NATIVE AMERICANS AND THE VACCINE ACT: EXCLUDING THOSE WE FOUND HERE

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INTRODUCTION

In *Black v. Secretary of Health and Human Services*,[1] the Federal Circuit ruled that a Native American child who was catastrophically injured by a vaccine was not eligible for lifetime benefits[2] under the National Vaccine Injury Compensation Program ("Vaccine Act"),[3] because the

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1. 93 F.3d 781 (Fed. Cir. 1996).

2. *See* 42 U.S.C. § 300aa-15(a)(1) (1994) (providing victims of vaccine-related injuries with compensation for actual unreimbursable expenses incurred before judgment and for reasonably projected after-incurred expenses); *id.* § 300aa-15(c) (mandating that such compensated expenses include cost of custodial or residential care sufficient to enable individual to remain living at home). Section 300aa-15 also compensates victims for lost earnings, pain and suffering, emotional distress, and attorneys' fees and costs. *See id.* § 300aa-15(a)(3), (e).

3. *See id.* §§ 300aa-10 to 300aa-34. Congress enacted the National Vaccine Injury Compensation Program ("Vaccine Act") to remedy a crisis in vaccine availability and to avoid the civil tort system's deficiencies in compensating individuals for vaccine-related injuries. *See* H.R. REP. NO. 99-908, pt. 1, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6348 (explaining impetus behind Vaccine Act as: "(a) the inadequacy—from both the perspective of vaccine-injured persons as well as vaccine manufacturers—of the current approach to compensating those who have been damaged by a vaccine; and (b) the instability and unpredictability of the childhood vaccine market"); *see also* Daniel A. Cantor, Comment, *Striking a Balance Between Product Availability and Product Safety: Lessons from the Vaccine Act*, 44 AM. U. L. REV. 1853, 1858-59 (1995) (describing exodus of vaccine manufacturers from U.S. market in response to $3.5 billion in damages sought between 1980 and 1984 by plaintiffs claiming vaccine injuries and subsequent decline in national vaccine stockpile); *id.* at 1859-60 (noting delay and expense in successfully pursuing civil tort remedy as well as legal barriers to success, including: (1) difficulty in proving that vaccine manufacturer's negligence proximately caused injury, given that most schools require vaccination and that children must attend school; and (2) preclusion of strict liability for design defects by courts that consider vaccines "unavoidably unsafe").

The Vaccine Act established a no-fault framework for compensating vaccine-injured individuals that eliminated proof of negligence and relieved manufacturers of potential liability, unless the petitioner prosecutes the Vaccine Act claim to its conclusion and elects to reject the Vaccine Act judgment. *See* 42 U.S.C. § 300aa-11(a) (requiring state and federal courts to dismiss

Indian Health Service's payment of medical expenses prevented him from meeting the $1000 unreimbursable expense requirement of the statute.[4]

The Federal Circuit's holding can be justified as a reasonable reading of the statute. As policy, however, it is indefensible. Congress should remedy the absurd result that inadequate and perhaps fleeting medical benefits disqualify a Native American from the lifetime benefits that the Vaccine Act provides to other severely injured vaccine victims.

I. DANIEL BLACK

On December 14, 1984, at the age of five months, a healthy Native American boy, Daniel Black, received a diptheria-tetanus-pertussis ("DTP") vaccination.[5] Within hours he had a seizure.[6] The seizures continued in a severe fashion during Daniel's infancy.[7]

As a result of the vaccine, Daniel developed profound impairments.[8] Today, he has serious learning disabilities that include visual perceptual deficits and auditory comprehension deficits, as well as short and long term memory problems.[9] He has severe problems with attention and concentration, displaying restlessness and high levels of distractibility that result in a poor ability to attend to matters at

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any civil suit against vaccine manufacturer relating to vaccinations administered on or after October 1, 1988, unless victim previously filed petition and had it adjudicated); *id.* § 300aa-13 (mandating compensation if record demonstrates by preponderance of evidence that injuries did not arise from "unrelated factors"—defined to exclude idiopathic, hypothetical, or undocumentable causes—and that victim's petition complies with § 300aa-11(c)(1)); *id.* § 300aa-11(c)(1) (presenting elements of valid petition that omit proof of negligence and require proof of causation-in-fact or proof of "Table Injury"—meaning proof that certain type of injury followed vaccination within certain time period as specified in Vaccine Injury Table at § 300aa-14(a)). Compensation awarded under the Vaccine Act derives from direct government appropriations or from an excise tax on vaccines, depending on when the injurious vaccination occurred. *See id.* § 300aa-15(i) (detailing source of compensation relating to vaccinations administered before October 1, 1988, as government appropriations and otherwise, as the Vaccine Injury Compensation Trust Fund); 26 U.S.C. § 4131 (1994) (imposing excise tax on certain types of vaccines); *id.* § 9510 (creating trust fund).

