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[01/28/1999]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Paul Weinstein Jr. to Elena Kagan and Bruce Reed re: Applicant (1 page)	01/28/1999	P6/b(6)

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
OPD ([Kagan])
OA/Box Number: 250000

FOLDER TITLE:

[01/28/1999]

2009-1006-F

bm87

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Melissa G. Green (CN=Melissa G. Green/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:28-JAN-1999 00:54:47.00

SUBJECT: Final Paper for Training Event

TO: Linda Ricci (CN=Linda Ricci/OU=OMB/O=EOP @ EOP [OMB])
READ:UNKNOWN

TO: Robert L. Nabors (CN=Robert L. Nabors/OU=OMB/O=EOP @ EOP [OMB])
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TO: Devorah R. Adler (CN=Devorah R. Adler/OU=OPD/O=EOP @ EOP [OPD])
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TO: Maya Seiden (CN=Maya Seiden/OU=WHO/O=EOP @ EOP [WHO])
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TO: Jennifer M. Palmieri (CN=Jennifer M. Palmieri/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Elizabeth R. Newman (CN=Elizabeth R. Newman/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Joseph C. Fanaroff (CN=Joseph C. Fanaroff/OU=WHO/O=EOP @ EOP [WHO])
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TO: Mona G. Mohib (CN=Mona G. Mohib/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Chandler G. Spaulding (CN=Chandler G. Spaulding/OU=WHO/O=EOP @ EOP [WHO])
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TO: Karen Tramontano (CN=Karen Tramontano/OU=WHO/O=EOP @ EOP [WHO])
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TO: Sidney Blumenthal (CN=Sidney Blumenthal/OU=WHO/O=EOP @ EOP [WHO])
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TO: Brian A. Barreto (CN=Brian A. Barreto/OU=OPD/O=EOP @ EOP [OPD])
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TO: Joshua Gotbaum (CN=Joshua Gotbaum/OU=OMB/O=EOP @ EOP [OMB])
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TO: William A. Halter (CN=William A. Halter/OU=OMB/O=EOP @ EOP [OMB])
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TO: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO])
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TO: Marsha E. Berry (CN=Marsha E. Berry/OU=WHO/O=EOP @ EOP [WHO])
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TO: Andrei H. Cherny (CN=Andrei H. Cherny/O=OVP @ OVP [UNKNOWN])
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TO: Neera Tanden (CN=Neera Tanden/OU=WHO/O=EOP @ EOP [WHO])

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TO: Michael V. Terrell (CN=Michael V. Terrell/OU=CEQ/O=EOP @ EOP [CEQ])
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TO: Leanne A. Shimabukuro (CN=Leanne A. Shimabukuro/OU=OPD/O=EOP @ EOP [OPD])
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TO: Virginia N. Rustique (CN=Virginia N. Rustique/OU=WHO/O=EOP @ EOP [WHO])
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TO: Virginia M. Terzano (CN=Virginia M. Terzano/O=OVP @ OVP [UNKNOWN])
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TO: Minyon Moore (CN=Minyon Moore/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Lynn G. Cutler (CN=Lynn G. Cutler/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: William H. White Jr. (CN=William H. White Jr./OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Barbara D. Woolley (CN=Barbara D. Woolley/OU=WHO/O=EOP @ EOP [WHO])
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TO: Charles R. Marr (CN=Charles R. Marr/OU=OPD/O=EOP @ EOP [OPD])
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TO: Sara M. Latham (CN=Sara M. Latham/OU=WHO/O=EOP @ EOP [WHO])
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TO: Lisa M. Kountoupes (CN=Lisa M. Kountoupes/OU=WHO/O=EOP @ EOP [WHO])
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TO: Michael Waldman (CN=Michael Waldman/OU=WHO/O=EOP @ EOP [WHO])
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TO: Jordan Tamagni (CN=Jordan Tamagni/OU=WHO/O=EOP @ EOP [WHO])
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TO: Jake Siewert (CN=Jake Siewert/OU=OPD/O=EOP @ EOP [OPD])
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TO: Dorothy Robyn (CN=Dorothy Robyn/OU=OPD/O=EOP @ EOP [OPD])
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TO: John Podesta (CN=John Podesta/OU=WHO/O=EOP @ EOP [WHO])
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TO: Bob J. Nash (CN=Bob J. Nash/OU=WHO/O=EOP @ EOP [WHO])
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TO: Janet Murguia (CN=Janet Murguia/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Linda L. Moore (CN=Linda L. Moore/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TO: Anne E. McGuire (CN=Anne E. McGuire/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Cathy R. Mays (CN=Cathy R. Mays/OU=OPD/O=EOP @ EOP [OPD])
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TO: Julie E. Mason (CN=Julie E. Mason/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Jacob J. Lew (CN=Jacob J. Lew/OU=OMB/O=EOP @ EOP [OMB])
READ:UNKNOWN

TO: Jeanne Lambrew (CN=Jeanne Lambrew/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Charles Konigsberg (CN=Charles Konigsberg/OU=OMB/O=EOP @ EOP [OMB])
READ:UNKNOWN

TO: Thomas A. Kalil (CN=Thomas A. Kalil/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Christopher C. Jennings (CN=Christopher C. Jennings/OU=OPD/O=EOP @ EOP [OPD])
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TO: Nancy V. Hernreich (CN=Nancy V. Hernreich/OU=WHO/O=EOP @ EOP [WHO])
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TO: Thomas L. Freedman (CN=Thomas L. Freedman/OU=OPD/O=EOP @ EOP [OPD])
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TO: Betty W. Currie (CN=Betty W. Currie/OU=WHO/O=EOP @ EOP [WHO])
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TO: Brenda M. Anders (CN=Brenda M. Anders/OU=WHO/O=EOP @ EOP [WHO])
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TO: Adrienne C. Erbach (CN=Adrienne C. Erbach/OU=OMB/O=EOP @ EOP [OMB])
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TO: Andrea Kane (CN=Andrea Kane/OU=OPD/O=EOP @ EOP [OPD])
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TO: Jeffrey A. Forbes (CN=Jeffrey A. Forbes/OU=WHO/O=EOP @ EOP [WHO])
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TO: Heather M. Riley (CN=Heather M. Riley/OU=WHO/O=EOP @ EOP [WHO])

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TO: Robin J. Bachman (CN=Robin J. Bachman/OU=WHO/O=EOP @ EOP [WHO])
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TO: Barbara Chow (CN=Barbara Chow/OU=OMB/O=EOP @ EOP [OMB])
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TO: John A. Gribben (CN=John A. Gribben/OU=WHO/O=EOP @ EOP [WHO])
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TO: Glen M. Weiner (CN=Glen M. Weiner/OU=WHO/O=EOP @ EOP [WHO])
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TO: Robert B. Johnson (CN=Robert B. Johnson/OU=WHO/O=EOP @ EOP [WHO])
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TO: Paul J. Weinstein Jr. (CN=Paul J. Weinstein Jr./OU=OPD/O=EOP @ EOP [OPD])
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TO: Jonathan A. Kaplan (CN=Jonathan A. Kaplan/OU=OPD/O=EOP @ EOP [OPD])
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TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
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**CLOSING THE SKILLS GAP:
PRESIDENT CLINTON'S ADULT EDUCATION AND FAMILY LITERACY,
RE-EMPLOYMENT, AND YOUTH EMPLOYMENT INITIATIVES**

January 28, 1999

Today, President Clinton Announces A \$965 Million Three-Part Initiative To Close America's Skills Gap. Last year, President Clinton signed the Workforce Investment Act transforming the job training system by streamlining services and empowering workers with a simple skills grant so that they can choose the training they need. However, more work needs to be done because America still faces a skills gap. Today, President Clinton is announcing that his FY2000 budget includes a \$965 million three-part initiative to address the skills gap.

The President's Budget Includes a Comprehensive Package to Help Us Educate and Train American Workers to Fill the Jobs of the 21st Century. This comprehensive strategy includes:

1. ***A \$190 Million Increase for Adult Education And Family Literacy Initiative.*** Today, 44 million adults struggle with a job application, cannot read to their children, or cannot fully participate in our economic and civic life because they lack basic skills or English proficiency. The President's initiative:
 - \$95 million -- or 25 percent -- more for adult education grants and challenges state and local governments to join with us to raise program quality.
 - \$70 million for an English literacy/civics initiative;
 - \$20 million to help develop technology for adult learners;
 - New 10% tax credit to employers who establish certain workplace literacy programs; and
 - New initiative to mobilize state and local communities to implement strategies to promote adult education and lifelong learning.

2. ***A \$368 Million Increase for Universal Re-employment Initiative.*** The President's FY2000 budget makes a five-year commitment to our Nation's reformed job training system. Specifically, President Clinton proposes to put us on a path that ensures that within five years:
 - All displaced workers will receive the job training they want and need -- after nearly tripling funding for dislocated workers since 1993, initiative makes first-year commitment of additional \$190 million;
 - All people who lose their jobs due to no fault of their own will get the re-employment services -- e.g., job search assistance -- they need; and
 - All Americans will have access to One-Stop Career Centers, including a nationwide toll-free telephone system so that *all* workers will be able to find out what services are available and where they can go to receive them; job search information at 4,000 Community-Based Organizations; 100 mobile One-Stop Career Centers; and increased access for the disabled and the blind.

3. ***A \$405 Million Increase for Youth Employment Initiative.*** The unemployment rate among African American teens is *6.5 times* higher than the national average. **In addition to an increase in JobCorps and the \$250 million for the new Youth Opportunity Areas, the initiative includes:**
 - **75-percent increase in YouthBuild, from \$42.5 million to \$75 million.**
 - New \$100 million "Right-Track" Partnership initiative to help lower drop-out rates;
 - Doubles the funding for GEAR UP -- which helps mentor children and prepare them for college -- from \$120 million to \$240 million;
 - New \$50 million initiative to help link Empowerment Zones and Enterprise Communities (EZ/ECs) to their broader metropolitan regional economies in order to increase the employment of disadvantaged youth; and
 - \$65 million more to prepare disadvantaged youth for success in college, including \$30 million increase in outreach, counseling, and educational support through TRIO program,

and new \$35 million initiative to help disadvantaged students stay in college.

**CLOSING THE SKILLS GAP:
PRESIDENT CLINTON'S ADULT EDUCATION AND
FAMILY LITERACY, RE-EMPLOYMENT,
AND YOUTH EMPLOYMENT INITIATIVES**

January 28, 1999

Today, President Clinton Announces A \$965 Million Three-Part Initiative To Close America's Skills Gap. In *Putting People First*, candidates Bill Clinton and Al Gore outlined a vision for lifelong learning, stating that workers should be "able to choose advanced skills training, the chance to earn a high school diploma, or the opportunity to learn to read. And we will streamline the confusing array of publicly funded training programs." Last year, President Clinton signed the Workforce Investment Act transforming the job training system by streamlining services and empowering workers with a simple skills grant so that they can choose the training they need. However, more work needs to be done. Today, President Clinton is announcing that his FY2000 budget includes a \$965 million three-part initiative to address the skills gap:

- (1) *A \$190 Million Increase for Adult Education And Family Literacy Initiative;*
- (2) *A \$368 Million Increase for Universal Re-employment Initiative; and*
- (3) *A \$405 Million Increase for Youth Employment Initiative.*

America Faces A Skills Gap. The evidence of a skills gap in America is pervasive. On average, employers report that one out of every five of their workers is not fully proficient in his or her job. In manufacturing, 88 percent of companies are having trouble finding qualified applicants for at least one job function. And according to one recent survey, more than 60 percent of corporate leaders say that the number one barrier to sustained economic growth is the lack of a skilled workforce. More than half -- 56 percent -- of establishments report that restructuring and the introduction of new technology has increased the skill requirements for non-managerial employees.

The President's Budget Includes a Comprehensive Package to Help Us Educate and Train American Workers to Fill the Jobs of the 21st Century. This comprehensive strategy has three parts:

1. **An Adult Education and Family Literacy Initiative.** Today, 44 million adults struggle with a job application, cannot read to their children, or cannot fully participate in our economic and civic life because they lack basic skills or English proficiency. Many have a learning disability and are not aware of it. Often, they do not know where to get help, are embarrassed to seek it, or cannot seek it because of family responsibilities. Others are immigrants who face long waiting lists in many places where they seek English-language instruction. For some individuals, these low basic skills present a challenge in moving off welfare and succeeding in the workforce.

The goal of the Adult Literacy initiative is to bring Presidential leadership and focus to a pressing national problem by demanding improvements in the quality of adult basic education programs and increasing funding to help States both meet the new quality goals and serve more people. This initiative includes:

- **\$95 Million Increase -- to \$468 Million -- to Expand Adult Education State Grants and Challenge State and Local Governments to Join Us in Dramatically Increasing Program Quality.** By the year 2005 the President's goal is for the Nation as a whole to: Increase the number of full-time teachers by 20%; Double the number of instructional hours per student; Triple the number of computer stations available at adult education centers; and more than double the amount of child care and counseling services offered in Federal, State, and local adult education programs.
 - **\$70 Million for an English Literacy/Civics Initiative.** This initiative provides competitive grants to States and communities for expanded access to high quality English language instruction linked to practical instruction in civics and life skills including how to navigate the workplace, public education system, and other essentials.
 - **\$23 Million for "America Learns Technology."** One of the important keys to higher quality adult education is effective use of advanced technology. This initiative will increase access to technology for adult learners by supporting high quality software, pilot projects in 40 communities, and advanced research and development.
 - **\$2 Million for a "High Skills Communities" Campaign.** The President's campaign will mobilize States and local communities to implement strategies to promote adult education and lifelong learning. Part of this initiative will provide up to 10 communities \$50,000 awards annually for achieving concrete results so that other communities know what works and what doesn't work.
 - **10% Workplace Education Tax Credit.** Employers who provide certain workplace literacy, English language instruction, and basic education programs will be allowed a 10 percent income tax credit for eligible educational expenses, with a maximum credit of \$525 per participating employee per year.
2. **A Universal Re-Employment Initiative.** The President's FY2000 budget makes a five-year commitment to our Nation's reformed job training system. Specifically, President Clinton proposes to put us on a path that ensures that within five years (1) all displaced workers will receive the job training they want and need; (2) all people who lose their jobs due to no fault of their own will get the re-employment services they need; and (3) all Americans will have access to One-Stop Career Centers. This initiative includes:

- **\$190 Million Increase In Dislocated Worker Program to Put Us On Track To Ensure Every Dislocated Worker Gets The Training They Need.** Since 1993, dislocated worker funding has been expanded by 171 percent -- helping to serve 689,100 this year, well more than double the 306,300 workers served in 1993. The President's FY2000 budget increases funding for the dislocated worker program by \$190 million -- helping to serve an additional 169,400 workers this year. This would put us on path to ensuring *every* dislocated worker can get the job training he or she needs.

- **Expansion of Employment Service To Put Us on Path To Ensure Every Person Who Loses Their Job Due to No Fault of Their Own Gets the Re-Employment Services They Need.** Today, many workers do not get the job search assistance or other types of re-employment services they need. Therefore, the President's FY2000 budget expands the budget of the Employment Service (ES) to put us on a path to serve within five years the 1.4 million people who lost their job due to no fault of their own and do not receive the re-employment services they need.

