

## Department of Justice White Paper

The Department of Justice has reviewed S.1057, the "Indian Health Care Improvements Amendments Act of 2005, version titled, "Revised Hotline". While we understand this legislation to be well intentioned, we strongly oppose those portions of the bill which would increase the potential liability of the United States. The Department also notes that providing direct federal funding for traditional health care practices that have a religious component, may raise concerns under the Establishment Clause of the First Amendment.

This bill repeatedly authorizes spending under, and invokes the authority of the Indian Self-Determination and Education Assistance Act (ISDA). Under that statute, an Indian tribe, tribal organization, or Indian contractor is "deemed" to be a Federal agency while carrying out an ISDA contract, and an employee of one of those entities is "deemed" to be a Federal employee while carrying out an ISDA contract and acting within the scope of his or her employment. Accordingly, under the ISDA, the United States (rather than the Indian tribe, tribal organization, or Indian contractor) is liable for any tort caused by the negligent or wrongful act of any employee of those entities.

As a general matter, the Department of Justice opposes legislation which would make the American taxpayers liable for the torts of persons who are not Federal employees. Liability protection for non-Federal entities and individuals can be provided through the purchase of insurance and appropriate legislation. Difficult questions of sovereignty arise when Federal attorneys are forced to defend in court the decisions, policies, and acts of tribes and tribal organizations.

Section 213 dramatically expands the categories of treatment which can be provided, the population to whom the treatment can be provided, and the potential liability of the United States. Section 213(a) authorizes funding for a broad range of partially defined "health care related services and programs." These include providing hospice care, home-based services, and assisted living. If such care were provided through a tribal contract, the United States would be liable under the Federal Torts Claim Act (FTCA) for injuries arising from such "health care related services and programs." Through section 213(d)(1), such "health care related services" would include "home health aide services," "Nursing care services provided outside of a nursing facility," "Adult day care," and "Such other home- and community - based services as the Secretary, an Indian Tribe, or a Tribal Organization may approve." This provision would expand the government's potential tort liability for matters which would typically take place in a domestic setting, rather than in a health care facility, making it difficult to distinguish private domestic conduct and compounding the difficulty of defending litigation. Excluding federal government liability for services "provided by a person legally responsible for providing the service," as set forth in Sec. 213(c)(1)(B), provides very little protection for the government since it would be a very rare case indeed where any party (other than perhaps a parent) is "legally responsible for providing" such a service.

Section 807 of the bill greatly expands the potential tort liability of the United States by authorizing health services for persons who would otherwise be ineligible and by treating "non-Service health care practitioners" as employees of the Federal Government for purposes of the

Federal Tort Claims Act under certain circumstances. We are also concerned that the bill does not specify who is authorized to "designate [ ]" the practitioner as a Federal employee.

Numerous sections in the bill require the United States to support "Traditional Health Care Practices."<sup>1</sup> Although the definition of the term 'traditional health care practices' in this bill has been amended so that it no longer refers expressly to religion, it may still be viewed as having a religious component and may raise First Amendment Establishment Clause issues. In addition, it would be problematic for the United States to defend malpractice suits arising from care given as "Traditional Health Care Practices." Any suit alleging that "Traditional Health Care Practices" were improperly followed (malpractice by a religious healthcare provider) would put the United States in the untenable position of litigating the standard of care of such religious practices. Indeed, there is a question whether such claims could be defended when applying state law as to standard of care. Unless state law holds that traditional health care practices are within the standard of care, even if they are not as effective as current medical practices, the United States will have no viable defense.

A number of provisions in the bill provide benefits to "Urban Indians." This term is broadly defined in section 4(27) of the bill to include individuals who are not necessarily affiliated with a federally recognized Indian tribe, including members of state-recognized tribes, descendants in the first or second degree of a tribal member, and any individual who is "an Eskimo, Aleut, or other Alaskan Native." In addition, the definition of "Indian" in section 4(12) of the bill includes these categories for purposes of sections 102 and 103 of the bill, which authorize certain scholarships.

In *Rice v. Cayetano*, the Supreme Court recognized that "Congress may fulfill its treaty obligations and its responsibilities to the Indian tribes by enacting legislation dedicated to their circumstances and needs." *Rice v. Cayetano*, 528 U.S. 495, 518-19 (2000). To the extent that the programs authorized by the bill and the current statute provide benefits to members of federally recognized Indian tribes, courts would likely uphold them as constitutional. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court upheld a Bureau of Indian Affairs hiring preference for certain members of federally recognized tribes as a "political rather than racial" classification. The Court specifically noted that the hiring preference at issue was "not directed toward a 'racial' group consisting of 'Indians'; instead, it applie[d] only to members of 'federally recognized' tribes. This operate[d] to exclude many individuals who are racially to be classified as 'Indians.'" *Id.* at 553 n.24; see also *id.* at 554 (emphasizing that "[t]he preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities"); *Rice*, 528 U.S. at 519-20 (2000) (same). The Court held that this sort of "political rather than racial" preference would be upheld "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555.

