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From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Sunday, January 12, 2003 8:35 AM
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]); Alberto R. Gonzales (CN=Alberto R. Gonzales/OU=WHO/O=EOP@EOP [WHO])
Subject: : Re: Sunday Lineup

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME:12-JAN-2003 09:35:14.00
SUBJECT:: Re: Sunday Lineup
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Alberto R. Gonzales (CN=Alberto R. Gonzales/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

Great. I will be in at about 11, after church.

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----- Original Message -----
From:Alberto R. Gonzales/WHO/EOP
To:Brett M. Kavanaugh/WHO/EOP@EOP
Cc:
Date: 01/11/2003 10:18:00 PM
Subject: Re: Sunday Lineup

Brett , I will be in the office tomorrow. I would like you to look at the brief if you can in the Michigan case.

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From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Sunday, January 12, 2003 3:43 PM
To: Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP@EOP [WHO])
Subject: : addtl suggestion

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME:12-JAN-2003 16:42:38.00
SUBJECT:: addtl suggestion
TO:Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

on bottom of page 15, change "racially discriminatory admissions standards" to "racial classifications in its admissions standards."

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From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Sunday, January 12, 2003 3:30 PM
To: Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP@EOP [WHO])
Subject: :

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME:12-JAN-2003 16:29:35.00
SUBJECT::
TO:Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

change "principle that each American ordinarily is to be considered and judged without regard to race or ethnicity" to "principle that all Americans should be treated equally rather than on account of their race or ethnicity."

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From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Tuesday, January 14, 2003 1:25 PM
To: Carolyn Nelson (CN=Carolyn Nelson/OU=WHO/O=EOP@EOP [WHO]); Alberto R. Gonzales (CN=Alberto R. Gonzales/OU=WHO/O=EOP@EOP [WHO])
Subject: :
Attachments: P_UG9ZC003_WHO.TXT_1.doc

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME:14-JAN-2003 14:25:27.00
SUBJECT::
TO:Carolyn Nelson (CN=Carolyn Nelson/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Alberto R. Gonzales (CN=Alberto R. Gonzales/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_UG9ZC003_WHO.TXT_1>

Summary

- Michigan and the intervenors justify Michigan's raced-based admissions program by asserting compelling interests in (i) diversity and (ii) remedying the effects of past societal discrimination. They further argue that the Michigan program is narrowly tailored to those ends.

- The interest in achieving racial diversity for the sake of racial diversity is an impermissible interest under the Court's case law and is indistinguishable from an approach that would advocate and justify strict racial quotas and proportional representation.

- The term "diversity" has multiple meanings, however, and sometimes is used to ensure that the government has taken sufficient and appropriate steps to remedy the effects of past societal discrimination and to make opportunities available for African-Americans, Hispanics, American Indians, Asian-Americans, and others. With respect to this argument, the Court and the United States have consistently emphasized the paramount importance of remedying past racial discrimination and thereby making educational and employment opportunities open and available to members of diverse minority groups.

- The Court also has made clear that the interest in remedying past societal discrimination and making opportunities available to minorities can (and thus must) be achieved through race-neutral means, such as outreach, recruiting, admissions factors such as income or familial status, or admissions programs such as the Texas 10% plan. Such race-neutral means achieve the important goals without compromising the equality principle that individuals should be considered without regard to race.

- In the university context, experience in several states, including Texas, California, and Florida, now confirms that race-neutral means can remedy the effects of past discrimination and make opportunities available to members of diverse minority groups.

- In the past and today, some have argued that race-neutral approaches will not always suffice to remedy the effects of past discrimination and ensure that members of diverse minority groups are included in higher educational institutions. (But experience shows that such race-neutral means in fact do work.) And if they did not work in some specific case, the state or local governmental entity could seek to demonstrate that the failure was the result of ongoing racial discrimination in the jurisdiction, which in such an extreme case would justify the use of race as a consideration in remedying such discrimination.

DRAFT OF FEDERALIST SOCIETY SPEECH
(12/12/01 AT 2:00 P.M.)

Thank you for inviting me to speak to you today. I appreciate the courtesy extended to me by Gene Meyer and Leonard Leo, and commend them for their excellent leadership of this fine organization.

For reasons that are not completely clear to me, my previous life did not bring me into contact with the Federalist Society. It was not an organization that I avoided. Rather I simply never had the opportunity to come to know the society and its mission.

That background may help you to understand an experience that I had shortly after January 20th of this year. In the very early days of this administration, there was considerable press attention focused on the White House Staff, particularly my office. Some of those early stories focused – quite negatively – on the fact that most of the lawyers in my office were or had been associated with the Federalist Society. The stories and the public discussion they provoked left one with the impression that a right wing para-military (or at least para-legal) organization had taken over the White House.

Of course, I was – and am – quite proud of the men an women I hired to serve with me in the Office of Counsel to the President. They have unbeleivable academic and professional credentials. But I admit that I was taken by surprise by the allegation that they were – or had been – card carrying members of the Federalist Society. I found my self looking around the circle of attorneys who gathered every morning for our staff meeting and saying to myself: "Is she really a *Federalist*? She looks so normal! And what about him? Is he going to break out singing the Horst Wesel song?

Time cures many ills, including uninformed first impressions. I quickly learned that these young associate counsels did not live up their press reports as right wing nuts bent on subverting the constituion. Rather they are among the best young lawyers with whom I have ever been privileged to work. They are dedicated to the rule of law, to ensuring that the legitimate powers of the presidency are preserved.

And that leads to my topic: Protecting the Powers of the Presidency.

The Federalist Society's statement of purpose provides that that "the separation of governmental powers is central to our Constitution." As Counsel to President Bush, enrusing that the legitimate powers of the Presidency are preserved is of daily importance to me and the lawyers on my staff.

In thinking back over my job this past year, what first comes to my mind is perhaps an obvious point, but nonetheless worth sharing. From the perspective of the Counsel's office, and from my perspective as Counsel to the President, the integrity and honesty of the President are of overriding importance to the protection of the office he holds. During the campaign, President Bush pledged repeatedly that when he put his left hand on the Bible and raised his right hand to

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Deleted: As you all know, the Federalist Society was very much in the news earlier this year. Critics of the President sought to tarnish members of the Administration who had been involved in Federalist Society programs and events in the past. But an odd thing happened amidst all the hoopla. Those who took the time to look carefully at the Society's history and programs found out what you all have long known -- that the primary mission and success of the Federalist Society over the last two decades has been in encouraging rational and civil debate about the fundamental legal issues of our time. ¶
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To really understand this organization, one need only look at the informative and balanced panels at your recent National Lawyers Convention. The kind of debate reflected at that -- and all -- Federalist Society events has prompted regular participants such as Nadine Strossen, President of the ACLU, to compliment the Society's contribution, in her words, "to free speech, free debate, and most importantly, public understanding of, awareness of, and appreciation of the Constitution." ¶
¶
The civil and dignified discourse that the Federalist Society encourages and sponsors reflects precisely the tone that President Bush has sought to bring to Washington. And so today, I want to thank the Federalist Society for its work in promoting legal debate and legal thought -- and for making sure that the debate remains civil in tone.¶
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Deleted: adherence to the constitutional separation of powers is of

Deleted: And as we near the end of the first year of the President Bush's service in office, it is particularly appropriate, therefore, that I speak to this group to provide some of my thoughts about the position of Counsel to the President.