- **Providing Every American Access To One-Stop Career Centers -- Helping Americans Informed Decisions About Their Futures.** As part of the Workforce Investment Act, every area of the country will have a One-Stop Career Center. Now, we must ensure every American has access to the information available at the One-Stops. The President's budget does just that -- providing \$65 million to take the following steps:
 - First, the President's budget will put in place a system so that the unemployed get job leads the moment they apply for Unemployment Insurance -- transforming our unemployment system into a re-employment system.

 - Second, the plan will create a nationwide toll-free telephone system so that *all* workers will be able to find out what services are available and where they can go to receive them. Every American will have universal access to the services and programs available through One-Stop Career Centers.

 - Third, the plan will ensure that workers will be able to get job search information at 4,000 Community-Based Organizations.

 - Fourth, the plan will create 100 new mobile One-Stop Career Centers -- designed to bring the information and services to rural residents and help the Labor Department's existing rapid response teams provide workers the information they need to get back to work.

 - Fifth, the plan will include funds to help the disabled and the blind benefit from One-Stop Career Centers, including a talking America's Job Bank (AJB), which will be developed in conjunction with the National Federation for the Blind.

3. **Disadvantaged Youth Initiatives.** Dealing with the problems of at-risk youth is one of the major challenges facing the Nation. In December 1998, the national unemployment rate was just 4.3 percent -- the lowest peacetime level in 41 years. However, while the unemployment rate among African-American teens (aged 16-19) also reached its lowest peacetime level in four decades, it was still *6.5 times* higher than the national average and much higher than the rate for white youth. The goal of the youth employment initiative is to fund promising approaches to increase the educational attainment and employment rates of disadvantaged youth. **In addition to an increase in JobCorps and another \$250 million investment in Youth Opportunity Areas, this initiative includes:**

- **YouthBuild Expanded by More than 75 Percent.** The FY2000 budget expands YouthBuild by \$32.5 million -- more than 75 percent. This means that we will provide \$75 million for the YouthBuild program that provides disadvantaged young adults with education and employment skills by rehabilitating and building housing for low-income and homeless people.
- **New \$100 Million "Right-Track" Partnership To Reduce Drop-Out Rate.** The President's balanced budget provides \$100 million for "Right Track Partnerships" to promote partnerships between schools, employers, and community-based organizations that devise innovative community-wide approaches to increase the rate at which economically disadvantaged and limited-English proficient youth complete and excel in high school and subsequently increase the rate at which these youth go on to post-secondary education, training, and higher paying careers. This new proposal builds on last year's Hispanic Education Action Plan, **which received nearly \$500 million for FY1999.**
- **Doubles GEAR-UP for College Program.** President Clinton's balanced budget doubles funding -- from \$120 million in FY99 to \$240 million in FY2000 -- for the GEAR UP program that supports States and partnerships between high-poverty middle or junior high schools and colleges to help low-income children prepare for and enroll in college. In 2000, GEAR UP will reach 381,000 students.
- **New \$50 Million Regional Youth Employment Initiative.** The President's balanced budget provides \$50 million for a Regional Empowerment Zone Program to assist urban Empowerment Zones and Enterprise Communities (EZ/ECs) in linking their economic development strategies to their broader metropolitan regional economies in order to increase the employment of disadvantaged youth.
- **\$65 Million to Prepare Disadvantaged Youth for Success in College.** The President's budget will include a \$30 million increase in federal TRIO programs, including Upward Bound, to fund outreach, counseling, and educational support to help disadvantaged students prepare for academic success in college. The budget will also include \$35 million for a new initiative to help disadvantaged students stay in college and earn diplomas.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jennifer M. Palmieri (CN=Jennifer M. Palmieri/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:28-JAN-1999 10:29:04.00

SUBJECT: Interviews

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

fyi

----- Forwarded by Jennifer M. Palmieri/WHO/EOP on
01/28/99 10:17 AM -----

Mark D. Neschis

01/27/99 06:28:02 PM

Record Type: Record

To: Joseph P. Lockhart/WHO/EOP, Jennifer M. Palmieri/WHO/EOP

cc: Heather M. Riley/WHO/EOP

Subject: Interviews

NHTSA's Ricardo Martinez is doing Fox News tomorrow and GMA Thursday morning on seat belt safety.

thanks

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Virginia L. Cearley (CN=Virginia L. Cearley/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:28-JAN-1999 10:33:22.00

SUBJECT: phone msg for Ellen Lovell

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

Elena -- Ellen has not been in the office much at all the past 4 days, she was in New Orleans over Tuesday and part of Wednesday. If she has not been able to call you back, and I don't think she has, I apologize. Is there anything I can pass on to her, or should I just reiterate that she should call you?

Thanks,

Ginger

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Virginia L. Cearley (CN=Virginia L. Cearley/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:28-JAN-1999 10:42:05.00

SUBJECT: Re: phone msg for Ellen Lovell

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

Elena, I am so sorry. Ellen was out of the office almost all day on Monday. If I had known I would have told you to go over to the East Room they rehearsed from 2 to 6 that day. I am sorry.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:28-JAN-1999 11:04:50.00

SUBJECT: Americorps

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

do you still have this or should I get it from someone else?

----- Forwarded by Laura Emmett/WHO/EOP on 01/28/99 11:04 AM -----

Sarah A. Bianchi @ OVP

01/28/99 10:58:25 AM

Record Type: Record

To: Laura Emmett/WHO/EOP

cc:

Subject: Americorps

Elena mentioned that she forwarded to Eli Attie a description of an Americorp announcement that the VP could do as the President does not have time -- However, Eli is in davos with the VVP so wondering if you could forward it to me so I can get it on the radar screen down there.

sb

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Sarah A. Bianchi (CN=Sarah A. Bianchi/O=OVP [UNKNOWN])

CREATION DATE/TIME:28-JAN-1999 11:16:55.00

SUBJECT: Re: Americorps

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

CC: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO])

READ:UNKNOWN

TEXT:

great thanks

sb

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Thomas L. Freedman (CN=Thomas L. Freedman/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:28-JAN-1999 11:26:23.00

SUBJECT: Re: Interviews

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:

NHTSA says Martinez is talking about the new ad campaign they are doing with the Ad Council, replacing the dummies they used in the ads with real people. They promise they know to hold the child safety seats.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Michael Cohen (CN=Michael Cohen/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:28-JAN-1999 11:47:16.00

SUBJECT: Ed-flex press guidance

TO: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:

Below is a revised version of yesterday's guidance. Please not two changes:

1. The response to the first question puts back in the idea that POTUS could support a responsible version of Ed-Flex separate from ESEA, though it then makes the case for why it is better to do this in ESEA. Since Kennedy is on the record supporting Frist-Wyden (including in a statement he issued yesterday) it is important that we not position ourselves too far from him. Kennedy's staff is very comfortable with this stance.
2. I added a new Q&A about yesterday's partisan vote. I framed it in terms of keeping education on a bipartisan track, though I think the real issue here is how the partisan move yesterday reflects the increasingly partisan nature of the impeachment process, and the D's decision to spend their time defending the President with the press and elsewhere rather than do legislative business. I'm not sure how we are addressing this issue, and didn't know how to prepare a Q&A that reflects it.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Michael Cohen (CN=Michael Cohen/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:28-JAN-1999 11:47:50.00

SUBJECT: this time the guidance is attached

TO: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP.@ EOP [OPD])
READ:UNKNOWN

TEXT:

Sorry--I forgot to paste before sending!

Guidance on Senate Mark-Up of Ed-Flex Partnership Act
January 28, 1999

Q. Does the Administration support the Ed-Flex bill marked-up by the Senate Health, Education, Labor and Pensions Committee yesterday?

A. The President strongly endorses the principle of greater flexibility in federal education programs tied to greater accountability for results, and last year he supported a responsible Ed-Flex bill. While the President is prepared to consider a separate Ed-Flex bill consistent with the one he supported last year, he believes it would make much more sense to consider Ed-Flex as part of the overall reauthorization of the Elementary and Secondary Education Act. This will ensure that Congress designs Ed-Flex to fit the federal education programs of the next five years, rather than the last five years. The Administration's ESEA reauthorization bill, to be transmitted in March, will contain such a proposal.

Q. How does the Ed-Flex bill being considered by the Senate fit with the accountability requirements that the President proposed in his State of the Union Address?

A. This Ed-Flex bill is consistent with the President's belief in giving states more flexibility in exchange for greater accountability, and the bill promotes higher standards, student testing, school report cards, and a procedure for intervening in failing schools. But because the President's State of the Union proposals have not been enacted, this bill does not specifically address them. This is another reason to postpone consideration of Ed-Flex until the ESEA reauthorization. We will then work with the Congress to ensure that an Ed-Flex bill provision reinforces, rather than undermines, the accountability measures the President called for.

Q. Yesterday's vote in the Senate Committee was partisan, with Republicans voting in favor of Ed-Flex and Democrats not participating in the mark-up at all. What does this say about the ability of the Congress to work together on Ed-Flex and other education issues?

A. This is a proposal that has all the potential to be bipartisan from start to finish, with support from the Administration, the Republican leadership and key Democrats including Sens. Wyden and Kennedy. We should do everything in our power to keep it bipartisan, and to set a tone for

all of the other work we and the Congress will do in education this year. Therefore, it is particularly unfortunate that the Senate majority yesterday chose to mark-up this bill at a time when many Committee Democrats were unable to participate. The President has said many times that politics must stop at the schoolhouse door. Unfortunately, instead of putting politics aside on this important issue, the majority has tried to turn Ed-Flex into a partisan issue.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:28-JAN-1999 11:05:00.00

SUBJECT: latest from g.black

TO: Cynthia A. Rice (CN=Cynthia A. Rice/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:

- 1.As we indicated in our piece on the coming DOJ lawsuit last week, DOJ's likely next step will be to persuade one or more Congressmen (Durbin, Conrad most likely) to introduce legislation that clarifies the federal government's statutory authority to seek recovery of Medicare and other federal expenditures under MCRA. We would expect little resistance to such legislation.
- 2.As long as the legislation is written as clarification of the MCRA statute --- rather than as new legislation -- we believe the government could bring claims against the industry back to at least 1996, when MCRA was amended to give the government the right to sue "independent of the rights of the injured or diseased person." Anything beyond clarifying language could be held by the courts as substantive changes to the law, which might preclude retroactive recovery -- as the Florida Supreme Court ruled.
- 3.Legislation clarifying the federal government's statutory right to bring claims for recovery of Medicare and other expenditures for smoking-related diseases would likely pave the way for a single, massive federal claim, comprised of: a) Direct post-1996 expenditures of \$30 - \$60 billion; b) punitive damages, and c) recovery of future anticipated expenditures for past tortious acts committed by the industry. Unlike the states, which can sue under "common law" theories for each state, the federal government needs explicit statutes under which to bring a suit. Absent clarifying language, the feds would have to bring 51 separate claims.
- 4.We see little resistance among Republicans to supporting a bill that clarifies the federal government's rights to bring a recovery claim under the 1962 Medical Cost Recovery Act (MCRA). A federal suit -- brought by the Clinton Administration -- would be viewed as the lesser of three evils to allow the federal government to get its share of the failed June 20 accord (about \$170 billion).

Raise federal excise taxes -- Clinton will propose a \$.55/pack increase on cigarettes in his budget to be submitted 2/1); Republicans from both the House and Senate have told Clinton that a tobacco tax hike is "dead on arrival"
Claim federal share of states' Medicaid settlement: Under the Health Care Financing Act (HCFA), the federal government can simply take its share (average 60%, but ranges from 50% to 80%) of each states' Medicaid settlement proceeds, by

deducting it from future payouts. Republicans have announced legislation to block the federal government from taking its share; and states have threatened to bring suit against the federal government if they deduct the fed share from state payouts.

Allow DOJ to bring independent cause of action: This option takes the pressure off Republicans to back either of the first two options, and allows Republicans to appear tough on tobacco without getting their hands dirty (Administration's lawsuit). Even conservatives indicated last week that there would be little resistance to language that simply makes explicit the government's ability to bring a claim. Senators Conrad or Durbin will introduce clarifying legislation in the next few weeks.

5. We believe Congress would follow the New Jersey model of legislation, rather than Florida's, so as to not trigger claims that the

legislation substantively changes the law, which might convince a court to preclude retroactive recovery. In 1996, the New Jersey legislature, backed by a Republican governor, passed clarifying language that gave the state explicit authority to bring common law claims for recovery. Florida, of course, had gone one step further, passing legislation that not only gave the state the right to seek recovery, but struck affirmative defenses, permitted use of statistics,

etc.. The FL Supreme Court ruled that the law had been substantially changed, and precluded recovery for claims prior to June, 1994 -- the law's date of passage. We expect Congress to follow the New Jersey precedent of passing clarifying language to ensure that recovery for claims back to 1996 be permitted.

6. We rate MO, RN, UST outperform. We continue to believe that the industry and government will agree to a \$150 - \$200 billion settlement if, and only if, the government agrees to reduce its settlement stream for all claims not covered in the AG settlement. With a federal settlement 6-12 months off, and with 4 trials ongoing, we expect tobacco stocks to remain dead money near-term.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Michael Waldman (CN=Michael Waldman/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:28-JAN-1999 12:31:14.00

SUBJECT: what do you think? I haven't sent yet

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:

MEMORANDUM FOR MARIA ECHAVESTE

CHRIS EDLEY

FROM: MICHAEL WALDMAN

SUBJECT: RACE BOOK

I am sorry that I have not gotten back to you with more extensive thoughts. It is well written and provocative. My major concern is this: in the set of values that is articulated (opportunity, community, heart), what is obviously missing is the key extra element that the President brought to the traditional liberal litany: responsibility.

This is more than just rhetoric or political positioning.

First, it is impossible to understand many of the changes he has pursued in social policy without the idea of renegotiating the social contract (the new covenant, even) that underscores it.

Second, in terms of the report as a document to be read and understood, without responsibility twinned with opportunity, people seem like the subjects of scrutiny rather than actors.

In any case, I think this is a thread that needs to be woven throughout the document.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Michael Waldman (CN=Michael Waldman/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:28-JAN-1999 13:39:18.00

SUBJECT: first cut at mayors draft

TO: Thurgood Marshall Jr (CN=Thurgood Marshall Jr/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Paul E. Begala (CN=Paul E. Begala/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Michael Deich (CN=Michael Deich/OU=OMB/O=EOP @ EOP [OMB])
READ:UNKNOWN

TO: Mickey Ibarra (CN=Mickey Ibarra/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Sarah Rosen (CN=Sarah Rosen/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Bruce N. Reed (CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Minyon Moore (CN=Minyon Moore/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Linda Ricci (CN=Linda Ricci/OU=OMB/O=EOP @ EOP [OMB])
READ:UNKNOWN

TO: Ann F. Lewis (CN=Ann F. Lewis/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Jonathan Orszag (CN=Jonathan Orszag/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Gene B. Sperling (CN=Gene B. Sperling/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:

Doug Sosnik thinks the President will want to look at this in his car after the event -- so an early version will be faxed to him in about 20 minutes. Please get me changes asap. MW

Draft 1/28/99 1pm
Waldman

PRESIDENT WILLIAM J. CLINTON
REMARKS TO THE U.S. CONFERENCE OF MAYORS
THE EAST ROOM
January 29, 1999

Acknowledgments: Mayor Corradini -- Thank you for your leadership on the Census. While the Supreme Court struck down the use of +sampling, for congressional apportionment, it reaffirmed our use of these scientific

methods for other purposes. And we are committed to making the Year 2000 census the most accurate ever.

