

From: Bumatay, Patrick J.
To: <Kavanaugh, Brett M.>
Sent: 4/4/2003 9:53:30 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: hr1166.senate.wpd; Snow letter re HR1166.doc

Just a reminder, this is due at 10 am.

-----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 << [hr1166.senate.wpd](#) >> Justice letter
[Snow letter re HR1166.doc](#) >> SBA letter

 - Snow letter re HR1166.doc <<

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 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:

061-JUSTICE - Jamie E. Brown - (202) 514-2141

REV_00384026

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

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Lisa J. Macecevic/OMB/EOP@EOP [OMB] <Lisa J. Macecevic>
Sent: 6/5/2002 7:48:26 AM
Subject: : Re: OLC response to Treasury addition on CDFI testimony

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: 5-JUN-2002 11:48:26.00
SUBJECT:: Re: OLC response to Treasury addition on CDFI testimony
TO: Lisa J. Macecevic (CN=Lisa J. Macecevic/OU=OMB/O=EOP@EOP [OMB])
READ: UNKNOWN
End Original ARMS Header

I agree with the OLC suggestion. Please ask OLC whether it agrees with my proposed sentence. If so, then I would suggest adding that as well. Thanks.

From: Lisa J. Macecevic on 06/05/2002 11:34:33 AM
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP
cc:
Subject: OLC response to Treasury addition on CDFI testimony

Brett - OLC would like some other language added to the testimony, as indicated below. I will tell them to add this sentence, plus the footnote info they originally offered. And to address your specific comments, would it be as simple as telling them to add a sentence after the OLC addition like: "Any program targeting Native Hawaiians as a group is subject to strict scrutiny and of questionable validity under the Constitution."

Please let me know as soon as you can. Thanks, Lisa

XX
OLC comment with additional language:

The addition of language from footnote 6 of the study would be helpful, but that language addresses only whether the United States has a trust obligation to Native Hawaiians. To address the concern we raised yesterday, we would also recommend adding a sentence at the end of that passage along the lines of "We do not currently recommend that Congress enact any federal government programs to provide special benefits to Native Hawaiians, but rather address various actions that could voluntarily be undertaken by financial institutions and Native Hawaiian organizations."

XX

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:

The Honorable Olympia J. Snow
Chair, Committee on Small Business
and Entrepreneurship
United States Senate
Washington, DC 20510

Dear Madam Chairman:

This letter is to express the concerns of the U.S. Small Business Administration (SBA) on H.R.1166, the Native American Small Business Development Act. While SBA recognizes the need and importance of providing assistance to small businesses and helping them comply with these issues, we do not support these amendments to the Small Business Act (Act).

H.R.1166 would establish a three-year pilot program for Small Business Development Centers (SBDC) to be used for outreach, development and enhancement of startups and expansions of small businesses owned by Indian tribe members, Native Alaskans and Native Hawaiians. The SBA supports activities designed to improve opportunities for success in businesses owned by Native Americans. However, SBA believes the funding and authority currently made available to SBDCs is sufficient to provide the services contemplated for the Native American, Native Hawaiian and Native Alaskan populations. In addition the bill does not address the major barriers relating to legal infrastructure, government operations, economics, physical and financial infrastructure and educational and cultural issues. Furthermore, SBA has a Native American initiative and the proposed program is duplicative of the Department of Treasury's Community Development Financial Institution Fund, Native American Program.

The Office of Management and Budget advises that there is no objection to the submission of this letter from the standpoint of the Administration's Programs.

Thank you for the opportunity to express our concerns regarding these proposed amendments to the Small Business Act.

Sincerely,

Hector V. Barreto
Administrator