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To: Robert T. Coulter, Executive Director
From: Andrew Huff
Re: Morton v. Mancari
Date: May 3, 2018

Executive branch departments of the federal government, through recent actions and pronouncements, have indicated an intent to treat Tribes as “racial classifications” rather than as governmental and political entities. This memo examines the evolution and present status of federal law with regard to Tribes-as-governments, and concludes that executive branch agencies are precluded from interacting with tribal governments as racial groups. As was thoroughly explained by the U.S. Supreme Court in Morton v. Mancari, 417 U.S. 535 (1974), Tribes are governmental entities, not racial groups. As such, Congress may enact legislation, and executive branch agencies may implement policy, that is unique to Indian peoples without violating the requirement of equal protection of the law, when such legislation or policies are reasonable and rationally designed to further tribal self-government. 417 U.S. at 555. This remains the governing law today.

I. The Federal Government’s Relationship to Tribes, Pre-Mancari

The U.S. Supreme Court’s 1974 decision in Morton v. Mancari remains among the best judicial summations of the federal government’s obligation, through Indian-specific legislation and policy, to further tribal self-government. The decision was preceded by over a century of legal development concerning the status of Tribes. A brief look at the legal evolution of federal authority in the field of Indian affairs is necessary for understanding the significance and continuing vitality of Morton v. Mancari.

Chief Justice John Marshall first articulated in American jurisprudence the existence of a unique legal relationship, established through treaties, between the federal government and Indian Tribes. In the *Cherokee* cases, Justice Marshall affirmed the legal vitality of Indian treaties, holding that the laws of the State of Georgia could have no effect within the treaty-protected lands of the Cherokee. Worcester v. Georgia, 31 U.S. 515 (1832). As explained by Marshall, “The treaty of Holston . . . explicitly recognizing the national character of the Cherokees, and their right of self government, thus guarantying their lands; assuming the duty of protection, and of course pledging the faith of the United States for that protection, has been frequently renewed, and is now in full force.” 31 U.S. at 515. At the same time Marshall, relying on the Indian Commerce Clause, distinguished Tribes from foreign nations, denominating them “domestic dependent nations,” and stating, “Their relation to the United States resembles that of a ward to his guardian.” Cherokee Nation v. Georgia, 30 U.S. 1 (1831). Marshall’s formulation of the unique legal relationship between the Indian Nations and the U.S. government thus recognized the right of Tribes to govern themselves on their own lands as “domestic dependent nations,” as well as a federal “duty of protection” to safeguard tribal treaty rights.

In the century that followed the *Cherokee* cases, the courts vacillated between Marshall’s formulation of a federal “duty of protection” largely to safeguard Indian self-government, and a much broader application of Congressional powers over Indian affairs. Rather than a coherent unified theory of Indian law, two lines of contradictory cases developed during this period. In one line of cases, Marshall’s federal duty to protect tribal self-governance is central. For example, in Ex Parte Crow Dog, 109 U.S. 556 (1883), the Supreme Court deferred to specific treaty provisions and tribal justice systems in upholding tribal criminal jurisdiction to the exclusion of the federal courts and the federal criminal code:

The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government, by appropriate legislation, thereafter to be framed and enacted, necessarily implies . . . that among the arts of civilized life, *which it was the very purpose of all these arrangements to introduce and naturalize among them*, was the highest and best of all, that of *self-government*, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.

109 U.S. at 568 (emphasis added). See also, Talton v. Mayes (1896) (holding that the Fifth Amendment – requiring that federal indictments be initiated by grand jury – does not apply to the criminal laws of the Cherokee nation as applied to their members).