Seven years ago, when I first sought the Presidency, nothing shook me more deeply than the wasted potential of our nation's cities and communities. Our great urban centers -- the gateway of opportunity for millions, the hubs of commerce and creativity -- were too often islands of decay and despair. Crack and crime and welfare seemed like an inexorable tide that submerged neighborhoods and drowned dreams.

I believed that America could renew itself -- that, as I said almost exactly six years ago when I became President, there is nothing wrong with America that cannot be cured by what is right with America. And I knew that -- together -- we could renew America's cities.

We set forth in 1993 with a new strategy to create a new economy. Fiscal discipline. Investing in our people. Seeking new markets for our goods abroad. We balanced the budget for the first time in 30 years -- and we increased investment in education and training by 40%.

This strategy has helped steer our nation through new and turbulent economic currents. Today, our economy leads the world. This morning, we received more good news about America's economy. I can now report that in the fourth quarter of 1998, the economy grew at a rate of [4 < percent] -- and at a rate of [3+&] in 1998.

America's growth in the 1990s is built not on the vapors of deficit spending but on the solid foundation of private sector investment. And this expansion is both wide and deep. Four of our ten largest cities have cut their unemployment rate in half since 1993. We have the highest real wage growth in over two decades -- growing at twice the rate of inflation; the lowest African American and Hispanic unemployment rate recorded since we began keeping such statistics in 1972. And average family income is by \$3,500. At long last, this rising tide is lifting all boats.

My friends, this economic good fortune poses a profound question for all of us: What will we do with these good times? If we simply relax and bask in our prosperity, we will look back at this moment of opportunity as a time of missed opportunity. I believe we have a duty to make certain that prosperity spreads throughout our nation -- that hope replaces despair in every corner of every community -- that every American be given the tools to reap the rewards of the new economy. We have a duty to rise to the challenges of the 21st Century.

We are committed to press forward with the new strategy that has helped to renew our cities.

We rejected the idea that the solutions to the problems of the cities were miles of concrete and acres of regulations, that the answer to your problems was a fiat from Washington. And we have decisively rejected the misguided idea that cities should be left to sink or swim on their own. Our approach -- our "third way" -- has been to offer empowerment, to help provide the tools to succeed, and to insist on results.

We have worked to be an effective partner. Over the past six years, we have transformed the Department of Housing and Urban Development from a bureaucratic backwater to a streamlined innovator. David Osborne -- the intellectual godfather of reinventing government -- says HUD is "a model for reinvention in the 1990s."

So the balanced budget I will submit to Congress will increase HUD's overall budget by \$3 billion -- the biggest increase in its history. It will support HUD's Community Empowerment fund ... 100,000 new vouchers to move people into homes of their own ... and dozens of other innovative steps. I ask you to support this commitment -- and to make your voices heard in the halls of Congress.

With new resources for HUD and a strong focus throughout the government, we can and must press forward with our new urban strategy. Our communities face stiff challenges -- stubborn pockets of poverty, shrinking populations, the flight of the middle class. We can and must act together to meet these challenges. Here's how.

First, strong cities in the 21st Century will depend above all on economic opportunity. We said from the beginning, the best poverty program, the best crime program, the best urban program is a private sector job.

So we created 30 Empowerment Zones, to bring the spark of private enterprise into inner cities and isolated rural areas. Vice President Gore announced the 20 newest zones earlier this month. And I will ask Congress to fully fund this round of Empowerment Zones so we can help create 90,000 jobs.

We created a network of Community Development Financial Institutions.

We strengthened and streamlined the Community Reinvestment Act, encouraging banks to lend more than \$1 trillion -- nearly 95% of all commitments since CRA has been on the books -- even as bank balance sheets have grown stronger.

In all these ways, we have sought to extend the horizons of opportunity into the hardest pressed urban areas.

But even today, the flows of capital too often bypass under served areas. The largest pool of untapped investment opportunities and new customers are not beyond our shores, they're in our backyard. They are in Harlem or Watts or Appalachia -- the kinds of communities that, according to a recent Harvard Business School study, control more than \$85 billion a year in purchasing power, more than the entire retail market in Mexico.

So I am proposing a bold initiative to bring jobs and opportunity into the "New Markets", here in America: We should write into law a "New Markets Tax Credit" -- \$1 billion of tax credits over five years worth 25% of the amount of equity placed in investment funds, community development banks and investment vehicles targeted for these untapped markets.

We help businesses invest abroad through the Overseas Private Investment Corporation. We should help them invest here at home through new American Private Investment Companies -- that can spur \$1.5 billion in equity for investment in under served America.

We will support a New Market Venture Capital initiative to bring capital and technical assistance to small businesses in distressed areas. Thousands of entrepreneurs who only need a little capital and expert guidance to expand their businesses and create new jobs -- these funds will give it to them.

All told, this New Markets initiative will bring \$15 billion in new private sector investment -- our most significant opportunity in years to break the cycle of poverty and joblessness. But it will only happen if together, we persuade Congress to make it happen. I ask your support.

We shouldn't stop there.

Today, welfare is at its lowest level in 3 decades, and the welfare rolls have been cut nearly in half. But we should use this prosperity to move the hardest cases off of welfare. We should reauthorize the Welfare to Work initiative and help 200,000 people move to the dignity and pride of work.

And we must do more to clean up and redevelop abandoned industrial sites. My balanced budget will propose a new Abandoned Buildings initiative so that brownfields can stop being eyesores and start being places of opportunity.

Every one of these initiatives will require Democrats and Republicans to work together. Every one of them requires Congress to act. I ask your help.

Here's the second step we must take together: Strong cities in the 21st Century simply must be safe cities.

Crime is down for six years in a row. Violent crime is at its lowest level in three decades. This year we will achieve our goal of 100,000 new community police, under budget and ahead of schedule. In all this, we worked with you on the frontlines to develop and deploy new strategies to fight crime. Now we must focus our efforts on neighborhoods where violent criminals still hold sway.

So I will propose a 21st Century crime bill that helps communities hire and redeploy at least 30,000 new officers for high crime neighborhoods ... that enlists probation and parole officers, school officials and faith-based organizations to take our streets back from crime ... and that gives police high-tech tools to fight crime, from digital mugshots to crime-mapping computers in squad cars. For years, drug dealers have used pagers, scam artists have used the Internet, and gangs have had high-tech weapons. It's time for police to have the benefit of 21st Century technology, too.

You know, as well, that crime is down because guns are being taken out of the hands of criminals. So I ask your support as we seek to restore the five-day waiting period for buying a handgun -- to extend the Brady Bill to prevent juveniles who commit violent crimes from buying a gun -- and to pass legislation to require child trigger locks.

Third, strong cities depend on strong schools. With 53 million children in school, one in five of them from immigrant families, in the 21st Century that will be more true than ever.

Across our nation, test scores are up. But too many schools are still failing too many children. In my State of the Union Address I set out a new agenda for America's schools. We should finish the job of hiring 100,000 new teachers to reduce class size in the early grade. We should act this year to build or modernize 5000 schools.

And I will soon propose an Education Accountability Act -- a dramatic change in the way the federal government invests in elementary and secondary education. We will invest only in what works, only in the

things that cities like Chicago and Boston have proven works. No social promotion. Quick action to turn around failing schools. Qualified teachers. Report cards on schools. Discipline codes.

Our goal is not to put our children down, but to lift them up. So my balanced budget will triple the support for after school programs where children can learn after the regular school bell has rung -- the hours when juvenile crime soars.

You know and I know that the issue is not whether the national government will be involved in education -- it already is. Our answer must be: we should invest in what works.

Fourth, as I said in the State of the Union Address, our communities face a preservation challenge, with 70,000 acres of farmland and green space lost every day. So I have proposed a \$1-billion Livability Agenda to help communities save open space, ease traffic congestion, and grow in ways that enhance every citizen's quality of life ... and a \$1-billion Lands Legacy Initiative to preserve places of natural beauty all across America -- from the most remote wilderness to the nearest city park.

In all these ways -- expanding economic empowerment, pressing our fight against crime, renewing our schools, keeping our growing communities livable -- we can meet our duty to make our cities and towns strong and vibrant for the 21st Century.

That new millennium is less than a year away. As the First Lady will tell you later today, it is an opportunity to honor the past and imagine the future. We have established the White House Millennium Council, which that seeks to use the millennium as an inspiration to leave gifts to future generations. And she will announce the Millennium Communities program will invite you to apply on behalf of your community to receive national designation as a Millennium Community. I hope every one of you takes advantage of this.

The turn of a century often marks a true turning point in how people see themselves and their world. We think back to the last turn of the century, and we see now that it was a time when America's cities literally created themselves. From the World's Colombian Exposition in Chicago, to the unification of the five boroughs of New York, to the rebuilding of San Francisco after the earthquake, in the early years of the 20th Century, America's cities were melting pots not only of people but of ideas -- the most remarkable in human history. Changes in technology and commerce and patterns of living don't make our cities obsolete. They give us a chance to come together as only great and growing communities can, to make our cities more dynamic, more exciting, more livable for more people than ever before. I look forward to that challenge.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Paul Weinstein Jr. to Elena Kagan and Bruce Reed re: Applicant (1 page)	01/28/1999	P6/b(6)

COLLECTION:

Clinton Presidential Records
Automated Records Management System [Email]
OPD ([Kagan])
OA/Box Number: 250000

FOLDER TITLE:

{01/28/1999}

2009-1006-F

bm87

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Tanya E. Martin (CN=Tanya E. Martin/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:28-JAN-1999 14:26:14.00

SUBJECT: AmeriCorps

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])

READ:UNKNOWN

TEXT:

Sorri I had to miss the staff meeting, I've had a couple of people tell me that you mentioned an AmeriCorps announcement that the VP could make. I passed along information to Jon Schnur about an event that AmeriCorps was planning for the President to announce the kickoff a nationwide recruiting drive, highlight its FY2000 budget number, celebrate the 100,000th member and release a report on AmeriCorps effectiveness. Is that the announcement(s) you were thinking of?

THE PRESIDENT ANNOUNCES EQUAL PAY INITIATIVE AND URGES PASSAGE OF PAYCHECK FAIRNESS ACT

In his weekly radio address, the President announced that he will include a new \$14 million Equal Pay Initiative as part of his Fiscal Year 2000 budget, and urged prompt passage of the Paycheck Fairness Act. The Initiative includes \$10 million for the Equal Employment Opportunity Commission (EEOC) to improve training for EEOC employees to better identify wage discrimination issues, increase technical assistance to businesses, and launch an equal pay public service announcement campaign. The Department of Labor will receive \$4 million, including funds for a program to assist contractors in recruiting and retaining qualified women in non-traditional occupations. The President also again called on Congress to pass the Paycheck Fairness Act which would improve the enforcement of wage discrimination laws and provide for research, training of EEOC staff, and public education efforts on this important subject.

Equal Pay Initiative

The President's FY2000 budget includes funding for a \$14 million equal pay initiative for the EEOC and the DOL's Office of Federal Contractor Compliance (OFCCP):

Equal Employment Opportunity Commission

The President's FY2000 budget includes \$10 million for the EEOC which will:

- provide training for EEOC enforcement staff in identifying wage discrimination cases;
- provide training and technical assistance to approximately 3,000 employers; and
- develop public service announcements to educate employees and employers on the importance of this issue as well as their rights and responsibilities.

The Department of Labor

The President's FY2000 budget includes \$4 million for the Labor Department's Office of Federal Contract Compliance Programs which will:

- help women obtain and retain employment in non-traditional jobs by identifying model employer practices and assisting contractors in identifying resources, including linking them with the new Workforce Investment Act system; and
- increase outreach, education, and technical assistance to employers on equal pay issues, by providing guidelines and industry best practices via the Internet.

Paycheck Fairness Act

The President again urged Congress to pass legislation called the "The Paycheck Fairness Act," introduced by Senator Daschle, to strengthen laws prohibiting wage discrimination. The highlights of this legislation include:

- Increased Penalties for the Equal Pay Act (EPA). The legislation adds full compensatory and punitive damages as remedies, in addition to the liquidated damages and back pay

awards currently available under the EPA. This proposal would put gender-based wage discrimination on equal footing with wage discrimination based on race or ethnicity, for which uncapped compensatory and punitive damages are already available.

- Non-retaliation provision. The bill would prohibit employers from punishing employees for sharing salary information with their co-workers. Currently, many employers are free to take action against employees who share wage information. Without the ability to learn about wage disparities, it is difficult for women to evaluate whether there is wage discrimination.
- Training, Research, and Pay Equity Award. This bill provides for increased training for Equal Employment Opportunity Commission employees to identify wage discrimination claims; **research on discrimination in the payment of wages; and the establishment of an award which will recognize and promote the achievements of employers that have made strides to eliminate pay disparities.**

1998 Clinton Administration Accomplishments on Equal Pay

TXX-Dump Conversion

The President's announcement builds on a strong record of fighting to end wage discrimination. Last year, the Administration supported legislation to strengthen penalties for wage discrimination, provided technical assistance to employers, and released two new studies documenting the scope of the problem.

- **Council of Economic Advisors (CEA) Report on the Wage Gap.** The President announced a report by the CEA that shows that a significant gap between the wages of women and men remains today although it has narrowed substantially since the signing of the Equal Pay Act. In 1963, the year that the Equal Pay Act was signed, women earned 58 cents for every dollar men earned. Today, women earn about 75 cents for every dollar men earn --a 29-percent increase over the 1963 levels. The gender gap has narrowed faster among younger women and among married women with children. And relative to all male workers, wage gains have been faster for black and white women than for Hispanic women.
- **Department of Labor Report With a Historical Perspective on the Wage Gap.** The Department of Labor produced a report that provides a thirty-five year perspective on the wage gap. This report focuses on three periods since the signing of the Equal Pay Act --1960-1975, 1975-1985, and 1985-1997 --and highlights the increased participation of women in the labor force, the changing occupations of women, and the emergence of more women-owned businesses.
- **10-Step Voluntary Self-Audit for Businesses and Employees.** To help employers who would like to improve their pay and hiring practices, DOL put on its website a 10-step package that gives companies guidelines in determining whether they offer equal pay, hiring, and promotional opportunities. A similar checklist for employees, to help them determine if they are being paid equitably, is also on DOL's website.
- **Guide to Recruitment and Retention of Women in the Federal Government.** OPM published a new Guide on Recruitment and Retention of Women in the Federal Government which contains information to make agency managers aware of career opportunities for women and to provide guidance on recruitment and career development for women.
- **Federal Contractor Best Practices.** DOL publicized successful steps that employers have used to promote best practices in compensation on DOL's web site.

**Questions And Answers on Equal Pay
January 29, 1999**

Q: What did the President announce today?

A: In his weekly radio address, the President announced a new \$14 million Equal Pay Initiative as part of his Fiscal Year 2000 budget, and urged prompt passage of the Paycheck Fairness Act. The Initiative includes \$10 million for the Equal Employment Opportunity Commission (EEOC) to improve training for EEOC employees to better identify wage discrimination issues, increase technical assistance to businesses, and launch an equal pay public service announcement campaign. The Department of Labor will receive \$4 million, including funds for a program to assist contractors in recruiting and retaining qualified women for non-traditional occupations. The President also again called on Congress to pass the Paycheck Fairness Act which would improve the enforcement of wage discrimination laws and provide for research, training of EEOC staff, and public outreach on this important subject.

Q: How large is the wage gap?

