

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Patrick J. Bumatay/WHO/EOP@EOP [WHO] <Patrick J. Bumatay>;Lisa J. Macecevic/OMB /EOP@EOP [OMB] <Lisa J. Macecevic>
Sent: 9/10/2002 2:17:21 PM
Subject: : LRM LJM153 - - TREASURY (CDFI) Oversight Testimony on Successful Strategies for Indian Reservation Development
Attachments: P_DP31A003_WHO.TXT_1.doc

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME: 10-SEP-2002 18:17:21.00

SUBJECT:: LRM LJM153 - - TREASURY (CDFI) Oversight Testimony on Successful Strategies for Indian Reservation Development

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])

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This testimony needs to be careful not to cross constitutional boundaries regarding racial preferences, particularly in light of Supreme Court case involving Native Hawaiians. I would ask that DOJ OLC take a careful look at this.

----- Forwarded by Brett M. Kavanaugh/WHO/EOP on
09/10/2002 06:05 PM -----

Patrick J. Bumatay
09/10/2002 03:58:03 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject: LRM LJM153 - - TREASURY (CDFI) Oversight Testimony on Successful Strategies for Indian Reservation Development

Just a reminder, this is due at 4 pm.

Thanks,
Patrick

----- Forwarded by Patrick J. Bumatay/WHO/EOP on
09/10/2002 03:58 PM -----

From: Lisa J. Macecevic on 09/10/2002 11:02:56 AM
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 LJM153 - - TREASURY (CDFI) Oversight Testimony on Successful Strategies for Indian Reservation Development

Attached for your review is CDFI oversight testimony on CDFI lending practices to Native Americans, Native Alaskans, and Native Hawaiians. Please respond with any comments by 4:00 P.M. TODAY - Tuesday, September 10th. Thank you.

- tt0183a.doc

LRM ID: LJM153
EXECUTIVE OFFICE OF THE PRESIDENT

REV_00150299

Tuesday, September 10, 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 (CDFI) Oversight Testimony on Successful
Strategies for Indian Reservation Development

DEADLINE: 4:00 P.M. TODAY Tuesday, September 10, 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 for your review is CDFI oversight testimony on CDFI
lending practices to Native Americans, Native Alaskans, and Native
Hawaiians. Please respond with any comments by 4:00 P.M. TODAY - Tuesday,
September 10th. Thank you.

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LRM ID: LJM153 SUBJECT: TREASURY (CDFI) Oversight Testimony on
Successful Strategies for Indian Reservation Development
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

Message Sent

To: _____

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REV_00150301

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ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_DP31A003_WHO.TXT_1>

Hearing on Successful Strategies for Indian Reservation Development

**United States Senate
Senate Committee on Indian Affairs**

Written Statement

Tony T. Brown, Director

**DEPARTMENT OF THE TREASURY
Community Development Financial Institutions Fund**

September 12, 2002

INTRODUCTION

Chairman Inouye, Vice Chairman Campbell and members of the US Senate Committee on Indian Affairs, I appreciate the opportunity to testify before you today on behalf of the Department of Treasury's Community Development Financial Institutions (CDFI) Fund. I am Tony Brown, Director of the CDFI Fund. I bring 20 years prior experience in banking to the CDFI Fund with a decade of service in community development during which I managed the community development program for the largest financial institution in the State of Florida.

The Secretary of the Treasury, Paul O'Neill, selected me as Director in August of last year. The Administration's vision for the CDFI Fund is to see it improve the lives of Americans by providing capital and technical assistance to institutions and entities who in turn provide credit, capital and financial services to underserved and distressed markets. The Administration does not see this as a sole responsibility of Treasury or the CDFI Fund itself. Instead, we view this as a comprehensive and collaborative undertaking involving federal interagency cooperation and public-private initiatives. My testimony will focus on the role the CDFI Fund has played and the strategic direction we will take to help improve the economies of Indian Lands¹ and Native Hawaiian Home Lands².

¹ "Indian Lands" are defined for the purposes of this testimony as they were defined in the Fund's Native American Lending Study, published in November, 2001: "lands owned by or under control of Tribal governments, including reservations, Indian Lands in Oklahoma, and Alaska Native Villages."

² "Hawaiian Home Lands" are defined for the purpose of this testimony as they were defined in the Fund's Native American Lending Study: "trust lands held for the benefit of Native Hawaiian purposes and are administered by the State of Hawaii's Department of Hawaiian Home Lands."

The CDFI Fund is a wholly owned government corporation within the United States Department of the Treasury. The mission of the CDFI Fund is to expand the capacity of financial institutions to provide credit, capital and financial services in economically distressed rural and urban communities. Put simply, the CDFI Fund invests in institutions that in turn provide capital and financial services to underserved people and communities.

The Fund promotes access to capital and local economic growth in four ways:

- 1) Through the CDFI Program, we directly invest in and support community development financial institutions (CDFIs) that provide loans, investments, financial services and technical assistance to underserved people in economically distressed communities;
- 2) Through the Bank Enterprise Award (BEA) Program, we provide an incentive to banks and thrifts (FDIC-insured depositories) to invest in their communities and in other CDFIs;
- 3) Through the Native American CDFI Technical Assistance (NACTA) Program and the Native American CDFI Training Program, we provide grants to assist Native American and Native Hawaiian organizations to build the create and build capacity of CDFIs; and;
- 4) Through our newest program - New Markets Tax Credit (NMTC) Program – we will provide an allocation of tax credits to Community Development Entities (CDEs) which will enable them to attract investment from the private sector and reinvest these amounts in low-income communities.

Community Development Financial Institutions (CDFIs) are specialized financial institutions operating in market niches that have not been adequately served by traditional financial institutions. Included in the various types of CDFIs are community development banks, credit unions, business loan funds, housing/facilities loan funds, microenterprise loan funds, and venture capital funds.

The organizations we support through our financial and technical assistance awards are able to lend in ways that are more flexible or innovative than regulated financial institutions. To date, we have certified 603 financial institutions as CDFIs across the country. To date, there are 24 certified CDFIs that include market areas serving Native American and Alaska Native communities and five certified CDFIs that serve Native Hawaiian communities. The CDFI Fund has awarded \$34 million to these organizations since 1996. Through the CDFI Program, our awards take the form of technical assistance grants, financial assistance grants, loans, equity investments, and share certificates.

We continue to certify about 200 new CDFIs each year; we re-certify CDFIs every three years. Yet, it's not the number of CDFIs certified that we are most pleased

with: it is the fact that these CDFIs serve 98 percent of the nation's most distressed urban and rural communities.

Our communities, through compassion and community activism, have built a financial network that is dedicated to improving the lives of our most economically deprived communities and citizenry. The reach of this financial network is unprecedented. The reach of this financial network is impressive.

The CDFI Fund is a financial lifeline that provides critical support in underserved communities. We are committed to building the strength and capacity of this CDFI financial network to do more by improving the economic conditions of the markets they serve. The CDFI Fund has several strategies underway to improve Indian Land and Native Hawaiian Home Land economic development.

Strategy #1: Obtain 100% certified CDFI coverage in Indian Lands and Hawaiian Home Lands

The CDFI Fund is focused on Native American, Alaska Native and Native Hawaiian communities, as within the nation's financially underserved communities. This focus includes the Native American CDFI Technical Assistance (NACTA) Program and the Native American CDFI Training Program. Through the NACTA Program, the Fund provides direct technical assistance grants to Native American, Alaska Native and Native Hawaiian CDFIs, Tribal³ organizations, and other financial institutions and organizations serving these communities for the purpose of creating CDFIs and building CDFI capacity.

During FY 2002, the first active year of the NACTA Program, the CDFI Fund made 38 awards for a total of \$ 2.6 million. These technical assistance grants will (i) enable financial institutions to enhance their capacity to provide access to capital and credit to these communities; and (ii) assist such communities in establishing their own CDFIs.

Another \$1.5 million in funding has been set aside to implement the Native American CDFI Training Program. This training program has been designed to help Native American, Alaska Native and Native Hawaiian communities build leadership skills enabling them to create and manage CDFIs.

The need for this new initiative was identified during the workshops organized by the CDFI Fund in conjunction with the development of the Native American Lending Study. This Study identified six barriers to accessing debt capital and equity investments in Native American, Alaska Native and Native Hawaiian communities and offered 17

³ " Tribal" is defined for the purposes of this testimony as defined in the Fund's Native American Lending Study: "Native American and Alaska Native governments."

recommendations to address Tribal legal system infrastructure and overcoming economic, financial, educational and cultural barriers.

The Fund firmly believes that increasing the number of active and effective CDFIs serving Indian Lands and Native Hawaiian Home Lands will lead to financial products and services that meet the needs of Native American, Alaska Native and Native Hawaiians and will increase the delivery of financial literacy services offered to these populations.

Strategy #2: Increase Bank Lending in Native Lands

Our second strategy is to provide incentives for regulated banks and thrifts to invest in Native American, Alaska Native and Native Hawaiian CDFIs and to increase their lending and financial services in distressed communities in Indian Lands and Native Hawaiian Lands. We do this through the Bank Enterprise Award (BEA) Program that recognizes the key role played by traditional financial institutions in community development.

Increasing bank lending in Indian Lands and Native Hawaiian Home Lands is one area that we believe could have the great impact for Native American and Native Hawaiian economic development. This summer I toured four Native American reservations in Arizona and New Mexico. I was very impressed with the progress and accomplishments these communities have made in accessing capital for economic and housing development. But I also became aware of the gap that still exists between banking services provided and the ability of these communities to attract additional capital.

As noted in the Fund's Native American Lending Study, there is a perception that lending in Indian Lands and Native Hawaiian Home Lands is "riskier"; the perceived uncertainty of Tribal legal structure causes some banks to either refrain from lending in Indian Lands and Native Hawaiian Home Lands or mitigate such risk by over-collateralizing debt instruments. Some banks are still unfamiliar with guaranty loan programs offered through the Bureau of Indian Affairs and the Department of Housing and Urban Development; the banks that are active with BIA and HUD programs may perceive those programs as cumbersome and therefore the programs may be under-utilized. Many financial institutions active in Indian Lands have stated that they would like Tribal governments to provide limited waivers of sovereign immunity, which, in many instances, is contradictory to the Tribe's legal authority. In addition, many Native Americans, Alaska Natives and Native Hawaiians lack capital, collateral and credit histories, which can make traditional lending to these populations difficult.

According to the Housing Assistance Council, a CDFI serving rural America, banks reject nearly two thirds of the mortgage applications filed by rural Native Americans, compared to about a third of rural whites' applications. And when they do lend to Native Americans, banks lend lower amounts: in 1998, the median loan to rural whites was 40 percent higher than the median loan to rural Native Americans (\$52,000

versus \$37,500). This difference cannot be explained by incomes, as median rural white income was only 17 percent higher than that of rural Native Americans (\$35,000 versus \$30,000). The cost of loans also tends to be higher. The National Community Reinvestment Coalition estimates that, in 2000, 27 percent of all conventional home mortgage loans to Native Americans were issued by high-cost sub-prime or manufactured home lenders, versus only 10 percent of home mortgage loans to whites.

The Fund believes that one of the best ways to overcome the perception that lending on Indian Lands and Native Hawaiian Home Lands is risky and to overcome systemic barriers to accessing credit and capital is to introduce a demonstration project. Beginning in FY 2003, the Fund has proposed introducing the Native American CDFI Comprehensive Assessment Program (NACCAP) as a funding component. The purpose of this new program will be to make significant CDFI Fund awards by using the experience of the NACTA Program, the Core Component of the CDFI Program, and the BEA Program to encourage CDFIs working with community partners, including banks, concentrating in one or more particular Indian Lands or Native Hawaiian Home Lands. The Fund will track the impact of these investments over five- year period and will use this data to help tribes, financial institutions and federal agencies to develop a systemic approach to economic development. NACCAP, as currently conceived, will have three goals:

1. Increase financing to businesses and individuals desiring to start or expand businesses on Indian Lands and Native Hawaiian Home Lands;
2. Expand the supply and quality of housing units in Indian Lands and Native Hawaiian Home Lands affordable to the local population and increase homeownership rates;
3. Expand access to affordable financial services to Native Americans and Native Hawaiians.

Strategy #3: Increase Equity Investments on Indian Lands and Native Hawaiian Home Lands

Our third strategy involves the use of tax credits to increase the flow of private capital in low-income areas. On December 21, 2000, the Community Renewal Tax Relief Act of 2000 was signed into law. This law created the New Markets Tax Credit (NMTC) Program.

It will help to stimulate up to \$15 billion of needed private sector investments in low-income communities across the country for the next seven years. The NMTC Program offers us a tremendous opportunity to focus on economic development and investments in Indian Lands and Native Hawaiian Home Lands as well. During my tour of Indian Lands this summer, I promoted this program among the tribal businesses and financial institution managers that I visited with.

