservation."

When the Senate subcommittee redrafted the original bill and reported out the new bill, S. 3645, there were no separate titles and there was only one definition of "Indian" for purposes of the Act. Section 21<sup>73</sup> of the newly redrafted S. 3645 provided:

The term “Indian” as used in this act shall include all persons of Indian descent who are members of any recognized Indian tribe, and all persons who are descendants of such members who were, on or about June 1, 1934, actually residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-fourth or more Indian blood.

Except for some minor redrafting, the new definition was not materially different from the one provided in Section 13(b) of Title I of the original bill.<sup>74</sup> Therefore, it is safe to look to the discussions concerning the meaning of this latter definition as it was debated in both the original and redrafted bills.

The Senate hearings are very enlightening with regard to whom the definition of “Indian” was to include. Those hearings demonstrate conclusively that there was to be no blood quantum limitation for either the membership class or the descendant class.

Discussing the membership class, Senator Thomas of Oklahoma points out:

[T]his makes an Indian out of a person who has, say, one sixty-fourth or double that amount. “The term ‘Indian’ as used in this act shall include all persons of Indian descent” *without regard to further blood*.

THE CHAIRMAN. *That does not change the present law at all.*<sup>75</sup>

Then switching the discussion to the descendant class:

SENATOR THOMAS. Then, on page 10, . . . it says “and all other persons who are descendants of such members.”

THE CHAIRMAN. Yes.

SENATOR THOMAS. Well, if someone could show that they were a descendant of Pocahontas, *although they might be only [a] five-hundredth Indian blood*, they would come under the terms of this act.

COMMISSIONER COLLIER. If they are actually residing within the present boundaries of an Indian reservation at the present time.<sup>76</sup>

The above debates demonstrate conclusively that the Committee was very aware that no minimum blood quantum was to be placed upon either the membership class or the descendant class. Indeed, the debates demonstrate that a person of as little as “one sixty-fourth” Indian blood could be included in the membership class and a person of as little as a “five-hundredth” Indian blood could be included in the descendant class.

The nonapplicability of a blood quantum to either of the first two classes is further demonstrated in this exchange between Senator Wheeler and Oliver La Farge, President of the National Association of Indian Affairs:

THE CHAIRMAN. They would all be wards under this bill, would they not?

MR. LA FARGE. All tribal Indians or Indians organizing under this form, coming under the qualifications this bill sets up (of residence on the reservation, or degree of blood) which is very distinctly defined.

THE CHAIRMAN. Your idea is that only quarter-blood Indians could come within the provisions of this law; is that correct?

MR. LAFARGE. No; as I understand it, *by the bill it is partially covered by quarter-blood and partially by certain residence qualifications, in cases where individuals of lesser blood are living the reservation life, or living in situ at the present time.* That seems to be necessary in the case of men who, from the blood point of view, we would think are white men, but who have been brought up in such a manner that, for all purposes of dealing with the outside world, are Indians.<sup>77</sup>

Thus, it can be seen that Indians who otherwise meet the terms of the first two classes are not to be excluded on the basis of degree of Indian blood. The membership definition can generally be described as a social/political definition, the descendant definition as a social definition, and the unaffiliated one-half blood definition as a racial definition. As John Collier explained to both the Senate and House committees: "The object of this definition is to include all Indian persons who, by reason of residence, are definitely members of Indian groups, as well as persons who are Indians by reason of degree of Indian blood."<sup>78</sup>

It is just as clear that membership in a tribe is not to be required for the descendant class. The descendant class does not require membership by virtue of the very language used in the Act. If membership were required for the descendant class, there would be no descendant class. The current BIA and IHS policy of requiring membership before according preference completely reads out the statutory inclusion of the descendant class. Any denial of preference to an Indian who is a descendant of a member of a federally recognized tribe is in violation of the law.

It is equally clear that membership in a federally recognized tribe is not to be imposed upon the unaffiliated one-half blood class. The

discussion of this issue will of necessity also include a discussion of the intent of the modifying language “now under Federal jurisdiction” used in the membership class definition. The two issues are so interconnected that it is impossible to discuss them separately.

The words “now under Federal jurisdiction” were added to Section 19 of the statute as a limitation upon and protection against unduly expanding the membership class. The Senate Committee thought that the unrestricted language, “members of any recognized tribe,” would be interpreted to include members of nonfederally recognized tribes (*i.e.*, state recognized tribes or Indians merely living in a tribal manner but without any political relationship with the federal government). The Committee did intend to include some of the nonrecognized Indians within the Act. However, because they were opening up the provisions of the Act to Indians who heretofore had not been included in special Indian legislation, they wished to carefully limit the potential number of new Indians to be included.

The language, “and shall further include all other persons of one-half or more Indian blood,” was intended to extend the provisions of the Act beyond the federally recognized Indians to the nonfederally recognized Indians, while at the same time limiting this new class of Indians to only those of one-half blood. However, since the unmodified language, “members of any recognized tribe,” could have conceivably been interpreted to include members of nonfederally recognized tribes as well, and because there was no blood quantum limitation imposed upon the membership class, the membership class definition might allow any nonfederally recognized tribes as well, and because there was no blood quantum limitation imposed upon the membership class, the membership class definition might allow any nonfederally recognized tribal Indian, regardless of degree of blood, to come under the Act. This would have defeated the intention to limit inclusion of nonfederally recognized Indians to those of one-half blood or more.

The debates in the Senate Committee demonstrate each of these points.

SENATOR THOMAS. Then the bill would require another section. It would be construed so that no Indians could have the benefit of this act unless they come under it in the form of a charter.

THE CHAIRMAN. No; *I do not see that at all.*

SENATOR THOMAS. That distinction is not made here. For example, roaming bands of Indians are not covered by this provision. If they are not a tribe of Indians they do not come under it. And we have in my State a great many numbers of Indians that are prac-

tically lost. They are not registered; they are not enrolled; they are not supervised. They are remnants of a band. Yet as I see it they could not come under this act because they are not under the authority of the Indian Office, and Mr. Wilbur, when he was Secretary, said he was not looking for more Indians. The policy then was to not recognize Indians except those already under authority. They refused to enroll any more, and the Indians outside could not come into the rolls, even full-bloods.

THE CHAIRMAN. They do not have any rights at the present time, do they?

SENATOR THOMAS. No rights at all.

THE CHAIRMAN. Of course, this bill is being passed, as a matter of fact, to take care of the Indians that are taken care of at the present time.

SENATOR FRAZIER. *Those other Indians have got to be taken care of, though.*

THE CHAIRMAN. Yes; but how are you going to take care of them unless they are wards of the Government at the present time?

SENATOR THOMAS. Take, for example, the Catawbias in South Carolina where we visited. I think that is the most pathetic and deplorable Indian tribe that I have discovered in the United States. I think the Seminoles in Florida should be taken care of. They are in bad circumstances. They are just as much Indians as any others.

THE CHAIRMAN. There is a later provision in here I think covering that, and defining what an Indian is.

COMMISSIONER COLLIER. This is more than one-fourth Indian blood.

THE CHAIRMAN. That is just what I was coming to. As a matter of fact, you have got one-fourth in there. I think you should have more than one-fourth. I think it should be one-half.

