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AM. FED'N OF GOV'T EMPLOYEES V. UNITED STATES, 330 F.3D 513 (D.C. CIR. 2003)

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FACTS

Section 8014(3) of the Department of Defense Appropriations Act of 2000 (Act) required the Department of Defense (DOD) to perform a "most efficient and cost-effective organization analysis" before using appropriated funds to pay private contractors for work previously performed by more than ten government employees.[1] The DOD could avoid this analysis if it chose to outsource a "commercial or industrial type function" to a "qualified firm under 51 percent Native American Ownership."[2] The Air Force awarded a contract at the Kirtland Air Force Base (Kirtland) in New Mexico to Chugach Management Services Joint Venture (Chugach), a qualified firm.[3] It was the only contract that the DOD awarded under section 8014(3).[4]

Two civilian DOD employees and the American Federation of Government Employees, AFL-CIO (Plaintiffs), an affiliated local union that represents civilian DOD employees at Kirtland, alleged that the civilian employees were displaced when the Air Force awarded the contract to Chugach.[5] They claimed that section 8014(3) violated the equal protection element of the Fifth Amendment's Due Process Clause and substantive due process by depriving them of an interest in federal employment.[6]

The United States District Court for the District of Columbia allowed Chugach to intervene as a defendant alongside the United States and denied Plaintiffs' motion for a preliminary injunction.[7] Both sides subsequently moved for summary judgment.[8] Finding no fundamental right to federal employment, the court granted summary judgment for the defendants on the substantive due process claim.[9] The court construed section 8014(3) to apply only to ownership by an Indian tribe.[10] Applying

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1 Department of Defense Appropriations Act, Pub.L.No. 106-79, § 8014, 113 Stat. 1212, 1234 (1999).

2 *Id.* § 8014(3), 113 Stat. at 1234.

3 Am. Fed'n of Gov't Employees, AFL-CIO v. United States, 330 F.3d 513, 516 (D.C. Cir. 2003).

4 *Id.* at 517.

5 *Id.* at 516.

6 *Id.* at 517.

7 *Id.* (citing Am. Fed'n of Gov't Employees v. United States, 104 F. Supp. 2d 58 (D.D.C. 2000)).

8 *Id.*

9 *Id.* (citing Am. Fed'n of Gov't Employees v. United States, 195 F. Supp. 2d 4, 25 (D.D.C. 2002)).

10 *Id.* (citing Am. Fed'n of Gov't Employees v. United States, 195 F. Supp. 2d 4, 18–24 (D.D.C. 2002)).

the rational basis standard, the court found no unconstitutional discrimination.[11] Plaintiffs appealed the decision.[12]

HOLDING

The United States Court of Appeals for the District of Columbia affirmed summary judgment for the defendants on the due process and equal protection claims, ruling that Congress should be granted great deference when regulating commerce with Indian Tribes.[13]

ANALYSIS

The court began its analysis by limiting its scope of review for the case.[14] Plaintiffs sought to enjoin the government from awarding any contract based on section 8014(3).[15] Because the Act only applied to the 2000 fiscal year, the court rendered that claim for relief moot.[16] Plaintiffs also sought to enjoin the government from renewing any contract awarded under section 8014(3).[17] To allow that claim to proceed, the court found that Plaintiffs must be under a real and imminent threat of harm.[18] Plaintiffs failed to show that any contract was awarded under section 8014(3) other than the Chugach contract.[19] As this particular claim related to any contracts the DOD might award under section 8014(3), not solely those awarded at Kirtland, the court found that Plaintiffs only had standing to bring claims related to the Chugach contract because it was the only contract that had the possibility of inflicting real harm on Plaintiffs.[20]

Plaintiffs argued that section 8014(3) violated the Constitution because it allowed preferences for firms owned by Native Americans who were not tribal members and owned no more than 51% of a firm.[21] The court disregarded this claim because it expanded the case beyond its factual context, as Native Americans own more than 51% of Chugach.[22] The court then reiterated its ruling that Plaintiffs are only entitled to relief relating

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11 *Id.*
12 *Id.* at 516.
13 *Id.* at 523.
14 *Id.* at 518.
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.* (citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995)).
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*

specifically to the Kirtland and denied Plaintiffs' invitation to expand the scope of the case.[23]

The court then turned to the government's contentions that section 8014(3) should be construed to resolve any constitutional doubts that Plaintiffs raised and that section 8014(3) applies only to "members" of federally recognized "tribal entities" and Indian Tribes.[24] The court declined to narrow the interpretation of section 8014(3) by holding that it applies only to "members" of federally recognized Indian tribes because the government's interpretation of the statute did not directly relate to the claims brought by Plaintiffs in this case.[25] To offer an interpretation of this kind would be tantamount to an advisory opinion because any ruling would be based on a hypothetical, as opposed to an actual, situation.[26]