By making an equity investment in an eligible “community development entity” (CDE), individual and corporate investors can receive a NMTC worth 39 percent of the amount invested over the seven-year life of the credit.

By offering a tax credit, the NMTC Program encourages private investment in underserved communities in an unprecedented manner. If investors embrace the program, it will be a significant source of new capital that will help to stimulate new industries and entrepreneurs, and to generate new jobs in low-income communities.

By increasing the number and vitality of CDFIs serving Native American and Native Hawaiian communities the Fund believes it will attract NMTC investments into these communities. Certified CDFIs may automatically qualify as a CDE and therefore have increased potential to receive an allocation of NMTCs or to attract an investment from another CDE with such an allocation.

Summary:

In conclusion, I believe that the CDFI Fund is a valuable federal government program that has a history of matching the capital raised by local communities to serve the credit needs of underserved populations. We will continue to work with Native American, Alaska Native and Native Hawaiian banks and various community and economic development associations across the country to utilize the best financial tools to meet the economic needs of these communities.

Tribal and Native Hawaiian communities throughout the nation confront daunting economic challenges. They are confronted with legal infrastructure, governmental operations, economic financial, physical infrastructure, education and cultural barriers. As indicated in the Fund’s Native American Lending Study Report, there has been palpable progress in addressing these challenges. A significant number of Tribes have mounted innovative development strategies. Efforts are underway to enhance the capacities of Tribal governments. There are many examples of “win-win” relationships with major manufacturing and financial service organizations. Real, albeit modest, progress has been made in addressing the backlog of investment in human and physical capital. Recent federal policies that stress government-to-government relationships are beginning to provide more Tribal governmental control.

To date, much of the progress in expanding access to capital was not achieved by Tribal governments, financial institutions or federal agencies acting alone. Rather, progress often depended on these stakeholders acting together. Neither technical assistance nor cultural education will have the desired effect unless Tribes, Native Hawaiian communities, and banks commit to such processes. Moreover, banks, government regulators, and Tribes would all likely have to participate in attempts to create new loan products for Native American or Native Hawaiian communities.

The CDFI Fund, through its programs, is committed to creating greater access to capital and equity investments throughout Indian Lands and Native Hawaiian Home

Lands. We believe that all Native Americans and Native Hawaiians should have access to affordable capital, credit and financial services for decent and affordable housing and support to finance small businesses to further create jobs and help to alleviate poverty. The CDFI Fund will work diligently to be a catalyst to bring these parties together to expand Native American, Alaska Native and Native Hawaiian communities to the benefit of all America.

Thank you very much.

From: CN=Noel J. Francisco/OU=WHO/O=EOP [WHO]
To: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
Sent: 3/13/2003 2:53:15 AM
Subject: : Re: Senate vote today

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR:Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME:13-MAR-2003 07:53:15.00
SUBJECT:: Re: Senate vote today
TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN
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This seems good from a Supreme Court perspective, doesn't it? It seems like potential defectors include: Lincoln Chafee, Susan Collins, Olympia Snowe, and Arlen Specter. All of the D's, however, are potential pickups.

Brett M. Kavanaugh
03/12/2003 07:41:12 PM
Record Type: Record

To: See the distribution list at the bottom of this message
cc:
Subject: Senate vote today

Apart from debate on partial birth bill, Senate also voted today on a sense of the Senate resolution approving of Roe v. Wade. This passed Senate 52-46 with Biden and McConnell not voting.

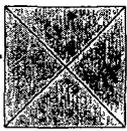
The 9 R's who voted in support of it were Ben Campbell, Lincoln Chafee, Susan Collins, Kay Bailey Hutchison, Lisa Murkowski, Olympia Snowe, Arlen Specter, Ted Stevens, and John Warner. The other 41 R's voted against.

The 5 D's who voted against were John Breaux, Zell Miller, Ben Nelson, Mark Pryor, and Harry Reid. The other 43 D's voted in favor.

Message Sent

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REV_00230976



U.S. Department of Justice

Office of Legislative Affairs

Washington, D.C. 20530

The Honorable

Dear

The Department of Justice has reviewed S.1, "Better Education for Students and Teachers Act", and offer the following concerns. We also have attached a listing of additional edits that the Department recommends for the bill.

Introduction. In a number of sections, the bill includes a general proviso that for example, "[n]othing in this Act shall be construed to permit, allow, encourage, or authorize any Federal control over any aspect of any private, religious, or home school." § 12; *see also* §§ 11, 15. We do not understand these provisions to be intended, and would not interpret them, to limit the federal conditions that may be placed on the use of federal funds, for example restrictions placed on the use of federal funds provided to private schools, which may be necessary to ensure compliance with the requirements of the Establishment Clause. *See, e.g.*, § 6 (establishing obligation and standards for equitable participation by private schools).

Title I, Part A. Section 120C of the bill would enact, among other provisions, a new section 1121 of the Elementary and Secondary Education Act ("ESEA"). Proposed subparagraph 1121(b)(2)(A) provides that grants shall be made to the Freely Associated States and that "[t]he Secretary *shall* award such grants according to the *recommendations* of the Pacific Region Educational Laboratory which shall conduct a competition for such grants." § 1121(b)(2)(A) (emphasis added). We recognize that this or similar language is found in a number of existing statutory provisions, including the current version of section 1121(b)(2)(A). Nevertheless, because of the political accountability concerns raised by this provision, we believe it creates a potential constitutional question. Under subparagraph 1121(b)(2)(A), the Secretary is statutorily charged with the legal obligation and responsibility for making these grants, and it is the Secretary (or the Department of Education) under whose name the grants will nominally be made. While the Secretary therefore is likely to be held politically accountable for these grants, the provision effectively divests him of any control over them. Actual authority to select who the grant recipients will be, as well as the authority to devise and administer the selection process, is instead legally assigned to the Pacific Region Educational Laboratory ("Laboratory"). In order to avoid any such constitutional problem that separating accountability from actual control might

cause, we recommend that the provision be modified either to provide the Secretary with appropriate control over the grants or, alternatively, to make clear that the Secretary is not legally responsible for the grants that are made. To this end, the provision could be modified to vest in the Secretary the responsibility for devising and administering the selection process and for selecting the ultimate recipients. Within this framework, the statute could also authorize the Laboratory to offer recommendations for the Secretary's consideration. ~~Alternatively, the provision could be modified to eliminate the Secretary's nominal responsibility for these grants, and instead made to provide a general grant to the Laboratory, with the Laboratory in turn making subgrants to the Freely Associated States in conformity with statutory criteria.~~

Title I, Part C. Section 134 of the bill would enact a new section 1308 of ESEA. Proposed subparagraph 1308(b)(2)(A) provides for the Secretary to provide a report to the relevant committees of Congress. As to the substance of that report, the bill provides that "the Secretary shall report . . . the Secretary's findings and recommendations regarding services under this part, and shall include in this report, recommendations for the interim measures that may be taken to ensure continuity of services under this part." § 1308(b)(2)(A). To the extent this provision might be interpreted to require the Secretary to formulate and propose legislative measures, it would be inconsistent with the Recommendations Clause of the Constitution, which grants to the President the authority to make those legislative recommendations that he, in his discretion, deems appropriate and necessary. *See* U.S. Const. art. II, § 3 (the President "shall from time to time . . . recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient"). In order to avoid the constitutional problem that such an interpretation would create, we recommend modifying this provision to make clear that the Secretary retains the discretion. For example, the language could be modified to read as follows: "the Secretary shall report . . . the Secretary's findings and, to the extent he concludes appropriate, any recommendations regarding services under this part, including recommendations, if any, for interim measures that may be taken to ensure continuity of services under this part."

(i.e. directly to any organization that receives funding under this bill.)

Title IV. Section 404 of the bill would enact a new Part D of Title IV of ESEA, addressing environmental tobacco smoke, including proposed section 4403. Proposed subsection 4403(a) states that after the Act's enactment "no person shall permit smoking within any indoor facility owned or leased or contracted for, and utilized, by such person for provision of routine or regular kindergarten, elementary, or secondary education or library services to children." In addition, subsection 4403(b) includes an identical prohibition directed towards indoor facilities used to provide "regular or routine health care or day care or early childhood development (Head Start) services." There are exceptions to the latter prohibition for "any portion of such facility that is used for inpatient hospital treatment" of persons dependent on or addicted to drugs or alcohol, and for "any private residence."

§ 4403(b)(2)(A) & (B). A third prohibition, set forth in subsection 4403(c), states that "no Federal agency shall permit smoking within any indoor facility in the United States operated by

¹ For purposes of the prohibition in subsection (c), the "person" subject to the prohibition means the head of the relevant federal agency or the relevant contractor. Section 4403(e)(1).

such agency, directly or under contract, to provide routine or regular kindergarten, elementary, or secondary education or library services to children.”¹ The prohibitions in subsections (a) through (c) “shall be published in a notice in the Federal Register by the Secretary . . . and by [affected] agency heads in funding arrangements involving the provision of children’s services administered by such heads.” § 4403(d). “[A]ny person subject to such prohibition” who ~~commits a violation is subject to a civil penalty in an amount up to \$1,000 for each violation, and~~ “[e]ach day a violation continues shall constitute a separate violation. In the case of any civil penalty assessed under this section, the total amount shall not exceed the amount of federal funds received by such person for the fiscal year in which the continuing violation occurred.” § 4403(e)(1).

The language of the bill appears to leave it uncertain whether the prohibitions in question, particularly that of subsection (a), are intended to apply only to persons who directly or indirectly receive federal funds, or instead are intended to apply whether or not the person is such a recipient. Nothing on the face of subsection (a) appears to indicate the necessity of any link to federal funding. Insofar as subsection (b) refers to “Head Start” services, it might arguably signal that the prohibition applies only to recipients of (certain) federal funds, but the provision is not otherwise so limited on its face. The prohibition in subsection (c) applies by way of subsection (e)(1) to federal contractors, and presumably is so tied to federal funding. The civil penalties provision, by capping the amount of potential liability at the “amount of federal funds” received by the violator in a fiscal year, may be taken to imply that the prohibitions of subsection (a), (b) and (c) are all limited to recipients of federal funds. § 4403(e)(1).² The publication requirement in § 4403(d) might also be understood to limit the scope of the prohibitions in subsections (a) through (c) to federal contractors (and presumably their subcontractors).

Insofar as some or all of the prohibitions in question were understood to apply without regard to federal funding, we think that they would raise constitutional concerns under *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). Alternatively, insofar as the prohibitions were understood to be conditioned on the receipt of federal funds, they would be analyzed instead under *South Dakota v. Dole*, 483 U.S. 898 (1997). Even on that understanding, however, constitutional questions would remain.

We begin by assuming that the prohibitions are intended to apply, at least in part, even to persons who do not receive federal funds.

In *Lopez* and *Morrison*, the Supreme Court identified three broad categories of activities that the Interstate Commerce Clause gives Congress the authority to regulate:

First, Congress may regulate the use of the channels of interstate commerce.

¹ For purposes of the prohibition in subsection (c), the “person” subject to the prohibition means the head of the relevant federal agency or the relevant contractor. Section 4403(e)(1).

² To be sure, subsection (c) also applies directly to Federal agencies as well as Federal contractors.

Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.

Lopez, 514 U.S. at 558-59 (citations omitted); *see also Morrison*, 529 U.S. at 608-09 (citations omitted).

In *Lopez*, the Court struck down the Gun Free School Zones Act, which had made it a federal offense for any individual knowingly to possess a firearm in a school zone, on the ground the Act could not be subsumed under any of these three categories. In addressing the last category – whether the Act had a substantial affect on interstate commerce – the Court explained that (1) the Act had “nothing to do with ‘commerce’ or any sort of economic enterprise, however broadly one might define those terms,” *Lopez*, 514 U.S. at 561; (2) the provision contained “no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession affects interstate commerce,” *id.*; and (3) there were no congressional findings to permit the Court to evaluate a legislative judgment that possession of firearms near schools substantially affected interstate commerce, *id.* at 562-63.

In *Morrison*, the Court found the civil remedy provisions of the Violence Against Women Act, which permitted victims of gender-motivated violence to sue their assailants in federal court, to exceed Congress's power under the Commerce Clause. Addressing the third category of legislative authority identified in *Lopez*, the Court observed that it had “thus far . . . upheld Commerce Clause regulation of intrastate activity only where that activity [was] economic in nature.” *Morrison*, 529 U.S. at 613. Because the regulated activity was noneconomic, because the regulation and punishment of interstate violence is traditionally a state matter, and because Congress had not established a sufficient link between the regulated activity and the effect on interstate commerce, the Court found the civil remedy provision to be beyond Congress's authority under the Interstate Commerce Clause.

We think that there is a serious risk that a court would find that smoking in a child care, kindergarten, elementary, or secondary education facility – like gun possession in a school zone or the commission of a crime of violence motivated by gender – is not an economic activity falling within the purview of the Interstate Commerce Clause. Regulation of child care and educational facilities is traditionally a state function. Furthermore, section 4403 does not include any jurisdictional element or congressional findings that might reasonably connect the activity of smoking in school or a child care center to interstate commerce.