A: According to the Department of the Labor, in 1997 the average woman who worked full-time earned just 74 cents for each dollar that men earned based on annual earnings. For women of color, the gap was even wider. On average, black women earned only 60 cents, and Hispanic women earned only 52 cents for each dollar earned by non-Hispanic white men. In 1998, based on weekly earnings, women earned 76 cents for every dollar men earned. Annual earnings are not yet available for 1998. Some wage differences exist due to differing levels of experience, education, and skill. However, studies show that even accounting for differences in education, experience, and occupation, there is still a significant wage differential for women.

Q: What will EEOC do with the new funding?

A: The President's FY2000 budget includes \$10 million for the EEOC which will: (1) provide training for EEOC enforcement staff in identifying wage discrimination cases; (2) provide training and technical assistance to employers; and (3) develop public service announcements to educate employees and employers on the importance of this issue as well as their rights and responsibilities. With this funding, EEOC will be able to provide direct technical assistance to approximately 3000 employers, and will be able to reach tens of thousands of employers through its PSA campaign.

Q: What will the Department of Labor do with the new funding?

A: The President's FY2000 budget includes \$4 million for the Labor Department's Office of

Federal Contract Compliance Programs which will: (1) help women obtain and retain employment in non-traditional jobs by identifying model employer practices and assisting contractors in identifying resources, including linking them with the new Workforce Investment Act system; and (2) increase outreach, education, and technical assistance to employers on equal pay issues by providing guidelines and industry best practices via the Internet.

Q: What activities do OFCCP and EEOC currently undertake regarding the enforcement of wage discrimination?

A: OFCCP enforces the anti-discrimination and affirmative action executive order that requires employers doing business with the government to apply their compensation practices in a non-discriminatory manner. OFCCP also conducts compliance evaluations and complaint investigations, and glass ceiling reviews, which are reviews designed to focus on the identification and removal of artificial barriers to the advancement of qualified women and minorities in Federal contractor workplaces. Currently, the EEOC investigates a little over one thousand charges each year involving equal pay claims in the private sector, brings charges against severe violators of the law, and provides limited technical assistance on equal pay issues.

Paycheck Fairness Act

Q: What does the Paycheck Fairness Act do?

A: The legislation, sponsored by Senator Daschle, seeks to improve the enforcement of wage discrimination laws and to strengthen the remedy provisions in the Equal Pay Act by permitting victims of wage discrimination to seek compensatory and punitive damages. Currently, women who are the victims of wage discrimination receive only backpay and liquidated damages, which may not fully compensate them for their loss. This change will mean that the penalties for sex-based wage discrimination will be the same as those for race-based wage discrimination. In addition, the legislation contains a non-retaliation provision that prohibits employers from penalizing employees for sharing information about their salaries with co-workers. Finally, the bill provides for training for EEOC employees on matters involving the discrimination of wages, **research on discrimination in the payment of wages, and the establishment of an award which will recognize and promote the achievements of employers that have made strides to eliminate pay disparities.**

Q: What's wrong with the current scheme for collecting damages under the Equal Pay Act?

A: Currently, the EPA allows only for liquidated damages and backpay awards. Liquidated damages usually are awarded in an amount equal to backpay. Such awards may not fully compensate a woman for real losses, such as damages for pain and suffering. In

addition, women cannot receive punitive damages for wage discrimination, no matter how intentional and egregious the employer's conduct. The legislation the Administration is endorsing will ensure that women are fully compensated when an employer discriminates against them in setting wages.

Q: What is the Administration doing with respect to data collection?

A: The endorsed legislation contains a Sense of the Senate that the President should take appropriate steps to increase the amount of information available with respect to wage disparities, while maximizing the utility of the data and protecting individuals' privacy and minimizing burdens on reporting entities. In addition, the Administration previously announced an annual report on the pay gap, by sex, to be produced by the Department of Labor. This easy-to-access report will raise the national prominence of wage disparities and will highlight the issue every year in order to spur Americans to achieve increased equal pay.

Q: Is the Administration's policy on uncapped punitive and compensatory damages consistent with its position in other areas of the law such as tort reform?

A: Yes, this is consistent with Administration's position on tort reform. Our proposals on tort reform have never sought to cap compensatory damages, which are necessary to remedy actual harm. And except in very exceptional circumstances, we have approved the use of punitive damage awards to deter intentional misconduct.

Q: Why isn't the Administration supporting comparable worth?

A: The Daschle bill is a significant step forward in solving the problem of unequal pay. The Administration believes there is no excuse for not taking these obvious steps towards providing better training and fuller remedies to help ensure women receive equal pay, while building a consensus on other ways to make sure every person receives the pay they deserve. The Administration is focusing on legislation that can be passed during this congressional session.

Questions on the Federal Work Force

Q: What are some of the specific accomplishments of the Clinton Administration with respect to women appointees?

A: Here are some specific accomplishments:

- **Appointed More Women than Any Other President** --40 percent of Administration appointees are women.
- **Women Hold 29 Percent of the Top Positions** --29 percent of the positions requiring Senate confirmation (PAS) are held by women. Additionally,

- < 35 percent of Presidential appointments, including boards and commissions, are held by women.
- > 40 percent of non-career Senior Executive Service positions are held by women.
- > 56 percent of Schedule C positions are held by women.

Appointed the First Women Ever to Serve as Attorney General, Janet Reno, and Secretary of State, Madeleine Albright. Including the Attorney General and Secretary of State, women make up 32 percent of the Clinton Cabinet: Alexis Herman, Secretary of Labor; Donna Shalala, Secretary of Health and Human Services; Carol Browner, Administrator of the Environmental Protection Agency; Janet Yellen, Chair of the Council of Economic Advisors; and Charlene Barshefsky, United States Trade Representative all serve in the President's Cabinet.

30 Percent of All of the President's Judicial Nominees Are Women.

Nominated the Second Woman to Serve on the Supreme Court. During his first year in office, President Clinton nominated Ruth Bader Ginsburg to the United States Supreme Court. Justice Ginsburg is only the second woman to serve on the nation's highest court.

Q: What is the representation of women in the federal work force?

A: Women represented 42.9 percent of the Federal permanent workforce in 1998 compared to 46.3 percent of the Civilian Labor Force, a difference of a -3.4 percentage points.

Q: What is the average salary of female political employees versus that of male appointees? How does that average compare to comparable figures in the previous Administration?

A: In 1992, under President Bush, women made up 40 percent of the political ranks, and the average female political appointee's salary was 75 percent of the average male appointee's salary. In 1998, in the Clinton Administration, the percentage of women appointees increased to 44 percent, and the average woman's salary increased to 86 percent of the average man's.

Number and Average Salary of Political Appointments (by Gender): 1992 (Pres. Bush) Compared to 1998 (Pres. Clinton)				
Gender	1992 (Bush) Appts	1998 (Clinton) Appts	1992 (Bush) Avg. Pay (\$)	1998 (Clinton) Avg. Pay (\$)
Women	1,361	1,282	\$61,554	\$71,859*
Men	2,055	1,611	\$82,490	\$83,799*
TOTAL	3,416	2,893	NOTE: Total Political Appointments exclude Ambassadors but include Noncareer SES, Schedule C and Other.	
Pct. Women	39.8%	44.3%		

* Rendered in constant (FY 1992) dollars
Source: Office of Personnel Management

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jennifer M. Palmieri (CN=Jennifer M. Palmieri/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:28-JAN-1999 16:44:19.00

SUBJECT: FYI -- new press plan attached

TO: Christopher S. Lehane (CN=Christopher S. Lehane/O=OVP @ OVP [UNKNOWN])
READ:UNKNOWN

TO: Linda Ricci (CN=Linda Ricci/OU=OMB/O=EOP @ EOP [OMB])
READ:UNKNOWN

TO: Victoria L. Valentine (CN=Victoria L. Valentine/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Amy Weiss (CN=Amy Weiss/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Sarah E. Gegenheimer (CN=Sarah E. Gegenheimer/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Julie B. Goldberg (CN=Julie B. Goldberg/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Jennifer M. Palmieri (CN=Jennifer M. Palmieri/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Jason H. Schechter (CN=Jason H. Schechter/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Beverly J. Barnes (CN=Beverly J. Barnes/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Nanda Chitre (CN=Nanda Chitre/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: CROWLEY_P (CROWLEY_P @ A1@CD@LNGTWY [UNKNOWN]) (NSC)
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TO: Julia M. Payne (CN=Julia M. Payne/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: WOZNIAK_N (WOZNIAK_N @ A1@CD@LNGTWY [UNKNOWN]) (NSC)
READ:UNKNOWN

TO: Brenda M. Anders (CN=Brenda M. Anders/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Dag Vega (CN=Dag Vega/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Patricia M. Ewing (CN=Patricia M. Ewing/O=OVP @ OVP [UNKNOWN])
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TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Jake Siewert (CN=Jake Siewert/OU=OPD/O=EOP @ EOP [OPD])

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TO: Heather M. Riley (CN=Heather M. Riley/OU=WHO/O=EOP @ EOP [WHO])
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TO: Dorinda A. Salcido (CN=Dorinda A. Salcido/OU=WHO/O=EOP @ EOP [WHO])
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TO: Julianne B. Corbett (CN=Julianne B. Corbett/OU=WHO/O=EOP @ EOP [WHO])
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TO: Megan C. Moloney (CN=Megan C. Moloney/OU=WHO/O=EOP @ EOP [WHO])
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TO: Barry J. Toiv (CN=Barry J. Toiv/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TEXT:
Updates for Friday and weekend press included.

===== ATTACHMENT 1 =====
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PRESS WEEK AHEAD JANUARY 23-29

Wednesday, January 27

- POTUS Social Security/Medicare Event (no advance)
- POTUS/VP Salmon Restoration Conference Call (no advance)

Thursday, January 28

- Workforce Development Initiative
- Advance OMB management initiative to Washington Post (Ricci)

Friday, January 29

- Advance Urban Agenda to NY Times, WSJ, Washington Post, LA Times, USA Today, Knight-Ridder, NY Daily News (Siewert and Terzano)
- Advance HRC Foster Care event to NY Times (Kagan)

Saturday, January 30

- Equal Pay Radio Address (Herman on CNN, CBS Saturday)(T)
- DPC budget options TBD

Sunday, January 31

- Computer Tech Centers to LA Times (Khalil)
- AMT tax relief for AP (Siewert)

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Devorah R. Adler (CN=Devorah R. Adler/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:28-JAN-1999 16:48:25.00

SUBJECT: grijalva brief

TO: Dan Marcus (CN=Dan Marcus/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

CC: Derek V. Howard (CN=Derek V. Howard/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

CC: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TEXT:

Here is the latest draft of the Grijalva brief, which we recieved from HHS today.

Please call with questions.

Devorah

- pdraft6.wpd

===== ATTACHMENT 1 =====
ATT CREATION TIME/DATE: 0 00:00:00.00

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002C020000A01D0000085E010000000C000000CC1F000008050100000008000000D81F00000055
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

DONNA E. SHALALA, SECRETARY OF HEALTH
AND HUMAN SERVICES, PETITIONER,

v.

GREGORIA GRIJALVA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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General Counsel

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PARTIES TO THE PROCEEDINGS

Automated Records Management System
Hex-Dump Conversion

QUESTIONS PRESENTED

Before 42 U.S.C. 1395mm was superseded, it authorized the Secretary of Health and Human Services to enter into contracts with private HMOs and similar healthcare organizations under which they would receive a fixed, per-person monthly fee for each Medicare beneficiary who chose to enroll in (and to receive medical services from) the HMO in place of traditional fee-for-services Medicare. The HMO, in turn, was required to provide enrolled beneficiaries with all medical services that Medicare ordinarily would cover. Any disputes between the HMO and the beneficiary regarding services ultimately would be resolved by the Secretary or her agents.

Alleging that HMOs participating in the Section 1395mm program failed to provide beneficiaries with a meaningful opportunity to contest decisions to reduce or deny service, plaintiffs filed this nationwide class action lawsuit. They alleged that the HMOs were "state actors" subject to the requirements of the Due Process Clause of the Fifth Amendment, and that the procedures the HMOs employed were inconsistent with the requirements of that Clause. After plaintiffs filed suit and the district court issued an injunction in plaintiffs' favor, however, Congress comprehensively reformed the relevant legal and regulatory framework governing reductions or denials of service. The new statutory scheme withdraws the Secretary's authority to enter into contracts under Section 1395mm, and replaces that provision with a new Medicare Part C and a new "Medicare + Choice" program that offers vastly expanded procedural protections for enrolled beneficiaries.

The questions presented by this case are:

1. Whether the decision by a Section 1395mm risk-sharing HMO to refuse an enrolled Medicare beneficiary's request for health services constitutes government action subject to the requirements of the Due Process Clause of the Fifth Amendment.
2. Whether the district court properly issued a mandatory injunction, creating new procedural requirements that HMOs must follow and the Secretary must enforce under Section 1395mm, on due process grounds.
3. Whether Congress's enactment of new Medicare Part C, which supersedes the Secretary's authority to contract under Section 1395mm, and establishes a new "Medicare + Choice" program that provides greatly enhanced procedural protections for Medicare beneficiaries enrolled in private HMOs, renders the current dispute moot, warranting vacation of the judgment below and a remand to the district court for consideration of the new statutory and regulatory scheme.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

No. 98-

DONNA E. SHALALA, SECRETARY OF HEALTH
AND HUMAN SERVICES, PETITIONER,

v.

GREGORIA GRIJALVA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Donna E. Shalala, Secretary of Health and Human Services, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a-__) is reported at 152 F.3d 1115. The opinion of the district court (App., infra, __-__) is reported at 946 F. Supp. 747.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1998. A petition for rehearing and suggestion for rehearing en banc was denied on November 12, 1998. App., infra, __. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Medicare Act, as it existed when the district court ruled, 42 U.S.C. 1395mm (1994), are reproduced in

the Appendix to this petition. App., infra, ___-___. Relevant provisions of the Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 4001-4003, 111 Stat. 270 (the BBA), amending the Medicare Act, are also reproduced in the Appendix to this petition. App., infra, ___-___.

STATEMENT

The Ninth Circuit in this case affirmed a nationwide injunction that prescribes additional terms that the Secretary of Health and Human Services was required to include, and enforce, in the contracts she entered into with Health Maintenance Organizations and similar "managed care" providers (collectively HMOs) under 42 U.S.C. 1395mm(g). Affirming that injunction, the Ninth Circuit in this case held that (1) HMO decisions to deny enrollee claims for medical services constitute "government action" that must meet the requirements of due process; and (2) that the procedural mechanisms imposed on HMOs by the Secretary at the time this case was filed did not provide enrollees with the process that was their constitutional due. Before the Ninth Circuit decided this case, however, Congress enacted legislation to supersede the provision (42 U.S.C. 1395mm) that prompted the district court to enter the injunction, replacing it with a wholly new statutory framework (Medicare Part C) which provides Medicare beneficiaries who choose to enroll in HMOs with dramatically greater procedural safeguards, protections, and review mechanisms. Moreover, to implement the new statute, the Secretary has since promulgated new regulations that provide still greater safeguards for the Medicare beneficiary community. Because those intervening legislative and regulatory

changes alter the fundamental nature of the current dispute and render it moot, we respectfully request that the Court vacate the judgment of the courts below and remand the case to the district court for consideration of the intervening legislative and regulatory reforms.

In addition, because of the close relationship between the decision below and the issues before the Court in American Manufacturers Mutual Insurance Company v. Sullivan, et al., No. 97-2000 (argued Jan. 19, 1999), we respectfully request that the petition in any event be held pending decision in that case and be disposed as appropriate in light of the Court's decision there.

