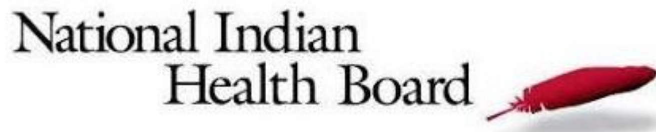

Testimony of

Victoria Kitcheyan, Chairperson, National Indian Health Board

Full Committee Hearing On:

The Trump Administration's Attack on the ACA: Reversal in Court Case Threatens Health Care for Millions of Americans

before the

House Committee on Oversight and Reform

Introduction

Chairman Cummings, Ranking Member Jordan, and Members of the Committee, I thank you for the opportunity to submit testimony in response to the full committee hearing dated July 10, 2019 titled 'The Trump Administration's Attack on the ACA: Reversal in Court Case Threatens Health Care for Millions of Americans." On behalf of the National Indian Health Board (NIHB), and the 573 Tribal Nations we serve, I submit this testimony for the record.

NIHB is a 501(c)3, not for profit, national Tribal organization founded by the Tribes in 1972 to serve as the unified, national voice for American Indian and Alaska Native (AI/AN) health in the policy-making arena. Our Board of Directors is comprised of distinguished and highly respected Tribal leaders in AI/AN health. They are elected by the Tribes in each of the twelve Indian Health Service (IHS) regions to be the voice of all 573 Tribes at the national level.

Since 1972, NIHB has advised the U.S. Congress, IHS, and other federal agencies under the U.S. Department of Health and Human Services (HHS) about health disparities and service issues experienced in Indian Country. These disparities are exacerbated by pervasive inaccessibility of health services, chronic underfunding of the Indian health system, and high provider shortages within IHS, Tribal, and urban Indian (collectively known as I/T/U) clinics and hospitals. As a result, AI/AN communities face higher disease morbidity and mortality rates, and lower life expectancy and quality of life.

Trust Responsibility

The federal promise to provide Indian health services was made long ago. Since the earliest days of the Republic, all branches of the federal government have acknowledged the nation's obligations to the Tribes and the unique trust relationship between the United States and Tribal Nations. The IHS is the primary agency by which the federal government meets the trust responsibility for direct health services. IHS provides services in a variety of ways: directly, through agency-operated programs, and through Tribally-contracted and operated health programs; and indirectly through services purchased from private providers. IHS also provides limited funding for urban Indian health programs that serve

AI/ANs living outside of reservations. Tribes may choose to receive services directly from IHS, run their own programs through contracting or compacting agreements, or they may combine these options based on their needs and preferences.

Today the Indian healthcare system includes 46 Indian hospitals (1/3 of which are Tribally operated) and nearly 630 Indian health centers, clinics, and health stations (80 percent of which are Tribally operated). When specialized services are not available at these sites, health services are purchased from public and private providers through the IHS-funded purchased/referred care (PRC) program. Additionally, 41 urban programs offer services ranging from community health to comprehensive primary care. Together, the IHS, the Tribal health programs, and the urban Indian health programs form the I/T/U health system. To ensure accountability and provide greater access for Tribal input, IHS is divided into 12 geographic Service Areas, each serving the Tribes within the Area.

Trust Responsibility and the Indian Healthcare Improvement Act

Using the power granted by the Constitution, the federal government entered into treaties with Tribes. These treaties resulted from the desire of the federal government to acquire Indian land and continue westward expansion. As part of these treaties, the federal government typically offered payment to be held in trust for Tribes, appointing itself trustee. Treaties stated that funds were to be spent for the welfare of Indians. In addition to the annuities promised, the federal government often promised the services of various tradesmen and professionals, including physicians, to aid Indian communities. Some treaties stipulated that buildings were to be constructed for physician residences or hospitals.

Taken together, these regularly recited treaty terms reveal a fairly uniform set of promises: Tribes cede their land in exchange for benefits from the federal government. The treaties, as a compilation, created the trustee-beneficiary relationship between the federal government and Tribes. Tribes accepted treaty terms under pressure and reluctantly, often seeing no other means for continued survival. Once accepted, however, Tribes rightly and reasonably relied upon the promises of the federal government to provide benefits and annuities.[1]

