U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 10, 2008

The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
U. S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

Thank you for the opportunity to comment upon H.R. 1328, the "Indian Health Care Improvement Act Amendments of 2007." The Department of Justice fully supports the purposes of this legislation – improving access to health care for American Indians and Alaska Natives. The Department has worked with the Senate Committee on Indian Affairs on other versions of this legislation and believes most of its prior concerns were addressed by S.1200, which passed the Senate at the end of February 2008. H.R. 1328 contains identical language and omissions that the Department has commented upon in the past, and our concerns remain the same. The Department believes that these concerns can be addressed, as most were in S. 1200, while continuing to advance the overall goal of improving health care for Native Americans.

Section 804

The legislation authorizes funding and encourages the use of traditional health care practices. The Department does not oppose the provision of traditional health care practices as an adjunct to Western medical practices. We note that on March 8, 2007, Ms. Rachel Joseph, Co-Chairperson of the National Steering Committee for the Reauthorization of the Indian Health Care Improvement Act, testified that "[t]raditional health care practices are usually provided as complementary services to Western medical practices at the request of family members." Ms. Joseph also testified that "[i]n most cases, the traditional health care practitioners are not employees of the IHS or tribes so FTCA coverage would not apply in the event that a malpractice claim was ever filed."

The Department in the past has proposed language clarifying that traditional health care practitioners are not covered by the Federal Tort Claims Act ("FTCA"), and we recommend that the same language that was added to S. 1200 be added to H.R. 1328. Specifically, we recommend the following provision as an addition to section 804:

> (b) TRADITIONAL HEALTH CARE PRACTICES.---Although the Secretary may promote traditional health care practices, consistent with the Service standards for the provision of health care, health promotion, and disease prevention under this Act, the United States is not liable for any provision of traditional health care practices pursuant to this Act that results in damage, injury, or death to a patient. Nothing in this subsection shall be construed to alter any liability or other obligation that the United States may otherwise have under the Indian Self-Determination and Education Assistance Act (25 U.S.C. 405 et seq.) or this Act.

This language is intended to confirm existing law that there is no valid cause of action under the FTCA for injuries resulting from traditional tribal healing practices provided pursuant to self-determination contracts because state law generally does not make private parties liable for "malpractice" involving traditional tribal healing practices. *See* 28 U.S.C. § 2674. Thus, this provision would ensure that the United States would not face potential tort liability for the provision of treatment through traditional health care practices for which no state standard of care exists and would prevent costly litigation about whether the United States could be held liable under the FTCA for such practices. Moreover, it would preclude intrusive discovery regarding the nature and purpose of traditional health care practices. Such litigation would almost certainly raise questions as to the advisability of Tribal health practices and potentially create unnecessary conflict between these practices and Western medical standards. Additionally, we believe the proposed language would ameliorate any Tribal sovereignty concerns that would arise in FTCA litigation regarding inquiry into traditional health care practices. At the same time, this language would not scale back in any way the current liability protections that the Tribes enjoy in carrying out self-determination contracts.

Section 213

Section 213's "Terms and Conditions" in H.R. 1328 contains language identical to that addressed by the Department in the past. The language in this subsection creates ambiguity about what the appropriate standards for the provision of services contemplated by section 213 would be and who would be responsible for ensuring that those standards exist and are enforced. Thus, the Department recommends that the "Terms and Conditions" section be deleted, as it was in S. 1200. Deleting the section would remove any ambiguities as to its application in practice and let state law standards of care continue to govern as they do under existing law.

Constitutional Concerns

The Department believes that the legislation continues to raise a constitutional concern to the extent that it provides government benefits to individuals who are not members of, or closely affiliated with, a federally recognized Indian tribe. As the Department has noted in the past, the

Supreme Court has held that classifications based on affiliation with a federally recognized tribe are "political rather than racial," and therefore will be upheld as long as there is a rational basis for them. To the extent, however, that programs benefiting "Urban Indians" or "Indians" under this legislation could be viewed as authorizing the award of grants and other government benefits on the basis of racial or ethnic criteria, rather than tribal affiliation, these programs would be subject to strict scrutiny under the equal protection component of the Due Process Clause. The proposed bill broadly defines "Urban Indian" and "Indians" to include individuals who are not necessarily affiliated with a federally recognized Indian tribe. Under the Supreme Court's decisions, there is a substantial likelihood that legislation providing special benefits to individuals of Indian or Alaska Native descent who do not have a clear and close affiliation with a federally recognized tribe would be regarded by the courts as creating a racial preference subject to strict constitutional scrutiny, rather than a political preference subject to rational basis review. In the event the legislation is regarded as awarding government benefits based on a racial classification, it would be constitutional only if the bill is supported by a factual record demonstrating that its use of race-based criteria to award the benefits at issue is "narrowly tailored" to serve a "compelling" government interest. The second constitutional concern with the bill flows from its inclusion of members of state recognized tribes in the statutory beneficiary class. The power to recognize an Indian tribe "derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973); *see* U.S. Const., art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes[.]"); § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation[.]").

