

Response to Senatorial Question
Regarding Equal Protection and Urban Indian Health

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The Due Process Clause of the Fifth Amendment precludes the United States government from discriminating between people unless the government can provide a "rational basis" for doing so.

Congress has always viewed its constitutional authority with respect to Indians and its resulting relationship with Indians as political rather than racially based. The U. S. Constitution recognized the unique sovereign standing of Indian tribes and required that treaties be secured to allow for U. S. dominion over North American lands. This recognition of the aboriginal rights of Indians became the foundation for a special relationship that continues to exist between Indian tribes (and their members) and the federal government. Both the Congress and the federal courts have consistently upheld the political nature of the relationship between the federal government and Indian people.

As Indians were denied the natural progression of their cultures and societies, Congress accepted responsibility for the welfare of Indians. Federal courts view Indians in a political manner, taking into account the unique history of the federal government and the tribes. The constitutional standard for judicial review is whether the legislation under attack is, "tied rationally to the fulfillment of Congress' unique obligation towards the Indians". *Morton v. Mancari*, 417 U.S. 535 (1974) In *Mancari*, the Supreme Court concluded that separate congressional treatment of Indians does not amount to a prohibited racial classification. The Court reasoned that differential treatment of tribes and their members under acts of Congress is justified by the "special relationship" the government has with Indian tribes, which the Court found to be derived from the separate governmental status of Indian tribes under the Constitution.

In the case of *Adarand v. Peña*, 515 U.S. 200 (1995), the U.S. Supreme Court used the standard of "compelling government interest" in their equal protection analysis because the issues involved in that case were based on a race-based distinctions and preferences that Congress and the Executive Branch had written into federal law. However, neither the Congress nor the federal courts have deemed the laws governing the provision of medical services to Indians to be race-based. From the *Snyder Act*, 25 USC 13, to the *Indian Health Care Improvement Act*, 25 USC 1601 et seq., the laws relating to the provision of services to Indians focus on whether Indians are members of a federally recognized tribe. In the case of non-reservation/urban Indians, Congress concluded that the rights to benefits granted Indians do not end at the reservation boundaries. In addition, Congress chose, as a recognition of the failure of earlier federal Indian policy, to expand the definition of Indian to include individuals who may not be members of a current federally recognized Indian tribe, but who are members of state recognized and

terminated tribes acknowledging that at a point in the past, all Indians were members of tribes that at some point were federally-recognized.

Providing for health care services to Indians is within the proper exercise of Congressional power. Congressional power includes the authority to provide benefits and programs to tribes and their members that are not available to the populace at large. *see e.g., Morton v Ruiz, 415 U.S. 199 (1974)*. The Supreme Court along with Congress has recognized that in depriving Indian tribes of their lands and traditional way of life, the federal government assumed a special duty or "trust responsibility" towards Indians. *Cherokee Nation vs. Georgia, 30 U.S. 16, 19-20 (1831)*.

The unique history of federal relations with Indian tribes and the federal trust responsibility provides the basis for the Congress to enact laws and to provide for benefits and services to Indian tribes and their members that might not have a rational basis if applied to other groups or individuals. *McClanahan v. Arizona State Tax Commissioner, 411 U.S. 164 (1973)*. The underlying objectives of Congress in the exercise of its fiduciary powers have principally focused on promoting tribal self-governance, maintaining Indian and Native cultures, improving housing, health care, educational attainment, and economic opportunities.

There are numerous Supreme Court decisions that uphold the authority of the federal Congress to enact laws that treat Indians differently than other citizens. *See e.g., Morton v. Mancari, 417 U. S. 535 (1974); Fisher vs. District Court, 424 U. S. 382 (1976); Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977); Washington v. Fishing Vessel Association, 443 U.S. 678 (1979)*.

The Supreme Court has allowed differential, and sometimes preferential, treatment of Indians based on the constitutional and historical status of tribes as political bodies separate from other classes of persons. For example, in *Washington v. Fishing Vessel Association, 443 U.S. 678 (1979)* the Court recognized the treaty based right of tribes to harvest fish. The resulting fishing license applied to members of the tribes whether they lived on or off a reservation. More notably, because of the relationship between on and off reservation Indians, distinguishing Indians from "other classes of persons" became an exercise in futility unless off-reservation Indians are included in the analysis.

The Supreme Court has not engaged in the task of distinguishing on-reservation Indians from off-reservation Indians for the purposes of any of the decisions that involve the availability of federal services. Decisions of the Court have applied to both on and off reservation Indians as long as individuals were members of the federally recognized tribe. But because not all current off-reservation Indians are members of a currently defined recognized tribe, and the fact that failed former federal policy contributed to this displacement, identity as a current or past member of an Indian tribe is sufficient to qualify for services under the ICHIA and is consistent with the policies of Congress and the Executive Branch that have their roots in the administrations of Presidents Johnson and Nixon.