The second group of cases can be called the “plenary power” line. These cases are characterized by United States v. Kagama, 118 U.S. 375 (1886); United States v. McBratney, 104 U.S. 621 (1881); and Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). In Kagama – which is essentially the judicial inverse of Ex Parte Crow Dog – the Court upheld the authority of Congress to adopt and implement the Major Crimes Act in Indian Country. In so doing, the Court performed a kind of judicial jujitsu – relying on the “unique obligation” of the federal government to Tribes to extend intrusive federal law over them, rather than to protect tribal self-governance. As stated by the Court:

It seems to us that [the Major Crimes Act] is within the competency of Congress From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. . . . [This power] must exist in [the federal] government, because it has never been denied, and because it alone can enforce its laws on all the tribes.

118 U.S. at 384-85. The Court in McBratney held that state courts, rather than tribal or federal courts, have proper jurisdiction over the crime of murder as between non-Indians committed on a reservation. In Lone Wolf – perhaps the most notorious of this line of cases – the Court held that Congress may unilaterally abrogate treaties and that Tribes had no recourse to the courts. “Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.” 187 U.S. at 565.

The “plenary power” understanding of the federal government’s relationship to Tribes predominates in the period from the late 1800s to 1934. Rather than supporting Justice Marshall’s conception of a duty to safeguard tribal self-determination, the federal government instead pursued policies aimed at the destruction of Tribes as distinct political entities. Congress passed the General Allotment Act in 1887, accelerating the break-up and loss of Indian lands. The federal government also assumed its bureaucratic, paternalistic and frequently corrupt management of Tribes and reservations. During this period, the federal government – through its policies and its corruption and incompetence – inflicted deep and lasting damage on Indian Tribes and peoples.

In 1934, Congress passed the Indian Reorganization Act, in part to stem the obvious damage done by the allotment of Indian reservations and revivify tribal self-government. The Act came about as a result of the efforts of John Collier and other New Deal reformers under President Roosevelt. The new policy of support for Indian self-

government found solid legal support in Felix Cohen's seminal Handbook of Federal Indian Law, published in 1942. In his Handbook Cohen – like Marshall over a century before – grounded the federal legal relationship with Tribes primarily in the treaty-making power of Congress and the Executive:

The first and chief foundation for the broad powers of the Federal Government over the Indians is the treaty-making provision which received its most extensive early use in the negotiation of treaties with the Indian tribes. . . . To carry out the obligations and execute the powers derived from those treaties became a principal responsibility of Congress, which enacted many statutes relating to or supplementing treaties.

Handbook of Federal Indian Law, Ch. 5, §2 (U.S. Printing Office, 1942).

In addition to the treaty-making power of the executive, the Constitution authorizes Congress in the commerce clause to “regulate commerce with foreign nations, and among the several States, and with the Indian tribes.” Art. I, Sec. 8, cl. 3. Cohen recognized that in the century since the *Cherokee* cases, the scope of the commerce clause grew to include more than just commerce:

The congressional power over commerce with the Indian tribes plus the treaty-making power is much broader than the power over commerce between the states. . . .The commerce clause in the field of Indian affairs was for many decades broadly interpreted to include not only transactions by which Indians sought to dispose of land or other property in exchange for money, liquor, munitions, or other goods, but also aspects of intercourse which had little or no relation to commerce, such as travel, crimes by whites against Indians or Indians against whites, survey of land, trespass and settlement by whites in the Indian country, the fixing of boundaries, and the furnishing of articles, services, and money by the Federal Government.

Handbook, Ch. 5, §3.

Cohen, however, expressed serious doubt about the validity of any doctrine of Congressional authority arising from “necessity”:

While the decisions of the courts may be explained on the basis of express constitutional powers, the language used in some cases seems to indicate that decisions were influenced by a consideration of the peculiar relationship between Indians and the Federal Government . . . Reference to the so-called ‘plenary’

power of Congress over the Indians, or, more qualifiedly, over ‘Indian Tribes’ or ‘tribal Indians,’ becomes so frequent in recent cases that it may seem captious to point out that there is excellent authority for the view that Congress has no constitutional power over Indians except what is conferred by the commerce clause and other clauses of the Constitution Whatever view be taken of the possibility or danger of federal power arising from ‘necessity,’ it is clear that the powers mentioned by Chief Justice Marshall proved to be so extensive that in fact the Federal Government’s powers over Indian affairs are as wide as state powers over non-Indians, and therefore one is practically justified in characterizing such federal power as ‘plenary.’ This does not mean, however, that congressional power over Indians is not subject to express limitations upon congressional power, such as the Bill of Rights.

