

April 27: USET SPF Alert: Challenges to the Constitutionality of Federal Indian Programs and Protections

Dear USET SPF Board of Directors and DC Tribal Reps,

We wanted to make you aware of some recent disturbing developments regarding challenges to the constitutionality of federal Indian programs and accommodations for American Indians and Alaska Natives (AI/AN). As you may already be aware, USET SPF has consistently advocated around the issue of constitutionality with all branches of government. Undermining the constitutionality of programs, laws, spending, and exemptions specific to AI/AN and Tribal Nations flies in the face of well-settled law that defines our relationship with the United States as political in nature and not one based on race.

Under familiar principles of Indian law, the Constitution explicitly addresses AI/AN and Tribal Nations based on their underlying political relationship with the United States. For this reason, actions directed at AI/AN and Tribal Nations that are taken pursuant to the Constitution's Indian affairs powers do not target a suspect racial classification.

At recent USET SPF BOD meetings, we have updated you on a determination issued by CMS in a January 2018 ["Dear Tribal Leader" letter](#) [linked] that it cannot exempt AI/AN from state-imposed work requirements upon Medicaid beneficiaries in spite of the federal trust responsibility. CMS says approving the exemption would raise constitutional and civil rights concerns, but it is not willing to provide any legal analysis or rationale for its position. Tribal leaders met with CMS and the Department of Health and Human Services (HHS) Office of Civil Rights recently, and both federal agencies remained steadfast in this conclusion. The bottom line is that CMS is wrong. It has authority to provide accommodations to Indians to make sure they receive health care without violating the Constitution's equal protection clause or, by extension, statutes prohibiting discrimination based on race.

In the days and weeks since the meeting, this issue has garnered attention from both the press and Congress. Politico published an article by Dan Diamond titled ["Trump Challenges Native Americans' Historical Standing"](#) on April 22, 2018 [linked]. The article states "the Trump administration contends the tribes are a race rather than separate governments, and exempting them from Medicaid work rules . . . would be illegal preferential treatment." The Politico article notes that the Medicaid work requirements are just one part of an overall problem. Indians' legal status is currently being attacked on multiple fronts.

It is critical to recognize that this is just the latest attack on the constitutionality of the unique relationship between the U.S. and Tribal Nations. Indian Country must remain vigilant and continue to challenge and oppose any efforts within the federal government—executive, legislative, and judicial—that seek to undermine the constitutionality of our relationship.

For example, President Trump in his May 5, 2017 signing statement for the appropriations statute said his Administration "shall treat provisions that allocate benefits on the basis of race, ethnicity, and gender . . . in a manner consistent with the requirement to afford equal protection of the laws under the Due Process Clause of the Constitution's Fifth Amendment," citing as an example Native American Housing Block Grants.

In another context, litigation plaintiffs have attacked the Indian Child Welfare Act (ICWA) as race-based. In the 2013 Supreme Court decision in *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013), four anti-tribal briefs argued that ICWA was unconstitutional. Although it did not decide the issue, the Court noted this argument and expressed concern. State and federal court cases in which plaintiffs assert

ICWA is unconstitutional are winding their way through the judicial system—threatening an eventual revisit to the Supreme Court.

Further, as Congress considered the 2013 reauthorization of the Violence Against Women Act, the passage of the legislation was in jeopardy due to constitutionality concerns expressed by some members regarding the limited restoration of criminal jurisdiction over non-Indians to Tribal Nations. While the legislation ultimately prevailed, Indian Country saw a number of Congressional leaders, including some on the Senate Committee on Indian Affairs, perpetuate this dangerous narrative by voting no.

This fundamentally flawed narrative, if allowed to go unchallenged, has the potential to erode the very foundation of Tribal Nation-U.S., government-to-government, sovereign-to-sovereign relations. It is critically important that all of Indian Country recognize and appreciate the magnitude of this current challenge and its potentially broader implications. Indian Country must be unified in its approach and response to this threat. The USET SPF is currently engaged in conversations and efforts with other Tribal organizations, both national and regional, in order to ensure a strong, coordinated message from Indian Country, both for the short and long term. Together, we are working to ensure that the strong legal basis of our relationship with the United States is the focus of our argument. Additionally, recognizing that the foundation of our relationship with the United States is not a partisan issue, the strategy includes working to ensure that Congress approaches their response and support efforts in a bipartisan manner.

We will provide additional updates and opportunities for briefings and discussions as they arise. In the meantime, we ask that you receive and manage this communication with the greatest level of sensitivity and confidentiality.

For further reading on this issue, we direct you to the following links:

[USET SPF Constitutionality Resolution](#)

[USET SPF Medicaid Work Requirements Resolution](#)

[USET SPF Letter to CMS re: State Medicaid Guidance](#)

[USET SPF Letter to CMS re: MaineCare Waiver](#)

[Hobbs Straus CMS Briefing Memo](#)

[Hobbs Straus Longer Memo on Constitutionality of Exempting AI/AN](#)

Thank you,

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