In other words, I do not think the Government of the United States should go out here and take a lot of Indians in that are quarter bloods and take them in under the provisions of this act. If they are Indians of the half-blood then the Government should perhaps take them in, but not unless they are. If you pass it to where they are quarter-blood Indians you are going to have all kinds of people coming in and claiming they are quarter-blood Indians and want to be put upon the Government rolls, and in my judgment it should not be done.<sup>79</sup>

Thus, the intent was not to limit the Act to only those Indians who



are members of a chartered community. Rather, the Act was intended to include Indians who are in no way affiliated with any federally recognized tribe provided they are "one-half blood Indian or more." As the above debates point out, the Committee was fully aware that they were including Indians within the provisions of the Act which formerly had "no rights at all."

The debates continued along this line and the inevitable problem arose concerning the possible interpretation of "recognized tribe" to mean nonfederally recognized as well as federally recognized.

THE CHAIRMAN (reading): The term "tribe" wherever used in this act shall be construed to refer to any Indian tribe, band, nation, pueblo, or other native political group or organization.

SENATOR THOMAS. That would take in the Spanish-American citizens of New Mexico, who are not now considered Indians.

COMMISSIONER COLLIER. If you stop at the word "pueblo" then you see all of those things are recognized as tribes.

SENATOR THOMAS. Under this language would this not cover into the Department under its jurisdiction the Catawbas and Miamis?

THE CHAIRMAN. You mean down in Florida?

SENATOR THOMAS. Yes.

THE CHAIRMAN. If they are half bloods. If they are half-blood Indians under this law, as I understand it, it would permit the Government to take those over.

SENATOR THOMAS. They are living on a reservation and they are descendants of Indians and they are not half bloods.

THE CHAIRMAN. If they are not half-blood Indians we should not take them in.

SENATOR THOMAS. Some of them are practically white. They have 500 acres of the poorest land in South Carolina. The Indians always get the poorest land.

COMMISSIONER COLLIER. Are they living on it?

SENATOR THOMAS. They are living on it, and that is all they are doing, in the State of South Carolina. The Government has not found out they live yet, apparently [*sic*].

THE CHAIRMAN. They would not be affected unless they are half-blood Indians. *If they are half-blood Indians they would have to take them over under this act.*

SENATOR THOMAS. Some of them presumably are half bloods, but most of them are not.

SENATOR O'MAHONEY. You are sure about that, Mr. Chairman? The first sentence of this section says, "The term 'Indian' shall include all persons of Indian descent who are members of any recognized Indian tribe"—comma. There is no limitation of blood so far as that is concerned.

SENATOR FRAZIER. That would depend on what is construed membership.

SENATOR O'MAHONEY. "The term 'tribe' wherever used in this act"—and that means up above—"shall be construed to refer to any Indian tribe, band, nation, pueblo." Now, the Catawbas certainly are an Indian tribe.

THE CHAIRMAN. You would have to have *a limitation after the description of the tribe*.

SENATOR O'MAHONEY. If you wanted to exclude any of them you certainly would in my judgment.

THE CHAIRMAN. Yes; I think so. You would have to.<sup>80</sup>

Finally, Commissioner Collier suggested a way to modify the membership class and descendant class definitions with their unrestricted blood quantum so that those two classes are limited to only federally recognized tribes, thus limiting the nonfederally recognized tribal or unaffiliated Indians to be covered exclusively by the one-half blood definition.

COMMISSIONER COLLIER. Would this not meet your thought, Senator: After the words "recognized Indian tribe" in line 1 insert "now under Federal jurisdiction"? That would limit the act to the Indians now under Federal jurisdiction, except that other Indians of more than one-half Indian blood would get help.<sup>81</sup>

In the case of *Maynor v. Morton*,<sup>82</sup> the United States Court of Appeals for the District of Columbia has very recently agreed that membership is not required for unaffiliated one-half blood Indians and that they are entitled to the same benefits under the IRA as federally recognized tribal Indians. The case presents many interesting points. The first point is that the Department of the Interior formally recognized nontribal one-half blood Indians as entitled to the benefits conferred by the IRA. In 1938, 209 Indians referred to as "Lumbee Indians"<sup>83</sup> contacted the Interior Department for the designed purpose of obtaining certification that they were one-half blood Indians so as to be entitled to the benefits of the IRA. The Secretary of Interior conducted an extensive study to determine who was one-half blood Indian entitled to IRA benefits. Only 22 of the 209 were so

certified.<sup>84</sup> It wasn't until 1971, however, that any of the 22 eligible Lumbees petitioned the Secretary of the Interior to establish a reservation for them pursuant to the IRA. The Secretary of the Interior alleged that these 22 one-half blood Indians were not entitled to benefits under the IRA. One of the arguments used on appeal in support of the Secretary's contention was that congressional Indian legislation does not apply to individuals who are merely racially Indian or nontribal Indian, but only to Indians who are tribal.<sup>85</sup>

With regard to the 1938 recognition by the Secretary of the Interior of the eligibility of the 22 Lumbee Indians for IRA benefits, it was argued by the government: "The statement in 1938 that Maynor, as a non-tribal Indian, was entitled to Indian Reorganization Act (IRA) benefits was an error. The United States is not bound by the erroneous legal conclusions of its agents."<sup>86</sup> The court responded:

Although the IRA was primarily designed for tribal Indians, and neither Maynor nor his relatives had any tribal designation, organization, or reservation at that time, it is clear from the language of the statute that some benefits of the Act were also open to *any nonreservation Indian who could prove that he possessed at least one-half Indian blood*. Among these benefits was the right to petition the Secretary to establish a reservation for such individuals, which, if granted, would afford them access to a wide range of federal Indian services (as members of a recognized Indian group on a reservation).<sup>87</sup>

A memorandum to the Commissioner of Indian Affairs from the Assistant Solicitor, Felix S. Cohen, in 1935, detailed the rights of nontribal Indians under the IRA. The memorandum states:

Clearly, this group [Siouan Indians of North Carolina] is not a "recognized Indian tribe now under federal jurisdiction" within the language of section 19 of the . . . [IRA]. Neither are the members of this group residents of an Indian reservation (as of June 1, 1934). These Indians, therefore, like many other Eastern groups, can participate in the benefits of the Wheeler/Howard Act only in so far as individual members may be one-half or more Indian blood. Such members may not only participate in the educational benefits under section 11 . . . and in the Indian preference rights for Indian Service employment granted by section 12 . . . but may also organize under sections 16 and 17 . . .<sup>88</sup>

Thus, Indians not affiliated with a federally recognized tribe are

nonetheless entitled to IRA preference provided they are at least one-half or more Indian blood.

There is one other issue which needs to be discussed with regard to the scope of the descendant class as defined by Section 19 of the IRA. The descendant class is defined as “[A]ll persons who are descendants of such members [members of a recognized tribe] who were on or about June 1, 1934, actually residing within the present boundaries of any Indian reservation. . .”<sup>89</sup> This language allows two possible interpretations. One possible interpretation is that the requirement of having to have lived on a reservation “on or about June 1, 1934,” applies to the member from whom the descendant descends. This interpretation would make preference applicable to any person of Indian descent who could show that he is a descendant of any Indian member of a federally recognized tribe who was residing on a reservation “on or about June 1, 1934.” This interpretation would allow the descendant class to geometrically increase to extremely vast numbers without regard to residency, political, or social relation to a tribe or degree of Indian blood. I shall refer to this interpretation as the *open-ended descendancy* interpretation.