Alternatively, as we have noted, all the prohibitions in section 4403 are at least arguably tied to the receipt of specific federal funding, and thus to Congress' spending power. In general, Congress may constitutionally place conditions on the receipt of federal funds, and thereby exercise broad power through the Spending Clause to encourage State action. *See, e.g., South Dakota v. Dole*, 483 U.S. at 206-07. Even so, constitutional questions remain under the current

draft of the section. At a minimum, such questions create litigation risks.

To begin with, “if Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously.’” *Dole*, 483 U.S. at 207 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)); see also *Commonwealth of Virginia v. Riley*, 106 F.3d 559, 566 (4th Cir. 1997) (en banc). Here it seems doubtful that this requirement has been met: as discussed above, it is only by inferences from the notice requirement of subsection (d) and from the civil penalties of subsection (e) that one might suppose that the receipt of federal funds is conditioned on an agreement to be bound by the prohibitions. “Insistence upon a clear, unambiguous statutory expression of congressional intent to condition the States’ receipt of federal funds in a particular manner is especially important where, as here, the claimed condition requires the surrender of one of, if not the most significant of, the powers or functions reserved to the States by the Tenth Amendment – the education of our children.” *Riley*, 196 F.3d at 566. Although courts may well relax this requirement of clarity when the alternative is a construction that raises constitutional concerns under the Commerce Clause, these concerns could be eliminated by a clearer indication that the provisions apply only to entities that receive federal funds.

Further, *Dole* requires that “the financial inducement offered by Congress [not] be so coercive as to pass the point at which ‘pressure turns into compulsion.’” *Dole*, 483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1936)). While the case law elucidating this test remains sparse, it is arguable that the civil penalties attached to violations here might be held to be coercive if the civil penalties section were read and applied broadly. A state or local governmental violator stands at risk of liability of as much as \$1,000 per day for a violation, up to an amount equal to “the amount of Federal funds received by such person for the fiscal year in which the continuing violation occurred.” Subsection 4403(e)(1). The consequences of a continuing violation could, therefore, rapidly equal the entire amounts that the violator received in federal funds under the program or programs authorized by this statute. Indeed, this problem could become more acute if the language of § 4403(e)(1) were read more broadly to put a covered state or local government or agency at risk of losing *all* the federal funding it received in a given fiscal year under this *or other* federal education programs, or indeed even under *any* federal funding program. In *Dole*, Congress had directed that the States lose only a small percentage (about 5%) of certain federal highway funds for failure to comply with the attached conditions. Here, however, the potential financial consequences for a violator could be substantially greater, depending on how subsection (e)(1) is read. Accordingly, in at least some applications, the civil penalties provision could arguably “begin[] to resemble impermissible coercion” under *Dole*. *Riley*, 106 F.3d at 569.

Finally, *Dole* seems to require a suitable nexus between the regulation at issue and the federal funding that is subject to being withdrawn. See 483 U.S. at 207 (“[O]ur cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs.’”) (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). Thus, in upholding the funding conditions at issue in *Dole*, the Court found that “the condition imposed by Congress is directly related to one of the main purposes for which highway funds are

expended – safe interstate travel.” *Id.* at 208. Although there is a conceivable nexus between regulating smoking in schools and federal education funds, a violation of section 4403 could, as noted above, arguably put a covered state or local government at risk of losing all the federal funding it received in a given fiscal year, including funding unrelated to education. It is doubtful, however, whether there is a sufficient nexus between smoking in schools and, for example, federal funding for a local police department.

Title VI. Title VI, Part B of the bill would enact new sections 6201 and 6202 of ESEA. Proposed § 6201(a)(2)(A)(i) would authorize grants to States based in part on “the progress of . . . students who are racial and ethnic minorities.” Further, under proposed section 6202(a)(2)(B), States would be penalized if students of racial or ethnic minorities failed to progress in certain academic subjects. The penalties would range up to a loss of 30% of covered funds for failure to meet standards for two consecutive years, and up to 75% for such failure for three consecutive years. The term “racial and ethnic minorities” is undefined.

The controlling Supreme Court decision for racial and ethnic preferences in federal programs is *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). There the Court affirmed “the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*.” *Id.* at 227. Further, the Court stated, *id.*:

It follows from that principle that all governmental action based on race – a *group* classification long recognized as “in most circumstances irrelevant and therefore prohibited,” *Hirabayashi [v. United States]*, 320 U.S. 81 (1943) at 100 – should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court’s understanding of equal protection, and holding “benign” state and federal racial classifications to different standards does not square with them. . . . Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny.

Sections 6201(a)(2)(A)(i) and 6202(a)(2)(B) are on their face racial classifications that award grant moneys to States, or withdraw it from them, depending on the performance of “racial and ethnic minorities.” The scheme creates powerful incentives for the States to allocate their educational resources, personnel, and efforts in accordance with racial and ethnic criteria. Success in achieving racially and ethnically defined benchmarks will bring financial rewards to the States; failure to meet those benchmarks will bring financial penalties. Such a program is, under *Adarand*, likely subject to strict scrutiny. *See also MD/DC/DE Broadcasters Ass’n v. FCC*, 236 F.3d 13, 19 (D.C. Cir. 2001) (applying strict scrutiny to federal broadcast licensing scheme that court viewed as “the practical equivalent of a rule that obliges a[] [licensee] to comply or suffer the consequences” for failing to meet racially defined benchmarks).

In order to survive strict scrutiny, the grant system contemplated by proposed section 6201 would be required to “serve a compelling governmental interest, and . . . be narrowly tailored to further that interest.” *Adarand*, 515 U.S. at 235. Whatever the governmental purpose

may be in this case, and whether or not that purpose would be considered “compelling,” we seriously doubt that the provisions could in any circumstances be said to be “narrowly tailored.” Apart from anything else, they refer in a broad and undefined manner to “racial and ethnic minorities” of any kind. Whether or not such classifications could be used to target funds to groups that suffered educational discrimination or even groups that had posted poor test scores, ~~the broad application to groups that presumably have suffered no discrimination and may have superior test scores as a group raises concerns under a narrow tailoring analysis.~~ *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (“The gross overinclusiveness of Richmond’s racial preference strongly impugns the city’s claim of remedial motivation.”).

Title VII. Title VII, Part A of the bill (“Indian Education”) provides for various kinds of grants for educational purposes. Some of these grants raise constitutional concerns because they are given to, for the benefit of, or made conditional on the participation of, people who may be classified according to racial characteristics, *i.e.*, Indian origin. Title VII, Part B (“Native Hawaiian Education”) relates to educational programs for the benefit of Native Hawaiians, and also raises constitutional questions. Title VII, Part C (“Alaska Native Education”), includes similar provisions with respect to Alaska Natives. For reasons discussed below, we think that the analysis with respect to Alaska Natives is substantially the same as for Indian tribes.

In addition to the Supreme Court’s decision in *Adarand*, constitutional analysis of this title is guided by *Morton v. Mancari*, 417 U.S. 535, 555 (1974). *Mancari* involved a preference in hiring and promotions at the Bureau of Indian Affairs (“BIA”), a preference favoring persons who had more than a prescribed quantum of “Indian blood,” *id.* at 553, n.24, and who were also members of a federally-recognized tribe. Although the classification was in part based on race, the Court found it to be “political rather than racial in nature.” *Id.* at 553, n.24; *see also id.* at 554 (“The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion.”). The Court upheld the BIA preference because it could be “tied rationally to the fulfillment of Congress’ unique obligation toward the Indians,” and because it was “reasonable and rationally designed to further Indian self-government.” *Id.* at 555. “The [*Mancari*] opinion was careful to note, however, that the case was confined to the authority of the BIA, an agency described as ‘*sui generis*’.” *Rice v. Cayetano*, 528 U.S. 495, 520 (2000) (quoting *Mancari*, 417 U.S. at 554); *see also United States v. Antelope*, 430 U.S. 641, 646 (1977) (*Mancari* “involved preferences or disabilities *directly promoting Indian interests in self-government*”) (emphasis added). Indeed, *Mancari* noted that “a blanket exception for Indians from all civil service examinations” would pose an “obviously more difficult question,” *Mancari*, 417 U.S. at 554. *See also Williams v. Babbitt*, 115 F.3d 657, 665 (9th Cir. 1997) (“[W]e seriously doubt that Congress could give Indians a complete monopoly on all Space Shuttle contracts” under *Mancari*), *cert. denied sub nom. Kawerak Reindeer Herders Ass’n v. Williams*, 523 U.S. 1117 (1998).

Accordingly, under the “limited exception,” *Cayetano*, 528 U.S. at 520, carved out by *Mancari*, Congress may enact preferences for Indians, provided that the classification is based on tribal membership rather than (purely) on race or ancestry, and provided further that the classification is reasonably related to Indian tribal self-government. Legislation directly affecting “

Indian land, tribal status, self-government or culture” is likely to “pass[] *Mancari*’s rational relation test because ‘such regulation is rooted in the unique status of Indians as “a separate people” with their own political institutions.’” *Williams*, 115 F.3d at 664 (quoting *Antelope*, 430 U.S. at 646). By contrast, preferential treatment for Indians not so linked to the distinctive status of Indian political institutions would have to be reviewed under *Adarand*’s strict scrutiny standard.

With these principles in mind, we turn to the various parts of Title VII.

Title VII, Parts A and C. In proposed section 7102, Congress states the overall purpose of Part A to be “to support the efforts of local educational agencies, Indian tribes and organizations, postsecondary institutions, and other entities to meet the unique educational and culturally related academic needs of American Indian and Alaska Native students, so that such students can meet the same challenging State performance standards as are expected for all students.” The statutory definition of “Indian,” however, raises concerns that programs are directed toward a racial group, rather than toward tribal membership, and therefore the *Mancari* standard would not apply. Section 7161(3) provides as follows:

- (3) Indian. – The term “Indian” means an individual who is –
- (A) a member of an Indian tribe or band, as membership is defined by the tribe or band, including –
 - (i) any tribe or band terminated since 1940; and
 - (ii) any tribe or band recognized by the State in which the tribe or band resides;
 - (B) a descendant, in the first or second degree, of an individual described in subparagraph (A);
 - (C) an individual who is considered by the Secretary of the Interior to be an Indian for any purpose;
 - (D) an Eskimo, Aleut, or other Alaska Native (as defined in section 7306); or
 - (E) a member of an organized Indian group that received a grant under the Indian Education Act of 1988 as in effect the day preceding the date of enactment of the ‘Improving America’s Schools Act of 1994’ (108 Stat. 3518).

The inclusion in subsection (C) of any individual who is “considered by the Secretary of the Interior to be an Indian for any purpose” in effect incorporates into section 7161(3) the definition of “Indian” contained in 25 C.F.R. § 5.1 (2000):

- (a) Members of any recognized Indian tribe now under Federal Jurisdiction;
- (b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;
- (c) All others of one-half or more Indian blood of tribes indigenous to the United States;
- (d) Eskimos and other aboriginal people of Alaska; and
- (e) For one (1) year or until the Osage Tribe has formally organized, whichever comes first, effective January 5, 1989, a person of at least one-quarter degree Indian ancestry of the Osage Tribe of Indians, whose rolls were closed by an act of Congress.

Thus, section 7161(3) includes within the definition of “Indian” three classifications that are purely racial: “a descendant, in the first or second degree” of a member of an Indian tribe or band, section 7161(3)(B); “[a]ll others of one-half or more Indian blood of tribes indigenous to the United States,” 25 C.F.R. § 5.1(c); and “Eskimos and other aboriginal people of Alaska,” 25 C.F.R.

§ 5.1(d).³ Because these parts of the definition of “Indian” appear to constitute racial, rather than political, classifications, they would not be subject to the deferential *Mancari* standard, but to the strict scrutiny standard of *Adarand*. As such, these parts of the definition are presumptively unconstitutional. Accordingly, we recommend that these portions of the definition of “Indian” be removed.⁴

Further, even insofar as any preferences in these parts of Title VII rest on tribal rather than racial classifications, there remains the question whether such provisions are reasonably designed to further Indian self-government. In the time we have had available to review the

³ We do not consider the reference in section 7161(3)(D) to “an Eskimo, Aleut, or other Alaska Native” to be a racial classification, because the bill defines “Alaska Native” to have the same meaning as the term “Native” in section 3(b) of the Alaska Native Claims Settlement Act, *see* § 7306(1). Under the Alaskan Native Claims Settlement Act, federally recognized Alaska Native Villages, village corporations, and regional corporations have a political status akin to Native American tribes. *See* 43 U.S.C. §§ 1601-1629g (1994 & Supp. IV 1998); *see also Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). Likewise, section 7161(3)(D) defines the term “Indian” to include “an Eskimo, Aleut, or other Alaska Native” as defined in section 7306.