4. *See* Black v. Secretary of Health & Human Servs., 93 F.3d 781, 787 (Fed. Cir. 1996); *see also* 42 U.S.C. § 300aa-11(c)(1)(D)(i) (mandating that petition for compensation demonstrate that individual suffering vaccine-related injury, because of that injury, has "incurred unreimbursable expenses . . . in an amount greater than $1000").

5. *See* Black v. Secretary of Health & Human Servs., 33 Fed. Cl. 546, 548 (1995), *aff'd*, 93 F.3d 781, 784 (Fed. Cir. 1996).

6. *See id.*

7. *See id.*

8. *See id.* (noting that vaccination's residual effects include seizure disorder and impairment of motor coordination skills).

9. *See* Brief for Appellant at 49, Black v. Secretary of Health & Human Servs., 93 F.3d 781 (Fed. Cir. 1996) (No. 95-5137).

hand.[10] He is the lowest functioning child in a classroom of emotionally and behaviorally disturbed and learning disabled children.[11]

Daniel's school does not have the resources to provide adequate speech or occupational therapy.[12] He functions in the borderline range of tested intelligence, and his daily skills and behaviors are even lower due to perceptual and auditory problems, as well as his attention deficit and hyperactivity disorder.[13] He is delayed in language development and fine and gross motor skills.[14] He is socially immature, aggressive, and difficult to manage.[15] Intensive therapy is necessary to control his behavior.[16]

When he becomes an adult, Daniel will be unable to live independently.[17] He will need a supervised living setting providing behavioral programming.[18] He may be able to work in a supported employment program if he has ongoing supportive services.[19]

II. THE VACCINE ACT

The Vaccine Act is intended to provide no-fault compensation for vaccine injuries.[20] To receive compensation, a vaccine-injured person must file a petition against the Secretary of Health and Human Services containing proof of certain required elements.[21] A valid petition need not allege fault, but instead must demonstrate that the vaccination was the cause-in-fact of the petitioner's injuries or that the

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10. *See id.*
11. *See id.*
12. *See id.* at 50.
13. *See id.*
14. *See* Black v. Secretary of Health & Human Servs., 33 Fed. Cl. 546, 548 (1995), *aff'd*, 93 F.3d 781 (Fed. Cir. 1996); Brief for Appellant, *supra* note 9, at 51.
15. *See* Brief for Appellant at 51.
16. *See id.*
17. *See id.* at 52.
18. *See id.*
19. *See id.*
20. *See* H.R. REP. No. 99-908, pt. 1, at 3 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6344 (summarizing one purpose of Vaccine Act as establishing "Federal 'no-fault' compensation program under which awards can be made to vaccine-injured persons quickly, easily, and with certainty and generosity"); *see also supra* note 3 and accompanying text (describing impetus behind Vaccine Act's creation).
21. *See* 42 U.S.C. § 300aa-11(a)(1) (1994) (requiring filing of petition for initiation of compensation proceeding); *id.* § 300aa-11(c)(1) (presenting required elements of valid petition); *id.* § 300aa-12(b)(1) (mandating that petition name Secretary of Health and Human Services as party). A valid petition contains an affidavit demonstrating that petitioner: (1) received a named vaccination; (2) received it in the United States, or if not, that petitioner was a member of the Armed Forces or that a U.S. manufacturer produced the vaccine; (3) died or suffered residual effects for more than six months and incurred unreimbursable expenses of $1000; and (4) has not previously received compensation. *See id.* § 300aa-11(c)(1). In addition, a valid petition must demonstrate causation in one of two ways. *See id.* § 300aa-11(c)(1)(C); *infra* note 22 and accompanying text (discussing proof of causation).

petitioner suffered a "Table Injury," meaning an injury described in the Vaccine Injury Table.[22] Daniel Black sustained a Table Injury following a DTP vaccination,[23] therefore, he fell within the class of individuals Congress intended to compensate.[24]

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22. *See* 42 U.S.C. § 300aa-14(a) (presenting Vaccine Injury Table ("Table") that lists for each named vaccine certain adverse reactions and the time period within which such reactions must manifest); *id.* § 300aa-11(c)(1)(C) (requiring in the petition proof of injury conforming to Table or proof of causation-in-fact if the adverse reaction listed in Table manifested outside the listed time period or if Table does not list, under the named vaccine, the reaction experienced by petitioner).