Deleted: the proper functioning of the Counsel's office.

take the oath of office, he would swear to uphold not just the laws of the land, but also the honor and dignity of the Presidency. And nearly one year into office, I think every American can be grateful, as I am, that the current occupant of the Oval Office is exactly as advertised: a man of integrity, a man of his word, a man whom all Americans can respect and trust and look to for principled and effective leadership in good times and bad, in times of peace and, as now, in times of war.

President Bush's integrity and focus obviously set the tone for this White House and for all that we do every day in the Counsel's office. They make it relatively easy to advocate princpled positions in defense of Presidential power.

Deleted: But many people ask what my goals are as Counsel, what I hope to achieve. ¶

As previous Counsels have often observed, much of the job is necessarily reactive, responding to the crisis or issue of the day. But that said, standing here with the benefit of nearly a year of service, I can say that there are two core principles that I have sought to pursue in serving the Presidency and this President.

The first principle is fidelity to the rule of law. Sounds simple and obvious -- even trite -- until you remember that one of the preceding six Presidents was impeached and another of them resigned under the threat of certain impeachment. And in both situations, as many have pointed out, Counsels to the President -- people who previously served in my position -- were criticized for disserving the Presidency by subordinating the rule of law to the personal interests of the Administration and, indeed, of the President himself. The lawyers in my office and I have studied -- and are intimately familiar -- with this history. And having examined the past, we fully understand that the first principle that must influence and determine everything we do is fidelity to the rule of law. And we intend to do just that. We owe the Presidency and this President no less.

The second principle is to recognize that the constitutional prerogatives of the Presidency are tested and challenged day after day in myriad ways. The examples are legion: Congressional requests for documents of internal policy debates, Senatorial demands for bipartisan commissions to nominate judges, congressional requests for sensitive military and intelligence information, congressional attempts to ensure that certain Executive Branch agencies, or at least certain Executive Branch officers, operate independently of the President and his policy agenda.

Deleted: preserve and defend

Deleted: . Those prerogatives

Deleted: One of the most important jobs we have in the Counsel's office is to preserve the powers and prerogatives of the Presidency against such congressional incursions.¶

Some ask what it really means to preserve the prerogatives of the Presidency? The answer is simple to state in the abstract: that we need to maintain and, where appropriate, restore the ability of the President to successfully perform his constitutionally assigned functions.

Part of this is the balance between the President and Congress. As many before me have observed, the history of this country has seen a back and forth in this balance of powers between Presidents and Congresses. In recent times, particularly in the wake of Watergate, there can be no doubt that Presidential authority has diminished as Congress has reacted with outrage -- and often with justifiable outrage, it bears emphasis -- to abuses by the Executive Branch. It seems to me, however, that Congress has, on ocassion, taken advantage of a partiuclar President's momentary political vulnerability to draw power to itself and away from the Executive.

Deleted: *official* Presidential authority has been overly diminished in reaction to the *personal* wrongdoing of individual Presidents, that at times Congress has overreacted. ¶

And I think we have all learned by now that the cure can at times be worse than the disease. To take the most notable example, the independent counsel statute has now come and gone, and I think its demise is a good thing for the Presidency.

Of course, it is one thing to talk about maintaining the prerogatives of the Presidency; it is quite another to do so. And to illustrate what I mean by proper balance, I would like to discuss three specific areas that have garnered substantial public attention in recent months -- executive privilege, military tribunals, and judicial selection.

The doctrine of Executive privilege is vital to ensuring that Presidents can make the best decisions for the American people. The privilege allows Presidents to guarantee the confidentiality of their deliberations and thereby ensure that they can receive candid advice and recommendations from their aides. The Founders recognized the importance of confidentiality; indeed, the records of the Constitutional Convention were sealed for more than 30 years.

Yet the mere mention of the phrase "executive privilege" has become controversial in recent decades, a lightning rod for skepticism -- if not outright criticism -- of the President daring to assert it. Having studied the recent evolution of executive privilege, I think the reason for the somewhat low reputation it now enjoys is rather clear: Executive Privilege has been asserted not to protect internal policy deliberations, but rather to conceal personal wrongdoing. And I think we can all agree that executive privilege assertions to protect personal wrongdoing have been a terrible mistake. Privilege assertions in these circumstances have cheapened and weakened the Presidency.

We in the Bush Administration hope to restore the doctrine of executive privilege to its proper place. First, the privilege should be invoked only on those rare ocassions when it is needed to protect core deliberations and other similar functions. Second, most disputes with Congress over such protected materials can and should be worked out through negotiation and compromise, always protecting the core concerns of the privilege. Finally, privilege should never be invoked to cover up personal or criminal wrongdoing. Assertions of privilege in such instances are an abuse of the Presidency, and this President has no intention of abusing his office.

Let me give you two concrete examples of President Bush's approach to this issue. Yesterday, President Bush invoked executive privilege in response to a subpoena from the House Committee on Government Reform that sought various prosecutorial declination and other deliberative memorandums from the Department of Justice. The President's claim of executive privilege in response to this subpoena was entirely appropriate and justified, both historically and legally. Line prosecutors in the Executive Branch must be free to provide their candid recommendations and evaluations whether to prosecute individuals without fear of subsequent politically inspired criticism.

To be sure, we did not seek out this opportunity to try out the privilege. Invocations of executive privilege require the expenditure of significant amounts of political capital and expose the President to such epithets and "stonewalling." We fervently hope that this will be an isolated incident and that we never need to assert the privilege again during this administration. But it is absolutely that we not flinch from recommending the assertion of the privilege when it is

Deleted: Ironically, this is also good for federal prosecutors, who wish to do their jobs without, as has happened in the past, public criticism from the President to whom the prosecutor constitutionally reports.

Deleted: Executive Privilege has been recognized since the Founding and asserted by Presidents beginning with George Washington. President Washington, as you may recall, refused a request by the House of Representatives for documents relating to a military expedition led by General St. Clair. Given all of that history, it came as no surprise in 1974, in the *United States v. Nixon* case, when the Supreme Court unanimously recognized the constitutional doctrine of executive privilege, even going so far as to label the doctrine "fundamental to the operation of government." ¶

Deleted: This President intends to assert executive privilege where appropriate and necessary so as to protect the confidentiality of Presidential decisionmaking against inappropriate incursions by Congress. We will not shy away from principled assertions of executive privilege -- notwithstanding the criticism that may be directed at such assertions. But equally as important, this President does not intend to assert executive privilege to

letigimate to do so and necessary to protect national security, law enforcement actions, or core deliberative processes.

