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AUGUSTA, MAINE 04333

March 13, 1979

Charles Rhynard, Commissioner
Department of Indian Affairs
State Office Building
Augusta, Maine 04333

Dear Commissioner Rhynard:

You have asked whether the provision of 22 M.R.S.A. § 4793 which prohibits any member of the Penobscot Tribe convicted of a felony from holding tribal office constitutes a denial of equal protection under the Fourteenth Amendment of the United States Constitution and Article I, § 6-A of the Maine Constitution. We answer in the affirmative.

The threshold question is whether tribal offices are of such status that restrictions or qualifications for holding those offices are subject to constitutional protections. The determinative factor in making this assessment is whether the particular officials exercise "general governmental powers over the entire geographic area served by the body." Hadley v. Junior College District, 397 U.S. 50 (1970) and Avery v. Midland County, 390 U.S. 474 (1968). The tribal offices which are the subject of this eligibility proscription are not of a purely ceremonial character. (See, Opinion of the Attorney General issued May 26, 1977, to Representative Talbot.) The Governor and Joint Tribal Council exercise many of the governmental prerogatives of a municipality, including the appointment of executive and law enforcement officers, 22 M.R.S.A. §§ 4706, 4716, the preparation of ordinances and the setting of fines and penalties, 22 M.R.S.A. § 4717, and the assignment of tribal land, 22 M.R.S.A. § 4780. In addition, the tribal representative constitutes a voice of the Tribe in the Maine Legislature.

Since tribal officers exercise general governmental powers, any statute limiting eligibility to these offices must pass constitutional scrutiny. See Annot., 23 L.Ed.2d 782 (1970); Annot., 11 L.Ed.2d 1057 (1964). In other words, an eligibility statute must not result in a violation of any person's right to equal protection under the laws[1/] by establishing classifications for which there is no rational basis.[2/]

A resolution of the pending problem involves consideration of two separate questions. The first is whether a felony conviction may ever be used as a basis for disqualification from public office. The second is whether such a disqualification, if not unconstitutional in and of itself, becomes unconstitutional by virtue of the fact that it applies only to the Penobscot tribal offices.

Since our opinion ultimately turns on the second issue, the constitutionality of a felony disqualification of general applicability may be treated very briefly. Although the Supreme Court has not recently ruled on this issue, there are a number of cases which suggest, by way of dicta, that it is constitutionally permissible to disqualify felons from public office. See, e.g., Davis v. Benson, 133 U.S. 333, 346-47 (1889); see also Richardson v. Ramirez, 418 U.S. 24 (1974) (state's constitutional and statutory provisions denying the right to vote to convicted felons do not violate the equal protection clause of the Fourteenth Amendment). Accordingly, we may assume for purposes of this opinion that the disqualification of all convicted felons from all public offices of a similar nature would be valid.[3/]

1/ These cases are almost always decided in the context of an alleged denial of equal protection rights under the Fourteenth Amendment. Kirkley v. State of Maryland, 381 F. Supp. 327, 329 (D. Md., 1974).

2/ The State may, of course, set qualifications for those seeking public office, as long as the laws of the State do not deny to its citizens their rights under the Constitution. Maddox v. Ferguson, 172 S.E.2d 595, 597 (Ga., 1970). See, 25 Am.Jur.2d "Elections," § 131. The reviewability of state set classifications under the equal protection clause was never intended to vitiate the traditional prerogatives of the states in governing their internal affairs. Blassman v. Markworth, 359 F. Supp. 1, 3 (N.D. Ill., 1973).

3/ Much of the judicial debate on this subject concerns the proper standard for scrutinizing state-imposed restrictions on qualifications for public office. For a discussion of the cases dealing with this subject, see Gordon, The Constitutional Right to Candidacy, 25 U. Kan. L. Rev. 545 (1977)

Turning to the second question, the problem stems from the fact that the disqualification applies only to Penobscot tribal offices, and thus, only to members of the Penobscot Tribe. By contrast, a member of the Passamaquoddy Tribe does not suffer from the same disability. Similarly, a non-Indian who has been convicted of a felony is not precluded from holding a comparable public office. In short, there can be no doubt that 22 M.R.S.A. § 4793 results in discrimination against Penobscot Indians.

To be constitutional, there would at a minimum have to be a rational basis to justify the discriminatory effect of § 4793.4/ Our inability to perceive a rational basis for this singular treatment of Penobscot Indians leads us to the conclusion that the felony disqualification provision in § 4793 is unconstitutional.

To summarize, while a general prohibition against convicted felons holding public office may be constitutional, the system of classification established by 22 M.R.S.A. § 4793 on its face disqualifies only Penobscot felons. This system, when viewed in its entirety (that is, in conjunction with the absence of any such similar restriction on non-Penobscot felons), has an arbitrary and invidiously discriminatory effect on Penobscots as a race.5/ Furthermore, the statute fails to meet the minimally required "rational basis" test, let alone any of the stricter standards a court would probably apply. Even if the State is seeking through § 4793 to preserve the integrity of the electoral process by preventing convicted felons from becoming candidates, the proscription of only Penobscot felons is clearly underinclusive.

I hope this answer is responsive to your inquiry. Please feel free to call on me if I may be of any further service.

Very truly yours,

RICHARD S. COHEN
Attorney General

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4/ Classifications based on race are inherently suspect and must withstand the strictest kinds of scrutiny in order to satisfy the Constitution. Bolling v. Sharpe, 347 U.S. 497 (1954). Since we can find no rational basis upon which § 4793 could be sustained, there is no need to determine whether a stricter standard should apply in this instance.

5/ Simson, A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause, 29 Stan. L. Rev. 663 (1977).