23. *See id.* § 300aa-14(a)(I)(D) (listing onset of residual seizure disorder within three days of diptheria-tetanus-pertussis ("DTP") vaccination as compensable injury); *supra* notes 5-7 and accompanying text (noting onset of Daniel's seizure disorder within hours of administration of DTP vaccination)

24. *See* H.R. REP. NO. 99-908, pt. 1, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6344, 6346 (asserting as one of five principal findings that "[t]he Federal government has the responsibility to ensure that all children in need of immunization have access to them [sic] and to ensure that *all* children who are injured by vaccines have access to sufficient compensation for their injuries") (emphasis added). The intent expressed by this report on the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C. §§ 300aa-1 to 300aa-34) [hereinafter 1986 Act], was frustrated by the enactment of the Vaccine Compensation Amendments of 1987, Pub. L. No. 100-203, §§ 4301-4307, 101 Stat. 1330-221 to 1330-225 (codified as amended at 42 U.S.C. §§ 300aa-11 to 300aa-34) [hereinafter Amendments]. *See* 133 CONG. REC. 38,262 (1987) (statement of Rep. Lent) (characterizing Amendments as "dreadful provision" packaged with two others in "such a manner that I would be forced to agree to all three provisions although I support only two"); CONGRESSIONAL QUARTERLY INC., 1987 ALMANAC 537 (1988) (quoting Rep. Henry Waxman (D-Cal.) as saying during the subcommittee markup session that "'I regret we can't have the system work the way he [sic] hoped it would last year, [but that without the Amendments] it would make a nullity of [the 1986 Act] and no one would benefit'"). The Vaccine Act experienced an unusual legislative history in that the 1986 Act outlined a compensation program that would become effective in the future only when a source of funding was identified. *See* 132 CONG. REC. 30,761 (1986) (statement of Rep. Madigan) (noting that compensation program would not be effective until House Ways and Means Committee generated bill providing funding mechanism). The Amendments established a funding mechanism but dramatically altered the compensation program outlined by the 1986 Act. Among other changes, the Amendments: (1) substituted a lump-sum payment for an award of periodic payments adjustable in the future if found insufficient; (2) created limits on the number of awards occurring under the program, which if exceeded would require notice to Congress and then termination of the program six months later; and (3) altered the required element of a valid petition at issue in Daniel Black's case. *See* 42 U.S.C. § 300aa-34 (requiring termination of program if awards exceed specified number or rate); *infra* note 25 and accompanying text (discussing change in petition requirement affecting Daniel). *Compare* 42 U.S.C. § 300aa-15(f)(4) (providing compensation in lump sum), *with* 1986 Act, § 2112(e), (f), 100 Stat. at 3762 (requiring program to review and administer periodic payments of compensation).

The House of Representatives never debated the changes to the compensation program contained in the Amendments, the Amendments never received a unique bill number, and no report was issued. Instead, the substantive provisions of the Amendments sprang fully-formed from the House Committee on Energy and Commerce to form a small part of the Omnibus Budget Reconciliation Act of 1987 ("Omnibus Act"), Pub. L. No. 100-203, 101 Stat. 1330. *See* 133 CONG. REC. D1329 (daily ed. Oct. 14, 1987) (reporting only that "[t]he Committee also approved amendments to the National Vaccine Injury Compensation Program to be included in Budget Reconciliation recommendations"); *id.* at 29,966, 30,041-42 (introducing the Amendments to the full House of Representatives as Part 4, Subtitle C, § 4201 of Title IV of H.R. 3545, 100th Cong. (1987)). Other portions of the Omnibus Act consumed Congress' attention to such an extent that the only recorded mention of the Amendments' effect occurred not on the floor but in the Extension of Remarks, material submitted to the *Congressional Record*