Also recently, President Bush issued an executive order to establish procedures for former Presidents to assert privileges over their Presidential records. This executive order gives effect to the Supreme Court's 1977 ruling in the *Nixon v. GSA* case that former Presidents retain the constitutional right to assert privileges over such records even after their terms have ended.

A second aspect of Presidential authority that has been the subject of much recent attention is the President's authority as Commander in Chief. Even in quiet and peaceful times, this constitutional power of the President exceeds all others in its importance. In times of war, in the wake of a vicious enemy attack on our people and country, the President's power as Commander in Chief assumes even greater significance.

Recently, in exercising that authority, the President issued an order authorizing the use of military tribunals under certain circumstances. There has been a lot of discussion of this order, and I would like to summarize what was done -- and not done -- in that order to set the record straight.

In this time of war, President Bush, as Commander in Chief, will employ appropriate constitutional tools and procedures to protect and defend the American people against terrorist attacks.

When used in appropriate circumstances, military commissions will provide important benefits for the security of our people. They will spare American jurors, judges and courts the grave risks associated with terrorist trials. They will allow the government to use classified information as evidence without compromising intelligence or military efforts. And they can dispense justice swiftly, close to where our forces may be fighting, without years of pretrial proceedings or post-trial appeals.

As the President's order directs, trials before military commissions will be "full and fair." Everyone tried before a military commission will know the charges against him, be represented by qualified counsel, and be allowed to present a defense. The American military justice system is the finest in the world, with a longstanding tradition of procedural fairness. The suggestion that these commissions will afford only sham justice is an insult to our military justice system.

In sum, military commissions do not undermine the constitutional values of civil liberties or separation of powers; they protect them by ensuring that the United States may wage war against enemies and defeat them. To defend the nation, to defend all of us, President Bush has rightly sought to employ constitutional means at his disposal. Military commissions are one such means.

An additional element of the President's power as Commander in Chief also bears mention today because it interacts with executive privilege. In responding to the terrorist attacks against the United States, the President intends to keep the leadership of Congress informed about the course of, and important developments in, our critical military, intelligence, and law

Deleted: It bears mention that the controlling opinion in that case -- the opinion that stated that former Presidents retain the constitutional right to assert privileges over their records *even after their terms have ended* -- was written by Justice Brennan, a Justice not generally known for an over-expansive view of executive power. Yet today, some congressional critics of the executive order would like to ignore that Supreme Court ruling and have Congress mandate the release of even sensitive Presidential records at some point after a President leaves office. Our response to such criticism is straightforward: Congress has no authority to override the Constitution in that manner, and the Administration will strenuously resist any effort to undercut the scope of executive privilege as the Supreme Court has defined it.

Deleted: These two examples are instructive, we believe, of how this Administration will approach Executive privilege because each example has everything to do with principle and nothing to do with the personal interests of any particular individual. Indeed, at a recent hearing on the Presidential Records Act, one critical Member of Congress remarked that he thought it odd that President Bush had asserted and recognized executive privilege even when the President's own interests were not really at stake. Although the Congressman certainly did not intend his remark as a compliment, I take it as the highest compliment. For it demonstrates that our approach is based on constitutional principle, not personal expediency. ¶
¶
When this Presidency comes to a conclusion, it is my hope that the doctrine of executive privilege will again have the respect of the public and the Congress. By asserting the privilege where necessary and appropriate -- but only where necessary and appropriate -- I believe that we can and will achieve that goal.¶
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enforcement operations. At the same time, the President has an obligation to protect military operational security, intelligence sources and methods, and sensitive law enforcement investigations. Leaks of sensitive or classified information from Congress threaten American lives, and as the President has indicated, he will not hesitate to narrow access to classified information if Congress does not properly protect it.

Let me turn then to a third aspect of the President's constitutional prerogatives: the nomination of federal judges.

I begin with the Constitution, which provides that the President *alone* is to exercise the nomination power, not the Senate or some committee.

Earlier this year, as you know, the Administration ended the practice of giving the American Bar Association a quasi-official role in the President's nomination process. This decision was made on principle. It is simply inappropriate, we believe, to afford any outside group a quasi-official role in the President's nomination process, particularly an outside group that takes position on divisive policy issues.

I turn finally to the Senate's role in the confirmation of federal judges. The Constitution obviously provides that the Senate is to pass judgment on a President's judicial nominees. But as the Vice President recently stated, the Senate abdicates its constitutional responsibility when its obstructs and delays the confirmation process, when it refuses to hold hearings for the President's judicial nominees rather than voting them up or down.

Now is a good time to assess whether the Senate is meeting its constitutional obligations.

To begin with, context is important. As of today, there are about 100 vacancies out of 840 authorized federal judgeships. Nearly 12% of the federal judgeships are vacant. There is a vacancy crisis in the judiciary.

Notwithstanding the record pace of judicial nominations in this administration, the number of vacancies in the federal judiciary has actually increased since President Bush took office. The Senate has simply failed to process judicial nominations in a timely manner. Only 24 of the President's 64 nominees have been confirmed thus far. And even worse, only 6 of the President's 28 nominees to the courts of appeals have been confirmed. The Sixth Circuit is half empty; the D.C. Circuit is one-third empty -- yet not a single one of the President's 8 nominees to these two courts has received so much as a hearing.

The Senate's current actions are inconsistent with its traditional practices. In the past, a President's first-year judicial nominees have been confirmed almost as fast as their nominations reach the Senate. In 2001, in contrast, President Bush submitted 44 nominations prior to the August recess, yet only half of them have received votes.

The President's first batch of judicial nominees presents perhaps the starkest example of the breakdown in the Senate's confirmation process. On May 9, at a ceremony in the East Room, the President announced the nomination of his first 11 circuit nominees, all of whom are

Deleted: And apart from that, there surely is no legitimate constitutional reason to give one group -- out of the literally dozens of groups and many individuals who have a strong interest in the composition of the federal courts -- a preferential role in the President's nomination process.

Deleted: A particular threat to the President's nomination power has also arisen with some frequency over the past year -- namely, demands by Senators in some states for bipartisan commissions that would control the process of recommending judicial candidates to the President. Although such commissions are used in a few states largely as a matter of tradition, let me be clear about the Administration's view on these commissions. Historically, bipartisan commissions rarely have been employed in the judicial nomination process because they have the effect of limiting the President's choices among all eligible lawyers in a state. Bipartisan commissions thus intrude substantially on the President's power of nomination, which the Constitution expressly assigns to the President alone. In addition, we are very doubtful that bipartisan commissions produce the most highly qualified candidates for the federal judiciary, as opposed to the least-common-denominator candidates agreed to by factions of the local bar. For these reasons, we will resist any expansion of the use of bipartisan judicial nominating commissions and any diminution in the President's power of nomination. ¶
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Recognizing the crisis, the President has moved rapidly, nominating 64 judges thus far with many more to come in the next few weeks. This pace already has established a modern record for a President's first year. ¶
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Deleted: . In each of the previous three administrations, for example, all but one of the judicial nominations submitted before the first August recess were confirmed by the end of the year. But that traditional practice appears to have ended:

very experienced and extraordinarily well qualified. They include widely respected judges and lawyers such as my former colleague Priscilla Owen, a superb judge on the Texas Supreme Court, and others such as Miguel Estrada, John Roberts, and Michael McConnell. Yet today, over 7 months have now passed, yet 8 of those original 11 nominees still have not received a hearing before the Senate Judiciary Committee. Seven months without a hearing. And not for one or two nominees. But for 8 of 11.