The second possible interpretation is that the “on or about June 1, 1934,” reservation residency requirement applies directly to the descendant. This interpretation would limit the applicability of preference to a finite number of descendants. The descendant himself would have had to have been alive and actually residing on the reservation “on or about June 1, 1934.” Thus, under this interpretation, this class would eventually die out. Like the previous interpretation, there is no requirement of political relationship to the tribe (*i.e.*, membership) and no minimum blood quantum. However, the societal reservation requirement is placed directly upon the descendant beneficiary. I shall refer to this second interpretation as the *limited descendancy* interpretation.

It is my conclusion that the intent of the legislation was to have a limited descendancy interpretation rather than an open-ended descendancy interpretation. To demonstrate the basis of this conclusion, it is necessary to look once again at the definition of “Indian” as it was originally drafted in Title I, Section 13(b) of the original bills, S. 2755 and H.R. 7902.

The term Indian . . . shall include all persons of Indian descent who are members of any recognized Indian tribe, band, or nation, or are descendants of such members and were, on or about February 1, 1934, actually residing within the present boundaries of any

Indian reservation and shall further include all other persons of one-fourth or more Indian blood.<sup>90</sup>

The language, "or are descendants of such members and were on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation," demonstrates that a twofold requirement was being placed on a person in the descendant class. First, the person had to be a descendant of a member, and second, the descendant himself had to have been residing on a reservation on or about February 1, 1934.

The definition stated in this way, however, caused concern that there might be confusion and that the reservation residency requirement might be viewed as a requirement not only upon the descendant class but also upon the membership class and the unaffiliated one-fourth (later changed to one-half) blood class. In order to guard against this, the Department of the Interior offered the following amendment specifically for the purpose of clarifying that the reservation residency requirement was applicable directly and exclusively on the descendant and not the other two classes.

Section 15 (formerly section 13): Paragraph (b), substitute for the phrase "persons of Indian descent who are members of any recognized Indian tribe, band, or nation, or are descendants of such members who were, on or about February 1, 1934, actually residing within the present boundaries of any Indian reservation," the following phrase: "persons of Indian tribe, band, or nation, and all persons who are descendants of such members," etc.

This amendment is designed to clarify the intent of the section that residence upon a reservation is deemed an essential qualification of charter members in a community only with respect to persons who are not members of any recognized Indian tribe and not possessed of one fourth degree of Indian blood.<sup>91</sup>

This amendatory language was adopted, and except for the change in the date to "June 1, 1934," it was this language which was finally enacted into law.<sup>92</sup>

There was one other point late in the Senate hearings which again demonstrates that the legislative intent was to impose the reservation residency requirement directly on the descendant himself.

Speaking in regard to the descendant class, Senator Thomas remarked: "Well, if someone could show that they were a descendant of Pocahontas, although they might be only a five-hundredth Indian blood, they would come under the terms of this act."<sup>93</sup>

Commissioner Collier qualifiedly added: "*If they are actually re-*

*siding within the present boundaries of an Indian reservation at the present time.*"<sup>94</sup> As these excerpts from the House and Senate hearings demonstrate, the intent was to have a limited descendency class rather than an open-ended class.

Getting back to the central focus of this section, it is very clear that the current BIA and IHS policy and practice in defining who is entitled to preference is clearly in conflict with the Act and cannot stand. There is nothing in the statute or the legislative history which indicates that either the Secretary of the Interior, the Commissioner of Indian Affairs, or the Secretary of Health, Education, and Welfare have any authority to alter the definition by administrative regulation or practice. If the officials of the Indian Office had desired discretion to impose additional requirements on the definition of "Indian," they could have made that desire known and the statute could have granted that discretion. If Congress wishes to vest discretion to alter a legislative definition of "Indian" for purposes of an act, it knows how to do so.<sup>95</sup> Section 19 of the IRA vests no such discretion. The definition was carefully and fully debated and intended to determine conclusively who is an "Indian" under the Act. The language, "the term 'Indian' as used in this Act shall include. . .," is mandatory. Any administrative attempt to alter the definition of "Indian" violates the express statutory language and legislative history of the Act.

At the same time, the BIA Manual was altered to require membership in a federally recognized tribe as well as one-fourth Indian blood, it was also altered to provide that the Commissioner of Indian Affairs could grant exceptions to the preference policy by approving the selection of non-Indians when he considered it in the best interests of the Bureau.<sup>96</sup> With regard to this discretion assumed by the Commissioner to make exceptions to Indian preference, the court in *Freeman v. Morton*<sup>97</sup> stated:

[T]he controlling statute [IRA] does not say the "Indians" . . . may have preference. It says: ". . . qualified Indians shall hereafter have. . . preference", and "if Congress had intended to write discretionary power into the language of Sec. 472 [Sec. 12], it would have done so expressly. . . . One need only look at various Indian preference statutes to recognize that Congress was well aware of the distinction between discretionary and mandatory action. . . ."

The Bureau regulation defining "Indian" for purposes of eligibility for preference likewise assumes a discretion that does not exist. The only discretion vested in the Secretary of the Interior with regard to preference is provided in Section 12. That discretion is limited to

establishing “standards of health, age, character, experience, knowledge and ability for Indians” who shall be entitled to preference. Nowhere in the Act is there a discretion to alter who is an “Indian.”

*Udall v. Tallman*<sup>98</sup> stands for the proposition that administrative interpretation is entitled to great weight in determining statutory language. To adhere to the administrative interpretation in this instance, however, would be to rewrite the law. The BIA and Interior officials were responsible for promulgating the IRA definition of “Indian” and were instrumental in clarifying its scope. It would be generous indeed to characterize the present BIA and IHS policies and practices as a misinterpretation of the Act. In any event, in order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose.<sup>99</sup> Any ambiguities should be resolved in favor of the Indians.<sup>100</sup>

Furthermore, in addition to not being consistent with the Act, the policies and practices of BIA and IHS in defining who is eligible for preference are procedurally invalid. The BIA policy is published only in the BIA Manual, solely an internal-operations brochure intended to cover policies that do not relate to the public.

Part of the IHS policy is published apparently only in a circular, while the membership requirement does not appear to be published at all. Failure to publish in the Federal Register or Code of Federal Regulations (CFR) any eligibility qualifications which affect any substantive rights of an individual is a violation of the Administrative Procedure Act. Such unpublished standards cannot extinguish the rights of a person otherwise within the class of beneficiaries.<sup>101</sup>

Now the question arises as to what extent does the language, “now under Federal jurisdiction,” act to include or exclude members of the tribes which have become federally recognized since enactment of the IRA. There are at least three possible interpretations. Each materially affects the number of Indians entitled to IRA preference.

The first possible interpretation is that “now under Federal jurisdiction” modifies “Indian.” Under this view, only members of federally recognized tribes who were alive at the time of the enactment of the IRA could constitute the membership class. Under this view, the membership class would eventually die out.