Handbook, Ch. 5, §1.

Despite Cohen’s admonition and the work of the New Deal reformers, Congress in the 1950s gave free reign to its tendency towards unrestrained “plenary power.” Beginning in 1953 and lasting until roughly 1960, Congress passed multiple acts terminating 109 Tribes and bands. These acts ended the unique relationship between the federal government and the targeted Tribes. Trust lands were no longer protected, programs supporting Tribes and Indians were eliminated, and state and local taxes were imposed. The 1950s also encompass the infamous decision in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). In Tee-Hit-Ton, the Supreme Court held that the Fifth Amendment right to just compensation for the taking of property did not apply to the aboriginal lands of the Tee-Hit-Ton clan of Tlingit Indians. In so holding, the Court stated:

Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.

348 U.S. at 289-90. Tee-Hit-Ton and the termination acts embody the doctrine of plenary power authorized only by “necessity,” and neither anchored in, nor restrained by, the U.S. Constitution.

Due to the obvious negative impacts of termination on the well-being of Indian peoples, federal policy whipsawed in the opposite direction in the 1960s. President Johnson began, through his Great Society programs, to invest public funds in reservations. In 1970, President Nixon declared any policy of forced termination to be

wrong. Soon thereafter, Congress began exercising its unique obligation to Tribes in a manner more in conformity with Marshall's original articulation, passing for example the Indian Education Act of 1972, the Indian Financing Act of 1974, the Indian Self-Determination and Education Assistance Act of 1975, the Indian Child Welfare Act of 1978, and the American Indian Religious Freedom Act of 1978.

II. Morton v. Mancari, 417 U.S. 535 (1974)

By the time of the Supreme Court's decision in Morton v. Mancari in 1974, the civil rights movement had been active for more than two decades. Brown v. Board of Education was decided in 1954. In various acts beginning in 1957 Congress protected voting rights, including the voting rights of American Indians. The Civil Rights Act of 1964, 78 Stat. 241, prohibited discrimination in public accommodations and created the Equal Employment Opportunity Commission to monitor employment discrimination in the private sector. The Civil Rights Act of 1968, 82 Stat. 73, prohibited discrimination in the sale or rental of housing. The 1972 Equal Employment Opportunity Act amended the 1964 Civil Rights Act to prohibit discrimination in federal employment.

The 1968 Civil Rights Act is interesting for the purposes of this memorandum. In addition to prohibiting discrimination in housing, the 1968 Act included several pieces of Indian-specific legislation: (1) the Indian Civil Rights Act, Title II of the 1968 Act, prohibited tribal governments from violating the rights of tribal members to equal protection of the laws and due process; (2) Title III of the Act directed the preparation of a model tribal court code; (3) Title IV of the Act amended PL-280 to prohibit any further extension of state jurisdiction over Tribes without tribal consent; and (4) Title VII of the Act directs that the Secretary of the Interior revise and republish Cohen's Handbook of Federal Indian Law, "In order that the constitutional rights of Indians might be fully protected." The 1968 Act thus captures both Congressional intent to prohibit racial discrimination (in housing), and the Congressional expectation that Tribes would continue to be self-governing, free of unwanted state jurisdiction, but pursuant to the restraints of the Indian Civil Rights Act as applied to their own tribal members.