1. The Medicare program, established under Title XVIII of the Social Security Act, 42 U.S.C. 1395 et seq., pays for covered medical care for eligible aged and disabled persons. For many years, Medicare operated in a manner similar to fee-for-service medical insurance. Under fee-for-service arrangements, the beneficiary first obtains needed medical care. The beneficiary or his health care provider then submits a claim for reimbursement to the Medicare program. Claims would then be reviewed by processing agents known as "fiscal intermediaries" or "carriers" -- private companies that act under contract as the Secretary's fiscal agent to evaluate claims and determine whether payment is authorized by the Medicare statute. Where the fiscal intermediary or carrier approves the claim, it is paid by the federal government out of the Medicare Trust Funds in the Treasury. This traditional payment system is governed under Medicare Part A if the payment is for covered care furnished by hospitals and other institutions, and by Part B with respect to supplemental medical insurance for covered physician

services and certain other medical benefits.

a. In 1982, Congress added a provision to the Medicare Act to permit beneficiaries to obtain covered services in a fundamentally different way -- by enrolling in private healthcare plans like HMOs.

See Pub. L. No. 97-248, § 114(a), codified at 42 U.S.C. 1395mm (1994). (Section 1395mm has now been superseded by new Medicare Part C and the new "Medicare + Choice" program, as discussed in greater detail below.) HMOs usually consist of a network of health-care providers and institutions. While a patient using a fee-for-service health plan normally chooses his own physician and then submits a bill for reimbursement, patients using HMOs generally must use a physician or hospital that has an agreement with (i.e., that participates in the provider network pertaining to) his or her HMO.

Because HMOs often operate efficiently and are able to obtain discounts for medical services from participating providers, they can offer their enrollees a more comprehensive package of services -- including extras like coverage for prescriptions -- at the same or even lower cost.

To permit Medicare beneficiaries to enroll in HMOs at government expense, Section 1395mm authorized the Secretary to enter into contracts with qualified HMOs. Medicare beneficiaries would have the choice between traditional Medicare and having the Secretary purchase private coverage for them from a participating HMO. Two types of HMO contracts were authorized. First, the Secretary could enter into a cost-based contract, under which the Secretary would reimburse the HMO's reasonable costs (based on submitted reports) for services actually rendered to the enrollee. See 42 U.S.C.

1395mm(h); 42 C.F.R. 417.530-417.576. Second, the Secretary could enter into "risk-sharing" contracts. Under those contracts, the HMO would be paid a flat-rate, monthly capitation payment -- that is, a monthly payment for each Medicare beneficiary that chose to enroll with the HMO -- and the HMO, in return, would provide each enrollee with the full range of services covered by Medicare. 42 U.S.C. § 1395mm(g). Under such a risk-sharing contract, the HMO rather than the Secretary bears the risks of increased patient needs, as the monthly payments from the government are not adjusted based on services actually used. Instead, if the cost of providing required services to enrolled beneficiaries exceeds the aggregate payments from the Secretary, the HMO bears the loss. This case concerns only patients enrolled in risk-sharing HMOs, i.e., HMOs that have entered into contracts pursuant to 42 U.S.C. 1395mm(g), under which they bear the risks of increasing costs.

Placing the risk of increased patient need gives HMOs an incentive to provide preventive healthcare that can avoid costly procedures later on. It also eliminates the incentive to over-utilize expensive medical treatments, an undesirable feature of fee-for-service systems. Finally, because HMOs must compete for Medicare enrollees -- Medicare beneficiaries can always switch to another participating HMO or return to traditional fee-for-service Medicare, 42 C.F.R. 417.461 (1997) -- competitive forces should compel HMOs to pass some of the cost savings back to enrollees in the form of better or more comprehensive services as a way of attracting or retaining them. Nonetheless, some health care experts and patient advocates point out that flat-rate capitation

arrangements may create economic incentives for HMOs to cut costs by improperly restricting access to necessary medical care. See generally Stayn, Securing Access To Care In Health Maintenance Organizations: Toward A Uniform Model Of Grievance and Appeal Procedures, 94 Col L. Rev. 1674 (1994).

Under 42 U.S.C. 1395mm, HMOs were required to provide "meaningful procedures for hearing and resolving grievances" between themselves and enrolled members. 42 U.S.C. 1394mm(c)(5)(A). The HHS regulations before the district court provided that, when an HMO denied a request for services, it had to give the enrollee notice of the decision, including the reasons for the denial and information about reconsideration rights, within 60 days. 42 C.F.R. §§ 417.608-417.612 (1995). Neither the statute, nor the regulations, however, provided a deadline for the issuance of reconsideration decisions. Neither the statute nor the regulations provided an expedited decision mechanism for cases involving urgent medical needs. See 63 Fed. Reg. 23,369 (noting that deficiency in the former regulations). And neither the statute nor the regulations attempted to address, in any way, the qualifications or identity of HMO decisionmakers, or the ability of plan enrollees to participate in or present evidence during that process. They did provide, however, that HMO enrollees who were dissatisfied with the HMO's decision could bring the matter before the Secretary or her agents for resolution. See 42 U.S.C. 1395mm(c)(5)(B).¹

¹ The Secretary's regulations provided that any adverse HMO decision, after reconsideration, would be turned over to HCFA (or its agent) for review, and that the member would have the right to present evidence in person as well as in writing. 42 C.F.R. §§ 417.614-417.626 (1995). Finally, any member aggrieved by HCFA's

or its agent's decision could, subject to a relatively low amount in controversy requirements, seek a hearing before an Administrative Law Judge (ALJ), review before the ALJ Appeals Council, and then judicial review. 42 C.F.R. §§ 417.630-417.636 (1995).

2. Respondents are the named representatives of a nationwide class of individuals covered by Medicare who chose to enroll in risk-based HMOs under Section 1395mm. They alleged that the HMOs were not providing legally adequate notice and appeal rights with respect to decisions to reduce or deny services. More effective procedures, they asserted, were required by Section 1395mm(c) (5) (A). They further claimed that, because the initial HMO decisions constituted "state action" affecting constitutionally protected property interests, the processes leading to these decisions had to meet the strictures of the Due Process Clause. The then-existing processes, respondents asserted, did not.

a. After certifying respondents as the representatives of a nationwide class, the district court granted their motion for partial summary judgment. App., infra, at __. The challenged HMO decisions, the court concluded, are properly attributable to the federal government; as a result, it also concluded that HMO decisional processes must comport with the Due Process Clause. App., infra, at __. The court further held that the decision-making procedures then in effect did not afford plaintiffs the process that was their constitutional due under Mathews v. Eldridge, 424 U.S. 319 (1976). The district court faulted the forms of notice used by HMOs, see App., infra, at __-__; the claimant's inability to present evidence, or have his physician present evidence, to the HMO for purposes of reconsideration, App., infra, at __-__; and delays in decisionmaking with respect to patients needing immediate medical care, App., infra, at __-__.

Accordingly, on March 3, 1997, the district court imposed a

mandatory injunction that created detailed notice and hearing requirements. The injunction commands the Secretary to require that HMOs provide a written notice of any decision that "denies, terminates or reduces services or treatment" within five days of an oral or written request for that care unless "exceptional circumstances" warrant additional time. App., infra, at __. The notice must be printed in 12-point type, explain the basis of the decision, and advise beneficiaries of their appeal rights. Id. The injunction also requires that HMOs honor reconsideration requests, and permit "informal, in-person communication" between the beneficiary and the decisionmaker. Id. If a doctor asserts (or other evidence suggests) that services are urgently needed, the HMO must resolve the reconsideration request within three working days. Id. at __.

Finally, where "acute care services" are at issue, the HMO must provide a hearing before denying the request; it cannot discontinue those services (or decline payment therefor) until after the initial decision and the reconsideration process is completed. App., infra, at __.²

The injunction further requires the Secretary to undertake enforcement actions against HMOs that do not substantially comply with these requirements. In particular, the Secretary is required to monitor and investigate compliance with all requirements, and is barred from contracting with, or renewing a contract with, a

² The injunction also requires the Secretary to ensure that HMOs do not prevent health professionals (such as HMO doctors) from assisting members in obtaining evidence for the appeals process, and bars the Secretary from contracting with any HMO that, in any single instance, has retaliated against a doctor who aids a beneficiary in the appeal process. App., infra, at __.

deficient HMO. App., infra, at __. The order specifies that the district court will retain jurisdiction over the case for a three-year period, and permits respondents to return to the court for additional relief if implementation of the required appeal and grievance procedures does not redress their claimed injuries. App., infra, at __.

b. The Secretary moved the district court to stay its injunction pending appeal, and the district court granted the motion.

App., infra, at __. In seeking the stay, the Secretary pointed out that on April 30, 1997 -- just after the district court entered its injunction -- the Secretary issued new HMO regulations in interim final form. 60 Fed. Reg. 23,368. The Secretary noted that the regulations made several significant changes in notice and appeal procedures. Among other things, the revised regulations provided a new procedure for expedited review in appropriate cases: Although HMOs would have 60 days within which to make ordinary determinations, they would have only 72 hours to make decisions where delay could seriously jeopardize the beneficiary's life, health, or functioning.

See id. at 23,370-23,371; see also id. at 23,375 (adding 47 C.F.R. 417.608 and 417.609). The district court concluded that a stay was warranted in light of these regulatory modifications, reasoning that "the hardships faced by the Plaintiffs outweigh those of the Defendant, but that the entire case may become largely moot if the Secretary's attestations regarding rule changes are implemented without delay." App., infra, at __.

3. The Secretary appealed the district court's March 3, 1997 Order. While the appeal was pending, Congress (on August 5, 1997)

overhauled Medicare's statutory and regulatory structure with respect to HMOs as part of the Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 4001-4003, 111 Stat. 270 (the BBA).

a. To replace Section 1395mm, the BBA creates an entirely new Part to the Medicare Act -- Part C -- and establishes the "Medicare + Choice" program. "Medicare + Choice" is designed to offer beneficiaries a widely expanded choice of alternatives to traditional Medicare fee-for-services coverage. These options include participation in traditional, privately-run fee-for-service plans, HMOs, and other private managed care organizations at government expense, as well as new medical savings account plans. See 111 Stat. 276 (to be codified at 42 U.S.C. 1395w-21(a)(2)). See also H.R. Rep. No. 217, 105th Cong., 1st Sess., 585 (1997).

The new law directs the Secretary to implement that program by establishing a process through which Medicare beneficiaries can, at their option, have the Secretary acquire coverage for them through participating private HMOs and other healthcare organizations. 111 Stat. 278 (to be codified at 42 U.S.C. 1395w-21(c)(1)). HMOs cannot accept Medicare beneficiaries as enrollees under the program, and may not receive payment, absent a valid "Medicare + Choice" contract with the Secretary. See 111 Stat. 319 (creating new Section 1857(a), to be codified at 42 U.S.C. 1395w-27).

The Act also provides a new and greatly enhanced statutory framework -- an entire Section entitled "Benefits and Beneficiary Protections" -- to govern such issues as quality assurance, disputes over treatment, grievances and appeals. See 111 Stat. 286 (to be codified at 42 U.S.C. 1395w-22(g)). As before, HMOs must in the

first instance determine for themselves whether or not they believe that the requested treatments are appropriate (just as they would with respect to non-Medicare enrollees). But, as a condition of participation, HMOs must provide Medicare enrollees with a clear, understandable statement concerning adverse decisions on a timely basis. Id. at 293 (to be codified at 42 U.S.C. 1395w-22(g)(1)). As before, any enrollee dissatisfied with the decision can seek reconsideration. But, unlike the statute or regulations before the district court, which did not give a deadline for reconsideration decisions, the new statute requires HMOs to issue such reconsideration decisions within 60 days (or earlier if the Secretary so directs). Ibid. (to be codified at 42 U.S.C. 1395w-22g(2)(A)). Moreover, unlike the statute and regulations before the district court, the new statute contains expedition provisions which require HMOs to issue decisions "no later than 72 hours [after] receipt of the request for the determination or reconsideration" in urgent cases. Id. at 293-294 (to be codified at 42 U.S.C. 1395w-22(g)(3)).

Unlike the prior statute and regulations, the new statute also addresses the qualifications and identity of the HMO reconsideration decisionmaker. In particular, where the basis for the initial decision to reduce or deny services is lack of medical necessity, the reconsideration decision must be made by a HMO physician with "appropriate expertise in the [relevant] field of medicine." Ibid. (to be codified at 42 U.S.C. 1395w-22(g)(2)(B)). In addition, the physician addressing the reconsideration request cannot be the same physician who made the initial treatment decision. Ibid.

As before, all private HMO treatment decisions denying or reducing services are subject to review by a neutral, independent entity selected by the Secretary. Id. at 294 (to be codified at 42 U.S.C. 1395w-22(g)(4)). Any enrollee (but not an HMO) dissatisfied with the result of that independent reviewer's decision may seek a hearing before an ALJ if the amount in controversy exceeds \$100.00. 111 Stat. 294 (to be codified at 42 U.S.C. 1395w-22(g)(5)); see also 63 Fed. Reg. 35,110 (adding 47 C.F.R. 422.600). ALJ decisions are subject to review by the Departmental Appeals Board (DAB) and, if the amount in controversy exceeds \$1,000, the DAB's decision is subject to judicial review. 111 Stat. 294 (to be codified at 42 U.S.C. 1395w-22(g)(5)); see also 63 Fed. Reg. (adding 47 C.F.R. 422.608, 422.612). HMOs and other healthcare organizations participating in the program are strictly prohibited from interfering with the efforts of healthcare professionals from providing advise to beneficiaries. See 111 Stat. 294 (to be codified at 42 U.S.C. 1395w-22(j)(3)).

New Medicare Part C also provides the Secretary with substantial enforcement authority, including the ability to impose monetary penalties and to terminate contracts with HMOs that fail to comply with statutory or regulatory requirements. See 111 Stat. 324-325 (adding new Section 1857(g) and (h), to be codified at 42 U.S.C. 1394w-27(g) and (h)). The new procedures also provide the Secretary with substantial flexibility in exercising her enforcement authority. Although the district court and the court of appeals read Section 1395mm(c) as barring the Secretary from contracting, (or renewing a contract) with any HMO that failed substantially to

comply with Medicare requirements, see App., infra, at 19a, ___ (citing 42 U.S.C. 1395mm(c)), the new statute omits the language upon which those courts relied, and nowhere provides that termination is a mandatory penalty for non-compliance.³

Finally, the new law eliminates the Secretary's authority to contract with HMOs under Section 1395mm -- the principal statutory provision at issue in the district court -- as of December 31, 1998, subject to limited exceptions. 111 Stat. 328 (adding new subsection (k) (1) to Section 1395mm, to be codified at 42 U.S.C. 1395mm(k) (1)).⁴

The Department of Health and Human Services advises that all risk contracts entered into under Section 1395mm expired effective December 31, 1998, and that no such contracts were renewed for 1999.⁵

b. On June 26, 1998 -- while the appeal to the Ninth Circuit

³ Section 1395mm(c) provided that "[t]he Secretary may not enter into a contract under this section with an eligible organization unless it meets the requirements of this subsection * * *." (emphasis added). The new law merely provides that the Secretary's contracts with healthcare organizations under the Medicare + Choice program "shall provide that the organization agrees to comply with applicable requirements and standards of [Part C] and the terms and conditions of payment as provided for in [Part C]." 111 Stat. 319 (new Section 1857(a), to be codified at 42 U.S.C. 1395w-27(a)).