The second possible interpretation is that the language modifies “tribe.” Under this view, two possible interpretations are possible. “Any member of a recognized tribe now under Federal jurisdiction” could mean that the membership class could be made up of Indians who were members then as well as in the future, but the federally recognized tribe of which these Indians are members, itself, would

have to have been federally recognized at the time of enactment of the IRA.

The third possible interpretation is that the language modifies “recognized tribes” only to the extent that the membership class then or in the future could be made up of federally recognized tribal Indians. Under this view, “recognized tribes now under Federal jurisdiction” would have an ambulatory meaning so that members of tribes which have been accorded federal recognition subsequent to enactment of IRA, as well as members of tribes which were already federally recognized, would fall under the membership definition.

The first interpretation is the weakest. The debate in the Senate hearings discussed *supra* demonstrates that the intent was to modify the language, “recognized Indian tribe,” rather than the term “Indian.” The first interpretation would lead to an absurd result not only in conflict with what the debates indicate, but also with the entire legislative intent and purpose of IRA preference.<sup>102</sup> The first interpretation would limit the membership class to only those members of federally recognized tribes alive at the date of enactment of the IRA. This would lead to the eventual termination of the membership class. Thus, all subsequent members of federally recognized tribes would not be eligible for IRA preference while unaffiliated one-half blood Indians born after enactment of the IRA would be eligible. It could not have been the intent of Congress to deny eligibility to subsequent members of federally recognized tribes while allowing subsequent nonfederal Indians to be eligible.

Both the second interpretation and the third interpretation are consistent with the legislative history. However, the third interpretation seems to be more consistent with the overall preference policy.

The second interpretation would result in a double standard. Members of pre-IRA federally recognized tribes would be eligible for preference regardless of blood quantum, while members of tribes federally recognized after IRA would have to meet the one-half blood requirement.<sup>103</sup> Therefore, the third interpretation that “now under Federal jurisdiction” was intended to have an ambulatory meaning appears to be a more reasonable interpretation. As Anita Vogt, formerly of the Indian Civil Rights Task Force has stated,

[O]ne of the major purposes of the IRA was to encourage tribes to organize under its terms. It seems reasonable to assume that Congress contemplated the possibility of previously unrecognized tribes securing Federal Recognition after passage of the act, and, bearing in mind the general thrust of the act, it seems unlikely that



it meant to define "Indian" in such a way as to exclude some members of newly recognized tribes from benefits of the act. Therefore, a non-restrictive interpretation of "now", i.e., a meaning of "now and hereafter," appears to be in keeping with the rest of the section and with the intent of the act.<sup>104</sup>

*Validity of Current Civil Service Laws with  
Regard to IRA Preference*

As previously stated, Section 12 of the IRA specifically provides that the appointment of Indians under IRA preference is to be accorded "without regard to civil service laws." Section 12 also directs the Secretary of the Interior "to establish standards of health, age, character, experience, knowledge and ability" for Indians.<sup>105</sup> These standards were intended to be in lieu of the more rigid standards and qualifications imposed by the Civil Service laws.<sup>106</sup>

This clear congressional mandate to the Secretary of the Interior to establish separate standards for appointment of Indians to the Indian Service has never been carried out. As then Assistant Solicitor Felix S. Cohen pointed out in 1942 in reference to Section 12 of the IRA: "This provision contemplates the establishment within the Interior Department of a special Civil Service for Indians alone. The failure of the Interior Department to complete such a system has been ascribed to lack of adequate appropriations."<sup>107</sup>

The Secretary of the Interior still has not established separate standards for Indians. As the congressional hearings have demonstrated, the lifting of the Civil Service laws was considered critical to the implementation of Indian self-determination through preference.

Largely as a consequence of the Secretary's abrogation of his duty to establish separate standards, the Civil Service Commission assumed the authority to impose Civil Service standards for Indians appointed to BIA and IHS.

Since enactment of the IRA, a number of executive orders have been issued pursuant to authority vested in the President by the Civil Service laws. These orders purport to either place certain positions in the Indian Service (BIA and IHS) in the excepted service or place them in the competitive service.<sup>108</sup>

The current Civil Service regulations provide that the following positions within the Department of the Interior shall be classified into the excepted service: "All positions of the Bureau of Indian Affairs and other positions in the Department of Interior directly and primarily related to the providing of services to Indians when filled by the appointment of Indians who are one-fourth or more Indian blood."<sup>109</sup>

Substantially the same language is used with regard to IHS positions within the Public Health Service of the Department of Health, Education and Welfare (HEW): "Positions directly and primarily related to the providing of service to Indians when filled by the appointment of Indians who are one-fourth or more Indian blood."<sup>110</sup>

The executive orders and Civil Service regulations are blatantly illegal. Section 12 very deliberately and clearly lifts the application of the Civil Service laws from Indians (as defined in Section 19 of the IRA) appointed to the Indian Service.

The legislative history of IRA clearly demonstrates that the entire purpose of IRA preference was to avoid application of the Civil Service laws.<sup>111</sup> Congress did not intend to pass just another preference law. There were at least six such laws already enacted, all of which were totally ineffectual.<sup>112</sup>

Another issue which must be dealt with is the effect of the Ramspeck Act<sup>113</sup> on IRA preference. Section I of the Ramspeck Act reads in relevant part:

That notwithstanding any provisions of law to the contrary, the President is authorized by Executive Order to cover into the classified civil service [competitive service] any office or positions in or under an executive department, independent establishment, or other agency of the Government. . . . Provided further, that the provisions of this section shall not apply to offices or positions in the Tennessee Valley Authority or to any positions in the Works Projects Administration or to any position to which appointments are made by the President by and with advice and consent of the Senate, or to positions of assistant United States District Attorney.

The President subsequently issued Executive Order 8743 on April 23, 1941.<sup>114</sup> Section I thereof provided:

All offices and positions in the executive Civil Service of the United States (1) those that are temporary, (2) . . . (3) those excepted from the classified Civil Service under Schedules A and B of the Civil Service Rules, are hereby covered into the classified Civil Service of the Government. . . .

It has been argued that the Ramspeck Act as implemented by this Executive Order has the effect of repealing that part of Section 12 of the IRA which states that Indians may be appointed "without regard to Civil Service laws."

The Civil Service Commission has reviewed this possibility on more than one occasion. In its Minute No. 2, of October 29, 1942, the Commission ruled that Indians employed by the BIA were not

brought into the classified service by the Ramspeck Act and Executive Order 8743. More recently, however, the General Counsel of the Commission prepared an analysis of the Ramspeck Act urging that the Act and the Executive Order operate to repeal the exemption from Civil Service laws.<sup>115</sup> The Commission has apparently not adopted this position.

It is extremely doubtful that Congress, after carefully debating and fully realizing the need to lift the Civil Service laws in order to facilitate Indian preference, intended to allow the Ramspeck Act to repeal that exemption only six years after enactment of the IRA. As the Senate and House hearings and congressional debates have demonstrated, the whole thrust of IRA preference was to get Indians into their own service.

