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**From:** Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP [ WHO ] )  
**Sent:** Wednesday, August 08, 2001 2:12 PM  
**To:** Timothy E. Flanigan ( CN=Timothy E. Flanigan/OU=WHO/O=EOP@EOP [ WHO ] )  
**Cc:** noel j. francisco ( CN=noel j. francisco/OU=who/O=eop@eop [ WHO ] ); alberto r. gonzales ( CN=alberto r. gonzales/OU=who/O=eop@eop [ WHO ] ); brett m. kavanaugh ( CN=brett m. kavanaugh/OU=who/O=eop@eop [ WHO ] )  
**Subject:** : Re: Adarand

##### Begin Original ARMS Header ##### RECORD TYPE: PRESIDENTIAL (NOTES MAIL) CREATOR:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP [ WHO ] ) CREATION DATE/TIME: 8-AUG-2001 14:12:06.00  
SUBJECT:: Re: Adarand  
TO:Timothy E. Flanigan ( CN=Timothy E. Flanigan/OU=WHO/O=EOP@EOP [ WHO ] ) READ:UNKNOWN CC:noel j. francisco ( CN=noel j. francisco/OU=who/O=eop@eop [ WHO ] ) READ:UNKNOWN CC:alberto r. gonzales ( CN=alberto r. gonzales/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 #####

I agree with point 2.

As to point 1, that would introduce a concept that, at least to my knowledge, has not previously appeared in the Supreme Court's equal protection jurisprudence, which means it would require an elaboration and justification in the brief.

As to merits of a deliberate indifference standard, four questions. First, would it mean that a victim of private discrimination could sue the government on some theory that the government was merely deliberately indifferent to (rather than the cause of) the private discrimination? If so, that might suggest an extraordinary expansion of governmental responsibility and liability for private racial discrimination. Second, how would one prove that the federal government was deliberately indifferent to private discrimination apart from simply proving widespread private discrimination in the relevant jurisdiction and field, which presumably is the requirement under current law anyway? Third, and looking at it from the flip side, what precisely would this new requirement add in terms of limiting the government's use of race-based classifications? What exactly would be allowed under current law but be prohibited with the deliberate indifference standard? Fourth, the argument itself as outlined in the e-mail does not really hang together to the extent it presupposes that these regulations do not use race-based remedies. The brief assumes that these regulations are in fact race-based (although I do not believe the brief should assume as much).

The fundamental problem in this case is that these DOT regulations use a lot of legalisms and disguises to mask what in reality is a naked racial set-aside. I have no doubt that Rehnquist, Scalia, Thomas, and Kennedy will realize as much in short order and rule accordingly -- unless the Court DIGs the case. I assume O'Connor will so rule as well, although that is less certain.

Timothy E. Flanigan  
08/08/2001 12:49:12 PM  
Record Type: Record

REV\_00289596

To: Noel J. Francisco/WHO/EOP@EOP  
cc: alberto r. gonzales/who/eop@eop, brett m. kavanaugh/who/eop@eop  
bcc:  
Subject: Re: Adarand

I agree with Noel's suggestions.

Noel J. Francisco  
08/08/2001 11:59:28 AM  
Record Type: Record

To: Alberto R. Gonzales/WHO/EOP@EOP, Timothy E.  
Flanigan/WHO/EOP@EOP, Brett M. Kavanaugh/WHO/EOP@EOP  
cc:  
Subject: Adarand

I have read the brief and have two initial reactions. First, in the "compelling interest" section, we should incorporate the deliberate indifference standard. That is, argue that the widespread nature of the disparities gives rise to a presumption that the Government, in the course of funding highway construction, was aware of the discrimination and deliberately indifferent to it. This may not be sufficient in and of itself to justify race-conscious remedies. It is, however, sufficient to justify the narrowly tailored regulations implementing this program.