⁴ Section 7161(3)(E) defines “Indian” to include “a member of an organized Indian group that received a grant under the Indian Education Act of 1988 as in effect the day preceding the date of enactment of the ‘Improving America’s Schools Act of 1994’ (108 Stat. 3518).” The definition of “Indian” found in the Indian Education Act of 1988, 25 U.S.C. § 2651(4) (as amended by Pub. L. No. 100-427, § 23, 102 Stat. 1603, 1613) (repealed by the Improving America’s Schools Act of 1994, Pub. L. No. 103-382, § 367, 108 Stat. 3518, 3976), read as follows:

- (4) The term “Indian” means any individual who is –
- (A) a member (as defined by an Indian tribe, band, or other organized group) of such Indian tribe, band, or other organized group of Indians, including those Indian tribes, bands, or groups terminated since 1940 and those recognized by the State in which they reside,
 - (B) a descendant, in the first or second degree, of an individual described in subparagraph (A),
 - (C) considered by the Secretary of the Interior to be an Indian for any purpose,
 - (D) an Eskimo, Aleut, or other Alaska Native, or
 - (E) is determined to be an Indian under regulations promulgated by the Secretary after consultation with the National Advisory Council on Indian Education.

For the same reasons as described in the text above, subsections (B), (C), and (D) comprise racial classifications. *See* Memorandum for Diane Weinstein, Acting General Counsel, Department of Education, from Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel, *Re: Constitutionality of Preferences Contained in Public Law No. 100-297*, at 3-5 (Nov. 9, 1988).

provisions, it appears to us that those in subpart 1, providing for formula grants to local educational agencies, on their face meet that requirement. It is conceivable, however, that some of these programs might be subject to legal challenge in particular applications. Subpart 2 deals with special programs and projects to improve educational opportunities for Indian children, and has as its purpose “to support projects to develop, test, and demonstrate the effectiveness of services and programs to improve educational opportunities and achievement of Indian children.”

§ 7121(a). The provisions of this subpart also appear to us generally to comply with the applicable constitutional standard.⁵ We do, however, have some concern with section 7122, whose purposes include “increas[ing] the number of qualified Indian individuals in teaching or other education professions that serve Indian people” and “improv[ing] the skills of qualified Indian individuals who serve in [such] capacities.” § 7122(a)(1) & (3). If this and related provisions⁶ were construed to require preferences for Indian over non-Indian teachers when teachers of both groups serve Indian people, we think it would be fair to ask whether they would be sufficiently tied to the aim of furthering Indian self-government. *Cf. Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (plurality opinion) (rejecting “role model” theory as basis for racial preferences in employment of public school teachers). Another cause of concern is section 7123(a)(1), authorizing the Secretary to “award fellowships to Indian students to enable such students to study in graduate and professional programs at institutions of higher education,” if such awards are set aside for Indian applicants exclusively: again, it would be fair to ask whether the classification has a sufficient nexus to Indian self-government, reasonably understood. Subpart 3, providing for aid for special programs relating to adult education for Indians, however, appears defensible on its face.

Title VII, Part B. In *Cayetano*, the Supreme Court found it to be “a matter of some dispute . . . whether Congress may treat the native Hawaiians as it does the Indian tribes,” 528 U.S. at 518, and left that “difficult” question unresolved, declining to “take the substantial step of finding authority in Congress . . . to treat Hawaiians or native Hawaiians as tribes.” *Id.* at 519. Accordingly, unless it is assumed *both* that Congress possesses the power to make such a determination *and* that it has in fact done so, classifications preferring Hawaiians or native Hawaiians to others would have to be viewed as racial classifications, subject under *Adarand* to strict scrutiny (rather than being reviewable under *Mancari*).

Unless we are mistaken as to the intent of proposed section 7202 (“Findings”), Congress does not appear to have taken the two steps in this bill and determined that Native Hawaiians are

⁵ For example, section 7125, making grants to Indian tribes and affiliated entities to plan and develop a centralized tribal administrative entity to perform certain educational functions, is plainly closely related to the valid aim of furthering Indian tribal self-government.

⁶ See section 7122(d)(1) (“Grant funds made available under subsection (c) shall be used for activities to provide support and training for Indian individuals in a manner consistent with the purposes of this section.”).

⁷ We note, however, that section 7202(12)(B) & (D) state that “Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once

in all relevant respects to be considered equivalent to an Indian tribe.⁷ Accordingly, although the question is not easy, we are inclined to think that the provisions of Title VII, Part B should be analyzed as creating a racial classification, and hence as subject to strict scrutiny. Under that standard, the constitutionality of at least some provisions of Part B would appear to be doubtful – for example, section 7205(a)(1)(A) & (B), authorizing grants to “Native Hawaiian educational organizations” and “Native Hawaiian community-based organizations,”⁸ assuming that this provision directs (or was implemented to create) a preference for such grant recipients or contractors. On the other hand, the provisions of Part B generally appear on their face to be defensible under *Mancari*, were that the applicable standard.

ADDITIONAL NON-CONSTITUTIONAL CONCERNS

1. Part IV of the bill would provide for formula grants for Safe and Drug-Free Schools. Subpart I contains section 4111(a), which would reserve 1% of the overall funds to the Secretary of the Interior to carry out programs for Indian youth. In our view, as advised by our Office of Tribal Justice, this figure is too low. First, the impact of substance and alcohol abuse on Indian youth is uniquely severe. In 1986, for example, Congress found that Indians between the ages of 15 to 24 are more than twice as likely to commit suicide as the general population and 80% of those suicides are alcohol-related. 25 U.S.C. 2401(7). In the same vein, Indians in the same age group are twice as likely to die in auto accidents, 75% of which are alcohol related. *Id.*(8). Second, the United States has a direct trust and treaty responsibility to educate and promote the welfare of Indian youth. See *Id.*(2) (“included in this responsibility is the treaty, statutory, and historical obligation to assist the Indian tribes in meeting the health and social needs of their members”). That is a closer responsibility than the indirect responsibility the US has to assist states with social and health needs their institutions encounter. For those reasons, a higher percentage of the federal funds dedicated to making schools safe and drug-free would seem appropriate.

By comparison, for some programs, the set-aside for Indians is as high as 5%. See 42 USC 3796gg-1(2)(b) (5% set-aside for tribes for grants under STOP Violence Against Women grant program). The figure for schools funded by Interior may not need to be that high, because many Indian children attend state schools that receive money under the state grant program. However, it should be higher than 1%.

2. Section 4125 authorizes grants to combat the impact of experiencing or witnessing domestic violence on elementary and secondary school children. Subsection 4125(a)(2) provides that awards should be made on a competitive basis and allocated in such a way that grants in a state are balanced between rural, urban, and suburban schools. We believe it would be appropriate to include a set-aside for schools funded by Interior or tribes. Again, the need is very

sovereign nation as to whom the United States has established a trust relationship,” and that “the political status of Native Hawaiians is comparable to that of American Indians and Alaska Natives.”

⁸ The definitions of these terms, *see* section 7207(2) & (3), include racial components.

high. A recent Bureau of Justice Statistics study found that American Indians are victimized by intimate partner violence at rates more than twice the other classified racial groups and nearly three times the rate for whites. See Violent Victimization and Race, 1993-1998 (BJS 2001) at 9. Thus, the likelihood that Indian children will be affected by domestic violence would appear higher than for other races. And, again, the US has a direct responsibility to promote the welfare of Indian children that is rooted in trust and treaty obligations. To meet that intersection of need and obligation, there should be a minimum set-aside figure added to section 4125(a)(2) for grants to schools that are funded by Interior or tribes.

Thank you for the consideration of our views. Please do not hesitate to call upon us if we may be of additional assistance in connection with this or any other matter. The Office of Management and Budget has advised that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

Sheryl L. Walter
Acting Assistant Attorney General

Attachment

who? call Sheldon
Acting OLA

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Alberto R. Gonzales/WHO/EOP@EOP [WHO] <Alberto R. Gonzales>
Sent: 12/10/2002 1:39:50 PM
Subject: : bio of Bill Pryor (age 40) possible nominee for CA11 Alabama

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: 10-DEC-2002 18:39:50.00

SUBJECT: : bio of Bill Pryor (age 40) possible nominee for CA11 Alabama

TO: Alberto R. Gonzales (CN=Alberto R. Gonzales/OU=WHO/O=EOP@EOP [WHO])

READ: UNKNOWN

End Original ARMS Header

Bill Pryor took office as Attorney General of Alabama on January 2, 1997. He was appointed by Governor Fob James to complete the term of Jeff Sessions who was elected to the United States Senate. At the time, Pryor was the youngest Attorney General in the United States. On November 3, 1998, Pryor was elected to a full four-year term. On November 5, 2002, he was reelected, with 59 percent of the vote, to a final term as Attorney General.

A native of Mobile, Pryor graduated magna cum laude in 1987 from Tulane University School of Law, where he was editor in chief of the Tulane Law Review.

He began his legal career as a law clerk for the late Judge John Minor Wisdom of the U.S. Court of Appeals, Fifth Circuit. Afterwards, Pryor engaged in the private practice of law in Birmingham in two of the state's finest law firms, specializing in commercial and employment litigation from 1988 until 1995. Pryor also taught as an adjunct professor at the Cumberland School of Law of Samford University from 1989 to 1995.

During the tenure of Attorney General Jeff Sessions, Pryor served as Deputy Attorney General in charge of special civil and constitutional litigation.

An experienced courtroom lawyer, Attorney General Pryor has tried civil and criminal cases in state and federal courts and has argued before the Supreme Court of the United States, the Supreme Court of Alabama, and the U.S. Court of Appeals for the Eleventh Circuit.

Attorney General Pryor has a record of prosecuting public corruption and white-collar crime, streamlining death penalty appeals, and as a leader of reform of both the juvenile justice system and criminal sentencing.

Pryor is a member of the State and Local Senior Advisory Committee for the White House Office of Homeland Security. Pryor served as a member of the Advisory Committee for the U.S. Department of Justice on the Bush-Cheney Transition Team.

He has a national reputation as a conservative leader for the cause of limited government, judicial restraint, and free enterprise. He has received the Guardian of Religious Freedom Award from Justice Fellowship and Prison Fellowship Ministries, the Civil Justice Achievement Award from the American Tort Reform Association, the Friend of the Taxpayer Award from the Alabama Citizens for a Sound Economy, and the Harlon B. Carter Award from the National Rifle Association's Institute for Legislative Action.

A frequent lecturer on law and public policy, Attorney General Pryor has given addresses at the Ronald Reagan Presidential Library, the U.S. Chamber of Commerce, the Heritage Foundation, the American Enterprise Institute, the Cato Institute, and the Federalist Society. He has written op-ed articles in The Wall Street Journal, the New York Times, and USA Today, and scholarly articles in several law reviews. He has testified before the U.S. Senate Judiciary Committee and its subcommittee on the Constitution, Federalism, and Property Rights, and the U.S. Senate Environmental and Public Works Committee.

Pryor is a member of the American Law Institute, the Legal Policy Advisory Board of the Washington Legal Foundation, and the Federalist Society. He is the Chairman-Elect of the Federalism and Separation of Powers Practice Group of the Federalist Society. In 2001, Pryor served as Chairman of the

Republican Attorneys General Association, and in 2000 Pryor served as Alabama Co-Chairman of the Bush-Cheney presidential campaign.

From: CN=Patrick J. Bumatay/OU=WHO/O=EOP@Exchange [WHO]
To: Kyle Sampson/WHO/EOP@EOP [WHO] <Kyle Sampson>
CC: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
Sent: 2/28/2003 12:25:42 PM
Subject: : FW: LRM AMB10 - - HOUSING & URBAN DEVELOPMENT Oversight Testimony on FY '04 Budget for Indian Housing and Community Development Programs
Attachments: P_S2LAE003_WHO.TXT_1.doc

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR:Patrick J. Bumatay (CN=Patrick J. Bumatay/OU=WHO/O=EOP@Exchange [WHO])

CREATION DATE/TIME:28-FEB-2003 17:25:42.00

SUBJECT:: FW: LRM AMB10 - - HOUSING & URBAN DEVELOPMENT Oversight Testimony on FY '04

Budget for Indian Housing and Community Development Programs

TO:Kyle Sampson (CN=Kyle Sampson/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

CC:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

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OMB thought you should look at this since it heavily involves the Native Hawaiian and Indian issue

-----Original Message-----

From: Briatico, Anna M.