⁴ New Subsection (k) (1) of Section 1395mm states that, "on or after the date standards for the Medicare + Choice organizations and plans are first established * * * the Secretary shall not enter into any risk-sharing contracts under this Section," and further provides that "for any contract year beginning on or after January 1, 1999, the Secretary shall not renew any such contract." 111 Stat. 328 (creating new 42 U.S.C. 1395mm(k) (1)).

⁵ The Secretary has granted a temporary, one month extension of a contract with a New Jersey HMO that became insolvent and is currently being operated by the State. The temporary extension -- which proved necessary to permit a transition of enrollees to new, qualifying Medicare + Choice plans or traditional fee-for-service Medicare -- will not extend beyond February 28, 1999.

was still pending -- the Secretary issued interim final regulations implementing new Medicare Part C and the Medicare + Choice program.

See 63 Fed. Reg. 34,968 (June 26, 1998). These regulations took effect on January 1, 1999, at the beginning of the contracting cycle for HMOs participating in Medicare + Choice. See 63 Fed. Reg. 52,610 (Oct. 1, 1998); 63 Fed. Reg. 34,968, 34,969, 34,976 (June 26, 1998).

Building on the statute's enhanced procedural protections for Medicare beneficiaries, the Secretary's regulations require participating HMOs to issue prompt initial decisions and reconsideration decisions. Although the BBA provides no deadline for initial HMO decisions and the Section 1395mm regulations before the district court allowed delays of up to 60 days, the Secretary's new regulations require HMOs to make initial decisions in non-urgent cases "as expeditiously as the [beneficiary's] health condition requires, but no later than 14 calendar days after the date the organization receives the request." 63 Fed. Reg. 35,108 (adding 42 C.F.R. 422.568(a)). And while the BBA sets 60 days as the time limit for resolution of ordinary reconsideration requests, and the Section 1395mm regulations before the district court gave no deadline, the Secretary's new regulations now require such decisions to be made within 30 days, 63 Fed. Reg. 35,110 (adding 42 C.F.R. 422.590(a)(2)).

Unlike the Section 1395mm regulations before the district court, the new regulations also address the need for expedition in particular cases. Following the BBA, the Secretary's new regulations provide that, where delays may threaten the health of the beneficiary, HMOs must make initial and reconsideration decisions within 72 hours of

the relevant request. See 63 Fed. Reg. 35,108-35109 (adding 42 C.F.R. 422.572 pertaining to initial decisions); 63 Fed. Reg. 35,110 (adding 42 C.F.R. 422.590(d) pertaining to reconsideration). Moreover, where an enrollee is receiving authorized in-patient hospital care, the Secretary's new regulations provide that the HMO cannot decide that the care is unnecessary absent concurrence of the physician responsible for the in-patient treatment. 63 Fed. Reg. 35,110 (adding 47 C.F.R. 422.620(b)). Even then, the enrollee can seek immediate review from an independent peer review organization, and the care cannot be discontinued until that organization issues its decision. Id. at 35,110-35,111 (adding 47 C.F.R. 422.622).

The new regulations also address enrollee participation in the decisional process. While the Section 1395mm regulations before the district court nowhere provided enrollees with the right to present evidence or argument to HMO decisionmakers, the Secretary's new regulations require HMOs to give enrollees seeking reconsideration "a reasonable opportunity to present evidence and allegations of fact or law, related to the dispute, in person as well as in writing." 63 Fed. Reg. 35,110 (adding 47 C.F.R. 422.586).

Finally, any disputed reconsideration decision must be sent for adjudication by an independent outside review organization that acts, under contract, as an adjudicatory agent for HCFA. 63 Fed. Reg. 35,111 (adding 47 C.F.R. 422.592); 111 Stat. 294 (to be codified at 42 U.S.C. 1395w-22(g)(4)). An enrollee dissatisfied with the result of the outside review organization's decision can seek a hearing before an ALJ, and judicial review, as set forth in the

statute. See pp. ___-___, supra.⁶

⁶ The statute and regulations also provide mechanisms for monitoring and enforcing HMO compliance with grievance and appeal requirements. The statute, for example, requires HMOs to establish and maintain provisions for monitoring and evaluating both clinical and administrative aspects of health plan operations, and implementing regulations make clear that these "quality assurance" programs must include evaluation of the grievance and appeal process.

See 111 Stat. 291 (adding new Section 1852(e), to be codified at 42 U.S.C. 1395w-22(e)); 63 Fed. Reg. 35,082 (adding 42 C.F.R. 422.152(c)(I)(ii)). In addition, the regulations make it clear that the Secretary may treat an HMO's failure to comply substantially with appeal and grievance provisions as a ground for terminating its contract. 63 Fed. Reg. 35,104 (adding 42 C.F.R. 422.510).

4. On August 12, 1998 -- after enactment of new Medicare Part C and the "Medicare + Choice" program, and after the Secretary's issuance of new implementing regulations -- the court of appeals affirmed the judgment of the district court. The court of appeals declined to remand the case for reconsideration in light of the new statute and the Secretary's revised regulations. See App., infra, at _____. Instead, the court of appeals addressed the case as if the statute and the regulations that were before the district court were still in place.⁷

Beginning with the question of "state action," the court of appeals held that a private HMO's medical judgment that a particular medical treatment is not necessary constitutes "state action." The court explained that, to establish government action, the plaintiff must show that "'there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.'" App., infra, at 8a (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)). It further noted that, while government regulation is not by itself sufficient to attribute private action to the government, "[g]overnment action exists if there is a symbiotic relationship with a high degree of interdependence between the private and public parties such that they are 'joint participant[s]

⁷ The statutory amendments were enacted shortly before the government filed its reply brief in the court of appeals. The government accordingly advised the Court that the statute would eventually modify the requirements for HMO grievance and appeal procedures, but that it had not yet taken effect and therefore did not, at that time, bear on the issues presented. See Gov't C.A. Reply Br. 10 n.9.

in the challenged activity.'" App., infra, at 8a-9a (quoting Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961)).

Applying those standards, the court held that "HMOs and the federal government are essentially engaged as joint participants to provide Medicare services such that the actions of HMOs in denying medical services to Medicare beneficiaries and in failing to provide adequate notice may be fairly attributed to the federal government."

App., infra, at 9a. The Secretary, the Ninth Circuit reasoned, "extensively regulates the provision of Medicare services by HMOs"; the HMOs must "comply with all federal laws and regulations"; the Secretary pays HMOs "for each enrolled Medicare beneficiary (regardless of the services provided)"; and the "federal government has created the legal framework -- the standards and enforcement mechanisms -- within which HMOs" must operate. App., infra, at 9a-10.

The court of appeals rejected the Secretary's argument that HMO decisions to deny treatment are private determinations, made without government compulsion or influence. Although such decisions may involve the same sort of judgment that HMOs ordinarily make with respect to non-Medicare enrollees, the court of appeals held that in this context those decisions "are more accurately described as * * * interpretations of the Medicare statute" rather "than * * * * medical judgments" and thus could be properly attributed to the government. App., infra, at 11a.

Turning to the due process question, the court of appeals held that, under the balancing test established by Mathews v. Eldridge, 424 U.S. 319 (1976), the process HMOs provided to Medicare

beneficiaries under Section 1395mm and the Secretary's pre-April 1997 regulations was less than their constitutional due. App., infra, at '12a-18a. It reasoned that: (1) the beneficiaries had a substantial interest in Medicare coverage, (2) the previously employed notices of adverse decisions created a substantial risk of erroneous deprivation by failing to state the reasons for denial and by failing to apprise beneficiaries of their appeal rights, and (3) the Secretary had failed to demonstrate that additional procedures would be unduly burdensome. Ibid.

The court of appeals also rejected the Secretary's challenge to the nature and scope of the injunctive remedy imposed. Because Congress had delegated implementation of Section 1395mm to the Secretary -- and because it was the Secretary's implementation of that provision that was found wanting -- the Secretary argued that the district court should have remanded the matter to her for an expedited rulemaking to cure the identified ills; and she disputed the appropriateness of the district court's three-year injunction, which prescribed detailed deadline, notice, hearing, and proceeding requirements. The cases upon which the Secretary relied, the Ninth held, were distinguishable. App., infra, at 18a.

5. The Secretary sought rehearing and rehearing en banc. The petition noted that the new statute and implementing regulations contain substantially different and much more detailed hearing and grievance procedures than those considered in the panel's decision.

It asserted that the court's holding, by effectively "constitutionalizing" HMO decisions, impaired the ability of Congress and the Secretary to tailor procedural safeguards to the

complex and varied relations between HMOs and their patients. And it urged the court of appeals to either rehear the case or to vacate the injunction and remand the matter to the district court with instructions to consider the new statute and implementing regulations. The court of appeals denied the petition. App., infra, at ____.

DISCUSSION

Affirming the district court's issuance of a detailed and highly prescriptive nationwide injunction, the Ninth Circuit in this case held (1) that Health Maintenance Organizations and similar healthcare organizations (HMOs) constitute "state actors" when they deny or dispute claims for treatment made by Medicare enrollees and (2) that the now-superseded HMO procedures imposed under 42 U.S.C. 1395mm were insufficient to meet the requirements of due process. Because the court of appeals' decision raises issues similar to those that this Court will be addressing in American Manufacturers Mutual Insurance Company v. Sullivan, et al., No. 97-2000 (argued Jan. 19, 1999), the petition should be held pending the Court's decision in that case. Moreover, shortly after the district court ruled in this case, Congress comprehensively revised Medicare's treatment of HMOs by enacting an entirely new Part of the Medicare Act -- Medicare Part C -- and introducing the new Medicare + Choice program. Those new provisions, and the Secretary's regulations implementing them, provide dramatically greater procedural protections for beneficiaries who choose to enroll in HMOs; they eliminate the grievances that prompted the request for judicial relief in this case; and they deprive 42 U.S.C. 1395mm, upon which the district

court and the court of appeals passed and relied, of future effect.

As a result of those changes, the current dispute is moot. Accordingly, we ask that, in addition to disposing of the petition as appropriate in light of this Court's decision in Sullivan (once it is issued), the Court also vacate the judgments of the court of appeals and the district court as moot and remand the case to the district court for consideration of the new statute and implementing regulations.

A. The Petition Should Be Held Pending This Court's Decision In American Manufacturers Mutual Insurance Company v. Sullivan, et al., No. 97-2000 (argued Jan. 19, 1999).

The state action and due process issues presented by this case are strikingly similar to the issues before the Court in American Manufacturers Mutual Insurance Company v. Sullivan, et al., No. 97-2000 (argued Jan. 19, 1999). Sullivan concerns a constitutional challenge to the payment procedures established by Pennsylvania's Workers' Compensation Act, Pa. Stat. Ann., tit. 77, § 531(5), (6) (West Supp. 1998) (77 Pa. Stat.). That statute establishes an exclusive system of no-fault liability for work-related injuries, under which employers or their insurers must pay "for reasonable surgical and medical services" for any employee disabled on the job "within thirty (30) days of receipt of [the] bills." 77 Pa. Stat. § 531(1)(i), (5) (Supp. 1998); 77 Pa. Stat. §§ 431, 481(a), 501 (Supp. 1998). If the "employer or insurer disputes the reasonableness or necessity of the treatment provided" for a covered injury, however, it may defer payment -- that is refuse to pay for the treatment -- and file a request for "utilization review." Id. §§ 531(5), (6)(i); 34 Pa. Code § 127.208(e). The dispute is then resolved by a neutral

"utilization review organization" and, if appropriate, through a hearing before a workers' compensation judge. 77 Pa. Stat. §§ 529-531.

1.a. The first question before the Court in Sullivan is whether private workers' compensation insurers, when they choose to withhold payment for medical treatment based on a challenge to the "necess[ity] or reasonable[ness]" of the treatment under Pa. Code § 531(5), (6), are engaged in "state action." Although the insurers' payment decisions were not by any means conclusive -- they could be challenged in a state-sponsored adjudicative proceeding -- the Third Circuit held that the insurer decisions were properly attributable to the State. Workers' compensation, the court of appeals reasoned, is "a complex and interwoven regulatory web enlisting the Bureau, the employers, and the insurance companies." Barnett v. Sullivan, 139 F.3d 158, 168 (3d Cir. 1998). Because the State "extensively regulates and controls" the system and because the insurers participating therein "provid[e] public benefits which honor State entitlements," the court concluded that the insurers "become an arm of the State, fulfilling a uniquely governmental obligation under an entirely state-created, self-contained public benefit system."

Ibid.

Here, the Ninth Circuit employed similar reasoning to reach an identical result, concluding that the decisions of private HMOs to reduce or deny treatments constitute government action. Even though HMO decisions can be challenged by the beneficiary through government-sponsored adjudication, the Ninth Circuit held that those HMOs decisions are attributable to the federal government because

the government and the HMOs "are essentially engaged as joint participants to provide Medicare services." App., infra, at __. In particular, the Ninth Circuit noted, the "Secretary extensively regulates the provision of Medicare services by HMOs"; HMOs must "comply with all federal laws and regulations"; the Secretary pays HMOs "for each enrolled Medicare beneficiary (regardless of the services provided)"; and the "federal government has created the legal framework -- the standards and enforcement mechanisms -- within which HMOs" must operate. App., infra, at __. Indeed, the issues presented and the reasoning of the courts of appeals in this case and Sullivan are sufficiently similar that lead counsel in this case filed an amicus brief in Sullivan to emphasize the potential impact of the Court's decision in Sullivan on the Medicare program and on the result the Ninth Circuit reached below.⁸

b. Moreover, the arguments presented by the petitioners and their amici in favor of reversal in Sullivan apply here as well. Petitioners in Sullivan identify three factors this Court has examined in determining whether the conduct of a private party can fairly be attributed to the government: Whether the private actor's decision is the product of governmental compulsion or encouragement; whether the private actor exercises a traditionally exclusive state

⁸ See Br. Amici Curiae Of the American Association of Retired Persons, The Center For Medicare Advocacy, Inc., et al, at 7 (emphasizing that "the Medicare program is aggressively encouraging increased beneficiary participation in private managed care structures" and concluding that "[t]he evolution in the administration of government benefit programs thus renders the state action determination important to a rapidly expanding number of individuals."); id. at 4 (identifying amici's involvement in this case as a basis for their interest in Sullivan).

power; and whether the government has some involvement that uniquely aggravates the injury. As to the first factor, petitioners in Sullivan argue that an insurer's initial decision to withhold payment and dispute a claim is not the result of "significant encouragement" by the State, as the State does not attempt to influence the insurers' decision; the initial decision whether to pay or dispute the claim is the insurers' and the insurers' alone. Pet Br. 20-21 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004-1005 (1982)). The same is true of HMO decisions to deny Medicare beneficiary claims. When an HMO decides whether or not to provide a requested service, it makes that determination without governmental participation. Instead, like any other private entity, HMOs rely on their own expertise and their own assessment of the relevant circumstances. Indeed, the very first provision of the Medicare statute *prohibits* the "exercise of any supervision or control over the practice of medicine or the manner in which medical services are provided * * *." 42 U.S.C. 1395.