Second, in the narrow tailoring section, I would simply move the last 8 paragraphs of the brief -- which address the certification requirement that limits the race preference only to DBE's that have actually suffered discrimination -- into a separate argument that would be the first argument under narrow tailoring. Since we're making this argument anyhow, I don't see how the SH could object to a simple reordering of it. This, moreover, would focus the Court on the aspect of the program that makes it most likely to survive strict scrutiny.

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**From:** Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP [ WHO ] )  
**Sent:** Thursday, January 17, 2002 9:58 AM  
**To:** Helgard C. Walker ( CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [ WHO ] )  
**Subject:** : Re: Racial Profiling

##### 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:17-JAN-2002 10:57:53.00  
SUBJECT:: Re: Racial Profiling  
TO:Helgard C. Walker ( CN=Helgard C. Walker/OU=WHO/O=EOP@EOP [ WHO ] ) READ:UNKNOWN  
##### End Original ARMS Header #####

The people who favor some use of race/natl origin obviously do not need to grapple with the "interim" question. But the people (such as you and I) who generally favor effective security measures that are race-neutral in fact DO need to grapple -- and grapple now -- with the interim question of what to do before a truly effective and comprehensive race-neutral system is developed and implemented.

Helgard C. Walker  
01/17/2002 10:47:08 AM  
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP  
cc:  
bcc:  
Subject: Re: Racial Profiling

I do, b/c that is what Noel was purporting to represent. His opening words were something to the effect of, "Well I think Joel's point was. . .  
."

You are right that we will have to grapple with the interim issue eventually, if we decide that our general policy will somehow be one that relies on more information and a system that take time to set up. But until we decide the general policy we can't get to the q of interim, which I admit is hard. I am not sure what the answer is to that.

Brett M. Kavanaugh  
01/17/2002 10:37:29 AM  
Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP  
cc:  
bcc:  
Subject: Re: Racial Profiling

Understood. I do not really care what Joel was or was not advocating or discussing. At staff meeting, I was curious about your position on the interim issue and explaining that the interim security needs almost by definition have to be one focus of you and the working group. That does not mean there are easy answers to that interim issue. But that issue certainly cannot -- or at least should not -- be avoided.

Helgard C. Walker  
01/17/2002 10:27:29 AM  
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP  
cc:  
bcc:  
Subject: Re: Racial Profiling

And my only point is that there is no agreement in the working group on the general policy. And when Joel was in here yesterday and we were debating the issue, he was not, as Noel suggested, arguing only about the interim. He was asking about the use of race in the bigger picture.

Brett M. Kavanaugh  
01/17/2002 10:22:25 AM  
Record Type: Record

To: Helgard C. Walker/WHO/EOP@EOP  
cc:  
bcc:  
Subject: Re: Racial Profiling

I still did not think anyone ever said the interim issue was the "only question" as your e-mail says . . . My only point was that your long-term approach, with which I agree entirely, still leaves the interim question, which actually is of critical importance to the security of the airlines and American people in the next 6 months or so, especially given Al Qaeda's track record of timing between terrorist incidents.

Helgard C. Walker  
01/17/2002 10:12:14 AM  
Record Type: Record

To: Alberto R. Gonzales/WHO/EOP@EOP, Timothy E. Flanigan/WHO/EOP@EOP  
cc: See the distribution list at the bottom of this message  
Subject: Racial Profiling

In light of our discussion at staff meeting this morning, I wanted to confirm for everybody -- especially the Judge -- the issues up for decision in the internal administration working group.

REV\_00328553

To be clear, it is not the case that there is widespread agreement in the group that we should be working toward a race-neutral (or as race-neutral as possible) system for airport security and other law enforcement, such that the only question presented is how to handle security between now and the time that such a system is put in place -- i.e., the "what-to-do-in-the-interim" question.

