U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 16, 2003

The Honorable Olympia J. Snowe
Chairwoman
Committee on Small Business and
Entrepreneurship
United States Senate
Washington, D.C. 20510

Dear Madam Chairwoman:

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, or to persons who have a clear and close affiliation with a recognized tribal entity (such as minor children of tribe members who are not yet eligible for tribal membership in their own right), 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. Pena*, 515 U.S. 200, 235 (1995). To avoid this constitutional concern, the bill should be amended to include only those individuals who have a close affiliation with a recognized tribal entity.

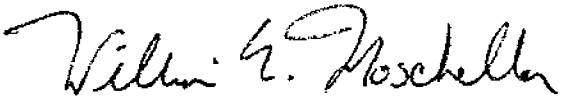
In particular, Congress has not recognized any group of Native Hawaiians as an Indian tribe, and there is a substantial, unresolved question "whether Congress may treat the native Hawaiians as it does the Indian tribes." *Rice v. Cayetano*, 528 U.S. 495, 518 (2000). This Department has on a number of 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 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,



William E. Moschella
Assistant Attorney General

cc: The Honorable John F. Kerry
Ranking Member