The Washington Post recently labelled the Senate's tactics regarding these original 11 nominees unacceptable, stating -- and I quote -- "The Judiciary Committee chairman, . . . , has offered no reasonable justification for stalling on these nominations. . . . Failing to hold [hearings] in a timely fashion damages the judiciary, disrespects the president's power to name judges and is grossly unfair to often well-qualified nominees."

I have heard the argument that the Senate's stalling tactics are appropriate payback for what happened during the previous President's Administration. Even accepting the legitimacy of payback, what about the fact that so many of President George H.W. Bush's nominees were held up in 1992? So which party is really to blame for firing the first shot? It is time for the cycle of recrimination and finger-pointing over judicial nominations to end.

I can't leave the topic of judicial nominations without one final observation. This President strongly believes – and I share that belief – that federal judicial nominees should be persons of the highest reputation, having a sound understanding of the limited role of the judiciary and who represent the diversity of American society. I am sure that some will say that this last requirement – diversity – is not appropriate, that quality is determined not by external characteristics but by internal discipline and training. The President – and I – would agree heartily with that premise. But at the same time, he recognizes that quality can be found in many colors and that those who seek out judicial candidates in a diverse society, must often go the extra mile to ensure that segments of society who have tended not to be selected for judicial service be given opportunities to serve.

In closing, let me say that I am deeply honored and humbled to serve this President at this time. When I come through the gates to the White House each morning, when I walk into the Oval Office to brief the President, I am always mindful of the awesome responsibility that the President has -- and the corresponding duty that falls upon all of us who serve him. I am grateful for the opportunity to serve this great country, and I thank you for inviting me here today. to

Deleted: . At the East Room event on May 9, President Bush stated, "I now submit these nominations in good faith, trusting that good faith will be returned in kind by the United States Senate." Seven months later, it is time to ask whether the President's trust has been returned: Has the Senate acted in good faith with respect to those 11 nominees? The numbers speak for themselves. The answer is clear. The answer is no. ¶
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No answer to that question will satisfy all. And that proves the wisdom of what President Bush stated back on May 9.

Deleted: It is time to settle on a judicial confirmation process that will stand the test of time. So let me again quote what the President said that day because his words are even more powerful today: "I urge senators of both parties to rise above the bitterness of the past – to provide a fair hearing and a prompt vote to every nominee, no matter who lives in this house, no matter who controls the Senate." The President asked for a fair process, for a prompt hearing and vote on every nominee. That is the Senate's constitutional duty, and I think it is past time for the Senate to perform its duty, particularly as to the President's original 11 nominees.¶

Deleted: share some of my thoughts about my current role. I look forward to your questions.

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From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Tuesday, January 14, 2003 8:48 AM
To: David G. Leitch (CN=David G. Leitch/OU=WHO/O=EOP@EOP [WHO]); Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP@EOP [WHO]); Alberto R. Gonzales (CN=Alberto R. Gonzales/OU=WHO/O=EOP@EOP [WHO])
Subject: : re-send with edits to the one sentence

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME:14-JAN-2003 09:47:31.00 SUBJECT:: re-send with edits to the one sentence TO:David G. Leitch (CN=David G. Leitch/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Alberto R. Gonzales (CN=Alberto R. Gonzales/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN ###### End Original ARMS Header

As America has confronted the legacy of slavery, segregation, and racial discrimination, two competing principles have operated in tension. The first is the basic nondiscrimination principle that each American is entitled to equal treatment under law and should be considered without regard to race or ethnicity. The second is the need and desire to remedy the continuing effects of past societal discrimination against African-Americans, American Indians, Hispanics, Asians, and other racial and ethnic groups (a remedial goal that has been used as the basis for preferences expressly on the basis of race or ethnicity).

The Court's case law attempts to resolve this tension, where possible, without sacrificing either principle -- that is, by holding the government, where possible, should remedy the effects of past societal discrimination without treating individuals differently on account of race or ethnicity. The Court thus has held that strict scrutiny applies to all racial classifications, including racial preferences for minorities, and that racial classifications are permissible only if necessary and narrowly tailored to serve a compelling government interest.

In this case, Michigan and the intervenors justify Michigan's raced-based admissions program by asserting compelling interests in (i) diversity and
(ii) remedying the effects of past societal discrimination. They further argue that the Michigan program is narrowly tailored to that end.

The interest in achieving diversity for the sake of diversity is an impermissible interest under the Court's case law and is indistinguishable from an approach that would advocate and justify strict racial quotas and proportional representation in employment, education, contracting, and voting for all racial and ethnic groups. Of course, the term "diversity" has multiple meanings and is sometimes used not to justify racial quotas and proportional representation, but rather to ensure that the government has taken sufficient and appropriate steps to include minorities and remedy the effects of past societal discrimination against African-Americans, Hispanics, American Indians, Asian-Americans, and others. With respect to this argument, the Court and the United States have consistently emphasized the paramount importance of remedying past racial discrimination and thereby making educational and employment opportunities open and available to members of diverse minority groups.

The Court has also made clear, however, that the interest in remedying past societal discrimination can (and where possible must) be achieved through race-neutral means, such as outreach, recruiting, admissions factors such as income or familial status, or admissions programs such as the Texas 10% plan. See Croson ("a race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation"); see also id. ("Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or

modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race.").

We also now know that, in the university context, the Court's premise -- that race-neutral means can remedy the effects of past discrimination and open universities to members of diverse minority groups -- is correct.
See Texas, Florida, California. Indeed, the four Justices who argued in Bakke that racial classifications and quotas were permissible to remedy the effects of societal discrimination based their conclusion on an assumption that race-neutral alternatives would not suffice to remedy the effects of past discrimination. They believed that there were "no practical means" by which the medical school in Bakke "could achieve its ends in the foreseeable future without the use of race-conscious measures"
and that "it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful." In 2003, we can say that this assumption is erroneous in light of the modern experience in states such as Texas, Florida, and California.