Sent: Thursday, February 27, 2003 4:29 PM

To: usdaocrleg@obpa.usda.gov; justice.lrm@usdoj.gov;

ocl@ios.doi.gov; ich@hud.gov; valrm@mail.va.gov; lrm@hhs.gov;

CLRM@doc.gov; ogc_legislation@ed.gov

Cc: Roberson, Halley M.; Rhinesmith, Alan B.; Digennaro, Elizabeth M.; Jacobson, Andrea E.; Peacock, Marcus; Fairweather, Robert S.; Irwin, Janet E.; Ceccucci, Gary; Kendrall, Ann; Reilly, Thomas; Montgomery, Charles M.; Roach, Crystal J.; Schwartz, Kenneth L.; Lyon, Randolph M.; Reaud, Beatrice A.; Matlack, Larry R.; Stack, Kathryn B.; Matteson, Brian R.; Boden, James; Crowley, Michael F.; Bernhard, Elizabeth A.; Timberlake, Courtney B.; Simms, Pamula L.; Little, Attia; Suarez, Aquiles F.; Whgc Lrm; Schneider, Matthew J.; Wood, John F.; Lobrano, Lauren C.; Rossman, Elizabeth L.; O'Hollaren, Sean B.; Nec Lrm; Jukes, James J.; Schroeder, Ingrid M.; Messenger, P. Thaddeus; Green, Richard E.; Weinberg, Jeffrey A.; MacEcevic, Lisa J.; Bowers, Constance J.; Burnim, John D.; Redburn, Francis S.; Clendenin, Barry T.; McMillin, Stephen S.

Subject: LRM AMB10 - - HOUSING & URBAN DEVELOPMENT Oversight

Testimony on FY '04 Budget for Indian Housing and Community Development Programs

LRM ID: AMB10

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

Washington, D.C. 20503-0001

Thursday, February 27, 2003

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

FROM: John D. Burnim (for) Assistant Director for Legislative Reference

OMB CONTACT: Anna M. Briatico

PHONE: (202)395-7301 FAX: (202)395-5691

SUBJECT: HOUSING & URBAN DEVELOPMENT Oversight Testimony on FY '04

Budget for Indian Housing and Community Development Programs

REV_00375049

DEADLINE: 5 pm Friday, February 28, 2003

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.

COMMENTS: Attached is draft HUD testimony for a March 5th hearing before the S. Indian Affairs Committee. Please note that Interior, Justice, HHS (Indian Health Service), Commerce, and Education have been invited to testify at the same hearing so additional testimony will follow under separate cover.

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Thanks.

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025-COMMERCE - Michael A. Levitt - (202) 482-3151
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Stephen McMillin
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LRM ID: AMB10 SUBJECT: HOUSING & URBAN DEVELOPMENT Oversight
Testimony on FY '04 Budget for Indian Housing and Community Development
Programs
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LEGISLATIVE REFERRAL
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- (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: Anna M. Briatico Phone: 395-7301 Fax: 395-5691
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant):
395-6194

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

ATT CREATION TIME/DATE: 0 00:00:00.00

File attachment <P_S2LAE003_WHO.TXT_1>

STATEMENT OF MICHAEL LIU
Assistant Secretary
Public and Indian Housing
U.S. Department of Housing and Urban Development



BEFORE THE
UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

March 5, 2003

INTRODUCTION

Chairman Campbell, Vice Chairman Inouye, and Members of the Committee, thank you for inviting me to provide comments on President Bush's fiscal year 2004 budget for HUD's Indian Housing and Community Development programs.

My name is Michael Liu, and I am the Assistant Secretary for Public and Indian Housing, Department of Housing and Urban Development. We are responsible for the management, operation and oversight of HUD's Native American programs. These programs are available to over 550 Federally-recognized, and a limited number of state-recognized Indian tribes. We serve these tribes directly, or through tribally designated housing entities (TDHE), by providing grants and loan guarantees designed to support affordable housing, community and economic development activities. Our tribal partners are diverse; they are located on Indian reservations, in Alaska Native Villages, in other traditional Indian areas, and most recently, on the Hawaiian Home Lands.

In addition to these duties, it is our responsibility to administer the Federal government's public housing program, which aids the nation's 3,300 public housing agencies in providing housing and housing-related assistance to low-income families.

It is a pleasure to again appear before you, and I would like to express my appreciation for your continuing efforts to improve the housing conditions of American Indian, Alaska Native and native Hawaiian peoples. As you heard at last year's NAHASDA reauthorization hearing, much progress is being made and tribes are taking advantage of new opportunities to improve the housing conditions of the Native American families residing on Indian reservations, on trust or restricted Indian lands, and in Alaska Native Villages. This momentum needs to be sustained as we continue to work together toward creating a better living environment throughout Indian Country.

OVERVIEW

At the outset, let me reaffirm the Department of Housing and Urban Development's support for the principle of government-to-government relations with Indian tribes. HUD is committed to honoring this fundamental precept in our work with American Indians and Alaska Natives.

You may recall that when I testified before you last year, I was searching for a Deputy Assistant Secretary for Native American Programs. I am very pleased to report that the search is over. In early October 2002, Mr. Rodger Boyd joined my staff. An architect by training, he brings to the position a wealth of experience, most recently as CDFI Manager at the Department of Treasury, but also as an economic advisor to the President of the Navajo Nation, and as director of their Washington, DC office.

BUDGET SYNOPSIS

For Fiscal Year 2004, the President's budget for HUD proposes a total of \$738.7 million, specifically for Native American and Native Hawaiian housing, community and economic development, and education programs. Of that amount, approximately \$639 million is for direct formula allocations under the Native American Housing Assistance and Self-Determination Act's (NAHASDA) Indian Housing Block Grant Program, \$72.5 million is for grants under the Indian Community Development Block Grant Program, and \$2 million is for the Native American Section 184 and Title VI loan guarantees. That loan authority will leverage an additional \$31 million in loan guarantees for Section 184 and \$8 million for Title VI.

The budget proposes \$10 million for the Native Hawaiian Housing Block Grant Program and \$1 million for the Section 184(A) Native Hawaiian Home Loan Guarantee Fund, which will leverage approximately \$40 million in loan guarantees.

The budget also proposes \$5 million for training and technical assistance to support all the above programs.

The Department also requests \$5.4 million to support American Indian, Alaska Native and Native Hawaiian-oriented higher education institutions.

INDIAN HOUSING BLOCK GRANT PROGRAM (IHBG)

Adjustments within the Indian Housing Block Grant (IHBG) program account have been made to allow more funds to be available for direct tribal use. The FY 2004 budget includes \$646.6 million for the IHBG program. This is the same as the FY 2003 request. As with last year's request, reducing set-asides will actually allow for an increase in grant dollars available to tribes. The decrease of \$1 million from the Title VI set-aside goes directly into the IHBG formula fund.

HUD TRAINING AND TECHNICAL ASSISTANCE

Training and Technical Assistance remains a critical component of the IHBG program. The Training and Technical Assistance set-aside has been increased to \$5 million, which is \$2 million more than last year's request. In the coming year ONAP is planning to provide additional training and technical assistance to assist tribes.

NAIHC TRAINING AND TECHNICAL ASSISTANCE

The President's Budget includes a \$2.2 million set-aside from CDBG to continue the same level of support provided in last year's budget to the National American Indian Housing Council. No funds are provided under the IHBG training and technical assistance set-aside, as the Department wishes to encourage all qualified organizations, including those at the regional and local level, to seek to provide training and technical assistance.

TITLE VI TRIBAL HOUSING ACTIVITIES LOAN GUARANTEE FUND

The Title VI Tribal Housing Activities Loan Guarantee Fund (Title VI) is also a set-aside under the IHBG Program. There is a set-aside of \$1 million to continue program activities. This budget recognizes that until the program is more fully subscribed, it is more effective to use available funds in the IHBG Program and allocate it by formula directly to IHBG grantees. There is sufficient carry-over of unused guarantee authority which, when combined with this year's budget request, will support anticipated future program needs. We intend to use some of the increase in the TA/Training to develop tribal capacity in the Title VI program.

WORKING CAPITAL FUND

The Department's request of \$2.7 million for the Working Capital Fund will help provide information technology and data resources to support enhanced program assessments, performance measurements and accountability.

SECTION 184 INDIAN HOUSING LOAN GUARANTEE FUND

Two years ago, the Section 184 Indian Housing Loan Guarantee Fund received its first annual credit subsidy re-estimate, as required by the Credit Reform Act. The re-estimate resulted in a reduced subsidy rate, which tripled loan amounts available for guarantees while holding Budget Authority constant. The subsidy rate declined due in part to the low number of defaults. The \$1 million requested in FY 2004 will provide an additional \$38 million in loan guarantee authority.

INDIAN COMMUNITY DEVELOPMENT BLOCK GRANT PROGRAM

The President's FY 2004 Budget request for the Indian Community Development Block Grant (ICDBG) Program is \$72.5 million. This is identical to the FY 2003 request, and an increase of \$1.5 million over the amount appropriated in FY 2003.

NATIVE HAWAIIAN HOUSING BLOCK GRANT PROGRAM

For FY 2004, the Department is requesting \$10 million for the Native Hawaiian Housing Block Grant Program. This budget recognizes the unique housing needs of native Hawaiian families eligible to reside on the Hawaiian Home Lands, and the Department is now beginning to meet those needs. A further acknowledgement of the unique status of native Hawaiians is the establishment of a separate program account for the Native Hawaiian Housing Block Grant Program. An interim regulation implementing the new Native Hawaiian Housing Block Grant Program was published in the *Federal Register* on June 13, 2002. This action allowed us to distribute funds and implement the program while public comments are being considered and incorporated into the final regulations.

SECTION 184A NATIVE HAWAIIAN HOUSING LOAN GUARANTEE FUND

The budget requests that \$1 million be allocated to the Section 184A Native Hawaiian Housing Loan Guarantee Fund. At that level of funding this new loan guarantee program, modeled after the Section 184 Program, will provide up to \$40 million in loan guarantee authority to guarantee market-rate mortgage loans and similar projects to eligible entities, including the Department of Hawaiian Home Lands (DHHL), non-profit organizations and income-eligible Native Hawaiian families who choose to reside on the Hawaiian Home Lands. The DHHL, a State agency, is the primary program partner. DHHL is the agency responsible for allocation of leasehold interests on the Hawaiian Home Lands. Until direct-endorsement lenders are approved, the ONAP National

Programs Office will work closely with DHHL qualified program partners and individual borrowers to review, underwrite and issue guarantee certificates for all loans.

TRIBAL COLLEGES AND UNIVERSITIES AND ALASKA NATIVE AND NATIVE HAWAIIAN SERVING INSTITUTIONS

The President's budget request includes, under the Community Development Fund, \$3 million for competitive grants to tribal colleges and universities to provide resources to build, expand, renovate and equip their facilities, and \$2.4 million to assist Alaska Native and Native Hawaiian serving institutions, as they are defined under the Higher Education Act, as amended.

FUNDING PIPELINE AND PRODUCTION OF UNITS

As of September 30, 2002, it has been reported that the expenditure rate for the Indian Housing Block Grant Program from FY'98 through FY'01 is 63% or \$1.5 billion. This leaves an unexpended rate of 37% or \$885.6 million. I would note that grant recipients have 2 years from the initial awarding of the grant to obligate 90% of the grant. As of September 30, 2002 grant recipients have reported through ONAP that new construction starts that have been completed were 6,219 including rental and homeownership units, with an additional 3,720 units under construction. Funds have also been used to complete the rehabilitation of 14,226 existing housing units including rental and homeownership units, with an additional 1,654 under construction. Combining all of the production numbers reported for the first four years of funding for the IHBG program there have been 25,819 new and rehabilitated housing units constructed through September 30, 2002. Regarding the unexpended rate of 37%, ONAP over the past several months has been in the process of developing the baseline data to determine the level and extent of obligated and unobligated funds by tribe. This information will also allow ONAP to identify related issues that may be confronting tribes, and enable ONAP to become more proactive in assisting these tribes in their construction efforts.

CONCLUSION

Finally, let me state for the record that the President's budget request for HUD's Indian housing, community development and education programs supports the progress being made by tribes in providing housing and housing-related activities in Indian Country.

This concludes my prepared remarks. I would be happy to answer any questions you may have.

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Kyle Sampson/WHO/EOP@EOP [WHO] <Kyle Sampson>
Sent: 2/28/2003 12:36:02 PM
Subject: : FW: LRM AMB10 - - HOUSING & URBAN DEVELOPMENT Oversight Testimony on FY '04 Budget for Indian Housing and Community Development Programs
Attachments: P_4NLAE003_WHO.TXT_1.doc

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)
CREATOR: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
CREATION DATE/TIME: 28-FEB-2003 17:36:02.00
SUBJECT: : FW: LRM AMB10 - - HOUSING & URBAN DEVELOPMENT Oversight Testimony on FY '04 Budget for Indian Housing and Community Development Programs
TO: Kyle Sampson (CN=Kyle Sampson/OU=WHO/O=EOP@EOP [WHO])
READ: UNKNOWN
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not sure there is much to say?