Congress required that to be eligible for Vaccine Act benefits, an individual must display residual effects of the injury that last for "more than 6 months after the administration of the vaccine" and the victim must have "incurred unreimbursable expenses due in whole or in part to such illness, disability, injury, or condition in an amount greater than $1,000."[25] These requirements were intended to bar compensation for *de minimis* injuries.[26]

Because Daniel is a Native American, the Indian Health Service paid $17,427.10 for his initial medical expenses.[27] As a result, he did not have $1000 in unreimbursable expenses at the time his Vaccine Act petition was filed.[28] The Federal Circuit held that the Indian

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at a later time. *See id.* at 34,652 (statement of Rep. Miller); *id.* at 38,262 (statement of Rep. Lent). The comments of Representative Lent on the unreviewed and largely unintended consequences for the compensation program entailed by passage of the Omnibus Act are well-taken:

> The vaccine compensation provisions exemplify the congressional conference process at its worst. The public can now see how this legislative body passes controversial and costly legislation by burying it in the middle of important legislation that many Members feel compelled to vote for.
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> . . . .
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> We do not serve the public interest when we legislate important and controversial programs out of the sight of the public, as we are about to do by considering the omnibus budget reconciliation bill. This process deprives the Members of the House the opportunity to debate the merits of individual programs. It is a disservice to the American public.

Id. (statement of Rep. Lent); *see id.* (statement of Rep. Lent) (agreeing with unknown source that Amendments are "'fiscally unsound, inequitable, and unworkable'").

25. 42 U.S.C. § 300aa-11(c)(1)(D)(i). Prior to enactment of the Amendments, this element of a valid petition required only demonstration that petitioner had

> (i) suffered the residual effects or complications of such illness, disability, injury, or condition for more than 1 year after the administration of the vaccine, (ii) incurred unreimbursable expenses due in whole or in part to such illness, disability, injury, or condition in an amount greater than $1,000, *or* (iii) died from the administration of the vaccine.

1986 Act, § 2111(c)(1)(D), 100 Stat. at 3761 (emphasis added). The Amendments shortened the time period for residual effects, but replaced the "(ii)" with "and." *See* Amendments, § 4304(b)(1), 101 Stat. at 1330-223. Thus, the 1986 Act sought to compensate severely injured vaccination recipients, determined with reference to length of residual effects, unreimbursable expenses, or death.

26. *See* 1986 Act, § 2115(a)(1), 100 Stat. at 3767 (providing compensation only for amounts in excess of $1000 threshold).

27. *See* Black v. Secretary of Health & Human Servs., 93 F.3d 781, 784 (Fed. Cir. 1996).

28. *See id.* at 787. On the date that Daniel's petition was filed, October 1, 1990, Daniel's father had incurred only unreimbursable expenses of $814.14 for a computer system used in Daniel's rehabilitation. *See id.* at 784. Daniel's father expended a further unreimbursable sum of $3719.75 on computer equipment after January 1992. *See id.* These expenditures failed to satisfy the requirement of § 300aa-11(c)(1)(D)(i) because they occurred after the statute of limitations period expired. *See id.* at 787. The statute of limitations period for incurring unreimbursable expenses relating to vaccinations administered before October 1, 1988, was 28 months after the date of vaccination. *See* 42 U.S.C. § 300aa-16(a)(1). Because Daniel received the vaccination in 1984, the statute of limitations for accruing expenses expired February 1, 1991, and thus the computer expenditures after January 1992 could not count toward § 300aa-11(c)(1)(D)(i)'s incurred unreimbursable expense threshold of $1000. In a separate appeal decided with *Black*, the Federal Circuit held that a petitioner may cure a deficient petition that

Health Service payment excluded Daniel because "the $1000 in expenses is a threshold criterion for seeking entry into the compensation program: . . . in order to file a qualifying petition, the injured person must have incurred at least $1000 in unreimbursable expenses."[29]

Because Daniel was excluded, he will not receive Vaccine Act compensation for developmental evaluation, special education, rehabilitation, vocational training and placement, counseling, case management services, emotional and behavioral therapy, special equipment, residential and custodial care and services, and related travel and facilities expenses.[30] Nor will he receive Vaccine Act compensation for projected lifetime loss of earnings, for actual and projected pain and suffering, or for emotional distress.[31]

III. THE DECISION

In holding that the $1000 unreimbursable expense requirement excluded Daniel, the Federal Circuit applied the statute as written.