Likewise, the second factor identified by the Sullivan petitioners -- whether the private party exercises a power "traditionally exclusively reserved to the State," Pet. Br. 18 (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)) -- weighs against finding government action here just as much as it does in Sullivan. An insurers' decision to dispute a claim and decline payment, the Sullivan petitioners argue, is the sort of uniquely private judgment that insurers of all varieties make on a regular basis: whether to pay a bill submitted for payment, or instead to withhold payment and dispute the bill. See Pet. Br. 17-22; U.S. Br. 13-16. The same is true with respect to HMO treatment

decisions for Medicare enrollees. When an HMO decides whether or not to provide a requested treatment, it does not act as an agent of the government or exercise governmental authority to adjudicate a dispute; it is not expected to act in the government's interest; and it does not distribute Treasury or governmental funds. To the contrary, the HMO exercises its own judgment, as a private actor, as to the reasonableness of the service and whether it is obligated to provide it. If the HMO chooses to provide the treatment, it (like the insurers in Sullivan) must bear the cost itself. And if the HMO decides not to provide treatment, the HMO's judgment (again like that of the insurers in Sullivan) is hardly conclusive. Instead, the HMO's decision can be challenged through the adjudicatory machinery established by the government, and only the decision of a true governmental authority, acting in its capacity as neutral arbiter of the dispute, can finally resolve the matter and leave the parties without further recourse. See 42 C.F.R. §§ 417.614-417.626-417.636 (providing for automatic review of adverse organization reconsideration decisions by agent of the Secretary and, in appropriate cases, a hearing before an ALJ and judicial review); see also 42 U.S.C. 1395mm(c) (5) (B) (same). (The conclusive adjudication of the dispute by the government or its agents, of course, is government action that is subject to the requirements of the due process clause. See Tr. Oral Arg., Sullivan, at __-__.)

Even the substantive criteria employed by HMOs in this case are indistinguishable from those applied by the insurers in Sullivan -- and from those applied by private actors in other contexts. Here,

HMOs must provide medical services that are "reasonable and necessary." 42 U.S.C. 1395y(a). That is an indistinguishable standard from the obligation at issue in Sullivan, where the statute requires insurers to pay for treatments that are "reasonable or necessary." Pa. Stat. Ann. § 531(5), (6)(1) (Supp. 1998); 34 Pa. Code § 127.208(e). And it is indistinguishable from the sort of appropriateness determination that private physicians, in the regular course of their practices, must make on a regular basis. See Blum v. Yaretsky, 477 U.S. 991 (1982) (exercise of ordinary medical judgment not state action, even where it affects eligibility for medical benefits). Indeed, even a cursory review of the complaint in this case demonstrates that to be the case -- each of the decisions respondents challenge was made on purely medical grounds.⁹ Thus, contrary to the Ninth Circuit's decision, an HMO's decision on the appropriateness of, or its obligation to provide, a particular form medical care does not constitute a delegated "interpretation of the Medicare statute," App., infra, 11a, any more than a Pennsylvania Workers' Compensation insurers' view of

⁹ One named plaintiff, for example, alleges that she was denied physical therapy because she could not follow therapeutic instructions. C.A. E.R. 10-11, ¶ 29. Another plaintiff alleges that treating physicians failed to prescribe adequate pain medication or to order physical therapy. C.A. E.R. 12-13, ¶¶ 40-41. Another plaintiff, much like the plaintiffs in Blum, alleges that the HMO erroneously concluded that skilled nursing care was not medically necessary. C.A. E.R. 13-15, ¶¶ 48-54. And yet another named plaintiff alleges that the HMO denied speech therapy services on the ground that the therapy would not be effective, C.A. E.R. 16, ¶ 62. Whatever the merits of these contentions may be, they plainly challenge decisions that turn on the exercise of professional medical judgment, and that thus are indistinguishable from the medical decisions this Court held to be private rather than state action in Blum.

"reasonable[ness] or necess[ity]" constitutes an adjudication of Pennsylvania law.¹⁰

Finally, the Sullivan petitioners and their amici contend that the Third Circuit erred in relying on the "rather vague generalization," Blum, 457 U.S. at 1010, that the system "inextricably entangles the insurance companies in a partnership" that makes the government "a joint participant in the challenged activity," Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961), and on the heavily regulated nature of the industry. See Pet. Br. 22-25, 26-29; U.S. Br. 17-20. Unlike Burton and similar cases, neither Sullivan nor this case involve the sort of dignitary injury or stigma, such that which results from racial discrimination, that can be "uniquely aggravated" by governmental endorsement or even passive involvement. See U.S. Br. in Sullivan, at 19-20; Pet. Br. 22-24. And, the governmental regulation of the industry in this case is neither qualitatively nor quantitatively different from the regulation of workers' compensation insurers at issue in Sullivan. Besides, relying on the scope of government regulation is particularly inappropriate. See Pet. Br. 26-29 (citing, inter alia, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1975);

¹⁰ Simply put, HMOs like any other provider of service under contract, traditionally has the option of either providing the service (thereby avoiding a dispute with the enrollee) or instead denying it instead (and thereby requiring the claimant to invoke the dispute resolution machinery established by the government). Because "a private party's decision" to deny the validity of the claim or refuse service and to await litigation of the issue instead "has never, to our knowledge, been considered 'state action' under the Fourteenth Amendment," U.S. Br. at 17-18, an HMOs decision to do the same thing in this context should not be considered government action here.

Rendell-Baker v. Kohn, 457 U.S. 830, and Blum, supra). Indeed, holding the government liable for private conduct simply because it has regulated in the area would tend to deter government intervention precisely at a time when beneficiaries need its protection most.

In any event, if the insurer conduct in Sullivan does not constitute state action, it would seem to follow a fortiori that the HMO decisions at issue here do not constitute government conduct either. One of the primary reasons given by the Third Circuit for finding state action is the involuntary and mandatory nature of the system; workers cannot "opt out" of workers' compensation and rely on their tort remedies instead. See Sullivan, 159 F.3d at 169 (likening workers' compensation claimants to "prisoners" of the Workers' Compensation scheme); Br. Resp. 33 (similar argument). In contrast, Medicare beneficiaries always have been permitted to "opt out" of private HMO coverage and select traditional Medicare fee-for-service benefits instead. See pp. __-__, supra.¹¹

¹¹ One other difference between this case and Sullivan is that, in this case, the government pays for the HMO policy, whereas in Sullivan both private and public employers pay for the insurance policy. It is hard to see why that distinction would make a difference. As explained in our amicus brief in Sullivan (at 18), neither "a private insurer's satisfaction of a claim with its own funds" nor its "decision to defer payment pending review of a disputed claim" is properly attributed to the State even if "the State pays for the underlying insurance policy," because "individual payment determinations are made by, and the financial consequences of those decisions are borne by, the private insurer and not the State. See Blum, 457 U.S. at 1011 (rejecting contention that decisions made by physicians and nursing homes are attributable to the State, despite state 'subsidization of the operating and capital costs of the facilities' and coverage for 'the medical expenses of more than 90% of the patients')." For similar reasons, insurers who provide health benefits to government employees under the Federal Employee Health

Benefits Act, 5 U.S.C. ___, do not become "state actors" simply because the government pays for the coverage. Indeed, if the rule were otherwise, the fact that the government pays physicians and hospitals directly under Medicare Parts A and B might be thought to convert those clearly private actors into government actors.

2. The second issue in Sullivan, whether Pennsylvania's workers' compensation regime is consistent with the requirements of due process, likewise resembles the due process and remedial questions decided by the Ninth Circuit and the district court below.

Among other things, the district court apparently thought it appropriate to require HMOs to pay for services until after both the initial determination and the reconsideration decisions were made, if the decisions involved "acute care services." App., infra, at ___. One of the questions before this Court in Sullivan is whether due process requires workers' compensation insurers likewise to continue paying for medical services until after some sort of outside review has taken place. See U.S. Br. 21-30; Pet. Br. 29-50. While the Secretary does not dispute the desirability of such a requirement in appropriate circumstances -- the Secretary's new regulations implementing Medicare Part C provide for precisely such a procedure in cases involving in-patient hospital care, see pp. ___-___ -- the fact that this Court may pass on whether such a procedure is constitutionally required in Sullivan is another reason to hold the petition pending the Court's decision there. Moreover, the Secretary believes that the Ninth Circuit and the district court fundamentally erred in imposing judicial requirements rather than remanding to the Secretary -- especially given the new legislation -- so that appropriate procedures could be tailored and refined through a participatory and fully public rulemaking process rather than through the more cumbersome and less public judicial process.

B. Because This Case Became Moot Pending Review, The Court Should Vacate the Lower Court's Judgments And Remand The Case to the District Court For Consideration Of Intervening

Statutory and Regulatory Changes

Even absent the obvious similarities between this case and Sullivan, the Ninth Circuit's decision in this case ordinarily would warrant further review. It declares unconstitutional the Secretary's implementation of a federal statutory mandate; it affirms a nationwide injunction requiring the Secretary to impose certain procedures on participating HMOs, denying the Secretary the ability to design and tailor the procedures herself in the first instance; it constitutionalizes the conduct of otherwise private actors; and it may have a substantial impact on an extensive and increasingly important federal program.

1. On August 5, 1997, however, Congress comprehensively reformed this area of law -- creating a new Medicare Part C and establishing the new "Medicare + Choice" program -- and thereby rendered this case moot. See Balanced Budget Act of 1997, Pub. L. No. 105-33, §§ 4001-4003, 111 Stat. 270. At the time the district court ruled, the governing statute merely required that Medicare HMOs provide "meaningful procedures for hearing and resolving grievances * * * ." 42 U.S.C. 1395mm(c)(5)(A) (1994). Neither the statute nor the regulations promulgated thereunder specified the precise circumstances under which notices of adverse decisions would be required. Neither provided any detail regarding the content of such notices. Neither regulated the extent to which enrollees could present evidence or argument to the HMO on reconsideration. Neither addressed the identity or qualifications of HMO reconsideration decisionmakers. And neither provided any rules regarding expedition in urgent cases. In the view of the district court and the court

of appeals, the practices that prevailed under that regulatory scheme did not afford plaintiffs constitutionally adequate notice or a constitutionally sufficient opportunity to be heard. To remedy the alleged deficiencies, the district court imposed and the Ninth Circuit affirmed a detailed and highly prescriptive injunction to regulate beneficiary appeals, specifying the form, content, and timing of HMO notices.

The new statute and the Secretary's regulations promulgated thereunder, however, dramatically expand the procedural and substantive protections afforded to Medicare HMO enrollees. See pp. ___-___, supra. Indeed, Medicare Part C adds an entirely new Section of the Medicare Act entitled "Benefits and Beneficiary Protections," 111 Stat. 286 (to be codified at 42 U.S.C. 1395w-22 (g)).

That new law, together with the Secretary's regulations, address each of the alleged deficiencies identified by the lower courts.

With respect to the questions of notice and timing of HMO decisions, for example, the new statute and the Secretary's new regulations require all HMOs denying requested services to provide enrollees with a clear, understandable statement concerning adverse decisions on a timely basis. 111 Stat. 286 (to be codified at 42 U.S.C. 1395w-22(g)(1)); 63 Fed. Reg. 35,108 (adding 47 C.F.R. 422.588(d)). The notice must be provided within 14 days of a request in ordinary cases, and within 72 hours in urgent cases. 63 Fed. Reg. 35,108-35,109 (adding 47 C.F.R. 422.568(a) and 42 C.F.R. 422.572); 111 Stat. 293-294 (to be codified at 42 U.S.C. 1395w-22(g)(3)). And reconsideration decisions must be issued 30 days ordinarily, and within 72 hours in expedited cases. 63 Fed.

Reg. 35,110 (adding 47 C.F.R. 422.590(a)(1), (d); 111 Stat. 293 (to be codified at 42 U.S.C. 1395w-22(g)(2)(A), (3)). Moreover, when it comes to authorized in-patient hospital care, the HMO cannot discontinue treatment absent concurrence of the physician responsible for the in-patient treatment, 63 Fed. Reg. 35,110 (adding 47 C.F.R. 422.620(b)), and even with that consent cannot discontinue treatment over the enrollee's objections until after the matter has been reviewed by an independent peer review organization, id. at 35,110-35,111 (adding 47 C.F.R. 422.622).

The new statute and regulations address HMO decisionmaking processes as well. While the statute and regulations before the district court said nothing about enrollee participation in the reconsideration process, the new regulations specify that the HMO must give the enrollee "a reasonable opportunity to present evidence and allegations of fact or law, related to the dispute, in person as well as in writing." 63 Fed. Reg. 35,110 (adding 47 C.F.R. 422.586). Moreover, unlike the statute and regulations before the district court, the new statute and regulations address the qualifications and identity of the reconsideration decisionmaker.

The reconsideration decisionmaker cannot be the same person who made the initial treatment decision. 111 Stat. 293 (to be codified at 42 U.S.C. 1395w-22(g)(2)(B)); 63 Fed. Reg. 35,111 (adding 47 C.F.R. 422.590(g)(1)). And where the basis for the decision to reduce or deny services was lack of medical necessity, the reconsideration decision must be made by a physician with "appropriate expertise in the [relevant] field of medicine." 111 Stat. 293 (to be codified at 42 U.S.C. 1395w-22(g)(2)(B)); 63 Fed. Reg. 35,111 (adding 47 C.F.R.

422.590(g)(2)).

Moreover, as before, HMO organization determinations are hardly conclusive. All disputed reconsideration decisions are subject to prompt and appropriate review by the Secretary and her agents, *id.* at 294 (to be codified at 42 U.S.C. 1395w-22(g)(4), including automatic review by an independent entity acting as HCFA's agent, 63 Fed. Reg. 35,111 (adding 47 C.F.R. 422.592)). And, as before, a hearing before an ALJ is available where the amount in controversy exceeds \$100.00, and judicial review is available for any matter valued at more than \$1,000.00. See pp. __-__, *supra*.

As a result of that sweeping change in federal law and Medicare policy, the practices of which plaintiffs complained and which precipitated the district court's exercise of its remedial power have been superseded through enactment of a dramatically different statutory and regulatory scheme.¹² No court has passed on the constitutional sufficiency of those new procedures. As a result, the law has "been sufficiently altered" pending appeal "so as to present a substantially different controversy than the one the [lower

¹² Although these new provisions address many areas covered by the district court injunction, they take a fundamentally different approach to several key issues. Unlike the district court, which required that detailed written notices be provided within five days even where the beneficiary's health is not in imminent jeopardy, Congress specified no specific time frame in such cases, see H. Conf. Rep. No. 105-217, 105th Cong, 1st Sess. 65 (1997) (noting that Congress delegated that issue to the Secretary), and the Secretary selected a 14-day deadline, Fed. Reg. 35,108-35,109 (adding 47 C.F.R. 422.568(a)). Moreover, while the Secretary has required certain in-patient hospital services to continue during the pendency of an administrative appeal, she did not extend similar requirements to a broad, unspecified range of "acute care" services. Compare with App., *infra*, at __, with 63 Fed. Reg. 35,110-35,111 (adding 47 C.F.R. 422.620(b), 422.622).

courts] originally decided." Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville, 508 U.S. 656, 662 n.3 (1993); see also id. at 670-671 (O'Connor, J., dissenting). Under such circumstances, it has been this Court's consistent practice to declare the case moot, vacate the judgments below, and remand the matter to the district court for such further proceedings as are appropriate. "[I]n instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully." Lewis v. Continental Bank Corp., 494 U.S. 472, 492 (1992); see, e.g., Department of the Treasury v. Galioto, 477 U.S. 556, 559-560 (1986) (vacating judgment and remanding to district court because a "new enactment significantly alter[ed] the posture of the case" by removing the concerns that prompted injunctive relief in district court); Calhoun v. Latimer, 377 U.S. 263 (1964) (per curiam) ("vacat[ing] the judgment and remand[ing] the cause to the District Court for further proceedings" to consider "the nature and effect" of a supervening change in school board policy); Arizonans for Official English v. Arizona, 117 S. Ct. 1055, ___ (1997) ("Vacatur is in order when mootness occurs through happenstance * * *").