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<sup>1</sup> These include: Sections 109(b)(6), 704(d), 708(d)(2), 711(b)(5), and 712(a)(2)(A)(v).

To the extent, however, that the programs enacted by S. 1057 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, the deferential *Mancari* standard would not apply and the programs would be subject to strict scrutiny under the requirement of equal protection of the laws, as set out in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995), and other cases. Although Congress has broad powers over Indian affairs pursuant to the Indian Commerce Clause of the Constitution, the Supreme Court in *United States v. Sandoval*, 231 U.S. 28, 46 (1913), stated that this power extends only to "distinctly Indian communities." Using this power, Congress and/or the Department of Interior have recognized some 562 tribal entities that are considered eligible for the services the United States provides to Indians. See 25 U.S.C. § 479a. Under the Supreme Court's decisions in *Mancari*, *Adarand*, and *Rice*, legislation providing special benefits to Indian individuals who do not have a clear and close affiliation with a federally recognized tribe likely would be regarded as a racial classification subject to strict constitutional scrutiny, rather than as a political classification. It, therefore, would be necessary to show that any such use of race-based criteria to award the governmental benefits provided for in the statute is "narrowly tailored" to serve a "compelling" governmental interest.

The definition in the bill of "Urban Indian" and "Indian" (as defined in section 4(12) for limited purposes) sweeps more broadly than members of federally recognized tribes, providing for benefits to non-member adult descendants of tribal members (or to Alaska Natives who are not members of a recognized Alaska Native village). These broad definitions present significant risk that a court would find the legislation subject to strict scrutiny and, in the absence of factual findings demonstrating that the definitions are narrowly tailored to support such a compelling governmental interest with respect to the program authorized, would find this statute unconstitutional. 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.

The Indian Health Care Improvement Act (IHCA) authorizes the Secretary to award contracts or grants, through the Indian Health Service (IHS), to urban Indian organizations to assist such organizations in establishing and administering programs to provide health services to Indians located in urban areas. Under current law, neither such organizations nor their employees are covered by the FTCA, and the Federal taxpayers thus are not liable for torts committed by such organizations or their employees. Section 515 would extend to urban Indian organizations and their employees the immunity from suit that the FTCA offers Federal employees, and makes the Federal taxpayers liable for torts committed by such organizations and their employees. In this regard, section 515 tracks the statutory extensions of the FTCA set forth in the Indian Self-Determination and Educational Assistance Act (ISDA), 25 U.S.C. § 450f(d), and note following (Pub. L. No. 101-152, Title III, 314, 104 Stat. 1959 (Nov. 5, 1990)).

Our experience with the ISDA and the litigation it has spawned demonstrates that it was unwise to extend the reach of the FTCA to non-federal entities. President George H.W. Bush

publicly stated his "serious reservations" about the 1990 ISDA provisions extending FTCA coverage to tribal organizations and their employees, and his description of those provisions and warning about their harmful effects apply equally to section 515. President Bush described the ISDA provisions as "fiscally irresponsible," and he warned that they also will undermine our efforts to foster the independence and autonomy of Indian tribes and tribal organization. The effect of this provision would be to make the United States permanently liable for the torts of Indian tribes, tribal organizations, and contractors. This provision is fundamentally flawed because the United States does not control and supervise the day-to-day operations of the tribes, tribal organizations, and contractors. Moreover, such control and supervision would be inappropriate and inconsistent with the relationship of the United States with the Tribes. Without that supervision and control over daily activities, the United States has no opportunity to limit the risks of grave injury to persons, as well as the public fisc. The extension of governmental responsibility for private conduct under these circumstances is untenable.

Signing Statement accompanying P.L. 101-512, November 5, 1990.

President Bush was correct when he stated these views in 1990, and our experience during the intervening fifteen years has provided firsthand knowledge that further confirms that extending FTCA coverage to tribal organizations, tribal contractors, and their employees was misguided. See also *Report of the Government Accounting Office to the Committee on Indian Affairs (July 2000)* (documenting some of the problems with application of the FTCA to tribes and tribal contractors). We have observed that the tribes and tribal organizations have no financial incentive to limit risk or to raise standards of care (which are, of course, among the purposes of tort law). Moreover, our experience has demonstrated that the tribes and tribal organizations lack any incentive to cooperate with the United States in defending litigation brought against the United States, since the Federal taxpayers rather than the tribes or tribal organizations will pay for any liability. The same will be true of urban Indian organizations -- which are statutorily defined as nonprofit corporate bodies situated in urban centers and governed by an urban Indian controlled board of directors -- and their employees. The United States has no say in the operation or management or training of such organizations and their employees, and we do not believe that it is sensible for the Federal taxpayers to be liable for the conduct of such organizations and their employees. It has also been our experience that tribes oppose any efforts by the United States to seek coverage under insurance policies purchased by the tribes that would otherwise cover the claims, even when that insurance is purchased with ISDA funds. The law in many jurisdictions would support a claim by the United States for subrogation, indemnification, or coverage under such policies.