The General Counsel of the Commission implied in his memorandum that subjecting Indians to Civil Service laws by virtue of the Ramspeck Act would not frustrate the intent of IRA preference because “[t]he Ramspeck Act did not operate to repeal the preference provisions of the Indian preference statute,” and Indians are covered into the excepted service by “reason of 5 CFR 213.3112(a) (7) and 213.3116 (b) (8).”<sup>116</sup>

The exemption provided by these current Civil Service regulations are exactly the same as provided by Executive Order No. 6676, which was in effect while the IRA was being debated.<sup>117</sup> It was similarly argued in the 1934 Senate Hearings that this exemption from competitive service by virtue of the Executive Order was adequate and therefore there was no need to lift the Civil Service laws entirely.<sup>118</sup> That argument was found unpersuasive then and it is doubtful that Congress had changed its mind six years later.

In addition, in the recent case of *Morton v. Mancari*,<sup>119</sup> the United States Supreme Court flatly rejected a broadside upon IRA preference premised similarly on the repeal-by-implication doctrine. The plaintiff/appellees in that case argued that the Equal Employment Opportunities Act of 1972,<sup>120</sup> which extended the Civil Rights Act of 1964 to government employment, impliedly repealed Indian preference. The Court stated as one of its reasons for rejecting the argument:

Appellees encounter head-on the “cardinal rule . . . that repeals by implication are not favored.” They and the District Court read the congressional silence as effectuating a repeal by implication. There is nothing in the legislative history, however, that indicates affirmatively any congressional intent to repeal the 1934 preference. . . .

In the absence of some affirmative showing of an intention to

repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. Clearly, this is not the case here. A provision aimed at furthering Indian self-government by according an employing preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race. Any other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of preference and the unique legal relationship between the Federal Government and tribal Indians. . . .

“When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal ‘must be clear and manifest.’” In light of the factors indicating no repeal, we simply cannot conclude that Congress consciously abandoned its policy of furthering Indian self-government when it passed the 1972 amendments.<sup>121</sup>

In light of the interpretative standards enunciated in *Morton v. Mancari*, it is very doubtful that any argument alleging the implied repeal of the critically important IRA exemption from Civil Service laws by the Ramspeck Act would be upheld. The Ramspeck Act on its face does not expressly withdraw the Section 12 IRA Civil Service exemption. There is nothing in the legislative history of the Ramspeck Act evidencing any congressional intent to repeal the Section 12 IRA Civil Service exemption. The Ramspeck Act and Section 12 of the IRA are not irreconcilable.

The exemption from Civil Service laws for Indians entitled to preference is a highly specialized law designed to meet the needs of a situation found in no other area of the federal government. As discussed before, Congress knew that it was carrying out a special exemption unlike anything that had ever been done before.<sup>122</sup> The highly specialized purpose of the IRA exemption from Civil Service laws can readily co-exist with the general purpose of the Ramspeck Act.

An additional troubling thing about the executive orders and Civil Service regulations is that IHS (and probably BIA) have relied on them for authority to impose a one-fourth or more quantum limitation in according preference to Indians.<sup>123</sup> Even if the executive orders and Civil Service regulations were valid, they would affect only the applicability of Civil Service standards with regard to individuals of one-fourth or more Indian blood. They do not in any way affect the IRA definition of who is entitled to preference. The issue of who is entitled to be accorded preference is an entirely separate issue from who is subject to Civil Service laws. A member

of a federally recognized tribe who is less than one-fourth blood is still eligible for preference, even though the Civil Service laws exempt only individuals of one-fourth or more blood from the competitive service. IHS has apparently failed to realize this distinction. It is probable that the one-fourth or more blood standard used by BIA in according preference was also issued in reliance upon these executive orders.

### *Subsequent Legislation Relating to IRA Preference*

Although not enacted in 1934, the original IRA bills contained provisions for the transfer of functions and services performed by the Indian Office and Department of the Interior to the Indian tribes themselves.<sup>124</sup> Roughly 40 years later, on January 4, 1975, the Indian Self-Determination and Education Assistance Act (Public Law 93-638)<sup>125</sup> was signed into law.

This Act, among other things, authorizes the contracting to the various Indian tribes and tribal organizations, the planning, conduct, and administration of federal Indian service programs. The new Act is very similar in policy and goals to the earlier enacted IRA. Public Law 93-638 is designed to allow Indians self-determination by contracting as many service programs to them as they can adequately handle. In addition, the Act provides for special training to assist the tribes in assuming their new role. Control over the expenditure of special educational funds for Indians is also provided for in the Act.

### *Conclusions*

Indian preference has been frustrated by assumption of discretion and breach of duty. The BIA has assumed the discretion to alter the definition of "Indian." The Secretary of the Interior has failed to establish separate standards for the appointment of Indians to the Indian Service. The President and Civil Service have assumed authority to impose Civil Service regulations upon the appointment of Indians.

All of the above are illegal and frustrate Indian preference and Indian self-determination. Hopefully, the review of the current preference policy which is being conducted in the Department of the Interior will result in these matters being corrected.

### *Addendum*

Since the submission of this article to the *American Indian Law Review*, the Department of the Interior has drafted new regulations

to govern "who is an Indian" for purposes of employment preference in the BIA.<sup>126</sup> The Indian Health Service has stated that it will revise its regulations to conform with the BIA's once BIA's have been approved.<sup>127</sup> These regulations substantially track the language contained in the IRA. Based on the author's extensive discussions with BIA officials and the Indian Affairs Division of the Solicitor's Office at Interior, the interpretations placed on the statutory definition will be substantially the same as developed in this article. The membership class will be without regard to blood quantum; the descendant class will be without regard to blood quantum, but the descendant must have been alive and living on an Indian reservation on or about June 1, 1934; and the one-half blood class will encompass presently nonfederally recognized Indians.

Submission of the proposed draft regulations to the Civil Service Commission for approval continues the illegal control by the Civil Service Commission over IRA preference.<sup>128</sup>

On March 18, 1975, Secretary Kleppe signed a letter to the Civil Service Commission requesting a change in the Schedule A Excepted Appointment Authority. This letter contained a special category for "(v) a descendant of an enrolled member of a currently federally-recognized tribe whose rolls have been closed by an act of Congress." This provision was primarily designed to apply to the Five Civilized and Osage tribes of Oklahoma whose rolls were closed by acts of Congress.<sup>129</sup> Under the previous preference standard of one-fourth Indian blood and membership in a federally recognized tribe, Interior and BIA had been according preference to recognized blood descendants of 1906 enrollees as if they were members of those tribes. However, in reviewing their new preference policy, Interior and/or BIA decided to begin characterizing descendants of those enrolled members as mere *descendants of members* rather than actual members of those tribes.<sup>130</sup> The BIA and Interior were under the mistaken belief that the IRA preference section (25 U.S.C. § 472) and definition section (25 U.S.C. § 479) were not applicable to the Oklahoma tribes in question. Thus, they contended that under pre-IRA preference laws<sup>131</sup> they had administrative authority to establish whatever definition of "Indian" for these tribes that they wished.

This contention was later abandoned in light of 25 U.S.C. § 473 of the IRA which specifically makes applicable the preference and definition sections of the IRA to Oklahoma tribes and specifically makes Section 18 and other sections of the IRA<sup>132</sup> inapplicable to them.