On many occasions, the federal government has renewed its promise to provide health care for AI/ANs. These occasions include the Snyder Act of 1921 (25 U.S.C. 13) and the Indian Health Care Improvement Act of 1976 (IHCIA) (25 U.S.C. 1601, et seq.). These Acts provide explicit legislative authority for Congress to appropriate funds specifically for Indian health care. In addition to this explicit authorization, a number of other laws and court cases reaffirm the trust role of the federal government to AI/ANs and the duty flowing from this special relationship.[iii] Moreover, IHCIA is the legislative embodiment of federal trust and treaty obligations for healthcare for all AI/ANs. The law was permanently reauthorized in 2010 as part of the Patient Protection and Affordable Care Act (ACA) (P.L. 111-148) under Section 10221. Its passage was the result of years of bipartisan negotiations, meetings, and strategy sessions between Tribes and Congress. It is an indispensable law that reinforces the government to government relationship while also expanding and improving the quality of care afforded to AI/ANs.

Although IHCIA and ACA were passed in tandem, the IHCIA is independent legislation that both predates and is unrelated to the overall ACA. Tribes and NIHB have discussed at length how IHCIA authorizations and provisions represent an entirely distinct legislative effort, and that the 2010 healthcare reform bill served as an effective vehicle for enactment of IHCIA.

Tribal Actions Regarding *Texas v. United States*

NIHB, along with Tribal Nations and other national Tribal organizations are highly concerned about the potential impact that the outcome of *Texas v. United States* may have on the Indian health system. A full repeal of the ACA could include the Indian Health Care Improvement Act (IHCIA) and other significant Indian-specific provisions in the ACA, such as the requirement that the I/T/U system be the payer of last resort, Medicare Part B Reimbursement, and health benefits provided to Tribal members are not included as taxable income. As a result, NIHB, along with 483 Tribes and Tribal organizations, filed an amicus brief before the Fifth Circuit. The purpose of the amicus brief was to convey to all involved parties that IHCIA and the Indian-specific provisions of the ACA serve an entirely separate and distinct purpose from the rest of the legislation, and exist to partially fulfill the federal government's constitutional obligations to provide health services to Tribal Nations and AI/AN peoples. Moreover, the brief highlights how IHCIA and the Indian-specific provisions of the ACA are completely independent from, and not reliant on, the individual mandate, and should thus not be struck down. As such, the amicus brief focuses exclusively on how IHCIA and the Indian-specific provisions should be preserved regardless of the ultimate decision of the Fifth Circuit in regards to the broader ACA bill itself.

Repeal of IHCIA would have disastrous consequences for the Indian health system. This would include loss of third party revenue – in which Medicaid revenue alone constituted 13% of total IHS program funding in FY2017[1] – loss of grant-making authorities to Tribes, Tribal organizations, and urban Indian organizations, and loss of life-saving programs to address critical health concerns ranging from diabetes to substance abuse. Preservation of the Indian health system has long been a bipartisan, bicameral objective that is integral to upholding the federal government's constitutional obligations to Tribal Nations and AI/AN peoples. NIHB strongly encourages Congress to acknowledge and understand the inherent separateness of IHCIA and certain Indian Specific provisions within the ACA as it considers any long-term changes to the national health system.

Conclusion

Without question, IHCIA is one of the most substantial pieces of federal Indian law ever enacted. Its significance to the fulfillment of the federal trust responsibility cannot be overstated. While NIHB applauds the Committee's continued dedication to preserving and improving the Indian health system, we request that the Committee acknowledge the innate separateness of IHCIA from the ACA. Tribal communities already face unprecedented challenges in elevating the health status of AI/AN peoples, and any threats to this monumental legislation would be catastrophic. Again, NIHB would like to thank the Committee for holding this hearing and soliciting input from a variety of stakeholders on the essential role that the ACA plays in the current national health system. While Indian Country faces many trials and tribulations in the health arena, repeal of IHCIA should not be one of them. For any follow up questions, please contact Stacy A. Bohlen, CEO of NIHB, at sbohlen@nihb.org or 202-507-4070.

Sincerely,

[1] Artiga, S., Ubri, P., Foutz, J. 2017. Medicaid and American Indians and Alaska Natives. Henry J Kaiser Family Foundation. Retrieved from https://www.kff.org/medicaid/issue-brief/medicaid-and-american-indians-and-alaska-natives/

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[1] *See* Brett Lee Shelton, Legal and Historical Roots of Health Care for American Indians and Alaska Natives in the United States, Kaiser Family Foundation (2004), http://www.kff.org/minorityhealth/upload/Legal-and-Historical-Roots-of-Health- Care-for-American-Indians-and-Alaska-Natives-in-the-United-States.pdf.