Some may argue that race-neutral approaches will not always suffice to remedy the effects of past discrimination and ensure that members of diverse minority groups are included in institutions of higher education.
But experience shows that such race-neutral means in fact do work. And if they did not work in some specific case, a state or local government could seek to demonstrate that the failure was the result of ongoing racial discrimination in the jurisdiction, which in an extreme case might justify the use of race as a consideration in remedying such discrimination. Cf.
Croson (O'Connor opinion) ("As a matter of state law, the city of Richmond has legislative authority over its procurement policies, and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment. . . . If the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private
prejudice."). As the Court stated in Croson, "Where there is a
significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."

[Go through specific narrowly tailored factors]

.

From: Jay P. Lefkowitz (CN=Jay P. Lefkowitz/OU=OPD/O=EOP@Exchange [OPD])
Sent: Friday, January 17, 2003 5:21 AM
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
Subject: : Re:

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Jay P. Lefkowitz (CN=Jay P. Lefkowitz/OU=OPD/O=EOP@Exchange [OPD]) CREATION DATE/TIME:17-JAN-2003 06:20:52.00
SUBJECT:: Re:
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

Ok. Then it's really good we filed the brief we filed.

Sent From Exchange 2000 Blackberry Handheld

-----Original Message-----
From: Kavanaugh, Brett M. <bkavanau@WHO.eop.gov>
To: Gonzales, Alberto R. <agonzale@WHO.eop.gov>; Francisco, Noel J. <nfrancis@WHO.eop.gov>; Leitch, David G. <David_G._Leitch@who.eop.gov>; Lefkowitz, Jay P. <Jay_P._Lefkowitz@opd.eop.gov>
Sent: Thu Jan 16 23:51:27 2003
Subject: ;

Clegg's ultimate aim is emerging: ;

Roger Clegg, general counsel for the Center for Equal Opportunity, a Virginia-based think tank that opposes race-conscious affirmative action, said that while the percentage plans are better than "racial preferences," they still amount to a thinly veiled system of selecting students by race.
"I think these plans are very vulnerable to a legal challenge," he said. ; ;

.

From: Lefkowitz, Jay P.
Sent: Friday, January 17, 2003 10:58 AM
To: Kavanaugh, Brett M.
Subject: RE: AP - Bush administration calls affirmative action plan ``plainly unconstitutional''

Makes no difference to me. If you think it might make you take some heat in front of the folks you rally for support on Judges, I am happy to go. If not, let's just see whose schedule it's easier for.

> -----Original Message-----
> From: Kavanaugh, Brett M.
> Sent: Friday, January 17, 2003 10:52 AM
> To: Lefkowitz, Jay P.
> Subject: Re: AP - Bush administration calls affirmative action plan
> ``plainly unconstitutional''
>
> Jay: I do all of these meetings and calls routinely on judges and
> can happily do these. Whoever does them should just provide a very
> straightforward summary of the position and, in response to inevitable
> questions, make clear that there was and is no need to take a position
> on whether diversity itself is a compelling interest since
> race-neutral alternatives are available and, in other states, have
> ensured that minorities have access to and are represented in
> institutions of higher education.
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>
> Brett M. Kavanaugh
> 01/17/2003 08:40:27 AM
> Record Type: Record
>
> To: Tim Goeglein/WHO/EOP@EOP
> cc:
> bcc: Records Management@EOP
> Subject: Re: AP - Bush administration calls affirmative
> action plan ``plainly unconstitutional'' << OLE Object: StdOleLink >>
>
> I suggest Jay Lefkowitz as your first choice. If not, I will do
> them.
>
>
>
>
>
>
>
>
> Tim Goeglein

> 01/17/2003 07:37:21 AM
> Record Type: Record
>
> To: Brett M. Kavanaugh/WHO/EOP@EOP
> cc:
> Subject:AP - Bush administration calls affirmative action
> plan ``plainly unconstitutional''
>
> My friend B
>
> A lot of interest in this in my world, as you might imagine.
>
> Who from Counsel could speak to Norquist and Weyrich next week, as
> well as the conservative teleconference on Monday?
>
> tsg
>
> ---------- Forwarded by Tim Goeglein/WHO/EOP on
> 01/17/2003 07:40 AM ----------
>
>
> From: Brian Bravo/WHO/EOP@Exchange on 01/17/2003 06:43:42 AM
> Record Type: Record
>
> To:
> cc:
> Subject:AP - Bush administration calls affirmative action
> plan ``plainly unconstitutional''
>
> Bush administration calls affirmative action plan ``plainly
> unconstitutional''
>
> By ANNE GEARAN Associated Press Writer
>
> WASHINGTON (AP) The Bush administration told the
> Supreme Court on Thursday that university admissions programs that
> gave an edge to minority students are unconstitutional and ignore
> race-neutral alternatives that could boost minority presence on campuses.
>
> The administration urged the high court to strike down
> admissions policies at the University of Michigan and its law school.
>
> The admissions policies amount to unconstitutional
> quota systems and unfairly discriminate against white students, the
> administration argued in a friend-of-the-court brief filed in the
> lawsuit challenging the Michigan school's practices.
>
> Solicitor General Theodore Olson wrote: ``The court
> should hold that the university's race- and ethnic-based undergraduate
> admissions policies are unconstitutional because proven race-neutral
> alternatives to achieving the laudable goals of educational openness
> and diversity remain available.''
>
> Both admissions policies fail the constitutional test
> of equal protection for everyone under the law and cannot be

> reconciled with previous Supreme Court rulings that severely limit the
> use of race as a factor in government decisions, Olson wrote.
>
> The filings do not go as far as some of President
> Bush's most conservative supporters had hoped.
>
> The administration did not stake a categorical
> position against any use of race in university admissions, and did not
> ask the court to overturn an affirmative action ruling that for 25
> years has allowed some role for an applicant's race.
>
> The case marks the court's first statement on racial
> preference programs in academic admissions since the 1978 Bakke case,
> which affirmative action critics and backers alike say has muddied the
> waters for a quarter century.
>
> The 1978 case, the last college affirmative action
> case at the high court, involved Allan Bakke, a white man rejected for
> admission to a California medical school while minorities with lower
> test scores got in through a special program.
>
> The court on a 5-4 vote outlawed racial quotas in
> university admissions, but left room for race to be a ``plus factor.''
> Michigan and many other public universities have used the ruling to
> design programs that can help minorities who might be rejected if only
> test scores and grades are considered.
>
> In practice, that has ``become a wholesale invitation
> to ... mechanically admit students who have questionable academic
> credentials and records merely because they self-identify themselves
> as falling within a favored category,'' said Catholic University law
> school dean Douglas Kmiec, who supports the Bush position.
>
> The administration is not a party to the Michigan
> fight and did not have to take any position. Affirmative action,
> however, is the most watched issue before the high court this year and
> it would have been unusual for the White House to remain on the sidelines.
>
> The issue is politically touchy because it is
> seemingly impossible to please both Bush's conservative political base
> and the Hispanic and black voters the Republican party hopes to
> attract during what is presumed to be Bush's re-election campaign next year.
>
> The deadline for filing court papers in the Michigan
> case also came close on the awkward, racially charged exit of Trent
> Lott, R-Miss., as the Senate's Republican leader. Bush condemned
> remarks Lott made last month that seemed to long for the days of segregation.
>
> The high court, which will hear arguments on the case
> in March, could do what the Bush friend-of-the-court brief apparently
> will not and conclude race can never be a factor when a
> government-funded school decides whom to let in.
>
> That position would eliminate the leeway from the
> Bakke case. Some think that may be what the White House wants, even if