However, this presented problems for the tribes in question because Interior and/or BIA had already changed their characterization

of Indians from these tribes who were not enrolled in 1906 from considering them members of those tribes to now considering them mere descendants of members. Thus, under the IRA definition, they would not be members of a tribe and could not qualify under the membership class. Also, Interior contended that the reservations of these tribes no longer existed in 1934, and thus they could not qualify under the descendant class. The only class they could fit under would be the one-half blood class. This caused the affected tribes great concern which they conveyed to the Speaker of the House, Carl Albert. The Speaker requested that an exception be made to allow one-fourth blood or more descendants from the Five Civilized and Osage tribes to be eligible for preference for a period of three years. During this three-year period the tribes could organize either under the Oklahoma Indian Welfare Act,<sup>133</sup> or independent of it, and adopt membership criteria. Thereafter, persons meeting such newly adopted membership criteria would be eligible for preference. The Seminole Tribe recently adopted a constitution and therein defined its membership based on open-ended descendancy—tracing to a descendant of the 1906 roll without regard to blood quantum. It appears that the Chickasaw, Choctaw, and Cherokee tribes will do the same. The Creek and Osage tribes are considering a quarter-blood criterion.

Since most of the other tribes throughout the United States have a quarter-blood or eighth-blood criterion, it may be necessary for Congress to amend the membership class of the IRA to provide some minimum blood quantum for preference, in addition to membership, so as to prevent an inequity to those tribes who have minimum blood quantum.—*Author*

## NOTES

1. U.C. CONST., art. I, § 8, cl. 3.

2. *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188 (1876). In F. COHEN, *FEDERAL INDIAN LAW* 91 (1942 ed.) [hereinafter cited as COHEN], in an exhaustive survey prepared on behalf of the United States Department of the Interior, the author declares that the federal commerce power “has for its field of action the entire nation, not just the Indian country.” See also *United States v. Ramsey*, 271 U.S. 367, 471 (1926).

3. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.), 1, 19, (1831). Chief Justice Marshall declared that the Constitutional Convention intended “to give the whole power of managing those [Indian] Affairs to the government about to be instituted.” In *United States v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 194 (1876) the federal Indian power was defined as “exclusive and absolute.” Most recently, in *Morton v. Mancari*, 417 U.S. 535, 551 (1974), the Court spoke of the “plenary power of Congress” over Indians.

4. *Perrin v. United States*, 232 U.S. 478, 486 (1914). See generally COHEN, *supra* note 2, at 89-93 n.2.

5. 25 U.S.C. (1970) is devoted exclusively to Indian affairs and the bulk of this volume contains legislation of general applicability to Indians and Indian tribes.
6. 25 U.S.C. § 2 (1970) provides: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." R.S. § 463.
- 25 U.S.C. § 9 (1970) provides: "The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs." R.S. § 465. See *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).
7. 25 U.S.C. § 452 (1970).
8. 25 C.F.R. § 33.1(g) (1975). These regulations were recently replaced by new regulations adopted by the BIA, 40 Fed. Reg. 51282 (Nov. 4, 1975).
9. The newly adopted regulations do not materially change these eligibility requirements.
10. S. REP. NO. 511, 73d Cong., 2d Sess. 1 (1934); H. REP. NO. 864, 73d Cong., 2d Sess. 1-2 (1934).
11. *Id.*
12. Memorandum Opinion M-35095, Interior Dep't, Solicitor to Secretary of Interior, Apr. 20, 1949.
13. NAACP LEGAL DEFENSE & EDUCATION FUND, INC., with the cooperation of The Center for Law and Education, Harvard Univ., AN EVEN CHANCE: REPORT ON FEDERAL FUNDS FOR INDIAN CHILDREN IN PUBLIC SCHOOL DISTRICTS (1971) [hereinafter cited as AN EVEN CHANCE].
14. See *supra* notes 7 and 8.
15. COHEN, *supra* note 2, at 5.
16. 25 U.S.C. §§ 461 *et seq.* (1970).
17. 25 U.S.C. § 479 (1970). This definition is analyzed in depth *infra*.
18. *Hearing on S. 2755 and S. 3645 Before the Senate Comm. on Indian Affairs*, 73d Cong., 2d Sess. at 264-65 (1934). See also detailed discussion re blood quantum *infra*.
19. Pub. L. 93-638, 25 U.S.C.A. §§ 13a, 450-58e (Supp. 1976).
20. 25 U.S.C.A. § 450b(a) (Supp. 1976).
21. 25 U.S.C.A. § 450b(a) (Supp. 1976).
22. Telephone interview with Deputy Commissioner Harley Frankel, Washington, D.C., Apr. 28, 1975.
23. 25 U.S.C. §§ 461 *et seq.* (1970).
24. The purposes of the legislation are set forth at length in the Committee hearings of the House and Senate. *Readjustment of Indian Affairs on H.S. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess. (1934) [hereinafter cited as 1934 House Hearings]; *Hearings on S. 2755 and S. 3645 Before the Senate Comm. on Indian Affairs*, 73d Cong., 2d Sess. (1934) [hereinafter cited as 1934 Senate Hearings].
25. 78 CONG. REC. 11729 (1934) (remarks of Rep. Howard).
26. "[I]n large measure, the charters granted under this bill to Indian communities will be a recognition of tribal powers which Congress has never seen fit to abrogate rather than a grant of new powers." 1934 House Hearings, *supra* note 24, at 23 (memorandum of Comm'r of Indian Affairs, John Collier) [hereinafter Comm'r Collier].
27. T. HAAS (Chief Counsel, United States Indian Service), TEN YEARS OF TRIBAL GOVERNMENT UNDER IRA 5-6 (1947).
28. General Allotment Act, ch. 119, § 1, 24 Stat. 388 (1887).



29. For the most part, the tribes were not in favor of the allotment agreements, but were often coerced and threatened by the federal commissioners sent to make the agreements with the tribes. There is also evidence that in order to get the requisite number of signatures on an agreement, some Indians would sign for a number of others without their consent and in opposition to their wishes. See National Archives Records of the Bureau of Indian Affairs, Special Case 78, Transcripts of Councils of the Cherokee Commission With Several Tribes (1890-1893). See also *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 637 (1970).

30. As Collier pointed out, the United States did not want to “. . . go through another scandal or another set of open predatory violations of treaties, and so the allotment system was devised. . . as an indirect method of peacefully under the forms of law of taking away [sic] the land that we were determined to take away but did not want to take it openly by breaking the treaties.” 1934 House Hearings, *supra* note 24, at 32.

31. *Id.* at 16-19.

32. 25 U.S.C. § 46 (1970) (originally enacted as Act of May 17, 1882, ch. 163, § 6, 22 Stat. 88); 25 U.S.C. § 44 (1970) (originally enacted as Act of Aug. 15, 1894, ch. 290 § 10, 28 Stat. 313); 25 U.S.C. § 274 (1970) (originally enacted as Act of May 25, 1918, ch. 86, § 1, 40 Stat. 564); 25 U.S.C. § 47 (1970) (originally enacted as Act of June 25, 1910, ch. 431, § 23, 36 Stat. 891).

33. “The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government; to further the government’s trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.” *Morton v. Mancari*, 417 U.S. 535, 541-42 (1974) (footnotes omitted).