In Morton v. Mancari, the Supreme Court faced a potential conflict between Congressional policies supporting tribal self-government and those prohibiting discrimination in public employment. Section 12 of the Indian Reorganization Act establishes a hiring preference for Indian appointments to the "Indian Office." In 1972, the Commissioner of Indian Affairs directed that the IRA hiring preference apply when Indians and non-Indians compete for promotion within the Bureau (as opposed to only the initial hiring process). Non-Indian BIA employees in the Albuquerque office sued, claiming the IRA preference was repealed by the 1972 Equal Employment Opportunity

Act. The Court first observed that the 1964 Act as amended specifically exempted from its coverage the preferential hiring of Indians by Tribes or by industries on or near reservations. 417 U.S. at 545. There was thus clear Congressional intent to continue the Indian hiring preference, even in the new era of nondiscrimination legislation and jurisprudence. The Court then went on to hold that the preference did not, in any case, constitute invidious racial discrimination. The reasoning of the Court is worth quoting extensively:

Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a “guardian-ward” status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to “regulate Commerce . . . with the Indian Tribes,” and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government’s power to deal with the Indian tribes. . . . Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. . . . As long as the special treatment can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress’ classification violates due process.

417 U.S. at 554-55. In reaching its conclusion, the Court held that the preference was not directed at a racial group at all, but at members of federally recognized Tribes. “In this sense, the preference is political rather than racial in nature.” 417 U.S. at 553, n. 24.

The Court in Morton v. Mancari anchored the federal-tribal relationship in the Constitution and imbued it with Marshall’s concept of a “duty of protection” shielding tribal self-government – while at the same time accounting for the modern norm of nondiscrimination. In 1977, Congress formally followed suit, stating that the federal trust responsibility’s “broad purposes, as revealed by a thoughtful reading of the various legal

sources, is to protect and enhance the people, the property and the self-government of Indian tribes.” Final Report of the American Indian Policy Review Commission (Washington, D.C.: Government Printing Office, 1977), at 126.

III. Doctrinal Development after Mancari

a. Pre-Adarand Supreme Court Jurisprudence

Since 1974, the federal courts have upheld the “political not racial” framework put forth in Mancari. In 1976, the Court decided Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, and Fisher v. District Court of Rosebud County, 424 U.S. 382. In Moe, the Court held that the State of Montana could not impose its tax statutes on the sale of cigarettes between Indian vendors and tribal members on the Flathead Reservation. Montana asserted that tribal tax immunity constituted invidious racial discrimination and violated the due process clause of the Fifth Amendment. The Court disposed of the argument citing to Mancari. In Fisher, the Supreme Court rejected an attempted assertion of state court jurisdiction over an Indian adoption proceeding on the Northern Cheyenne Reservation. The Court rejected the adoptive couples’ argument that being denied access to state courts constituted invidious racial discrimination. In both Moe and Fisher, the Court applied Mancari to shield tribal self-government from intrusive state laws and rejected arguments of invidious racial discrimination.

In 1977, the Court in United States v. Antelope, 430 U.S. 641, assessed whether prosecution of tribal members under the Major Crimes Act and a related federal felony murder statute violated due process and equal protection. The Court cited to Mancari for the proposition that the federal scheme applied to Indians not because of their race, but because of their political classification. As stated by the Court, “the principles reaffirmed in Mancari and Fisher point more broadly to the conclusion that federal regulation of Indian affairs is not based upon impermissible classifications. Rather, such regulation is rooted in the unique status of Indians as ‘a separate people’ with their own political institutions.” 430 U.S. at 641, 646-47.

In Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977), the Court upheld the exclusion of the Kansas Delaware Indians (a non-federally recognized tribal entity) from the distribution of an Indian Claims Commission judgment award. In so holding, the Court disposed of the canard enunciated in Lone Wolf v. Hitchcock that all Congressional action in the arena of Indian affairs constituted a political question beyond the scope of judicial scrutiny. The Court then upheld the exclusion of the Kansas Delawares from the judgment fund as tied rationally to the fulfillment of Congress’ unique obligation to the Indians, surviving Fifth Amendment scrutiny.

In Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658 (1979), the Court upheld Indian treaty rights to harvest salmon against the argument of Washington State that the treaties violated equal protection principles. The Court again referenced Mancari, holding that the “constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government’s “unique obligation toward the Indians.”