----- Forwarded by Brett M. Kavanaugh/WHO/EOP on
02/28/2003 05:39 PM -----

From: Patrick J. Bumatay/WHO/EOP@Exchange on 02/28/2003 03:27:15 PM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject: FW: LRM AMB10 - - HOUSING & URBAN DEVELOPMENT Oversight Testimony on FY '04 Budget for Indian Housing and Community Development Programs

Just a reminder, this is due at 5 pm.

-----Original Message-----

From: Briatico, Anna M.
Sent: Thursday, February 27, 2003 4:29 PM
To: usdaocrleg@obpa.usda.gov; justice.lrm@usdoj.gov; ocl@ios.doi.gov; ich@hud.gov; valrm@mail.va.gov; lrm@hhs.gov; CLRM@doc.gov; ogc_legislation@ed.gov
Cc: Roberson, Halley M.; Rhinesmith, Alan B.; Digennaro, Elizabeth M.; Jacobson, Andrea E.; Peacock, Marcus; Fairweather, Robert S.; Irwin, Janet E.; Ceccucci, Gary; Kendrall, Ann; Reilly, Thomas; Montgomery, Charles M.; Roach, Crystal J.; Schwartz, Kenneth L.; Lyon, Randolph M.; Reaud, Beatrice A.; Matlack, Larry R.; Stack, Kathryn B.; Matteson, Brian R.; Boden, James; Crowley, Michael F.; Bernhard, Elizabeth A.; Timberlake, Courtney B.; Simms, Pamula L.; Little, Attia; Suarez, Aquiles F.; Whgc Lrm; Schneider, Matthew J.; Wood, John F.; Lobrano, Lauren C.; Rossman, Elizabeth L.; O'Hollaren, Sean B.; Nec Lrm; Jukes, James J.; Schroeder, Ingrid M.; Messenger, P. Thaddeus; Green, Richard E.; Weinberg, Jeffrey A.; MacEcevic, Lisa J.; Bowers, Constance J.; Burnim, John D.; Redburn, Francis S.; Clendenin, Barry T.; McMillin, Stephen S.
Subject: LRM AMB10 - - HOUSING & URBAN DEVELOPMENT Oversight Testimony on FY '04 Budget for Indian Housing and Community Development Programs

LRM ID: AMB10
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Thursday, February 27, 2003

LEGISLATIVE REFERRAL MEMORANDUM

REV_00375087

TO: Legislative Liaison Officer - See Distribution below
FROM: John D. Burnim (for) Assistant Director for Legislative Reference
OMB CONTACT: Anna M. Briatico
PHONE: (202)395-7301 FAX: (202)395-5691
SUBJECT: HOUSING & URBAN DEVELOPMENT Oversight Testimony on FY '04 Budget for Indian Housing and Community Development Programs

DEADLINE: 5 pm Friday, February 28, 2003

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LEGISLATIVE REFERRAL
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TO: Anna M. Briatico Phone: 395-7301 Fax: 395-5691
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant):
395-6194

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

_____ (Telephone)

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_____ No Objection

_____ No Comment

_____ See proposed edits on pages _____

_____ Other: _____

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ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_4NLAE003_WHO.TXT_1>

STATEMENT OF MICHAEL LIU
Assistant Secretary
Public and Indian Housing
U.S. Department of Housing and Urban Development



BEFORE THE
UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS

March 5, 2003

INTRODUCTION

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The President's FY 2004 Budget request for the Indian Community Development Block Grant (ICDBG) Program is \$72.5 million. This is identical to the FY 2003 request, and an increase of \$1.5 million over the amount appropriated in FY 2003.

NATIVE HAWAIIAN HOUSING BLOCK GRANT PROGRAM

For FY 2004, the Department is requesting \$10 million for the Native Hawaiian Housing Block Grant Program. This budget recognizes the unique housing needs of native Hawaiian families eligible to reside on the Hawaiian Home Lands, and the Department is now beginning to meet those needs. A further acknowledgement of the unique status of native Hawaiians is the establishment of a separate program account for the Native Hawaiian Housing Block Grant Program. An interim regulation implementing the new Native Hawaiian Housing Block Grant Program was published in the *Federal Register* on June 13, 2002. This action allowed us to distribute funds and implement the program while public comments are being considered and incorporated into the final regulations.

SECTION 184A NATIVE HAWAIIAN HOUSING LOAN GUARANTEE FUND

The budget requests that \$1 million be allocated to the Section 184A Native Hawaiian Housing Loan Guarantee Fund. At that level of funding this new loan guarantee program, modeled after the Section 184 Program, will provide up to \$40 million in loan guarantee authority to guarantee market-rate mortgage loans and similar projects to eligible entities, including the Department of Hawaiian Home Lands (DHHL), non-profit organizations and income-eligible Native Hawaiian families who choose to reside on the Hawaiian Home Lands. The DHHL, a State agency, is the primary program partner. DHHL is the agency responsible for allocation of leasehold interests on the Hawaiian Home Lands. Until direct-endorsement lenders are approved, the ONAP National

Programs Office will work closely with DHHL qualified program partners and individual borrowers to review, underwrite and issue guarantee certificates for all loans.

TRIBAL COLLEGES AND UNIVERSITIES AND ALASKA NATIVE AND NATIVE HAWAIIAN SERVING INSTITUTIONS

The President's budget request includes, under the Community Development Fund, \$3 million for competitive grants to tribal colleges and universities to provide resources to build, expand, renovate and equip their facilities, and \$2.4 million to assist Alaska Native and Native Hawaiian serving institutions, as they are defined under the Higher Education Act, as amended.

FUNDING PIPELINE AND PRODUCTION OF UNITS

As of September 30, 2002, it has been reported that the expenditure rate for the Indian Housing Block Grant Program from FY'98 through FY'01 is 63% or \$1.5 billion. This leaves an unexpended rate of 37% or \$885.6 million. I would note that grant recipients have 2 years from the initial awarding of the grant to obligate 90% of the grant. As of September 30, 2002 grant recipients have reported through ONAP that new construction starts that have been completed were 6,219 including rental and homeownership units, with an additional 3,720 units under construction. Funds have also been used to complete the rehabilitation of 14,226 existing housing units including rental and homeownership units, with an additional 1,654 under construction. Combining all of the production numbers reported for the first four years of funding for the IHBG program there have been 25,819 new and rehabilitated housing units constructed through September 30, 2002. Regarding the unexpended rate of 37%, ONAP over the past several months has been in the process of developing the baseline data to determine the level and extent of obligated and unobligated funds by tribe. This information will also allow ONAP to identify related issues that may be confronting tribes, and enable ONAP to become more proactive in assisting these tribes in their construction efforts.

CONCLUSION

Finally, let me state for the record that the President's budget request for HUD's Indian housing, community development and education programs supports the progress being made by tribes in providing housing and housing-related activities in Indian Country.

This concludes my prepared remarks. I would be happy to answer any questions you may have.

From: CN=Noel J. Francisco/OU=WHO/O=EOP [WHO]
To: Daryl L. Joseffer/OMB/EOP@EOP [OMB] <Daryl L. Joseffer>
CC: john f. wood/omb/eop@eop [OMB] <john f. wood>; Kyle Sampson/WHO/EOP@EOP [WHO]
<Kyle Sampson>; brett m. kavanaugh/who/eop@eop [WHO] <brett m. kavanaugh>
Sent: 3/19/2003 5:32:38 AM
Subject: : Re: New SBA Affirmative Action Bill
Attachments: P_4A8TE003_WHO.TXT_1.htm

Begin Original ARMS Header

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Noel J. Francisco (CN=Noel J. Francisco/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME: 19-MAR-2003 10:32:38.00

SUBJECT:: Re: New SBA Affirmative Action Bill

TO: Daryl L. Joseffer (CN=Daryl L. Joseffer/OU=OMB/O=EOP@EOP [OMB])

READ: UNKNOWN

CC: john f. wood (CN=john f. wood/OU=omb/O=eop@eop [OMB])

READ: UNKNOWN

CC: Kyle Sampson (CN=Kyle Sampson/OU=WHO/O=EOP@EOP [WHO])

READ: UNKNOWN

CC: brett m. kavanaugh (CN=brett m. kavanaugh/OU=who/O=eop@eop [WHO])

READ: UNKNOWN

End Original ARMS Header

Kyle Sampson reviewed this. Here are his comments:

The provisions in this bill, which would amend the Small Business Act, because they would permit the award of government benefits on the basis of racial or ethnic criteria, raise significant constitutional concerns. The Supreme Court has held that Congress may fulfill its treaty obligations and its responsibilities to members of Indian Tribes (including members of Native Alaskan Regional or Village Corporations) by enacting legislation dedicated to their circumstances and needs. The Court has declined, however, to address the substantial, unresolved question whether Congress may treat the Native Hawaiians as it does members of Indian Tribes. Moreover, Congress itself has not recognized any group of Native Hawaiians to be an Indian tribe, and it is uncertain whether it would have the constitutional authority to do so anyway: the Supreme Court has stated that Congress may not arbitrarily call a community or body of people an Indian Tribe.

Because Native Hawaiians are not members of an Indian Tribe, the proposed legislation which singles them out for government benefits would be subject to strict scrutiny. Under strict scrutiny, it would be necessary to show that the use of race-based criteria to award government benefits is narrowly tailored to serve a compelling government interest. In the absence of findings establishing such a constitutional basis, I recommend that the references to Native Hawaiians throughout the bill be deleted.

Kyle Sampson
WHCO
6-5257

Daryl L. Joseffer
03/19/2003 10:00:54 AM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP, Noel J. Francisco/WHO/EOP@EOP
cc: John F. Wood/OMB/EOP@EOP
Subject: New SBA Affirmative Action Bill

REV_00379901

Just as one SBA issue went away, the next came up. Udall has introduced the attached bill to amend the SBA Act to spend millions of dollars "to assist with outreach, development, and enhancement on Indian lands of small business startups and expansions owned by Indian tribe members, Native Alaskans, and Native Hawaiians."

Last year, Kerry sponsored a similar bill (as did Udall), and DOJ recommended (on constitutional grounds) that the bill be limited to Indian tribes and Alaska Native corporations, and not include any Hawaiians or other Indians or Alaskans. OMB cleared DOJ's letter as consistent with the Administration's program.

DOJ will presumably render the same opinion this year. The question is whether anything has changed to warrant a different approach this year. One thing that makes this awkward is that we are about to send up the SBA re-authorization act, which includes the existing DBE provisions that are more questionable (from a legal standpoint) than this new proposed legislation.

Please let me know what you think. Our LR people think that committee action could begin next week, though I would expect the bill to focus on other matters during that timeframe.

----- Forwarded by Daryl L. Joseffer/OMB/EOP on
03/19/2003 09:40 AM -----

From: James A. Brown on 03/18/2003 05:33:44 PM
Record Type: Record

To: justice.lrm@usdoj.gov, ocl@ios.doi.gov, CLRM@doc.gov,
cla@sba.gov @ inet
cc: See the distribution list at the bottom of this message
Subject: LRM JAB31 - - OMB Request for Views on HR1166 To Expand
and Improve Assistance Provided by SBDCs to Indian tribe members, Native
Alaskans, and Native Hawaiians

- HR1166 Expand SBDC Assistance 03-18-03.doc
LRM ID: JAB31
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Tuesday, March 18, 2003

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: OMB Request for Views on HR1166 To Expand and Improve
Assistance Provided by SBDCs to Indian tribe members, Native Alaskans, and
Native Hawaiians

DEADLINE: 10:00 A.M. Monday, March 24, 2003

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.

COMMENTS: Committee or other action on this bill may occur as early as

REV_00379902

next week.

DISTRIBUTION LIST

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- 107-Small Business Administration - Richard Spence - (202) 205-6700

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- David Rostker
- Janet E. Irwin
- NEC LRM

- Daniel D. Heath
- Brian Reardon
- James J. Jukes
- Richard E. Green
- Lauren C. Lobrano

LRM ID: JAB31 SUBJECT: OMB Request for Views on HR1166 To Expand and Improve Assistance Provided by SBDCs to Indian tribe members, Native Alaskans, and Native Hawaiians

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.

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) faxing us a memo or letter.

Please include the LRM number and subject shown above.

TO: James A. Brown Phone: 395-3473 Fax: 395-3109
Office of Management and Budget

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 Copied

To: _____

Stephen S. McMillin/OMB/EOP@EOP

Alan B. Rhinesmith/OMB/EOP@EOP

Randolph M. Lyon/OMB/EOP@EOP

Yvette M. Dennis/OMB/EOP@EOP

Lorenzo Rasetti/OMB/EOP@EOP

Jay P. Lefkowitz/OPD/EOP@Exchange@EOP

WHGC LRM

David S. Addington/OVP/EOP@EOP

Philip J. Perry/OMB/EOP@EOP

Matthew J. Schneider/OMB/EOP@EOP

Daryl L. Joseffer/OMB/EOP@EOP

David Rostker/OMB/EOP@EOP

Janet E. Irwin/OMB/EOP@EOP

NEC LRM

Daniel D. Heath/OPD/EOP@EOP

Brian Reardon/OPD/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_4A8TE003_WHO.TXT_1>

108th CONGRESS

1st Session

H. R. 1166

To amend the Small Business Act to expand and improve the assistance provided by Small Business Development Centers to Indian tribe members, Native Alaskans, and Native Hawaiians.