Rather, the question is whether we should work toward a race-neutral system at all or whether we should instead permit the use of race as a factor in certain circumstances. My own view is that, as required by traditional Equal Protection standards, we must at least consider how to construct a race-neutral system. I can imagine such a system that could be effective, perhaps even more effective than one based on racial classifications. For instance, you could break air passengers down into groups of those with/without U.S. passports, those with/without recent international travel, those with/without criminal history, et cetera, and subject persons in higher risk categories to higher levels of scrutiny. This sort of system would require airlines and/or governmental authorities to obtain more personal information from the flying public, and there is some resistance to that within the group on the grounds that that would too burdensome, invasive of privacy, and so forth.

Another school of thought is that if the use of race renders security measures more effective, than perhaps we should be using it in the interest of safety, now and in the long term, and that such action may be legal under cases such as Korematsu.

The point being that the foregoing -- the general policy, not the interim policy -- is what we are currently debating in the group. Of course, if it were decided that our general policy should be to try and devise a race-neutral system, we would be at the juncture of deciding upon interim measures. And that is, admittedly, not an easy question. But we are not there yet.

HCW

Message Copied

To: \_\_\_\_\_

Courtney S. Elwood/WHO/EOP@EOP  
Brett M. Kavanaugh/WHO/EOP@EOP  
Bradford A. Berenson/WHO/EOP@EOP  
H. Christopher Bartolomucci/WHO/EOP@EOP  
Robert W. Cobb/WHO/EOP@EOP  
Noel J. Francisco/WHO/EOP@EOP  
Rachel L. Brand/WHO/EOP@EOP



**From:** CN=Bradford A. Berenson/OU=WHO/O=EOP [ WHO ]  
**To:** Courtney S. Elwood/WHO/EOP@EOP [ WHO ] <Courtney S. Elwood>  
**CC:** brett m. kavanaugh/who/eop@eop [ WHO ] <brett m. kavanaugh>; alberto r. gonzales/who/eop@eop [ WHO ] <alberto r. gonzales>; timothy e. flanigan/who/eop@eop [ WHO ] <timothy e. flanigan>; bradford a. berenson/who/eop@eop [ WHO ] <bradford a. berenson>; helgard c. walker/who/eop@eop [ WHO ] <helgard c. walker>; stuart w. bowen/who/eop@eop [ WHO ] <stuart w. bowen>; h. christopher bartolomucci/who/eop@eop [ WHO ] <h. christopher bartolomucci>; rachel l. brand/who/eop@eop [ WHO ] <rachel l. brand>; noel j. francisco/who/eop@eop [ WHO ] <noel j. francisco>; robert w. cobb/who/eop@eop [ WHO ] <robert w. cobb>  
**Sent:** 3/27/2001 3:15:40 AM  
**Subject:** : Re: Adarand -- other considerations

##### Begin Original ARMS Header #####  
RECORD TYPE: PRESIDENTIAL (NOTES MAIL)  
CREATOR:Bradford A. Berenson ( CN=Bradford A. Berenson/OU=WHO/O=EOP [ WHO ] )  
CREATION DATE/TIME:27-MAR-2001 08:15:40.00  
SUBJECT:: Re: Adarand -- other considerations  
TO: Courtney S. Elwood ( CN=Courtney S. Elwood/OU=WHO/O=EOP@EOP [ WHO ] )  
READ:UNKNOWN  
CC:brett m. kavanaugh ( CN=brett m. kavanaugh/OU=who/O=eop@eop [ WHO ] )  
READ:UNKNOWN  
CC:alberto r. gonzales ( CN=alberto r. gonzales/OU=who/O=eop@eop [ WHO ] )  
READ:UNKNOWN  
CC:timothy e. flanigan ( CN=timothy e. flanigan/OU=who/O=eop@eop [ WHO ] )  
READ:UNKNOWN  
CC:bradford a. berenson ( CN=bradford a. berenson/OU=who/O=eop@eop [ WHO ] )  
READ:UNKNOWN  
CC:helgard c. walker ( CN=helgard c. walker/OU=who/O=eop@eop [ WHO ] )  
READ:UNKNOWN  
CC:stuart w. bowen ( CN=stuart w. bowen/OU=who/O=eop@eop [ WHO ] )  
READ:UNKNOWN  
CC:h. christopher bartolomucci ( CN=h. christopher bartolomucci/OU=who/O=eop@eop [ WHO ] )  
READ:UNKNOWN  
CC:rachel l. brand ( CN=rachel l. brand/OU=who/O=eop@eop [ WHO ] )  
READ:UNKNOWN  
CC:noel j. francisco ( CN=noel j. francisco/OU=who/O=eop@eop [ WHO ] )  
READ:UNKNOWN  
CC:robert w. cobb ( CN=robert w. cobb/OU=who/O=eop@eop [ WHO ] )  
READ:UNKNOWN  
##### End Original ARMS Header #####

Of course the Clinton administration gave us some cover on this by declining to defend the constitutionality of the statute at issue in Dickerson last Term -- to near-universal praise by the media.

Courtney S. Elwood  
03/27/2001 08:12:14 AM  
Record Type: Record

To: Brett M. Kavanaugh/WHO/EOP@EOP  
cc: See the distribution list at the bottom of this message  
bcc:  
Subject: Re: Adarand -- other considerations

Another consideration: Although Olsen would likely find it troubling to do so, he and the AG, in deciding whether to defend the program, may take into consideration the "long-standing practice" of the Department "to defend [a] statute against [constitutional] challenge unless there is no reasonable argument that could be made in defense. See, e.g. The Attorney

REV\_00125571

General's Duty To Defend the Constitutionality of Statutes, 43 Op. Atty. Gen. 325 (1981) (Opinion of Attorney General Smith); The Attorney General's Duty To Defend and Enforce Constitutionally Objectionable Legislation, 43 Op. Atty. Gen. 275 (1980)." Letter from Dick Thornburgh to Senator Strom Thurmond, dated Oct. 7, 1999 (appended to the Brief of Amici Curiae former Attorneys General of the United States William P. Barr and Edwin Meese III Supporting Affirmance in Dickerson v. United States, No. 99-5525.

While in Adarand, the constitutionality challenged law is a regulatory program and not a statute, the practice may nonetheless have some application. I don't know. In any event, if the decision is made not to defend the constitutionality of the program, I suspect we will hear the words of these Republican attorneys general repeated back to us in the press and in briefs before the Supreme Court.

Brett M. Kavanaugh  
03/26/2001 08:58:32 PM  
Record Type: Record

To: See the distribution list at the bottom of this message  
cc:  
Subject: Adarand -- other considerations

A few more preliminary thoughts, although they are phrased somewhat more definitively. But these are really just initial ideas.

1. My sense, for what it is worth, is that it would be better for the SG to independently assess and come to a constitutional conclusion about the program -- and only then advise the President of it -- than for the White House to dictate -- or even hint -- to the SG what the SG's position should be. Indeed, in my view, the White House should not be involved in the SG's formulation of a position in the first instance, but rather only in approving or disapproving what the SG proposes.

This is admittedly not my ideal of how a unitary executive should work, but it is the real world, and there is a very strong tradition in the Executive Branch -- and in the Congress and media -- that the SG is independent and should come to his or her own independent conclusions about the constitutionality of laws. It is also why SG is such a critically important position. That is not to say that the SG's office cannot be overruled by the President/White House; it can be and has been in the past and will be in the future. It is to say, however, that there is a serious long-term political cost to the perception or reality that the SG's positions and recommendations are being driven in the first instance by the White House. Lincoln Caplan's book The Tenth Justice is a fine example of the kinds of criticism that can occur.

Apart from that public relations/political consideration, as a matter of standard process, moreover, the SG is in the best position to assess a case like this in the first instance and propose a course of action.

I thus would recommend that, if asked and forced to answer, the President and Ari might say something like the following about the President's position:

In the Executive Branch, it is the role of the Solicitor General, acting under the Attorney General and ultimately the President, to represent the United States in the Supreme Court. In cases involving the United States, therefore, it is properly the role of the Solicitor General and the Department of Justice to examine and study the facts and the law in the first instance and to make appropriate decisions and

recommendations. Of course, the President is the head of the Executive Branch and in particularly important Supreme Court cases previous Presidents have approved -- and, on occasion, disapproved -- the Department of Justice's recommended course of action. In any particularly important case like that, however, this President would await the Department of Justice's recommendation before making any decision.

I also would recommend that the Judge communicate to the Attorney General that the President will await the recommendation of the Attorney General and Solicitor General as to the constitutionality of this program and the proper course of action in the Supreme Court. I would propose that there be no other communications between the White House and Department about this case.

2. This case makes Ted Olson's hearing more likely to gain attention and draw fire given what he has written and who he has represented in race cases.

3. An approach referenced but not elaborated in my earlier e-mail is for the SG to file a brief saying that the program is unconstitutional, thus refusing to defend the constitutionality of the program and forcing the Supreme Court to appoint counsel to defend the program. That is, in fact, my personal opinion about what the SG ought to do, but that is only my personal opinion. Again, however, if this is the SG's ultimate position, this is much better coming from the SG than being dictated or hinted in any way to the SG.

Message Sent

To:

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Alberto R. Gonzales/WHO/EOP@EOP  
Timothy E. Flanigan/WHO/EOP@EOP  
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From: Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP [ WHO ] ) [mailto:Brett M. Kavanaugh ( CN=Brett M. Kavanaugh/OU=WHO/O=EOP [ WHO ] )]  
Sent: Wednesday, April 24, 2002 9:40 AM  
To: Noel J. Francisco ( CN=Noel J. Francisco/OU=WHO/O=EOP@EOP [ WHO ] )  
Subject: : Re: LRM JAB205 OMB Request for Views on S\_\_\_\_\_ Native American Small Business

##### 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-APR-2002 09:39:34.00  
SUBJECT:: Re: LRM JAB205 OMB Request for Views on S\_\_\_\_\_ Native American Small Business TO:Noel J. Francisco ( CN=Noel J. Francisco/OU=WHO/O=EOP@EOP [ WHO ] ) READ:UNKNOWN  
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FYI

----- Forwarded by Brett M. Kavanaugh/WHO/EOP on  
04/24/2002 09:39 AM -----

Brett M. Kavanaugh  
04/23/2002 09:04:57 PM  
Record Type: Record

To: Patrick J. Bumatay/WHO/EOP@EOP, James A. Brown/OMB/EOP@EOP  
cc:  
bcc: Records Management@EOP  
Subject: Re: LRM JAB205 OMB Request for Views on S\_\_\_\_\_ Native American Small Business

White House Counsel objects and raises questions about the constitutionality of this bill, including but not limited to the portions that refer to Native Hawaiians. See Rice v. Cayetano. We believe that an "Office of Native American Affairs" within SBA triggers both policy and constitutional concerns. If the Office will deal solely with tribes, members of tribes, and tribal activities, it is appropriate. But if it grants benefits to Native Americans because of their race/ethnicity alone, that raises serious problems under Rice and the Constitution, which generally requires that all Americans be treated as equal (absent a program narrowly tailored to serve a compelling government interest). The desire to remedy societal discrimination is not a compelling interest, however. See Croson.

OLC needs to review this.

Patrick J. Bumatay  
04/23/2002 11:37:40 AM  
Record Type: Record

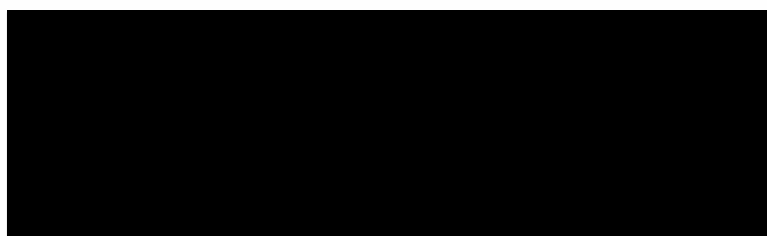
To: Brett M. Kavanaugh/WHO/EOP@EOP  
cc:  
Subject:LRM JAB205 OMB Request for Views on S\_\_\_\_\_ Native American Small Business

----- Forwarded by Patrick J. Bumatay/WHO/EOP on 04/23/2002 11:37 AM -----

REV\_00339902

James A. Brown  
04/23/2002 10:57:14 AM  
Record Type: Record

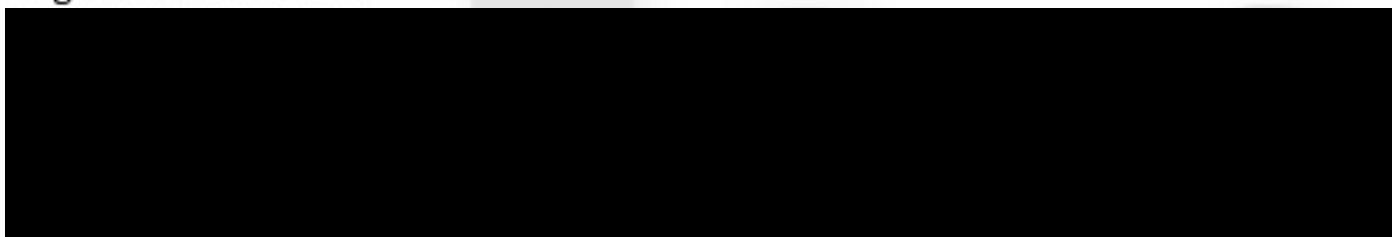
To: See the distribution list at the bottom of this message  
cc:  
Subject: LRM JAB205 OMB Request for Views on S\_\_\_\_\_ Native  
American Small Business



Tuesday, April 23, 2002

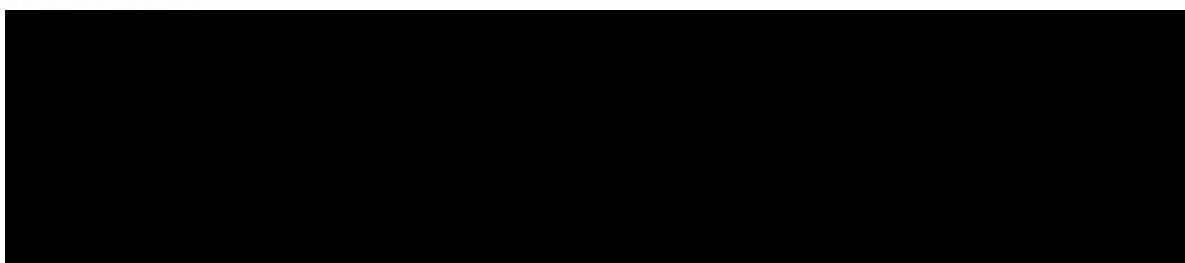
LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution  
below  
FROM: Richard E. Green (for) Assistant Director for  
Legislative Reference



DEADLINE: 10:00 A.M. Friday, April 26, 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: The Small Business Administration is scheduled to testify on  
this legislation on April 30th.

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LRM ID: JAB205 SUBJECT: OMB Request for Views on S\_\_\_\_\_ Native  
American Small Business Development Program  
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.

\_\_\_\_\_ No Objection

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\_\_\_\_\_ See proposed edits on pages \_\_\_\_\_

\_\_\_\_\_ Other: \_\_\_\_\_

\_\_\_\_\_ FAX RETURN of \_\_\_\_\_ pages, attached to this response sheet

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To: \_\_\_\_\_

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