> In order to construe the statute to avoid the kind of unfair treatment of Native Americans that Black perceives, we would have to read the word "unreimbursable" out of the statute, which we decline to do, or we would have to create a special statutory exception for Native Americans, for which there is no textual justification whatever.[32]

The court rejected Black's argument that, "while Congress may have wanted to exclude some persons whose expenses were defrayed by others, it could not have wanted to do that in the case of Native Americans whose medical expenses have been paid by the Indian Health Service."[33]

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fails to demonstrate $1000 in unreimbursable expenses by filing a supplemental pleading after the expiration of the statute of limitations so long as the matter is pending and the expenses were incurred prior to the expiration of the statute of limitations. *See* May v. Secretary of Health & Human Servs., No. 91-1057V, 1995 WL 298554 (Fed. Cl. Special Master, May 2, 1995).

29. *Black*, 93 F.3d at 787 (internal citations omitted).

30. *See* 42 U.S.C. § 300aa-15(a)(1)(A)(iii)(II) (providing compensation for unreimbursable expenses already incurred as well as for anticipated expenses).

31. *See id.* § 300aa-15(a)(3)(B), (a)(4). In Daniel Black's case, the combined possible compensation for lost earnings, pain and suffering, and emotional distress was limited to $30,000. *See id.* § 300aa-15(b) (limiting compensation for vaccinations administered before October 1, 1988). Other possible compensation was unlimited.

32. *Black*, 93 F.3d at 787.

33. *Id.* at 786-87.

IV. AS A MATTER OF SIMPLE FAIRNESS AND CONSISTENT POLICY, CONGRESS SHOULD ACT

The result in *Black*, although understandable as a matter of statutory analysis, is inconsistent with the government's duty of fairness to Native Americans. "The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions."[34]

Nothing could violate the federal government's duty of fairness to Native Americans more blatantly than for it to use the health care benefits provided to Daniel Black as grounds to deny him Vaccine Act benefits. Yet that is precisely what the government has done: it has denied Vaccine Act benefits to Daniel for a lifetime of disability because, as a Native American, he received payment of medical expenses.

Consistent policy toward Native Americans likewise demands congressional action. Congress expressly intends that Native American children be vaccinated.[35] Congress cannot have sought vaccination of every Native American child and at the same time intended to exclude Native American children who are severely injured by vaccination from the lifetime benefits provided by the Vaccine Act. Yet this is exactly what happens when Indian Health Service medical payments are grounds for exclusion from Vaccine Act benefits. This is exactly what happened to Daniel Black.

The congressional goal of vaccination of Native American children necessarily implies the willingness to compensate severely injured Native American children in the same manner that other children are compensated.

Daniel has no guarantee of continued health care benefits because he is Native American. The Indian Health Service is perennially

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34. Morton v. Ruiz, 415 U.S. 199, 232-34, 236 (1974) (holding that Bureau of Indian Affairs' denial of general assistance benefits to Indians living near, but not directly on, reservation in accordance with its policy manual violated Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, because eligibility requirements are substantive rules, requiring formal rulemaking); *see* Seminole Nation v. United States, 316 U.S. 286, 296 (1942) (recognizing "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people" and concluding that U.S. government participated in tribal official's breach of fidicuary duty by distributing trust funds that the U.S. government knew would be misappropriated) (internal citations omitted).

35. *See* 25 U.S.C. § 1602(b) (1994) ("It is the intent of the Congress that the Nation meet the following health status objectives with respect to Indians and urban Indians by the year 2000: .... (49) Reduce indigenous cases of vaccine-preventable diseases as follows: (A) Diphtheria among individuals aged 25 and younger, 0. (B) Tetanus among individuals aged 25 and younger, 0. . . . (H) Pertussis, 1,000."). Congress expressly defined "disease prevention" among Native Americans to include, first and foremost, immunizations. *See id.* § 1603(*l*)(1).

underfunded.[36] Future funding is subject to shifting political winds and hard economic realities as the federal government continues to downsize.[37] The Indian Health Service's decision to discontinue any health care program is committed to its discretion and is not subject to judicial review.[38] Native Americans have little political clout as they attempt to preserve the federal benefits that they received in the past.[39]