IN THE HOUSE OF REPRESENTATIVES

March 6, 2003

Mr. UDALL of New Mexico (for himself, Mr. MANZULLO, Ms. VELAZQUEZ, Mr. GRAVES, Mr. RENZI, Mr. FRANKS of Arizona, Mr. MATHESON, Mr. HAYWORTH, Mr. KILDEE, Mr. UDALL of Colorado, Ms. MILLENDER-MCDONALD, Mr. BALLANCE, Mrs. CHRISTENSEN, Mr. GONZALEZ, Mr. ACEVEDO-VILA, Mr. CASE, Mr. MICHAUD, Mrs. JONES of Ohio, Mr. CARSON of Oklahoma, Mr. FALEOMAVAEGA, Ms. BORDALLO, Mrs. NAPOLITANO, and Mr. DAVIS of Illinois) introduced the following bill; which was referred to the Committee on Small Business

A BILL

To amend the Small Business Act to expand and improve the assistance provided by Small Business Development Centers to Indian tribe members, Native Alaskans, and Native Hawaiians.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. FINDINGS AND PURPOSES.

(a) FINDINGS- Congress finds the following:

- (1) Approximately 60 percent of Indian tribe members and Native Alaskans live on or adjacent to Indian lands, which suffer from an average unemployment rate of 45 percent.
- (2) Indian tribe members and Native Alaskans own more than 197,000 businesses and generate more than \$34,000,000,000 in revenues. The service industry accounted for 17 percent of these businesses (of which 40 percent were engaged in business and personal services) and 15.1 percent of their total receipts. The next largest was the construction industry (13.9 percent and 15.7 percent, respectively). The third largest was the retail trade industry (7.5 percent and 13.4 percent, respectively).
- (3) The number of businesses owned by Indian tribe members and Native Alaskans grew by 84 percent from 1992 to 1997, and their gross receipts grew by 179 percent in that period. This is compared to all businesses which grew by 7 percent, and their total gross receipts grew by 40 percent, in that period.

(4) The Small Business Development Center program is cost effective. Clients receiving long-term counseling under the program in 1998 generated additional tax revenues of \$468,000,000, roughly 6 times the cost of the program to the Federal Government.

(5) Using the existing infrastructure of the Small Business Development Center program, small businesses owned by Indian tribe members, Native Alaskans, and Native Hawaiians receiving services under the program will have a higher survival rate than the average small business not receiving such services.

(6) Business counseling and technical assistance is critical on Indian lands where similar services are scarce and expensive.

(7) Increased assistance through counseling under the Small Business Development Center program has been shown to reduce the default rate associated with lending programs of the Small Business Administration.

(b) PURPOSES- The purposes of this Act are as follows:

(1) To stimulate economies on Indian lands.

(2) To foster economic development on Indian lands.

(3) To assist in the creation of new small businesses owned by Indian tribe members, Native Alaskans, and Native Hawaiians and expand existing ones.

(4) To provide management, technical, and research assistance to small businesses owned by Indian tribe members, Native Alaskans, and Native Hawaiians.

(5) To seek the advice of local Tribal Councils on where small business development assistance is most needed.

(6) To ensure that Indian tribe members, Native Alaskans, and Native Hawaiians have full access to existing business counseling and technical assistance available through the Small Business Development Center program.

SEC. 2. SMALL BUSINESS DEVELOPMENT CENTER ASSISTANCE TO INDIAN TRIBE MEMBERS, NATIVE ALASKANS, AND NATIVE HAWAIIANS.

(a) IN GENERAL- Section 21(a) of the Small Business Act (15 U.S.C. 648(a)) is amended by adding at the end the following:

“(7) ADDITIONAL GRANT TO ASSIST INDIAN TRIBE MEMBERS, NATIVE ALASKANS, AND NATIVE HAWAIIANS-

“(A) IN GENERAL- Any applicant in an eligible State that is funded by the Administration as a Small Business Development Center may apply for an additional grant to be used solely to provide services described in subsection (c)(3) to assist with outreach, development, and enhancement on Indian lands of small business startups and expansions owned by Indian tribe members, Native Alaskans, and Native Hawaiians.

`(B) ELIGIBLE STATES- For purposes of subparagraph (A), an eligible State is a State that has a combined population of Indian tribe members, Natives Alaskans, and Native Hawaiians that comprises at least 1 percent of the State's total population, as shown by the latest available census.

`(C) GRANT APPLICATIONS- An applicant for a grant under subparagraph (A) shall submit to the Associate Administrator an application that is in such form as the Associate Administrator may require. The application shall include information regarding the applicant's goals and objectives for the services to be provided using the grant, including--

`(i) the capability of the applicant to provide training and services to a representative number of Indian tribe members, Native Alaskans, and Native Hawaiians;

`(ii) the location of the Small Business Development Center site proposed by the applicant;

`(iii) the required amount of grant funding needed by the applicant to implement the program; and

`(iv) the extent to which the applicant has consulted with local Tribal Councils.

`(D) APPLICABILITY OF GRANT REQUIREMENTS- An applicant for a grant under subparagraph (A) shall comply with all of the requirements of this section, except that the matching funds requirements of paragraph (4)(A) shall not apply.

`(E) MAXIMUM AMOUNT OF GRANTS- No applicant may receive more than \$300,000 in grants under this paragraph in a fiscal year.

`(F) REGULATIONS- After providing notice and an opportunity for comment and after consulting with the Association recognized by the Administration pursuant to paragraph (3) (A) (but not later than 180 days after the

date of enactment of this paragraph), the Administrator shall issue final regulations to carry out this paragraph, including regulations that establish--

`(i) standards relating to educational, technical, and support services to be provided by Small Business Development Centers receiving assistance under this paragraph; and

`(ii) standards relating to any work plan that the Associate Administrator may require a Small Business Development Center receiving assistance under this paragraph to develop.

`(G) DEFINITIONS- In this paragraph, the following definitions apply:

`(i) ASSOCIATE ADMINISTRATOR- The term 'Associate Administrator' means the Associate Administrator for Small Business Development Centers.

`(ii) INDIAN LANDS- The term 'Indian lands' has the meaning given the term 'Indian country' in section 1151 of title 18, United States Code, the meaning given the term 'Indian reservation' in section 151.2 of title 25, Code of Federal Regulations (as

in effect on the date of enactment of this paragraph), and the meaning given the term 'reservation' in section 4 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1903).

`(iii) INDIAN TRIBE- The term 'Indian tribe' has the meaning given such term in section 8(a)(13).

`(iv) INDIAN TRIBE MEMBER- The term 'Indian tribe member' means a member of an Indian tribe (other than a Native Alaskan).

`(v) NATIVE ALASKAN- The term 'Native Alaskan' has the meaning given the term 'Native' in section 3(b) of the Alaska Native Claims Settlement Act (43 U.S.C. 1602 (b)).

`(vi) NATIVE HAWAIIAN- The term 'Native Hawaiian' means any individual who is a descendant of the aboriginal people, who prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

`(H) AUTHORIZATION OF APPROPRIATIONS- There is authorized to be appropriated to carry out this paragraph \$7,000,000 for each of fiscal years 2004 through 2006.

`(I) FUNDING LIMITATIONS-

`(i) NONAPPLICABILITY OF CERTAIN LIMITATIONS- Funding under this paragraph shall be in addition to the dollar program limitations specified in paragraph (4).

`(ii) LIMITATION ON USE OF FUNDS- The Administration may carry out this paragraph only with amounts appropriated in advance specifically to carry out this paragraph.'

SEC. 3. STATE CONSULTATION WITH LOCAL TRIBAL COUNCILS.

Section 21(c) of the Small Business Act (15 U.S.C. 648(c)) is amended by adding at the end the following:

`(9) ADVICE OF LOCAL TRIBAL COUNSELS- A State receiving grants under this section shall request the advice of local Tribal Councils on how best to provide assistance to Indian tribe members, Native Alaskans, and Native Hawaiians and where to locate satellite centers to provide such assistance.'

END

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Ho, James (Judiciary) <James_Ho@Judiciary.senate.gov>
CC: ledeen, barbara (republican-conf) <barbara_ledeen@src.senate.gov>
Sent: 3/24/2003 6:43:59 AM
Subject: : RE: Pro-choice op-eds in support of Justice Owen?

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: 24-MAR-2003 11:43:59.00

SUBJECT: RE: Pro-choice op-eds in support of Justice Owen?

TO: "Ho, James (Judiciary)" <James_Ho@Judiciary.senate.gov> ("Ho, James (Judiciary)" <James_Ho@Judiciary.senate.gov> [UNKNOWN])

READ: UNKNOWN

CC: "ledeen, barbara (republican-conf)" <barbara_ledeen@src.senate.gov> ("ledeen, barbara (republican-conf)" <barbara_ledeen@src.senate.gov> [UNKNOWN])

READ: UNKNOWN

End Original ARMS Header

On substance, I had a few thoughts.

-- I think it very odd to compare Owen to Souter and thereby imply that she is another Souter or would be another Souter on the US Supreme Court.

-- I am not sure the women appointee point works all that well, and I actually doubt that is the D's "real motivation" here as you say in last paragraph. Indeed, that strikes me as odd given that Clement, Raggi, and others were confirmed without a problem (and the King being a Republican point seems quite obscure). It seems to me that double standard is a better theme and to compare her to McConnell.

-- I am not sure that all legal scholars refer to Roe as the settled law of the land at the Supreme Court level since Court can always overrule its precedent, and three current Justices on the Court would do so. The point there is in the inferior court point.

-- It is hundreds not thousands, I believe, who have obtained bypasses.

My 2 cents. Thanks.

"Ho, James (Judiciary)" <James_Ho@Judiciary.senate.gov>

03/24/2003 10:14:55 AM

Record Type: Record

To: "Ledeem, Barbara (Republican-Conf)" <Barbara_Ledeem@src.senate.gov>, Brett M. Kavanaugh/WHO/EOP@EOP

cc:

Subject: RE: Pro-choice op-eds in support of Justice Owen?

Thanks, Brett. I assume that you didn't find anything substantively problematic with the op-ed draft, then? I don't expect any problems, but just wanted to make absolutely certain in case you had a chance to read it.

Barbara, I called you earlier this morning and left a message. If I don't hear back from you soon, I will just go ahead and contact Ann Stone. I won't proceed on the others, however. Let's talk whenever you get the chance. Thanks!

James C. Ho

REV_00381175

Chief Counsel
Senate Subcommittee on the Constitution, Civil Rights & Property Rights
Chairman, Senator John Cornyn
James_Ho@judiciary.senate.gov
(202) 224-9614 (direct line)
(202) 224-2934 (general office number)

PRA 6

Brett_M._Kavanaugh@who.eop.gov wrote:

> Her e-mail is **PRA 6** I alerted her this morning that someone may
> contact

> her about activity this week. I am good with her doing an op-ed.

>
>

> Record Type: Record

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

> cc: barbara_ledeen@src.senate.gov

> Subject: Re: Pro-choice op-eds in support of Justice Owen?

>

> I have a one page press release from Ann Stone, dated 7/23/2002, and her
> two-page letter to Leahy and Hatch. Manny Miranda confirmed that neither
was

> submitted into the committee record, so at a minimum we should do that.

>

> Barbara, should the three of us coordinate this morning on how to proceed
on

> getting Stone to do the op-ed?

>

> James C. Ho

>

PRA 6

> (202) 224-9614 (direct line)

> (202) 224-2934 (general office line)

>

>

PRA 6

>

PRA 6

>

> At 08:28 a.m. 3/24/2003, Brett_M._Kavanaugh@who.eop.gov wrote:

> >Do you have the letter from last summer? Barbara, have you talked to
Ann?

I

> am

> >happy to do so again if need be, but you all may have done so.

> >

> > (Embedded

> > image moved "James C. Ho" **PRA 6**

> > to file: 03/23/2003 01:20:29 PM

> > pic07668.pcx)

> >

> >Record Type: Record

> >To: See the distribution list at the bottom of this message

> >cc:

> >Subject: Re: Pro-choice op-eds in support of Justice Owen?

> >

> >I have a copy of that, which I'd be happy to provide to anyone who's
> interested.

> >I don't know if it was in the committee record last time, but we should
> >certainly put it in (again) this time.

> >

> >At 12:15 p.m. 3/23/2003, Brett_M._Kavanaugh@who.eop.gov wrote:

> >>Ann Stone was helpful and did letter/release last summer that should be
in

> >>committee record and can be used thursday.

> >>

> >>.