Next, the court distinguished *Adarand Constructors, Inc. v. Pena*[27] from the instant case, concluding that the Native American classification is different from other racial classifications because Congress has Constitutional authority to regulate commerce with Indian Tribes.[28] Additionally, the court noted that the Supreme Court has sustained legislation that provides "particular and special treatment" for Indian tribes in *Morton v. Mancari*.[29] Congress has broader authority to draft legislation favorable to Indian tribes than other minority groups.[30]

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[23] *Id.* at 518–19.

[24] *Id.* at 517.

[25] *Id.* at 519.

[26] *Id.*

[27] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). Under federal law, contractors received additional compensation if they subcontracted work to firms owned by individuals who were members of socially and economically disadvantaged groups. *Id.* at 205. "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities" were considered to be socially and economically disadvantaged. *Id.* A subcontractor sued after a main contractor rejected its low bid in favor of a firm owned by a minority. *Id.* The Court did not focus on which minority group received the contract but the preference for minority groups in general. *Id.* at 206–07. The Court ruled that the government's use of race as a classification must be "compelling," and the correct standard to apply is strict scrutiny. *Id.* at 237–38.

[28] Am. Fed'n of Gov't Employees, AFL-CIO v. United States, 330 F.3d 513, 520 (D.C. Cir. 2003) (citing U.S. CONST. art. I, § 8, cl. 3).

[29] Morton v. Mancari, 417 U.S. 535 (1974). Plaintiffs claimed that the Equal Employment Opportunity Act of 1972 repealed preferences in the Bureau of Indian Affairs for hiring Indians. *Id.* at 539. The Court rejected this claim, finding that Congress did not intend to overrule the preference by implication. *Id.* at 547–50. Additionally, the Court found that the plaintiffs' due process claims must be considered in light of Congress's "guardian-ward" status toward Indian Tribes. *Id.* at 551. The Court concluded that the preference did not violate due process because "[a]s long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555.

[30] *Am. Fed'n of Gov't Employees*, 330 F.3d at 520.

Plaintiffs sought to reconcile *Adarand* with other cases allowing preferences for members of Indian Tribes.[31] They characterized the treatment of Indians under section 8014(3) as preferences for a distinct social group, which would be tantamount to an illegal preference.[32] The court rejected the argument because legislation benefiting Indian Tribes shall not be examined under the same terms as suspect racial classifications.[33]

Plaintiffs claimed that the proper standard to apply was strict scrutiny, despite precedents that called for the rational basis standard.[34] They argued that the Supreme Court had only found preferences for Indians to be constitutional in the context of employment in the Indian service.[35] The court found that the critical factor in its determination is Congress's power to regulate commerce "'with the Indian Tribes.'"[36] Incident to this power, Congress may regulate tribal members.[37] Plaintiffs claimed that no record of Congressional motivation or proof of Congressional intent for the enactment of section 8014(3) existed and therefore, the court could not rationally review Congress's motives.[38] The court noted that Congress is not required to publish its lawmaking findings and the Constitution gives Congress the power to regulate its own proceedings.[39] The court stated that if Congress had acted reasonably, the court need not make further inquiries regarding the constitutionality of the law, regardless of whether Congress explicitly stated its reasoning.[40] As a result, the court found that it had been proper for the district court to examine legislative material produced in analogous contexts to determine Congressional intent.[41]

Plaintiffs also claimed that section 8014(3) violated substantive due process under the Fifth Amendment because they had a property interest in federal employment.[42] The court found that in the absence of an infringement of a fundamental interest or a suspect classification, the Fifth Amendment only requires a rational basis review.[43] Additionally, the court

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31 *Id.* at 521.

32 *Id.*

33 *Id. See generally* Washington v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979); Morton v. Mancari, 417 U.S. 535 (1974).

34 Am. Fed'n of Gov't Employees, AFL-CIO v. United States, 330 F.3d 513, 521 (D.C. Cir. 2003).

35 *Id.*

36 *Id.* (quoting U.S. CONST. art. I, § 8, cl. 3).

37 *Id.*

38 *Id.* at 522.

39 *Id.* (citing U.S. CONST. art. I, § 5, cl. 2).

40 *Id.* at 521.

41 *Id.* (citing Am. Fed'n of Gov't Employees v. United States, 195 F. Supp. 2d 4, 23 (D.D.C. 2002)).

42 *Id.* at 523.

43 *Id.*

noted that the Supreme Court had never recognized an interest in federal employment as a fundamental right.[44] As a result, the court found that rational basis review was appropriate and that Plaintiffs had failed to prove their due process claim.[45]

CONCLUSION

The court's affirmation of section 8014(3) is one piece of a larger legislative and judicial effort to afford greater rights and protections to Indians, Native Alaskans, and Native Hawaiians (Native Americans). While some reparations have been granted to Native Americans for takings of land affected by Congress and approved by the judiciary,[46] many economic and non-economic problems caused by such takings have not been remedied.[47] The Constitution provides a basis for treating Indian Tribes differently from other racial and ethnic groups, as well as from society at large.[48] This basis has provided recent benefits to Native Americans,[49] but these remunerations are merely Congress's recent response to the many social and economic problems that exist for Native Americans.[50]

In the past, Congress's special relationship to Indian Tribes caused at least as much harm to them as its current system of benefits now provides[51]; similarly, judicial opinions have also had the same effect as Congressional action by denying ownership, and therefore property rights, to Native Americans.[52] In 1946, Congress passed the Indian Claims Commission Act,[53] the first federal law that gave Indian Tribes various rights to sue for property claims.[54] More recently, court decisions,[55] much like recent

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[44] *Id.*

[45] *Id.*

[46] *See* Nell Jessup Newton, *Compensation, Reparations & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 468–70, 475–77 (1994) (discussing reparation schemes).

[47] *See* William Bradford, *"With a Very Great Blame on Our Hearts": Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 14–15 (2003) (detailing problems cause by federal Indian policies).

[48] U.S. CONST. art. I, § 8, cl. 3.

[49] *See, e.g.*, Department of Defense Appropriations Act, Pub. L. No. 106-79, § 8014(3) 113 Stat. 1212, 1234 (1999).

[50] The Alaska Natives Commission found that "many Alaska Native individuals, families, and communities were experiencing a social, cultural and economic crisis marked by rampant unemployment, lack of economic opportunity, alcohol abuse, depression and morbidity and mortality rates that have been described by health professionals as 'staggering.'" H.R. REP. NO. 104-838, at 1.

[51] Newton, *supra* note 48 at 20 (explaining how Congress acquired land from Indian Tribes).

[52] *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823).

[53] Indian Claims Commission Act, 25 U.S.C. § 70 (1946) (repealed 1978).

[54] *Id.* § 70(a).

Congressional action,[56] have treated Native American interests more favorably than in the past.[57] Congress, with its unique power to regulate commerce with Indian Tribes,[58] has enacted several measures to improve the lives of Native Americans.[59] In the current Congress, legislators have submitted bills to provide tax incentives for Native Americans,[60] to provide tax deductions for ground rent on qualified residences on Native American-owned land,[61] and to extend and improve assistance provided by Small Business Development Centers for Native Americans.[62]

In this context, section 8014(3) is a continuation of Congressional and judicial intent to right past wrongs. The purpose of section 8014(3) is to give the DOD incentive to use firms owned by Native Americans,[63] thereby alleviating the problems that many Native American communities are currently facing by providing jobs. Section 8014(3) functions as a reparation, similar to cash payouts for land. It is part of a larger historical arc, using Constitutional principles as a rationale to grant preferences to Native Americans. Consequently, the court's examination of section 8014(3) in this case is consistent with other recent, similar judicial interpretations of the Constitution.[64] Within this framework, future laws that are similar to section 8014(3) will be upheld.

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[55] *See, e.g.*, Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) (upholding the Chippewa Indians' usufructuary rights in land ceded to Wisconsin and Minnesota in 1837).

[56] *See infra* notes 61–54.

[57] Bradford, *supra* note 49.

[58] U.S. CONST. art. I, § 8, cl. 3.

[59] *See, e.g.*, 7 U.S.C. § 1926(c) (2003) (supplying grants to Indians for water management in rural areas); 15 U.S.C. § 4726 (2003) (providing assistance to Indians to develop foreign markets for Indian crafts).

[60] Tribal Enhancement Act of 2003, S. 1542, 108th Cong. (2003).

[61] H.R. 1426, 108th Cong. (2003).

[62] H.R. 1166, 108th Cong. (2003).

[63] *See* Paul D. Hancq & Karen S. White, *A Preference for Native-American Contractors*, 2002-SEP Army Law 39, 42 (2002) (stating that hiring a contractor without doing a most efficient and cost-effective organizational analysis "can be desirable, since it could save time and money, and may be less disruptive to the mission").

[64] Am. Fed'n of Gov't Employees, AFL-CIO v. United States, 330 F.3d 513, 521 (D.C. Cir. 2003).