> Bush is not saying so.
>
> ``His public rhetoric of no quotas is obviously quite
> different than the position they hope the Supreme Court will take,''
> University of Southern California constitutional law professor Erwin
> Chemerinsky said.
>
> The court, which is expected to rule by summer, could
> redraw the rules for when race may be considered.
>
> Applicants for Michigan's undergraduate classes are
> scored by points, with minorities or some poor applicants receiving a
> boost of 20 points on a scale of 150. At the law school, admissions
> officers use a looser formula that tries to make sure that each class
> has about 10 percent or 12 percent minority enrollment.
>
> The administration says the point system is skewed
> toward minorities, noting that a perfect SAT score is worth just 12
> points, and an outstanding essay gets three points.
>
> The cases are Grutter v. Bollinger, 02-241 and Gratz
> v. Bollinger, 02-516.
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From: Charnes, Adam ("Charnes, Adam" <Adam.Charnes@usdoj.gov> [UNKNOWN]) <Adam.Charnes@usdoj.gov>
Sent: Wednesday, December 11, 2002 6:27 AM
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
Cc: Benjamin A. Powell (CN=Benjamin A. Powell/OU=WHO/O=EOP@EOP [WHO]); Alberto R. Gonzales (CN=Alberto R. Gonzales/OU=WHO/O=EOP@EOP [WHO])
Subject: : Re: CA11

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:"Charnes, Adam" <Adam.Charnes@usdoj.gov> ("Charnes, Adam" <Adam.Charnes@usdoj.gov> [UNKNOWN]) CREATION DATE/TIME:11-DEC-2002 07:26:49.00
SUBJECT:: Re: CA11
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN CC:Benjamin A. Powell (CN=Benjamin A. Powell/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN CC:Alberto R. Gonzales (CN=Alberto R. Gonzales/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
End Original ARMS Header

Brett, at your request, I asked Matt to speak with Pryor about his interest. Pryor responded that he was "intrigued" but needed to speak with his wife. Incidentally, he will be at the WH today for a Christmas party, and is staying at the Willard, so you might want to speak with him directly. Also, we should probably communicate, either directly or through Matt, a deadline for him to let us know definitively, because of the time pressure imposed by Steele's renomination.

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov <Brett_M._Kavanaugh@who.eop.gov>
To: Charnes, Adam <Adam.Charnes@USDOJ.gov>
CC: Benjamin_A._Powell@who.eop.gov <Benjamin_A._Powell@who.eop.gov>; Alberto_R._Gonzales@who.eop.gov <Alberto_R._Gonzales@who.eop.gov>
Sent: Tue Dec 10 18:15:57 2002
Subject: Re: CA11

Adam, actually, I think we should discuss this. Makes sense to think through this seat carefully for many reasons. In particular, we perhaps should think about recommending Pryor for CA11 and Steele for one of the district court seats, which would be a very solid result on both CA11 and district court and avoid a potentially serious problem that we can discuss.

(Embedded
image moved "Charnes, Adam" <Adam.Charnes@usdoj.gov>
to file: 12/10/2002 05:57:21 PM
pic32120.pcx)

Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP

cc:
Subject: CA11

Told by Lembke that Pryor may now be viable candidate for CA11 if Steele isn't renominated (because GOP governor). I assume that there is no question that Steele will be renominated?

.

From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Saturday, March 08, 2003 6:31 PM
To: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]); Manuel_Miranda@frist.senate.gov [UNKNOWN]
Subject: : Re: Kuhl / For your prep

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME: 8-MAR-2003 19:30:31.00
SUBJECT:: Re: Kuhl / For your prep
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN
TO:Manuel_Miranda@frist.senate.gov (Manuel_Miranda@frist.senate.gov [UNKNOWN]) READ:UNKNOWN
End Original ARMS Header

I will get them for you. She did not go through commission because that is only for dct but we had extensive consultation with boxer and feinstein over kuhl including kuhl meeting with them individually before nomination and answering written questions. At the time sens were much more concerned about chris cox.

.

----- Original Message -----
From:<Manuel_Miranda@frist.senate.gov>
To:Brett M. Kavanaugh/WHO/EOP@EOP
Cc:
Date: 03/08/2003 07:24:36 PM
Subject: RE: Kuhl / For your prep

Can one get the answers she gave on this? From the Commission?

-----Original Message-----
From: Brett_M._Kavanaugh@who.eop.gov
[mailto:Brett_M._Kavanaugh@who.eop.gov]
Sent: Saturday, March 08, 2003 7:09 PM
To: Miranda, Manuel (Frist); brian.a.benczkowski@usdoj.gov; Nathan.Sales@usdoj.gov; Kristi.L.Remington@usdoj.gov; Brett_M._Kavanaugh@who.eop.gov
Subject: Re: Kuhl / For your prep

Kuhl has dealt with this in her answers to boxer and feinsteins written questions that she did before she was ever nominated. Note that she is catholic so any attempt to accuse her of pro bob jones sympathy can be countered. This
case and roe are 2 big issues with her.

..

----- Original Message -----
From:<Manuel_Miranda@frist.senate.gov>
To:brian.a.benczkowski@usdoj.gov,
<Nathan.Sales@usdoj.gov>,
Kristi.L.Remington@usdoj.gov,
Brett M. Kavanaugh/WHO/EOP@EOP
Cc:
Date: 03/08/2003 04:33:37 PM

Subject: Kuhl / For your prep

As you may know, the Dems were expecting Kuhl to come up this coming week and are surprised by Owen.

Dem JC counsel have all received copies of 2 news articles from 1982 (one NYT article by Stuart Taylor and one Washington Post article by Charles Babcock). These articles refer to the change in the Reagan Administration's policy that led to the reversal of the 11-year old policy of denying tax exemptions to racially discriminatory private schools, and discuss Kuhl's role in the decision. According to Dems, these articles mention:

1) That more than 200 lawyers in the Justice Department's civil rights division signed a letter expressing serious concerns about the change in policy. They stated that "the extension of tax-exempt status to these institutions violates existing federal civil rights law, as expressed in the Constitution, acts of Congress, and Federal court interpretations thereof."

2) That, the Senate Finance Committee held hearings after that decision, in 1982, on whether to pass a law making it illegal to grant such exemptions. According to the news accounts, documents released to the Finance Committee included "internal memorandums between high Justice and Treasury officials and correspondence with members of Congress." There was also Testimony by William Bradford Reynolds, then head of the Civil rights division, and Deputy AG Edward Schmults.

According to the news articles, the documents show that "Mr. Reynolds and his allies, Bruce Fein, an aide to Mr. Schmults, and Carolyn Kuhl, an aide to Attorney General Smith, began to argue in early December, the documents and testimony . . . show, that the Administration should reverse its position. . . "

The documents also apparently show that Mr. Reynolds was one of the chief advocates of the view that even segregationist schools are legally entitled to tax exemptions, and that he and his allies (Scmults and AG Smith) prevailed over objections by the head of the IRS (Roscoe Egger), and other career Justice Department lawyers, including then-OLC head Ted Olson, and Lawrence Wallace, the Deputy SG in charge of the pending Supreme Court case involving the issue.

Dems are trying to track down testimony and the related documents from that Finance Committee hearing.

- att1.htm

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From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Tuesday, April 23, 2002 3:58 PM
To: Patrick J. Bumatay (CN=Patrick J. Bumatay/OU=WHO/O=EOP@EOP [WHO]); James A. Brown (CN=James A. Brown/OU=OMB/O=EOP@EOP [OMB])
Subject: : Re: LRM JAB 206 Small Business Administration Draft Provision on Authorization for Native American Economic Development Activities

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME:23-APR-2002 16:57:52.00
SUBJECT:: Re: LRM JAB 206 Small Business Administration Draft Provision on Authorization for Native American Economic Development Activities TO:Patrick J. Bumatay (CN=Patrick J. Bumatay/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:James A. Brown (CN=James A. Brown/OU=OMB/O=EOP@EOP [OMB]) READ:UNKNOWN
End Original ARMS Header

White House Counsel: The Supreme Court has held that Native Hawaiians are not the equivalent of Indian tribes under the Constitution.
See Rice v. Cayetano. That group thus should not be included in the list because of the constitutional issues that would arise from this race-based classification.

Patrick J. Bumatay
04/23/2002 03:07:06 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject:LRM JAB 206 Small Business Administration Draft Provision on Authorization for Native American Economic Development Activities

---------- Forwarded by Patrick J. Bumatay/WHO/EOP on 04/23/2002 03:07 PM ----------

James A. Brown
04/23/2002 02:39:59 PM
Record Type: Record

To: See the distribution list at the bottom of this message
cc:
Subject:LRM JAB 206 Small Business Administration Draft Provision on Authorization for Native American Economic Development Activities

It is anticipated that this provision, which is necessary to implement a proposal in the FY 2003 Budget, will be transmitted informally. SBA is testifying on a related matter on April 30th. If we do not hear from you by the deadline (either in the form of a comment, or notification that a

comment will be forthcoming), we will assume that you have no objection to clearance of this provision.
The Provision is as follows:

"Section __ of the Small Business Act is amended by adding the following:
"(1) IN GENERAL - The Administrator may make grants to and enter into cooperative agreements with any recognized Indian Tribe or tribal entity, Alaskan Native Corporation, or Native Hawaiian organization for the purposes of expanding opportunities for economic development.
(2) AUTHORIZATION OF APPROPRIATIONS -- There is authorized to be appropriated to carry out this subsection $1,000,000 for fiscal years 2003 through 2007."

LRM ID: JAB206
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Tuesday, April 23, 2002

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below
FROM: Richard E. Green (for) Assistant Director for Legislative Reference
OMB CONTACT:James A. Brown
PHONE: (202)395-3473 FAX: (202)395-3109
SUBJECT: Small Business Administration Draft Provision on Authorization for Native American Economic Development Activities

DEADLINE: 12:00 Noon Wednesday, April 24, 2002
In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: It is anticipated that this provision, which is necessary to implement a proposal in the FY 2003 Budget, will be transmitted informally. SBA is testifying on a related matter on April 30th. If we do not hear from you by the deadline (either in the form of a comment, or notification that a comment will be forthcoming), we will assume that you have no objection to clearance of this provision.

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Richard E. Green
James J. Jukes
Anna M. Briatico
Dirksen Lehman
Sarah S. Lee
Pamula L. Simms
David Rostker
LRM ID: JAB206 SUBJECT: Small Business Administration Draft Provision on Authorization for Native American Economic Development Activities
RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:
(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
(2) sending us a memo or letter
Please include the LRM number shown above, and the subject shown below.

TO: James A. Brown Phone: 395-3473 Fax: 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant):
395-3454

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this response sheet

Message Sent
To:_____
ocl@ios.doi.gov
justice.lrm@usdoj.gov
CLRM@doc.gov
WHGC LRM
NEC LRM
Philip J. Perry/OMB/EOP@EOP
Matthew J. Schneider/OMB/EOP@EOP
OVP LRM
David S. Addington/OVP/EOP@EOP
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Aquiles F. Suarez/OPD/EOP@EOP
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Anna M. Briatico/OMB/EOP@EOP
Dirksen Lehman/WHO/EOP@EOP
Sarah S. Lee/OMB/EOP@EOP
Pamula L. Simms/OMB/EOP@EOP
David Rostker/OMB/EOP@EOP

.

From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Monday, April 29, 2002 11:41 AM
To: Patrick J. Bumatay (CN=Patrick J. Bumatay/OU=WHO/O=EOP@EOP [WHO]); James A. Brown (CN=James A. Brown/OU=OMB/O=EOP@EOP [OMB])
Subject: : Re: Passback: Revised SBA Native American Business Testimony
Attachments: P_1DO07003_WHO.TXT_1.pdf

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME:29-APR-2002 11:41:21.00
SUBJECT:: Re: Passback: Revised SBA Native American Business Testimony TO:Patrick J. Bumatay (CN=Patrick J. Bumatay/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:James A. Brown (CN=James A. Brown/OU=OMB/O=EOP@EOP [OMB]) READ:UNKNOWN
End Original ARMS Header

White House Counsel concurs with OLC's comments.

Patrick J. Bumatay
04/29/2002 11:10:35 AM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject:Passback: Revised SBA Native American Business Testimony

---------- Forwarded by Patrick J. Bumatay/WHO/EOP on 04/29/2002 11:10 AM ----------

James A. Brown
04/29/2002 11:06:48 AM
Record Type: Record

To: See the distribution list at the bottom of this message
cc:
Subject:Passback: Revised SBA Native American Business Testimony

The attachment contains OLC's comment on the revised testimony, and my further pen-and-ink revisions to bring the testimony into conformity with OLC's comments. Absent objection, I plan to pass this back to SBA at noon. Thanks.

Message Sent
To:_____
Stephen S. McMillin/OMB/EOP@EOP
Alan B. Rhinesmith/OMB/EOP@EOP
James Boden/OMB/EOP@EOP
Janis A. Coughlin/OMB/EOP@EOP
Yvette M. Dennis/OMB/EOP@EOP
WHGC LRM
Brett M. Kavanaugh/WHO/EOP@EOP
David S. Addington/OVP/EOP@EOP
Philip J. Perry/OMB/EOP@EOP
Matthew J. Schneider/OMB/EOP@EOP
James J. Jukes/OMB/EOP@EOP
Richard E. Green/OMB/EOP@EOP
Lauren C. Lobrano/OMB/EOP@EOP

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_1DO07003_WHO.TXT_1>

.

From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Tuesday, June 04, 2002 5:51 PM
To: Patrick J. Bumatay (CN=Patrick J. Bumatay/OU=WHO/O=EOP@EOP [WHO]); Lisa J. Macecevic (CN=Lisa J. Macecevic/OU=OMB/O=EOP@EOP [OMB])
Subject: : ANY COMMENTS? -- LRM LJM114 - - TREASURY Testimony on Capital Investment In Indian Country
Attachments: P_STGT7003_WHO.TXT_1.doc; P_STGT7003_WHO.TXT_2.pdf

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME: 4-JUN-2002 17:51:14.00
SUBJECT:: ANY COMMENTS? -- LRM LJM114 - - TREASURY Testimony on Capital Investment In Indian Country TO:Patrick J. Bumatay (CN=Patrick J. Bumatay/OU=WHO/O=EOP@EOP [WHO]) READ:UNKNOWN TO:Lisa J. Macecevic (CN=Lisa J. Macecevic/OU=OMB/O=EOP@EOP [OMB]) READ:UNKNOWN
End Original ARMS Header

This needs to be carefully vetted by OLC. First, Supreme Court case law makes clear that laws affecting Indians on Indian territory are different from general laws affecting Indians (which are analyzed as are other race-based classifications). Second, Supreme Court case law also suggests that Native Hawaiians are not an Indian tribe and thus are treated as other racial and ethnic groups under the Constitution, not as Indian tribes. OLC needs to vet all of this to be sure nothing runs afoul of those principles.

---------- Forwarded by Brett M. Kavanaugh/WHO/EOP on 06/04/2002 05:49 PM ----------

Patrick J. Bumatay
06/04/2002 05:14:04 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject:ANY COMMENTS? -- LRM LJM114 - - TREASURY Testimony on Capital Investment In Indian Country

---------- Forwarded by Patrick J. Bumatay/WHO/EOP on 06/04/2002 05:13 PM ----------

From: Lisa J. Macecevic on 06/04/2002 05:12:29 PM
Record Type: Record

To: Alan B. Rhinesmith/OMB/EOP@EOP, James Boden/OMB/EOP@EOP, Patrick J. Bumatay/WHO/EOP@EOP
cc:
Subject:ANY COMMENTS? -- LRM LJM114 - - TREASURY Testimony on Capital Investment In Indian Country

---------- Forwarded by Lisa J. Macecevic/OMB/EOP on 06/04/2002 05:11 PM ----------

From: Lisa J. Macecevic on 06/03/2002 05:11:35 PM
Record Type: Record

To: See the distribution list at the bottom of this message
cc: See the distribution list at the bottom of this message
Subject:LRM LJM114 - - TREASURY Testimony on Capital Investment In Indian Country

Attached is Treasury testimony (Special Asst. to the Director, CDFI Fund) for a June 6th hearing before the Senate Banking Committee's Subcommittee on Financial Institutions. Please respond with any comments by 3:00 P.M. TOMORROW - Tuesday, June 4th. Thank you.

(The referenced report is also attached for your information.)

- tt0155a.doc
- treas19a.pdf

LRM ID: LJM114
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Monday, June 3, 2002

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below
FROM: Richard E. Green (for) Assistant Director for Legislative Reference
OMB CONTACT:Lisa J. Macecevic
PHONE: (202)395-1092 FAX: (202)395-3109
SUBJECT: TREASURY Testimony on Capital Investment In Indian Country

DEADLINE: 3:00 P.M. TOMORROW Tuesday, June 4, 2002
In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: Attached is Treasury testimony (Special Asst. to the Director, CDFI Fund) for a June 6th hearing before the Senate Banking Committee's Subcommittee on Financial Institutions. Please respond with any comments by 3:00 P.M. TOMORROW - Tuesday, June 4th. Thank you.

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LRM ID: LJM114SUBJECT: TREASURY Testimony on Capital Investment In Indian Country
RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this

response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

(1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or

(2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Lisa J. Macecevic Phone: 395-1092 Fax: 395-3109
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant):
395-3454

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

_____ Concur

_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

_____ FAX RETURN of _____ pages, attached to this response sheet

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ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_STGT7003_WHO.TXT_2>

.

From: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Sent: Tuesday, June 04, 2002 7:54 PM
To: Lisa J. Macecevic (CN=Lisa J. Macecevic/OU=OMB/O=EOP@EOP [OMB])
Subject: : Re: FW: Treasury testimony on Capital Investment in Indian Country (OLA #1206) (OLC #35683)

Begin Original ARMS Header ###### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]) CREATION DATE/TIME: 4-JUN-2002 19:53:55.00
SUBJECT:: Re: FW: Treasury testimony on Capital Investment in Indian Country (OLA #1206) (OLC #35683) TO:Lisa J. Macecevic (CN=Lisa J. Macecevic/OU=OMB/O=EOP@EOP [OMB]) READ:UNKNOWN
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I think the testimony needs to make clear that any program targeting Native Hawaiians as a group is subject to strict scrutiny and of questionable validity under the Constitution.

Lisa J. Macecevic

06/04/2002 07:13:28 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject:FW: Treasury testimony on Capital Investment in Indian Country (OLA #1206) (OLC #35683)

Thanks for your earlier email. I'm almost positive the comment below came from OLC. Do you have any additional comments to add?

---------- Forwarded by Lisa J. Macecevic/OMB/EOP on 06/04/2002 07:16 PM ----------

"Jones, Gregory M (OLA)" <Gregory.M.Jones@usdoj.gov>
06/04/2002 06:09:41 PM
Record Type: Record

To: Lisa J. Macecevic/OMB/EOP@EOP
cc:
Subject: FW: Treasury testimony on Capital Investment in Indian Country (OLA #1206) (OLC #35683)

Lisa, I spoke too soon. We do have one constitutional concern about the CDFI testimony. The testimony largely summarizes the findings and recommendations of a study the CDFI conducted on barriers to access to capital and financial services on Indian Lands and Native Hawaiian trust lands. To the extent that the testimony could be viewed as advocating that Congress enact programs to benefit Native Hawaiians, it would raise questions about the authority of Congress to treat Native Hawaiians as it would an Indian tribe. See Rice v. Cayetano, 528 U.S. 495, 518-19 (2000) (declining to address that question "of considerable moment and difficulty"). In the event that the Supreme Court eventually determines that Congress lacks this authority, federal programs providing benefits to Native Hawaiians would be viewed as racial classifications subject to strict scrutiny. To avoid this concern, it would be helpful for the statement to make clear that Treasury is not recommending that Congress enact such programs (or alternatively to identify a compelling government interest that any such program would be narrowly tailored to serve).