> >>

> >>----- Original Message -----

REV_00381176

> >>From: [REDACTED] PRA 6
> >>To: Makan_Delrahim@Judiciary.senate.gov,
> >> Rena_Johnson_Comisac@Judiciary.senate.gov,
> >> Alex_Dahl@Judiciary.senate.gov,
> >> Manuel_Miranda@frist.senate.gov,
> >> Barbara_Ledeen@src.senate.gov,
> >> viet.dinh@usdoj.gov,
> >> Steve.Koebele@usdoj.gov,
> >> Kristi.L.Remington@usdoj.gov,
> >> Jamie.E.Brown@usdoj.gov,
> >> Brett M. Kavanaugh/WHO/EOP@EOP,
> >> Wendy J. Grubbs/WHO/EOP@EOP
> >>Cc:
> >>Date: 03/22/2003 08:55:30 PM
> >>Subject: Pro-choice op-eds in support of Justice Owen?
> >>
> >>I learned late Friday that, although high-profile, pro-choice women
such
as
> Ann
> >>Stone, Victoria Toensing, and former members of Congress Susan Molinari
and
> >>Tillie Fowler may be willing to publish op-eds supporting Justice
Owen's
> >>confirmation, apparently no one has yet signed up to help write them.
> >>
> >>I presume that such op-eds would be very helpful as this Thursday's
executive
> >>business meeting on Justice Owen approaches. Accordingly, please find
below
> >two
> >>op-eds I drafted *relatively quickly*. The first draft is a more
political
> >>piece perhaps more appropriate to someone like Toensing, Molinari, or
Fowler;
> >>the second draft is geared more specifically for someone like Ann
Stone.
> >>
> >>In order to ensure proper coordination, I don't plan to do anything
with
these
> >>until Monday morning. If, however, there are no expressions of concern
or
> >>objection by Monday morning, I will work with Barbara Ledeen on Monday
to
try
> >to
> >>get these to appropriate authors to get them placed in time for
Thursday.
> >>
> >>Thanks, everyone!
> >>
> >>-----
> >>
> >>DRAFT #1
> >>
> >>Democrats Talk About Diversity, But Practice Only Obstruction
> >>
> >> President Bush named two of the nation's top jurists to the
federal
> courts
> >>of appeals, when he announced the nominations of D.C. attorney Miguel
Estrada
> >>and Texas Supreme Court Justice Priscilla Owen nearly two years ago.
> >>Unfortunately, however, both nominees still await confirmation by the
United
> >>States Senate.
> >>

> >> Amazingly, Senate Democrats, who repeatedly claimed the mantle of
> >>diversity
> >>when President Clinton was in the White House, have seen fit to
obstruct
both
> >>nominees. They have done so even though, if confirmed, Estrada would
be
the
> >>first Hispanic ever to serve on the D.C. Circuit, while Owen would
increase
> the
> >>diversity on the Fifth Circuit, which represents Texas, Mississippi and
> >>Louisiana.
> >>
> >> The reason for the Democrats' apparent reversal is simple, if
> disturbingly
> >>crass and partisan. As the Dallas Morning News recently noted,
"Democrats
> >don't
> >>relish giving President Bush one more thing to brag about when he goes
into
> >>Hispanic neighborhoods during his re-election campaign next year." Nor
do
> >>Democrats want to give President Bush credit for placing his second
woman
on
> >the
> >>Fifth Circuit.
> >>
> >> Owen's confirmation would give that court four female judges - all
of
> whom
> >>happen to be Republican or appointed by Republican Presidents. [FYI:
King, a
> >>Republican, was appointed by Carter.] By contrast, President Clinton,
who
> >>appointed four judges to the Fifth Circuit, didn't nominate a single
woman
to
> >>that court - a notable record for a party that claims to emphasize
diversity.
> >>
> >> In light of this record, Democrats simply cannot afford to see
President
> >>Bush succeed in confirming Estrada and Owen, for that would
significantly
> >>discredit their claims that the Democratic Party is for some reason the
party
> >of
> >>women and minorities.
> >>
> >> Of course, Senate Democrats do not, and cannot, admit that this is
their
> >>real reason for objecting to Estrada and Owen. Yet they have no real
grounds
> >on
> >>which to object to either candidate. Both are exceptionally talented
and
> >>deserving of confirmation. Indeed, the ABA unanimously rated both
candidates
> >>well-qualified, its highest rating, and what some Senate Democrats used
to
> call
> >>the "gold standard."
> >>
> >> Thus, instead of arguing the merits of either nominee, Democrats
have
> >>concocted reasons to object to their confirmation. With respect to

Estrada,
> >for
> >>example, Democrats complain that Estrada has no prior judicial
experience,
> even
> >>though that describes a majority of the current court for which he has
been
> >>nominated.
> >>
> >> The invented charge against Owen is similarly groundless. Some
Democrats
> >>claim that confirming Owen would somehow threaten a woman's right to
choose an
> >>abortion. As a fervently pro-choice woman who has studied the law and
Owen's
> >>nine-year record on the Texas Supreme Court, I find the claim patently
absurd.
> >>
> >> First of all, it is widely understood accepted by legal scholars
across
> >the
> >>board that Roe v. Wade and its progeny are the settled law of the land.
> >>Moreover, federal courts of appeals, which are inferior to the Supreme
Court,
> >>have no power to overturn Supreme Court precedents like Roe v. Wade.
That's
> >why
> >>the Democrat-controlled Senate last year confirmed Professor Michael
McConnell
> >>to the federal court of appeals with unanimous consent, even though
McConnell
> >>(unlike either Owen or Estrada, and like numerous liberal law
professors
and
> >>commentators) has publicly stated that Roe v. Wade was incorrectly
decided.
> >>
> >> Second of all, there is no evidence that Owen is in fact opposed
to
Roe
> v.
> >>Wade. Quite the contrary, she has cited and applied Roe v. Wade and
its
> >progeny
> >>on a number of occasions as a sitting justice of the Texas Supreme
Court.
> >>
> >> The only thing that Owen's opponents have been able to cite, in
their
> >>reckless crusade to transform Justice Owen from a scholarly and
dispassionate
> >>jurist to a lawless, pro-life zealot, are a series of Texas Supreme
Court
> >>decisions involving that state's parental notification statute. But
here
is
> >the
> >>truth about that statute and those rulings:
> >>
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> Attachment::text/plain; charset=iso-8859-1
> MIME Type::text/plain

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> Attachment:;pic32355.pcx
> MIME Type:;application/octet-stream
> -----

James C. Ho

PRA 6

(202) 224-2934 (work)

PRA 6

PRA 6

From: CN=Patrick J. Bumatay/OU=WHO/O=EOP@Exchange [WHO]
To: Brett M. Kavanaugh/WHO/EOP@EOP [WHO] <Brett M. Kavanaugh>
CC: Kyle Sampson/WHO/EOP@EOP [WHO] <Kyle Sampson>
Sent: 4/2/2003 6:15:12 AM
Subject: : FW: LRM JAB42 - - JUSTICE; Small Business Administration Report on HR1166 To Expand and Improve Assistance Provided by SBDCs to Indian tribe members, Native Alaskans, and Native Hawaiians
Attachments: P_BO99F003_WHO.TXT_1.doc; P_BO99F003_WHO.TXT_2; P_BO99F003_WHO.TXT_3.wpd; P_BO99F003_WHO.TXT_4.doc

Begin Original ARMS Header

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR:Patrick J. Bumatay (CN=Patrick J. Bumatay/OU=WHO/O=EOP@Exchange [WHO])

CREATION DATE/TIME: 2-APR-2003 11:15:12.00

SUBJECT:: FW: LRM JAB42 - - JUSTICE; Small Business Administration Report on HR1166 To Expand and Improve Assistance Provided by SBDCs to Indian tribe members, Native Alaskans, and Native Hawaiians

TO:Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

CC:Kyle Sampson (CN=Kyle Sampson/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

End Original ARMS Header

Brett - please clear.

Kyle - you make want to look at for Indian issues.

-----Original Message-----

From: Brown, James A.

Sent: Wednesday, April 02, 2003 11:12 AM

To: justice.lrm@usdoj.gov; ocl@ios.doi.gov; CLRM@doc.gov; cla@sba.gov

Cc: McMillin, Stephen S.; Rhinesmith, Alan B.; Lyon, Randolph M.;

Dennis, Yvette M.; Rasetti, Lorenzo; Lefkowitz, Jay P.; Whgc Lrm;

Addington, David S.; Perry, Philip J.; Schneider, Matthew J.; Joseffer,

Daryl L.; Rostker, David; Cea Lrm; Nec Lrm; Heath, Daniel D.; Reardon,

Brian; Jukes, James J.; Green, Richard E.; Lobrano, Lauren C.

Subject: LRM JAB42 - - JUSTICE; Small Business Administration

Report on HR1166 To Expand and Improve Assistance Provided by SBDCs to Indian tribe members, Native Alaskans, and Native Hawaiians

- hr1166.senate.wpd Justice letter - Snow
letter re HR1166.doc SBA letter

LRM ID: JAB42

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

Washington, D.C. 20503-0001

Wednesday, April 2, 2003

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: JUSTICE; Small Business Administration Report on HR1166

To Expand and Improve Assistance Provided by SBDCs to Indian tribe
members, Native Alaskans, and Native Hawaiians

DEADLINE: 10:00 A.M. Friday, April 4, 2003

In accordance with OMB Circular A-19, OMB requests the views of your

REV_00383051

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.

COMMENTS: This bill passed the House on March 31st and has been referred to the Senate Small Business Committee for consideration. Since the Senate Small Business Committee favorably considered similar legislation in the last Congress, Committee action on the bill (if any) may occur rapidly. We therefore need to clear these proposed letters at the deadline.

DISTRIBUTION LIST

AGENCIES:

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LRM ID: JAB42 SUBJECT: JUSTICE; Small Business Administration
Report on HR1166 To Expand and Improve Assistance Provided by SBDCs to
Indian tribe members, Native Alaskans, and Native Hawaiians
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.

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) faxing us a memo or letter.

Please include the LRM number and subject shown above.

TO: James A. Brown Phone: 395-3473 Fax: 395-3109
Office of Management and Budget

FROM: _____ (Date)

_____ (Name)

_____ (Agency)

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

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_BO99F003_WHO.TXT_1>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_BO99F003_WHO.TXT_2>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_BO99F003_WHO.TXT_3>

ATT CREATION TIME/DATE: 0 00:00:00.00
File attachment <P_BO99F003_WHO.TXT_4>

The Honorable
United States Senate
Washington, D.C. 20210

Dear Mr. _____ :

The Department of Justice has reviewed H.R. 1166, a bill which would amend the Small Business Act to expand and improve the assistance provided by Small Business Development Centers to Indian tribe members, Native Alaskans, and Native Hawaiians. Upon completion of our review, we found that this legislation raises significant constitutional concerns as stated below.

H.R. 1166 would amend section 21(a) of the Small Business Act to authorize grants that would be used to provide services and assistance for the "development[] and enhancement on Indian lands of small business startups and expansions owned by Indian tribe members, Native Alaskans, and Native Hawaiians." To the extent that these grants would provide benefits to members of federally recognized Indian tribes and Alaska Native villages or corporations, courts would likely uphold them as constitutional under *Morton v. Mancari*, 417 U.S. 535 (1974). To the extent, however, that the bill could be viewed as authorizing the award of government benefits on the basis of racial or ethnic criteria, rather than tribal affiliation, the deferential *Mancari* standard would not apply and the grants would be subject to strict scrutiny under *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

In particular, Congress has not recognized any group of Native Hawaiians as an Indian tribe, and there is a substantial, unresolved question "whether Congress may treat the native Hawaiians as it does the Indian tribes." *Rice v. Cayetano*, 528 U.S. 495, 518 (2000). This Department has on a number of occasions expressed concerns as to whether the Supreme Court would hold that any group of Native Hawaiians constitutes "a distinctly Indian communit[y]." See *United States v. Sandoval*, 231 U.S. 28, 45-46 (1913). In the absence of findings demonstrating that the bill's authorization of benefits for Native Hawaiians is narrowly tailored to serve a compelling governmental interest, we recommend that the term "Native Hawaiians" be deleted. (We further note that the bill in its current form makes little sense, as we are unaware of any Hawaiian lands that would satisfy the definition of "Indian lands" in the bill.)

Moreover, to the extent that the term "Native Alaskans" includes individuals who are not affiliated with any federally recognized Alaska Native village or corporation, the use of government funds to benefit such individuals would also be subject to strict scrutiny. Since the bill's definition of "Indian tribe" already includes recognized Alaska Native villages and corporations, we recommend that the term "Native Alaskans" also be stricken from the bill.

Thank you for the consideration of our views. If we can be of further assistance in this matter, please do not hesitate to contact us. The Office of Management and Budget has advised that there is no objection to this report from the standpoint of the Administration's program.

Sincerely,

Jamie E. Brown
Acting Assistant Attorney General

cc: