THE DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENATE

COMMITTEES ON INDIAN AFFAIRS

MR. C. FREDERICK BECKNER III

DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

DEPARTMENT OF JUSTICE

ON

PROPOSED

"INDIAN HEALTH CARE IMPROVEMENT ACT AMENDMENTS"

MARCH 8, 2007

Mr. Chairman, Members of the Committee, my name is C. Frederick Beckner III. I am a Deputy Assistant Attorney General for the Civil Division of the Department of Justice. Thank you very much for the opportunity to share the views of the Department of Justice on the reauthorization of the Indian Health Care Improvement Act. As of today, the Department of Justice has not had the opportunity to fully review the most current version of the proposed legislation, and we are not, therefore, in a position to provide specific comments on this legislation.

That said, the Department of Justice strongly supports the laudable objectives of improving health care for American Indians and Alaska Natives, and the Department looks forward to working with the Committee to achieve these goals. The Department

Deleted: Native Americans

federally recognized tribe would be regarded by the courts as a racial classification subject to strict constitutional scrutiny, rather than as a political classification subject to rational basis review. This distinction is important, because if the legislation awards government benefits on grounds that trigger strict scrutiny, courts may uphold the legislation as constitutional only upon a showing that its use of race-based criteria to award the subject benefits is "narrowly tailored" to serve a "compelling" governmental interest.

In closing, the Department believes that any proposed legislation regarding Indian health care is important and significant, and we are grateful for the opportunity to share our views with the Committee. As we have in the past, we look forward to working with the Committee on this important piece of legislation.

federally recognized tribe are "political rather than racial," and therefore will be upheld as long as there is a rational basis for them. *Morton v. Mancari*, 417 U.S. 535, 555 (1974). Congress may have limited authority in Indian affairs to provide benefits that extend beyond members of federally recognized tribes to individuals such as spouses and dependent children of tribal members (particularly in circumstances where such children are not yet eligible for tribal membership), who are recognized by the tribal entity as having a clear and close relationship with the tribal entity. To regulate beyond such confines, however, presents a risk that the statute may be subject to strict scrutiny. [HHS: This language was part of the"white paper" on the IHCIA reauthorization agreed to by DOJ and HHS last September. We believe inclusion of this language is necessary to provide a more balanced view of the constitutional issue here.] To the extent that programs benefiting "Urban Indians" under current law or in the prior version of the bill 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 requirement of equal protection of the laws, as set out in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995) and other cases. For example, the statute and the previous reauthorization bill broadly define "Urban Indian" to include individuals who are not necessarily affiliated with a federally recognized Indian tribe, such as descendants in the first or second degree of a tribal member, members of state recognized tribes, and any individual who is "an Eskimo, Aleut, or other Alaskan Native." Under the Supreme Court's decisions, there is a substantial likelihood that legislation providing special benefits to individuals of Indian or Alaska Native descent based on something other than membership or equivalent affiliation with a

Formatted: Font: Bold

Formatted: Font: Bold

Deleted: , however,

worked with Committee staff on language that would have clarified that the home-based or community-based services that can be provided under self-determination contracts are those for which the Secretary of the Department of Health and Human Services had developed meaningful standards of care.

The Department expressed concerns in previous versions of the bill regarding the possibility of unlicensed individuals providing mental health treatment to American Indians and Alaska Natives. **IHHS: Extension of the discussion from mental health providers to all health care providers is overly broad and, in light of the pending HHS-requested DOJ amicus in Alaska Dental Society, et al. v. the State of Alaska, et al., potentially in conflict w/ the Administration position on the IHS Dental Health Aide Therapist program. We argue that this program (authorized under the Community Health Aide Program in IHCIA) preempts state licensure law.)** In the previous version of the bill, the Department worked with the Committee to add language that would have ensured the licensing requirement for providing mental health services, and we believe the change was in the interest of both the United States and the Indian community.

Finally, the Department noted its concern that the previously proposed legislation may raise a significant constitutional issue. We had previously attempted to work with the Committee to address this concern, but unfortunately, resolution was not attained. Most of the programs authorized by current law or that would have been authorized by the previously proposed legislation tied the provision of benefits to membership in a federally recognized Indian tribe, and courts would therefore likely uphold them as constitutional. The Supreme Court has held that classifications based on membership in a

Deleted: Native Americans

Deleted: The Department strongly supports the goal of better health care for Native Americans and believes that any health care provider to Native Americans should be licensed to provide such care in order to ensure quality care. Unlicensed health care providers ill serve the Native American community and expose the taxpayers to unwarranted liability.

Formatted: Font: Bold

Department was concerned that it would not be able to defend such suits because the courts might conclude that tribal health practitioners were providing "medical" services that, by definition, do not comply with the standards of the relevant state's medical community. Consequently, we met with the American Indian community and worked extensively with the Committee late last year to add language that would have clarified that the United States, and ultimately the taxpayers, would not be liable for malpractice claims under the FTCA arising out of the provision of traditional health care practices. This language would not have impacted any other tort suits that could be brought against the United States for any other service provided under self-determination contracts.

Deleted: Native

The Department also expressed its concern regarding a provision that would have extended FTCA coverage to persons who are providing home-based or community-based services. Again, the Department stresses that it has no objection to the Act's goal of increasing the availability of these services. However, these services are sometimes [HHS: We have no records to substantiate use of "often" and believe the term to be a mischaracterization of the IHS and tribal practice.] provided by relatives and, in many instances, there are no established standards for such layperson care or for the environment in which they are provided. Thus, the United States should not have to defend against, nor should the taxpayers be required to pay for, negligent or wrongful conduct by such individuals performing home-based or community-based services [HHS: Any such services contracted under ISDEAA are subject to approval by the IHS (and its medical staff). It is not accurate to describe such services as "amorphous". Additionally, we note that the term may be considered by tribal leaders to be insulting.] that are not subject to any standards of care. To address these concerns, the Department

Deleted: often

Deleted: amorphous

worked extensively with this Committee and met with representatives of the American Indian community on a prior version of this legislation. We expect that this cooperative relationship will continue as the Department reviews the current legislation.

In commenting on the prior legislation, the Department identified targeted concerns that could be – and for the most part were – addressed with relatively modest changes to the legislation that did not detract from the overall goal of improving health care for American Indians and Alaska Natives. Indeed, in the Department's view, the changes benefited both the American Indian community specifically and taxpayers generally.

For example, in an earlier version of proposed legislation, the Department of Health and Human Services and Indian tribes could enter into self-determination contracts that cover tribal "traditional health care practices." Such practices are unique to American Indian tribes and cannot be measured by established standards of medical care recognized by the state. However, to the extent that these traditional health care practices were being provided by an Indian Tribe under a self-determination contract, a party injured by such a practice could potentially sue the United States under the Federal Tort Claims Act (known as the "FTCA") and expose taxpayers to any resulting liability. It is a basic tenet of the FTCA that the United States is liable in tort only "under circumstances where the United States, if a private person, would be liable to claimant in accordance with the law of the place where the act or omission occurred." Case law has defined "the law of the place" to mean state law, not federal law, not tribal law.

The Department was thus concerned that the bill would require the Department to litigate tort claims with no meaningful way to defend the cases. In particular, the

Deleted: Native

Deleted: Native Americans

Deleted: Native

Deleted: unwarranted