

From: CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO]
To: Lisa J. Macecevic/OMB/EOP@EOP [OMB] <Lisa J. Macecevic>
Sent: 6/4/2002 3:53:55 PM
Subject: : Re: FW: Treasury testimony on Capital Investment in Indian Country (OLA #1206) (OLC #35683)

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

Lisa J. Macecevic

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

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

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

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

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

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

Lisa, I spoke too soon. We do have one constitutional concern about the CDFI testimony. The testimony largely summarizes the findings and recommendations of a study the CDFI conducted on barriers to access to capital and financial services on Indian Lands and Native Hawaiian trust lands. To the extent that the testimony could be viewed as advocating that Congress enact programs to benefit Native Hawaiians, it would raise questions about the authority of Congress to treat Native Hawaiians as it would an Indian tribe. See *Rice v. Cayetano*, 528 U.S. 495, 518-19 (2000)

(declining to address that question "of considerable moment and difficulty"). In the event that the Supreme Court eventually determines that Congress lacks this authority, federal programs providing benefits to Native Hawaiians would be viewed as racial classifications subject to strict scrutiny. To avoid this concern, it would be helpful for the statement to make clear that Treasury is not recommending that Congress enact such programs (or alternatively to identify a compelling government interest that any such program would be narrowly tailored to serve).

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