34. “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.” 25 U.S.C. § 45 (1970) (originally enacted as Act of June 30, 1834, ch. 162, § 9, 4 Stat. 737).

35. Exec. Order No. 4948 (Aug. 14, 1928).

36. The Indian Office was one of the first bureaus to be placed under the Civil Service. *Administration of the Indian Office*, Bureau of Municipal Research Pub. No. 65, at 24 (1915).

37. Vogt, *Eligibility for Indian Employment Preference*, 1 INDIAN L. REPR. No. 6, 32-37 (June 1974) [hereinafter cited as Vogt Article].

38. See Exec. Order No. 209, Rule III (Mar. 20, 1903).

39. 1934 House Hearings, *supra* note 24, at 18.

40. See note 56 *infra*.

41. See note 32 *supra*.

42. 25 U.S.C. § 472 (1970) [hereinafter Section 12].

43. 1934 House Hearings, *supra* note 24, at 15.

44. H.R. 7902, 73d Cong., 2d Sess. (1934); S. 2755, 73d Cong., 2d Sess. (1934).

45. 1934 House Hearings, *supra* note 24, at 4-5

46. “It is recognized that the unlimited and largely unreviewable exercise of administrative discretion by the Secretary of the Interior and the Commissioner of Indian Affairs has been one of the chief sources of complaint on the part of the Indians. It is the chief object of the bill to terminate such bureaucratic authority by transferring the administration of the Indian Service to the Indian communities themselves.” 1934 House Hearings, *supra* note 24, at 22 (memorandum of Comm’r Collier).

47. *Id.* at 19: “The bill admits qualified Indians to the position in their own service.

Thirty-four years ago, in 1900, the number of Indians holding regular positions in the Indian Service, in proportion to the total positions, was greater than it is today. The reason primarily is found in the application of the generalized civil service to the Indian Service, and the consequent exclusion of Indians from their own jobs."

48. *Id.* at 22-23: "The first section of the bill states the fundamental purposes of the bill, i.e., to promote Indian self-government (gradually to turn over to organized Indian communities the various functions and powers of supervision which the Interior Department now exercises, and to offer to Indians the opportunity of training and financial assistance which will be needed to carry out this program). It will be seen that the bill looks toward the elimination of the Office of Indian Affairs in its present capacity as a nonrepresentative governing authority over the lives and property of Indians. It contemplates that the Office of Indian Affairs will ultimately exist as a purely advisory and special-service body, offering the same type of service to the Indians of the Nation that the Department of Agriculture offers to American farmers."

49. *Id.* at 32.

50. *Id.* at 237 (remarks of Senator Wheeler): "I will say that I first appointed a subcommittee with the idea of taking the other bill [S. 2755] and amending it, but subsequently I got together with the Commissioner of Indian Affairs and went over the important points that I thought were in controversy and on yesterday they sent up this bill [S. 3645], which eliminates . . . practically all the matters that are in controversy. . . ."

51. *Id.* at 250.

52. *Id.* at 256.

53. *Id.* at 250-51.

54. *Id.* at 256.

55. "MR. STEWARD. Mr. Chairman and gentlemen of the committee, I merely want to call attention to the fact that the effect of section 14 is to withdraw from the classified service of the Federal Government the entire personnel of the Indian Service and to vest in the appointing officer, the Secretary of the Interior, without restriction whatsoever, the right of appointment.

"THE CHAIRMAN. That is the purpose of it. That is what should be done, in my judgment. You are discriminating at the present time. We are setting up in the United States a civil service rule which prevents Indians from managing their own property. It is a entirely different service from anything else in the United States, because these Indians own this property. It belongs to them. What the policy of this Government is and what it should be is to teach these Indians to manage their own business and control their own funds and to administer their own property, and the civil service has worked very poorly so far as the Indian Service is concerned, because of the fact that it has discriminated against Indians.

"MR. STEWARD. Granted that, Mr. Chairman; but at the same time, all that you seek to accomplish could be done under existing law.

"THE CHAIRMAN. If it can be done we have not been able to find a way." *Id.* (remarks of Luther Steward, President of the American Federation of Federal Employees and Senator Wheeler).

56. "Indian progress and ambition will be enormously strengthened as soon as we adopt the principle that the Indian Service shall gradually become, in fact as well as in name, an Indian Service predominantly in the hands of educated and competent Indians." 78 CONG. REC. 11731 (1934) (remarks of Rep. Howard).

57. 25 U.S.C. § 478 (1970) [hereinafter Section 18].

58. A three-judge district court recently addressed this same issue and came to substantially the same conclusions. The court held: "[T]he elections [to accept or reject

the IRA] were to be only for the purposes of accepting or rejecting sections 476 [Section 16] and 477 [Section 17] of Title 25, 48 Stat. 987-88.”

. . . “Nothing which followed in the debate or in the way of amendments suggests to us that the option of acceptance was extended to any other portion of the act . . . the preference section [Section 12] . . . must be held to extend to all Indians as individuals.” *Mancari v. Morton*, 359 F. Supp. 585, 588 (N.M. 1973), *rev'd on other grounds*, 417 U.S. 535 (1974).

59. 1934 Senate Hearings, *supra* note 24, at 261-63 (emphasis added).

60. *Id.*

61. 25 U.S.C. §§ 44-47 (1970).

62. *See supra* note 33.

63. 25 U.S.C. § 479 (1970) [hereinafter Section 19].

64. 44 BIAM 335, 3.1 (revised Oct. 30, 1972). The standard used prior to this stated that you were eligible for preference if you were one-fourth or more degree of Indian blood. However, the one-fourth degree of blood had to consist of blood from federally recognized tribe(s). For example, you could be one-eighth Cherokee and one-eighth Chippewa, and not enrolled in either tribe and still be eligible because both tribes are federally recognized, *contra* if one was not federally recognized. Interview with David Jones, Staff Attorney, Solicitor's Office Division of Indian Affairs, Department of the Interior, Mar. 21, 1975.

65. IHS Circular No. 71-1, Indian Preference (June 28, 1971).

66. Exec. Order No. 8043 (Jan. 30, 1939). This order did not deal in any way with who is entitled to Indian preference. The order merely provided exemptions from competitive civil service examinations for “Positions in the Bureau of Indian Affairs . . . when filled by the appointment of Indians who are of one-fourth or more Indian blood.” Not only does this provision of the order in no way alter the definition of Indian under the IRA, it is also completely ineffectual in exempting Indians of one-fourth or more blood from competitive Civil Service examination. The IRA had already lifted the application of the Civil Service laws to Indians. This will be discussed more fully *infra*.

67. The legislative intent will be discussed in the next section.

68. 1934 House Hearings, *supra* note 24, at 6-7, 11.

69. *Id.* at 6.

70. 25 U.S.C. § 479 (1970).

71. 1934 House Hearings, *supra* note 24, at 7.

72. *Id.* at 11.

73. 1934 Senate Hearings, *supra* note 24, at 264.

74. 1934 House Hearings, *supra* note 24, at 6.

75. 1934 Senate Hearings, *supra* note 24, at 264 (emphasis added).

76. *Id.*

77. *Id.* at 176 (emphasis added).

78. *Id.* at 23.

79. *Id.* at 263-64 (emphasis added).

80. *Id.* at 265-66. (emphasis added).

81. *Id.* at 266.

82. *Maynor v. Morton*, 510 F.2d 1254 (D.C. Cir. 1975).

83. “Lumbee Indian” is not a designation of an aboriginal or historical tribal group. It is a name which, over time, was used to refer to the general group of individuals of Indian descent who live in and around Robeson County in North Carolina. “Lumbee Indians” are remnants of a number of Indian tribes.

84. *Maynor v. Morton*, 510 F.2d 1254, 1256 (D.C. Cir. 1975).
85. Brief for Appellee at 7-9, *Maynor v. Morton*, 510 F.2d 1254 (D.C. 1975).
86. *Id.* at 9 (citations omitted).
87. *Maynor v. Morton*, 510 F.2d 1254, 1256 (D.C. Cir. 1975) (emphasis added).
88. Memorandum from Felix S. Cohen, Assist. Solicitor, Department of the Interior, to the Commissioner of Indian Affairs, Apr. 8, 1935 (unpublished, on file at the Bureau of Indian Affairs).
89. 25 U.S.C. § 479 (1970).
90. 1934 House Hearings, *supra* note 24, at 6.
91. *Id.* at 196.
92. 25 U.S.C. § 479 (1970).
93. 1934 Senate Hearings, *supra* note 24, at 264.
94. *Id.* (emphasis added).
95. For example, 20 U.S.C. § 1221h (Supp. 1972) defines "Indian" for purposes of the Act and further provides that "Indian" means any individual who "is determined to be an Indian under regulations promulgated by the Commissioner after consultation with the National Advisory Council on Indian Education, which regulations shall further define the term "Indian." 20 U.S.C. § 1221h(4) (Supp. 1972).
96. See *supra* note 64.
97. 499 F.2d 494, 501 (D.C. Cir. 1974).
98. 380 U.S. 1 (1965).
99. *Morton v. Ruiz*, 415 U.S. 199, 237. (1975); *Freeman v. Morton*, 499 F.2d 494, 502 (D.C. Cir. 1974).
100. *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *Freeman v. Morton*, 499 F.2d 494, 501 (D.C. Cir. 1974).
101. See *Morton v. Ruiz*, 415 U.S. 199, 232-36. (1974).
102. "The result [of present civil service rules] has been that the Indians have been given no opportunity to handle their own affairs or to be trained in their own affairs. This bill, we think, gives them the opportunity to which they are entitled . . . to make the Indians the principle [*sic*] agents in their own economic and racial salvation and . . . progressively reduce and largely decentralize the powers of the Federal Indian Service." 1934 Senate Hearings, *supra* note 24, at 19 (memorandum of Comm'r Collier).
- "The definite goal [of the Act] is to have Indians eventually handling everything." *Id.* at 322.
- "Indian progress and ambition will be enormously strengthened as soon as we adopt the principle that the Indian service shall gradually become, in fact as well as in name, an Indian service predominantly in the hands of educated and competent Indians." 78 CONG. REC. 11731 (1934) (remarks of Rep. Howard).
103. Neither BIA or IHS appear to accord IRA preference to only tribes federally recognized prior to enactment of the IRA. Generally, new federally recognized tribes are entitled to all the same benefits and services that are accorded tribes recognized at earlier dates.
104. *Vogt Article*, *supra* note 37, n.6, at 35.
105. 25 U.S.C. § 472 (1970).
106. With regard to these standards, Collier remarked: "[I] believe that the Secretary of the Interior is capable of setting up standards which will control the appointing officers in their certification of eligible Indians." 1934 Senate Hearings, *supra* note 34, at 259.
107. COHEN, *supra* note 2, at 160.

108. *E.g.*, Exec. Order No. 7423 (July 26, 1936) (exempts one-fourth bloods); Exec. Order No. 7916 (June 24, 1938); Exec. Order No. 8043 (Jan. 31, 1939) (exempts one-fourth bloods); Exec. Order No. 8383 (Mar. 28, 1940); Exec. Order No. 8743 (Apr. 23, 1941); Exec. Order No. 9004 (Dec. 1941) (exempts one-fourth bloods).

109. 5 C.F.R. § 213, 3112(a) (7) (1941).

110. 5 C.F.R. § 123, 3116(b) (8) (1974). The Indian Health Service was transferred from the Department of the Interior to the Department of Health, Education and Welfare in 1954. 25 U.S.C. §§ 2001 *et seq.* When that transfer was made, all the authority, functions, and duties which were previously vested in the Secretary of the Interior were transferred to the Secretary of HEW. The legislative history indicates that the duty to accord preference to Indians under Section 12 of the IRA was included in the transfer. *See Act of Aug. 5, 1954, ch. 638, 68 Stat. 674. See also 1954 U.S.C., CONG. & ADMIN. NEWS 2939.*

111. *See supra* note 55.

112. *See supra* note 32.

113. Act of Nov. 26, 1940, ch. 919, § 1, 54 Stat. 1211, *as amended* 5 U.S.C. § 2102 (1970).

114. Exec. Order No. 8743, 5 U.S.C. § 3301 (1970).

115. A. Mondello, Effect of Ramspeck Act on Exemption of Indians from Civil Service Laws under 25 U.S.C. § 472, April 16, 1971 (unpublished and unsigned memorandum in the Solicitor's Office, Division of Indian Affairs, Department of the Interior).

116. *Id.* at 3.

117. *See Vogt Article, supra* note 37, at 35 n.6.

118. "MR. STEWARD. Granted that, Mr. Chairman; but at the same time, all that you seek to accomplish could be done under existing law.

"THE CHAIRMAN. If it can be done we have not been able to find a way.

"MR. STEWARD. These examinations that are being held for Indian Service at the present time are conducted on consultation and at the request of the Bureau of Indian Affairs, and recently an Executive Order was issued by the President granting Indians the right to take noncompetitive tests. 1934 Senate Hearings, *supra* note 24, at 256-51 (remarks of Luther Steward, President of the American Federation of Federal Employees, and Senator Wheeler).

119. *Morton v. Mancari*, 417 U.S. 535 (1974) (unanimous Court).

120. 42 U.S.C. § 2000e-16(a) (Supp. II, 1973).

121. *Morton v. Mancari*, 417 U.S. 535, 549-51 (1974) (unanimous Court).

122. *See supra* note 55.

123. *See supra* note 66.

124. *See the section supra* on the conflict between BIA and IHS administrative standards and IRA language.

125. Pub. L. 93-638, *supra* note 19.

126. Letter of Secretary of Interior Kleppe to the Chairman of Civil Service Commission, Mar. 18, 1976.

127. Discussion with Dr. Emery Johnson, Director, Indian Health Service, Mar. 23, 1976, Rockville, Md.

128. *See section supra* on the validity of current Civil Service laws with regard to IRA preference.

129. *See Act of Apr. 26, 1906 (34 Stat. 137) and the Act of June 28, 1906 (34 Stat. 539).*

130. The basis for this change in characterization does not appear in Secretary Kleppe's letter of Mar. 18, 1976.

131. See note 32 *supra*.

132. 25 U.S.C. § 478 (1970).

133. 25 U.S.C. § 503 (1970).

