



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 30, 2020

The Honorable Russell Vought
Director
Office of Management and Budget
Washington, DC 20503

Dear Mr. Director:

This letter responds to your request for the views and recommendations of the Department of Justice (the Department) on Enrolled Bill S. 209, the “Practical Reforms and Other Goals to Reinforce the Effectiveness of Self-Governance and Self-Determination (PROGESS) for Indian Tribes Act of 2019.” The Department takes no position on whether the President should sign this bill. If he does, we recommend the following signing statement language:

[I am pleased today to sign S. 209, the PROGRESS for Indian Tribes Act of 2019, which makes several amendments to enhance tribal self-governance under the Indian Self-Determination and Education Assistance Act (ISDEAA).] I note, however, that the bill presents certain constitutional concerns that my Administration will address in implementation.

First, section 408(g)(3)(B)(ii) of ISDEAA, as amended by the bill, purports to prohibit the Secretary of the Interior from reducing the amount of funding under title IV of the ISDEAA except as required by “a congressional directive in legislation or an accompanying report.” Unless incorporated into the legislation itself, an accompanying report will not have undergone bicameralism and presentment under Article I, section 7. Deeming a directive in such a report to be mandatory would unconstitutionally delegate lawmaking authority to the committee or conference that produced it, in contravention of the separation of powers. My Administration will give every consideration to the recommendations in these reports accompanying legislation but will not consider them legally binding.

Second, section 105(p) of the ISDEAA, as amended by the bill, purports to apply a rule of interpretation in the administration of the ISDEAA to “Executive orders.” One of the means by which I carry out my constitutional responsibility

under Article II, section 3, to “take Care that the Laws be faithfully executed,” is through the issuance of executive orders to supervise the executive branch. It is thus my responsibility to ensure that any executive order I may issue regarding the administration of the ISDEAA will heed the rule of interpretation in amended section 105(p), but that provision cannot itself amend or change the meaning of executive orders, any more than an executive order can amend or change the meaning of a statute.

Our explanation for this recommended signing statement follows:

1. Section 101(e) of the bill would amend the Indian Self Determination and Education Assistance Act (“ISDEAA”) to prevent the Secretary of the Interior from reducing funding under title IV of the ISDEAA in subsequent years except, among other reasons, “as necessary as a result of . . . a congressional directive in legislation *or an accompanying report*.” S. 209, sec. 101(e), § 408(g)(3)(B)(ii) (emphasis added). The Executive Branch is not subject to direction by Congress outside of the bicameralism and presentment process prescribed by Article I, Section 7. *INS v. Chadha*, 462 U.S. 919, 951 (1983) (“It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers’ decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”). The instruction here to limit funding unless as a result of “a congressional directive in legislation or an accompanying report,” such as a committee or conference report, would attempt to give legal effect to congressional action that has not undergone bicameralism and presentment, in violation of the anti-aggrandizement principle of the separation of powers. *See Bowsher v. Synar*, 478 U.S. 714, 733–34 (1986) (“[O]nce Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation.”); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827 (D.C. Cir. 1993) (“Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role”).

2. Section 203(2) would add a subsection (p) to section 105 of the ISDEAA, providing that, “[e]xcept as otherwise provided by law, the Secretary [of the Interior] shall interpret all Federal laws (including regulations) *and Executive orders* in a manner that facilitates, to the maximum extent practicable” certain goals regarding self-determination by Indian tribes (emphasis added). Executive orders are one of the President’s means of supervising the Executive Branch in order to “take Care that the Laws,” including ISDEAA, “be faithfully executed.” U.S. Const. art. II, § 3. Congress may prescribe a rule of interpretation that governs the manner in which the President and his subordinates in the Executive Branch administer a law such as the ISDEAA, but it is for the President to ensure that any executive orders he might issue are in compliance with the law, including the interpretive principle set out in proposed section 105(p). In its application to executive orders themselves, proposed section 105(p) would unconstitutionally interfere with the President’s supervision of the Executive.

The Honorable Russell Vought
Page 3

Thank you for the opportunity to present our views. Please do not hesitate to contact this office if we may be of additional assistance to you.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary Blanche Hankey". The signature is written in a cursive, flowing style.

Mary Blanche Hankey
Deputy Assistant Attorney General