In Washington v. Confederated Bands and Tribes of the Yakima Nation, 439 U.S. 463 (1979), the Court relied on Mancari and its rational basis framework to uphold the application of PL-280 to the Yakima Reservation. “It is settled that ‘the unique legal status of Indian tribes under federal law’ permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive.” 439 U.S. at 501; *citing* to Morton v. Mancari, 417 U.S. 535, 551-552.

b. Adarand

In 1995, the Supreme Court decided Adarand Constructors, Inc. v. Pena, 515 U.S. 200. In Adarand, an equal protection claim was brought against the federal government. The claim challenged the government’s practice of financially incentivizing its contractors to use minority-owned subcontractors. The Court held that all racial classifications, even those that are benign or remedial, imposed by any federal, state or local government, are subject to strict scrutiny analysis. 515 U.S. at 227. On remand, the federal district court enjoined implementation of the federal procurement contracting incentives at issue. 965 F. Supp. 1556. Thus far, the Court has not extended the reasoning in Adarand to Indian-specific law and policy, continuing to rely on Mancari.

Both Adarand and an earlier equal protection case, Regents of the University of California v. Bakke, 438 U.S. 265 (1978), reference Morton v. Mancari. In Bakke, the Court assessed the use of affirmative action quotas in college admissions. In a split decision, the Court struck down racial quotas but upheld the use of race in the admissions process. In Bakke and Adarand, the regents and later the federal government relied in part on Mancari to argue that racial classifications were not subject to strict scrutiny when done to benefit disadvantaged minorities. The Court responded in Bakke that the legal status of the BIA was *sui generis*, and that the classification in Mancari was not in any case racial. 438 U.S. at 304, n. 42. In Adarand, Justice Stevens (joined by Justice Ginsburg), referenced Mancari and the BIA hiring preference in his dissent, arguing that there was no moral equivalence between government policies designed to eradicate racial subordination, and those meant to perpetuate such subordination. 438 U.S. at 304, n. 42. Both references to Mancari affirm its continuing validity.

c. Post-Adarand Supreme Court Jurisprudence

Since Adarand, the Supreme Court has maintained Mancari's central formulation of Tribes as governmental, rather than racial entities. The Court has declined, therefore, to characterize Indian-specific federal law or policy as a racial classification in Indian law cases that cite to Mancari and post-date Adarand. In Rice v. Cayetano, 528 U.S. 495 (2000), the Court distinguished between federal law and policy concerning Tribes, and state law and policy concerning Tribes. Pursuant to that distinction, the Court struck down a state-based voting restriction, holding that Mancari did not apply to the state action at issue. In so holding, the Court reaffirmed Mancari as applied to federal law and policy: "It does not follow from Mancari . . . that Congress may authorize a State to establish a voting scheme that limits the electorate for its public officials to a class of tribal Indians, to the exclusion of all non-Indian citizens. . . . If a non-Indian lacks a right to vote in tribal elections, it is for the reason that such elections are the internal affair of a quasi-sovereign." 528 U.S. at 520. In other words, a federal law or policy limiting the right to vote in tribal elections to tribal members would pass muster under Mancari.

In U.S. v. Lara, 541 U.S. 193 (2004), the Court held that a Tribe and the federal government could separately prosecute a nonmember Indian for the same crime committed on a reservation, without violating the prohibition on double jeopardy. The defendant Indian argued that after the Supreme Court decided in Duro v. Reina that a Tribe did not have criminal jurisdiction over nonmember Indians, Congress delegated federal authority to Tribes to prosecute such nonmember Indians pursuant to 25 U.S.C. § 1301. The Indian defendant argued there could be but one prosecution commenced under one federal authority. The Court held, however, that the tribal prosecution proceeded under its own authority as a sovereign, rather than authority delegated to it by the federal government. The federal statute in question merely lifted previously imposed restrictions on tribal inherent authority to address misdemeanor crimes committed by nonmember Indians. 541 U.S. at 199. In upholding the authority of the Tribe, the Court cited to Mancari as support for the basic proposition that Congress has broad authority rooted in the treaty and commerce clauses to legislate in the field of Indian affairs, including passage of 25 U.S.C. § 1301. 541 U.S. at 200-202.