The lack of Supreme Court precedent holding that Congress may constitutionally delegate its tribal recognition authority to the States renders constitutionally questionable the bill's apparent attempt to include members of "state-recognized tribes" in a federal benefit scheme enacted pursuant to the Indian Commerce Clause. Moreover, even if it were clear (which it is not) that Congress may constitutionally delegate its tribal recognition authority to the states as a general matter, the delegation in this bill would on its face allow states to designate as "tribal members" who qualify for special federal benefits individuals who: (i) do not belong to a "distinctly Indian community" or other group that conforms to the Supreme Court's definitions of "the Indian tribes" referenced in the Commerce Clause, but instead are considered a member of a state "tribe" solely on the basis of race; and/or (ii) are outside the class of beneficiaries that Congress intended to reach because, for example, some states recognize as "tribes" loosely affiliated groups of people who wish to operate gaming facilities but have little or no distinctly Indian heritage or affiliation with any federally-recognized tribe.

The Department recommends that, consistent with the settled practice of avoiding unnecessary constitutional issues, Congress revise the bill to extend benefits only to individuals who, in addition to satisfying whatever other criteria Congress may wish to impose, qualify as "members of, or individuals having a clear and close affiliation with, a federally-recognized tribe." Such a revision would avoid the constitutional concerns outlined above in a way that the

Department believes would not detract from the overall goal of improving heath care for Native Americans, and might actually better ensure that benefits under the bill would extend only to the class of beneficiaries contemplated by Congress and the Constitution.

Finally, section 601(a) conflicts with the Appointments Clause of the Constitution. That section establishes within the Department of Health of Human and Services a new "Assistant Secretary of Indian Health," assigns to the Assistant Secretary a number of authorities (including performing functions previously carried out by the Secretary or the Director of the Indian Health Service), and provides that the President shall appoint the Assistant Secretary, "by and with the advice of Senate." We do not question these provisions of the section. The section further provides, however, that "the individual serving in the position of the Director of the [Indian Health] Service on the day before the date of the enactment of the Indian Health Care Improvement Act Amendments of 2007 shall serve as Assistant Secretary." The mandate that the incumbent Director of the Indian Health Service serve as the first Assistant Secretary conflicts with the Appointments Clause, which provides that Congress may vest the appointment of "inferior Officers of the United States" "in the President alone, in the Courts of Law, or in the Heads of Departments," U.S. Const. art. II, § 2, cl. 2, but does not allow Congress to mandate that a specific individual serve in a new office. *See The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 157 (1996) ("[A] statute creating a new office and conferring it and its duties on the incumbent of an existing office would be unconstitutional under the Appointments Clause."); *Shoemaker v. United States*, 147 U.S. 282, 301 (1893) ("[W]hile Congress may create an office, it cannot appoint the officer."); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 483 (1989) (Kennedy, J., concurring) (The Appointments Clause gives "[n]o role whatsoever . . . either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment."); *Olympic Fed. S & L Ass'n v. Director, Office of Thrift Supervision*, 732 F. Supp. 1183, 1192-93 (D.D.C. 1990). The new Assistant Secretary position established by section 601(a) would exercise authorities beyond those exercised by the Director of the Indian Health Service, and thus constitutes a new and different office that must be filled in accordance with the requirements of the Appointments Clause. If the bill is not revised to eliminate the statutory appointment to this new office of a specific individual, the provision concerning the Director of the Indian Health Service will be unconstitutional and therefore unenforceable.

Thank you for the opportunity to comment upon this very important legislation. We are committed to working with the Committee to address these concerns as this legislation moves forward. The Office of Management and Budget has advised us that there is no objection to this letter from the perspective of the Administration's program.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

cc: The Honorable Joe Barton
Ranking Minority Member