We are not aware of any strong public policy reason for the taxpaying public to shoulder the costs associated with the performance of contracts or grants to urban Indian organizations. To the contrary, we believe that these costs may be managed appropriately through the use of insurance on the part of the grantees. It is unrealistic to assume that the public Treasury can better absorb the costs of such liabilities without the concomitant ability to control and supervise performance. In sum, we believe that further extending FTCA coverage to urban Indian organizations and their employees by deeming them to be Federal actors is unnecessary and ill-advised.

Indeed, it would be more efficient for the United States, and more conducive to safe practices, if Congress provided funds to purchase insurance for Indian tribes, tribal organizations, and Indian contractors and rescinded the provisions of the Indian Self-Determination and Education Assistance Act which create the fiction that those entities are Federal employees for liability purposes. Such a step would provide a strong incentive for those entities to use due care in their operations. It would also allow them to have their own attorneys defend them when their actions are challenged.

Section 515 would also make FTCA coverage of urban Indian organizations retroactive to the end of Fiscal Year 2004. No justification is apparent for such retroactivity. There is no reason for the United States to assume liability for acts that should be covered by insurance already purchased to cover the period prior to the date of any enactment.

Section 512 applies to two urban Indian organizations in Oklahoma which have been denoted "demonstration projects." For more than a decade, these two Urban Indian organizations have been treated as IHS service units "in the allocation of resources and coordination of care," and have expressly not been subject to the provisions of the Indian Self-Determination and Education Assistance Act. See 25 U.S.C. § 1660b(a). Thus, the Department of Justice has taken the position in litigation that, under current law, these demonstration projects and their employees are not entitled to immunity from suit in tort under the provisions of the Federal Tort Claims Act. See *Woodruff v. United States*, 189 F.Supp.2d 1283 (E.D.Okla., 2002), *aff'd* 389 F.3d 1117 (10th Cir. 2004). The proposed legislation continues to provide that the demonstration projects will not be subject to the provisions of the Indian Self-Determination Act. However, it is unclear precisely what effect is intended by the language that the organizations shall "continue to meet the requirements and definitions of an urban Indian organization in this Act." One possible reading of this language is that the organizations are not only required to conform to the requirements of urban Indian organizations, but that FTCA coverage would be extended to them by section 515 of the Act, as is the case with other urban Indian organizations. Extending FTCA coverage to these demonstration projects continues to appear unnecessary and ill-advised in the view this office. This provision, along with section 515, should be removed.

Section 705, "LICENSING REQUIREMENT FOR MENTAL HEALTH CARE WORKERS," could be read to deem people who lack particular professional qualifications to have those qualifications. It should be changed to state, "... any person employed as a psychologist, social worker, or marriage and family therapist for the purpose of providing mental health care services to Indians in a clinical setting under this Act or through a Funding Agreement shall be a licensed clinical psychologist, social worker, or marriage and family therapist." People who do not have the qualifications to work as "a psychologist, social worker, or marriage and family therapist" should not purport to work in those positions. Obviously, patients are at risk if treated by people not qualified to provide such medical care, and the potential liability of the United States would increase when such unqualified care is provided.

Sec. 708 which would create an Indian Youth Telemental Health Demonstration Project to, *inter alia*, prevent suicides. The risk of litigation in this area is particularly high because people who have suicidal ideation are those most likely to commit suicide. The potential tort liability from undertaking such a program could be significant, particularly if a patient who seeks

help is later involved in a murder/suicide. Insurance, rather than the unlimited liability of the United States, would be a better way to deal with these risks.

Section 801 would require the Secretary, at the time of submitting the annual budget, to submit to Congress "a report on the progress made in meeting the objectives of this Act, including assessments and recommendations of additional programs or additional assistance necessary to, at a minimum, provide health services to Indians, and ensure a health status for Indians, which are at a parity with the health services available to and the health status of, the general population, including specific comparisons of appropriations provided and those required for such parity." This requirement raises a significant constitutional concern under the Recommendations Clause, U.S. Const. art. II, § 3, which provides that the President "shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient." We have frequently stated that the President's authority to formulate and present his own legislative recommendations includes the power to decline to offer any recommendation, directly or through a subordinate, if the President believes that no legislation is necessary or expedient. We therefore recommend that this provision be amended by substituting the phrase "any recommendations that he deems appropriate with respect to" for the phrase "assessments and recommendations of."

Section 802(e) is entitled "Inconsistent Regulations" and provides: "The provisions of this Act shall supersede any conflicting provisions of law) [*sic*] in effect on the day before the date of enactment of the Indian Health Care Improvement Act Amendments of 2005, and the Secretary is authorized to repeal any regulation that is inconsistent with the provisions of this Act." Similar to language contained in previous bills, the intention of this provision remains unclear and continues to strike us as being extremely broad in its potential temporal reach. We suggest either eliminating the provision or adding language to clarify what, if any, retroactive effect is intended for the remainder of the provisions in the bill.