Even at historical funding levels, the health services provided to Native Americans are grossly inadequate.[40] The federal government admits that Native Americans suffer from "outdated, inefficient, and undermanned [health care] facilities," insufficient medical services, and lack of access to health services.[41] Any health services that may

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36. *See OTA Study on Indian Health Care: Hearing Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 99th Cong. 44-45 (1986) (statement of Rep. Henry Waxman (D-Cal.)) (noting proposed 16.5% reduction in 1987 fiscal year budget for Indian Health Service ("IHS") and expressing concern at scenario, which by the end of this century would lead to IHS services "increasingly [being] provided in obsolete facilities, by inadequate numbers of frequently changing medical personnel"); S. REP. NO. 102-392, at 4 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3943, 3946 (noting proposed 1993 fiscal year budget included three percent reduction in IHS funding compared to 1992 budget); 139 CONG. REC. S15,089 (daily ed. Nov. 4, 1993) (statement of Sen. McCain) ("Unfortunately, Federal Indian programs are already severly underfunded.").

37. *See* Mike Causey, *Boggins for Buyouts*, WASH. POST, Apr. 12, 1996, at B2 (discussing methods used by federal government departments to reduce number of employees).

38. Lincoln v. Vigil, 508 U.S. 182, 184, 193-94 (1993) (holding IHS's decision to discontinue treatment services to handicapped Indian children in Southwest exempt from judicial review and not violative of APA, because Congress' lump-sum appropriations rendered decision one "committed to agency discretion by law," 5 U.S.C. § 701(a)(2) (1994)).

39. *See Health Care Reform in Indian Country Oversight of the Indian Health Service: Hearing Before the Senate Comm. on Indian Affairs*, 103d Cong. 2 (1994) [hereinafter *Health Care Reform*] (statement of Sen. Thomas A. Daschle (D-S.D.)) (noting that although IHS represents only two percent of budget for Department of Health and Human Services, "the budget for fiscal year 1995 proposed that Indian Health Service assume 49 percent of staff reductions this year, and 83 percent of staff cuts next year").

40. *See* 25 U.S.C. § 1601(d) (1988) ("Despite [federal health] services, the unmet health needs of the American Indian people are severe and the health status of the Indians is far below that of the general population of the United States."). Previous congressional findings held that "for Indians compared to all Americans in 1971, the tuberculosis death rate was over four and one-half times greater, the influenza and pneumonia death rate over one and one-half times greater, and the infant death rate approximately 20 per centum greater." *Id.*; *see* Indian Health Care Improvement Act of 1992, Pub. L. No. 102-573, § 3(a)(2), 106 Stat. 4526, 4526 (deleting quoted portions of § 1601's congressional findings). In 1987, the health status of Indians remained severely inferior. *See* S. REP. NO. 102-392, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3943, 3945 (reporting that Indian death rate from tuberculosis remained four times greater than the rate for all races and that the death rate from pneumonia and influenza exceeded the rate for all races by 44%).

41. *See* Indian Health Care Improvement Act, Pub. L. No. 94-437, § 2(f)(1), 90 Stat. 1400, 1400 (1976) (codified at 25 U.S.C. § 1601(f)); Indian Health Care Improvement Act of 1992, § 3(a)(3), 106 Stat. at 4526 (deleting § 1601(f)); *Health Care Reform*, *supra* note 39, at 2 (statement of Sen. Thomas A. Daschle (D-S.D.)) ("Only 15 of the 505 Indian Health Service facilities have the potential to provide the full range of health care services today. There is a $484 million backlog in repair or replacement of facilities . . . ."); S. REP. NO. 102-392, at 15 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3943, 3957 (noting that "documented backlog of services

be provided are an inadequate alternative to Vaccine Act benefits.

CONCLUSION

"On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[42]

Native Americans such as Daniel Black, by virtue of their heritage as those we found here, conquered, and subjugated, have received some benefits based on race. They should not suffer because of their race by being denied the benefits of Vaccine Act compensation for their injuries.

Congress should amend the Vaccine Act so that other profoundly injured Native American vaccine victims like Daniel Black are not denied lifetime compensation merely because the Indian Health Service paid their medical expenses.

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and waiting list for surgeries that in some areas are as long as three to four years").

42. Morton v. Mancari, 417 U.S. 535, 554-55 (1974) (internal citations omitted).