Additionally, it is unlikely that an equal protection challenge to the federal government's provision of health services to urban Indians would be successful. Opponents of federal health services for urban Indians would have to argue that the health care services provided to urban Indians denies equal protection of the laws to the other similarly situated urban residents unless the distinction is rationally justified. However, it should not be difficult to rationally justify federal health services for urban Indians as consistent with the broader objectives Congress has established for federal Indian policy, including self-determination, improved educational attainment, and economic opportunity. This is even more true in light of the tragic and misguided congressional policies of termination and relocation that account for the presence of many of the tribal citizens in urban areas.

Those opposed to federal health services for urban Indians also would face a number of other significant legal problems in asserting an equal protection claim including:

1. Standing Issues. Those with standing to bring an equal protection claim, namely indigent and impoverished American citizens who feel that they are being denied substantially similar federally funded health services, are not members of a protected class necessary to raise the level of scrutiny under which the Court would evaluate an equal protection claim. See e.g. *Dandrich v. Williams*, 397 U.S. 471 (1971). In *San Antonio School District v. Rodriguez*, 411 U.S. 471 (1972), the Supreme Court expressly held that poverty is not a suspect classification like race or ethnicity. The Court noted that equal protection claims that allege discrimination against the poor should be subject to a rational basis review rather than the more stringent compelling government interest standard used by the Court in *Adarand*. Under the rational basis test, the appropriate analysis is whether the government's actions are, "clearly wrong, a display of arbitrary power, [or] not an exercise of judgment". *Helvering v. Davis*, 301 U.S. 619, 640 (1937). Given the obligations that the federal government has toward Indians, a successful equal protection challenge that is evaluated under a rational basis test is unlikely.
2. Urban Indian Health Clinics are not exclusive. Clinics providing health services to urban Indians do not exclude non-Indians from obtaining care. As a practical matter, a majority of those who use the clinics are Indians; however other citizens are not turned away based on their lack of tribal status. Because there is no exclusivity based upon status, those who will have standing to assert an equal protection violation would have a difficult time showing that harm occurred. This is especially true when taking into account alternative services such as Medicare, Medicaid, and community health centers that cater to financially challenged citizens. Harm is an essential element of a successful equal protections challenge.
3. The Definition of Urban Indian. The *Indian Health Care Improvement Act* defines an urban Indian as any Indian who resides in an urban center and meets one or more of the four criteria for qualifying as an Indian under the Act. 25 USC 1601 et seq. Off-reservation Indians are Indians not living on reservation, but who may or may not live in an urban center. Without doubt, the definition of an American Indian, an off-reservation American Indian, and an urban American Indian are not mutually exclusive.

Accordingly, an equal protection challenge against the federal health services for urban Indians will first have to clearly articulate a definition of the group. Given the Supreme Court's inability to accomplish this task, the demands on the party who brings an equal protection challenge would be great.

Finally, forcing urban Indians to obtain medical attention on reservations could be seen as an unconstitutional restriction on travel and would frustrate other significant Congressional policy objectives.

Like all other U. S. citizens, Indians have the fundamental right to travel – a right which has been recognized by the Supreme Court as constitutionally guaranteed. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

In *Shapiro*, the Court declared unconstitutional a state law creating a one-year residency requirement for receiving welfare. The Court focused on the, "fundamental right of interstate movement" and the importance of citizens to be able to travel freely within the country. Thus, if the provision of federal health services for Indians is based on location (i.e. limited to on-reservation), it might discourage Indians from exercising their fundamental right to travel. Moreover, the Court has held that residence requirements for the receipt of government benefits are particularly suspect. See e.g., *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

Lastly, if federal health services are limited to reservation residents, Indians potentially will be denied access to the education and employment opportunities that are essential to the fulfillment of other significant objectives of Congressional policy toward Indians.

In conclusion, we believe that *Adarand* does not apply to the federal health services that are offered to urban Indians for the very fundamental reason that those services are not provided on the basis of race or ethnicity, but based on the political relationship that exists between the United States and Indian tribes. It is that relationship and the federal trust responsibility that provides the rational basis on which Congress has authorized the provision of health care services to urban Indians.

It is unlikely that anyone would have standing to bring an equal protection challenge to the provision of federal health care services to urban Indians. Terminating the federal programs for urban Indians would potentially impair the constitutional right of Indians to travel and would undermine significant Congressional objectives for federal Indian policy including improving educational attainment and employment opportunities.