In Adoptive Baby Couple v. Baby Girl, 133 S. Ct. 2552 (2013), the Court held that the biological Cherokee father of an Indian child could not obtain custody of the child under the Indian Child Welfare Act after the child had been adopted by a non-Indian couple. The Court based its decision on straight statutory interpretation. Justice Thomas did, however, discuss the potential equal protection implications of the application of ICWA in such situations. "As the State Supreme Court read [ICWA], a

biological Indian father could abandon his child *in utero* and refuse any support for the birth mother — perhaps contributing to the mother’s decision to put the child up for adoption — and then could play his ICWA trump card at the eleventh hour to override the mother’s decision and the child’s best interests. If this were possible, many prospective adoptive parents would surely pause before adopting any child who might possibly qualify as an Indian under the ICWA. Such an interpretation would raise equal protection concerns. . . .” 133 S. Ct. at 2565.

But Justice Sotomayor in her dissent (joined by Justices Kagan, Ginsburg and Scalia (in part)), shot down the suggestion of an equal protection problem:

It is difficult to make sense of this suggestion in light of our precedents, which squarely hold that classifications based on Indian tribal membership are not impermissible racial classifications. See United States v. Antelope, 430 U. S. 641, 645-647, 97 S. Ct. 1395, 51 L. Ed. 2d 701 (1977); Morton v. Mancari, 417 U. S. 535, 553-554, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). The majority’s repeated, analytically unnecessary references to the fact that Baby Girl is 3/256 Cherokee by ancestry do nothing to elucidate its intimation that the statute may violate the Equal Protection Clause as applied here. See *ante*, at ____, ____, 186 L. Ed. 2d, at 735, 739; see also *ante*, at ____, 186 L. Ed. 2d, at 744 (stating that ICWA “would put certain vulnerable children at a great disadvantage solely because an ancestor — *even a remote one* — was an Indian” (emphasis added)). I see no ground for this Court to second-guess the membership requirements of federally recognized Indian tribes, which are independent political entities. See Santa Clara Pueblo v. Martinez, 436 U. S. 49, 72, n. 32, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). I am particularly averse to doing so when the Federal Government requires Indian tribes, as a prerequisite for official recognition, to make “descen[t] from a historical Indian tribe” a condition of membership. 25 CFR §83.7(e) (2012).

133 S.Ct. at 2584-85.

Mancari remains good law even in light of Adarand, and there are strong arguments for the continuing vitality of its political/racial distinction. Further, there are a range of arguments for upholding unique treatment of Tribes and Indians on alternative grounds, including: that the structure and language of the U.S. Constitution establish Tribes and Indians as unique for the purposes of equal protection law; or that, because of the unique status of Tribes, federal legislation supporting tribal self-determination survives any level of judicial scrutiny.

IV. Conclusions

The Supreme Court has maintained and deferred to the core construct of Morton v. Mancari in assessing federal law and policy: Tribes are governments, not racial classifications. The Court in Mancari made it clear that support for tribal self-governance is either the central purpose of Congress' unique relationship with Tribes, or at the very least a major aspect of that relationship. The 1977 Final Report of the American Indian Policy Review Commission – a Congressional commission – echoed Mancari in its unequivocal understanding of Congress' unique obligation to Tribes as protecting the “people, the property and the self-government of Indian tribes.” Since that time, Congress has repeatedly reaffirmed tribal self-determination and self-governance as the foundational principle animating its lawmaking in this area. There is no support, in either the jurisprudence of the Supreme Court or the pronouncements of Congress, for treating Tribes as racial groups.

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