2. The Court should follow that settled practice here. It is now well established that "[a]n injunction can issue only after the plaintiff has established that the conduct sought to be enjoined

is illegal and that the defendant, if not enjoined, will engage in such conduct." United Transportation Union v. The State Bar of Michigan, 401 U.S. 576, 584 (1971). Here, no apparent basis for injunctive relief -- the only relief granted -- remains. The allegedly unlawful practices and regulations have been erased by subsequent legislative and regulatory changes. As a result, the claim for injunctive relief is moot, and no longer a proper matter for further judicial consideration. See Princeton University v. Schmid, 455 U.S. 100, 103 (1982) (per curiam) (where "the regulation at issue is no longer in force" and the "lower court's opinion" does not "pass on the validity of the revised regulation," the "case 'has lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law."); see also Associated General Contractors, 508 U.S. at 663 n.3 (prior cases considered moot where "the statutes at issue * * * were changed substantially, and * * * there was therefore no basis for concluding that the challenged conduct was being repeated."); Legal Assistance for Vietnamese Asylum Seekers v. Department of State, 45 F.3d 469, 472 (D.C. Cir. 1995) (Plaintiffs are "certainly not entitled to prospective relief based on a no longer effective version of a later amended regulation"). Indeed, the district court in this very case itself anticipated that, given subsequent legislation and regulatory changes, "the entire case may become largely moot." App., infra, at __. And just that has occurred.

Respondents, of course, may argue that even the new statutory and regulatory structure is constitutionally inadequate. See, e.g., Calhoun, supra. Even setting aside the implausibility of such a

claim, it remains true that the nature of the dispute has been fundamentally altered by the intervening change in law. Indeed, the district court's decision is specifically addressed to, and rules only on, the claims of Medicare beneficiaries enrolled in HMOs with risk contracts under 42 U.S.C. §1395mm. See App., *infra*, at ___ (limiting the class to persons who were "enrolled in Medicare risk-based health maintenance organizations or competitive medical plans during the three years prior to the filing of the lawsuit").

And the district court's analysis focused exclusively on the appeal provisions the Secretary provided under Section 1395mm, App., *infra*, at 33a-38a, as did the analysis of the court of appeals, App., *infra*, at ___-___. New Section 1395mm(k) (1) (B), however, provides that the Secretary cannot renew Section 1395mm contracts after January 1, 1999.¹³ And, as of December 31, 1998, all of the Secretary's Section 1395mm contracts expired, and no new Section 1395mm contracts have been signed.¹⁴ As a result, the actual "case or controversy" the district court and the Ninth Circuit adjudicated, like the Section

¹³ Cost-based contracts under Section 1395mm(h), which are not at issue in this case, are permitted to continue until the end of 2001. 42 U.S.C. 1395mm(h) (5) (B). If the HMOs in which respondents are or were enrolled still contract with Medicare, they now do so as "Medicare+Choice" organizations under new "Part C" of the Medicare statute, the provisions of which have not been addressed by the court of appeals or the district court.

¹⁴ One HMO that became insolvent and is now being operated by the state of New Jersey had its Section 1395mm contract "extended" in order to permit enrollees time to move to qualified "Medicare + Choice" HMOs under Medicare Part C or to return to the traditional Medicare fee-for-services program. HHS advises that this temporary extension will expire on February 28, 1999 and that, as of March 1, 1999, there will be no enrollees under Section 1395mm risk contracts.

1395mm risk-contracts that precipitated the dispute, has ceased to exist.

The fundamental change in the regulatory and legal regime also eliminates the district court's and the court of appeals' rationale for the highly prescriptive injunctive relief imposed in this case.

Justifying the decision to bar the Secretary from renewing HMO risk contracts or entering into such contracts with any HMO that violates the procedural requirements imposed by the district court's order, the district court and court of appeals alike relied on Section 1395mm(c)(1)'s declaration that "[t]he Secretary may not enter into a contract under this section with an eligible organization unless it meets the requirements of this subsection * * *." App., infra, at ___ (court of appeals); id. at 52a (district court); see also id. at 53a (justifying notice requirements by declaring that the Secretary's failure to require impose them in her HMO contracts is a "violation of 42 U.S.C. § 1395mm(c)(1)."); id. at 54a (declaring that failure of Secretary to require certain hearing procedures in HMO contracts is a "violation of 42 U.S.C. § 1395mm(c)(1)."). The new statute, however, omits the prohibitory language upon which those courts relied, and nowhere suggests that termination and non-renewal are mandatory penalties for HMO non-compliance.¹⁵ In fact, the new statute strongly suggests that the Secretary has flexibility in responding to non-compliance, as it provides the Secretary with a

¹⁵ The new law merely provides that the Secretary's contracts with healthcare organizations under the Medicare + Choice program "shall provide that the organization agrees to comply with applicable requirements and standards of [Part C] and the terms and conditions of payment as provided for in [Part C]." 111 Stat. 319 (new Section 1857(a), to be codified at 42 U.S.C. 1395w-27(a)).

range of options and sanctions. See 111 Stat. 324-325 (adding new Section 1857(g) and (h), to be codified at 42 U.S.C. 1394w-27(g) and (h)).

3. Following settled practice here would likewise further the interests underlying the practice. Here, through no fault of the Secretary's, the case became moot pending this Court's review; the matter was simply overtaken by a comprehensive legislative reform. In such a circumstance, the Secretary ought not be bound by a judgment that she cannot appeal. See United States v. Munsingwear, 340 U.S. 36, 40 (1951); see also Arizonans for Official English, 117 S. Ct. at 1071 ("Vacatur 'clears the path for future relitigation' by eliminating a judgment the loser was stopped from opposing on direct review."). That is especially true given the present circumstances. The rulings below address an issue of substantial national importance, as respondent's lead counsel has already conceded in filings with this Court. See Br. Amici Curiae of the American Association of Retired Persons, The Center For Medicare Advocacy, Inc., et al., in Sullivan, supra, at 7 (emphasizing that, because "the Medicare program" increasingly involves "beneficiary participation in private managed care structures," the state action issue is increasingly "important to a rapidly expanding number of individuals."). And the ruling, despite the mootness of the actual controversy, threatens to have continuing repercussions for this important federal program: HMOs may well be deterred from participating in the new program by the Ninth Circuit's constitutional holding.

Even in less compelling circumstances, this Court has

unhesitatingly concluded that it was appropriate to vacate the judgments below and remand the matter to the district court for further proceedings in light of intervening events. Thus, in McLeod v. General Electric, 385 U.S. 533, 535 (1967) (per curiam), this Court declined to review the standard under which a preliminary injunction had been issued under Section 10(j) of the National Labor Relations Act because, after the lower courts had passed on the issue, a "supervening event" -- a new labor agreement -- had drawn into question "the appropriateness of injunctive relief" vel non. Given that change, the Court determined that the proper resolution was to "set aside the judgment of the Court of Appeals with direction to enter a new judgment setting aside the order of the District Court and remanding to that court for such further proceedings as may be appropriate in light of the supervening event." Similarly, in Calhoun, 377 U.S. at 265, the Court determined that the school board's adoption of a new policy while the case was pending on review had substantially altered the nature of the controversy; the Court therefore "vacate[d] the judgment and remand[ed] the cause to the District Court for further proceedings." Id. at 264; cf. Burlington Truck Lines v. United States, 371 U.S. 156, 172 (1962) (when confronted with intervening facts, court of appeals should not review administrative agency decision but should vacate order and remand to agency for further consideration in light of changed conditions).

Likewise here the new statute enacted by Congress and the Secretary's new regulations promulgated thereunder fundamentally both the relevant legal framework and the nature of the dispute between the parties. Accordingly, a like order vacating the lower court

judgments, and remanding the matter to the district court for consideration of those intervening developments, is appropriate in this case as well.¹⁶

CONCLUSION

The Court should hold the petition pending decision in American Manufacturers Mutual Insurance Company v. Sullivan, et al., No. 97-2000 (argued Jan. 19, 1999). Once the Court issues its decision in Sullivan, it should grant the petition, vacate the judgment below as moot, and remand to the court of appeals with instructions to set aside the district court judgment and to remand the matter to the district court for consideration of intervening statutory and regulatory changes and, to the extent appropriate, for reconsideration in light of this Court's decision in Sullivan.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
Counsel of Record

FEBRUARY 1999

¹⁶ It is no answer to suggest that the "state action" question remains "live" under the new statute, even if changed facts alter the due process analysis of the lower courts. This court reviews judgments, not statements in opinions. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984). In this case, the judgment of the district court commands the Secretary to impose certain procedures on participating HMOs. It should go without saying that the change in procedures mandated by the new statute dramatically affects the propriety of that judgment.

After all, if the new procedures are constitutional, and no court has determined that are not, then that judgment cannot be sustained.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: "Christopher Edley, Jr." <edley@law.harvard.edu> ("Christopher Edley, Jr."

CREATION DATE/TIME: 28-JAN-1999 19:04:23.00

SUBJECT: Next steps on ESEA/Compact

TO: Michael Cohen (CN=Michael Cohen/OU=OPD/O=EOP [OPD])
READ: UNKNOWN

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])
READ: UNKNOWN

CC: James T. Edmonds (CN=James T. Edmonds/OU=PIR/O=EOP [PIR])
READ: UNKNOWN

CC: terry.edmonds@ssa.gov (terry.edmonds@ssa.gov [UNKNOWN])
READ: UNKNOWN

CC: Clara J. Shin (CN=Clara J. Shin/OU=WHO/O=EOP [WHO])
READ: UNKNOWN

CC: Scott R. Palmer (CN=Scott R. Palmer/OU=PIR/O=EOP [PIR])
READ: UNKNOWN

CC: Maria Echaveste (CN=Maria Echaveste/OU=WHO/O=EOP [WHO])
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CC: aedmonds1@home.com (aedmonds1@home.com [UNKNOWN])
READ: UNKNOWN

CC: felicia.wong@npr.gov (felicia.wong@npr.gov [UNKNOWN])
READ: UNKNOWN

TEXT:

[I would have cc'd Bruce, but don't have his email address]

Lots of good input. Thanks. I take to heart Bruce's comment about how close we are and the "sea change" implicit in the ESEA ideas. Indeed, things really are in such a better place than they seemed in October.

I see two central options as of now. First is to, in essence, make the ESEA approach the mountain top, and talk about how it advances the vision of accountability and gap-closing as a non-trivial first step. [Like the space station as a step towards Mars.] The second option is to do option one PLUS a discrete program within ESEA that provides a supercharger for districts that, with state support, want to move on a faster, bolder track, with higher risks and rewards, etc.

I'd like to flesh out these possibilities further, but don't quite know how given time constraints, etc. I've asked Scott and Felicia Wong to try to arrange for us (me by speaker phone from Cambridge) to pursue this with Mike Cohen, or whomever, as early as possible next week. Or we could do it tomorrow (Friday).

Part of the background we need is to resolve what seems to us a disconnect between the WH description of the ESEA revolution and the Department's take on things. And second, where you are on Ed Flex these days, especially in relation to the Frist bill in the Senate.

Ciao

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jeffrey L. Farrow (CN=Jeffrey L. Farrow/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:28-JAN-1999 19:28:37.00

SUBJECT: Territories & President's Initiatives

TO: Joshua Gotbaum (CN=Joshua Gotbaum/OU=OMB/O=EOP @ EOP [OMB])
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TO: James B. Kazel (CN=James B. Kazel/OU=OMB/O=EOP @ EOP [OMB])
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TO: Barbara Chow (CN=Barbara Chow/OU=OMB/O=EOP @ EOP [OMB])
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TO: Michael Deich (CN=Michael Deich/OU=OMB/O=EOP @ EOP [OMB])
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TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
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TO: James J. Jukes (CN=James J. Jukes/OU=OMB/O=EOP @ EOP [OMB])
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TO: Mickey Ibarra (CN=Mickey Ibarra/OU=WHO/O=EOP @ EOP [WHO])
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TO: Christopher C. Jennings (CN=Christopher C. Jennings/OU=OPD/O=EOP @ EOP [OPD])
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TO: Fred DuVal (CN=Fred DuVal/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TEXT:

This draft concerns the treatment of the territorial areas in the President's recently-announced initiatives that would not automatically apply to the areas. It suggests ways of treating them in the case of a few

Q's and A's on the application of the President's national Initiatives to the territories

Q. Will the President's proposal to adequately fund Medicare end the unequal treatment of Puerto Rico in in-patient hospital services payment rates?

A. In 1997, the Administration initiated two measures to treat Puerto Rico more equally in Medicare hospital services rates. One changed the formula in the law based 25% on the rates applicable elsewhere in the country and 75% on local costs to 50% of the national rates and 50% local costs. The other changed the regulation that provides the wage index that is a major factor in the calculation of local costs. Each measure increased Medicare hospital payments in Puerto Rico [close to \$25 million] in 1998 with commensurate increases in succeeding years.

The President's proposal to adequately fund Medicare would use funds obtained by taxation from residents of the States -- but not residents of territories -- to supplement the Medicare tax (which Puerto Ricans pay). However, the proposal will include changing the rate formula to base it 67% on national rates and 33% on local costs.

Q. Will the President's proposal to reauthorize the Elementary and Secondary Education Act end its unequal treatment of Puerto Rico?

A. The limitations on Puerto Rico's funding are a result of Puerto Rico's historically low per pupil expenditures as well as the special formula for the islands. Even under the formula, Puerto Rico, which has a population less than that of half the States, receives more funds than all but eight States although it does not contribute the revenue which funds the programs. Applying the national formula would increase Puerto Rico's share of the funding to a percentage greater than all but three States.

Puerto Rico's treatment is equitable in that the islands do not contribute to program costs, but we will consider any other specific proposals its representatives may wish to make concerning reauthorization.

Q. Will the President's proposal to enable disabled workers to buy into Medicaid apply to the territories?

A. Medicaid is capped in the territories. In 1997, the President proposed annual increases in the cap through FY02. The Congress essentially approved the significant first year increase but not those proposed for subsequent years in spite of strong efforts by the Administration. At the same time, it created a new area of unequal treatment of the territories in health care programs in acting on the President's proposal to ensure health care insurance for needy children. It provided them one-sixth of the share proposed by the Administration. Providing more equitable treatment in the new Children's Health Insurance program has been our health care funding priority since then. Last year, we obtained a quadrupling of the funding for the territories for FY99.

The President's FY00 budget again proposes continuing this over the longer term.

The proposal to enable disabled workers to buy into Medicaid will exempt such buy-ins from the cap to enable the proposal to apply to disabled workers in the territories.

Q. Will the proposed increase in the cigarette tax apply to the territories?

A. The purpose of the proposal is to discourage health damaging and budgetarily costly cigarette use, especially among teenagers, and generate revenue for programs that incur those costs.

We should discourage health damaging and budgetarily costly smoking, especially among teens in the territories as well as the States. The territories are covered by the programs that would be funded by the tax. The territories should be treated equally in this proposal.

Q. Will the proposal to increase Empowerment Zones funding include the territories?

A. The territories have not been eligible to be Empowerment Zones because, in terms of taxes -- a major aspect of Empowerment Zone benefits, they have been super empowerment zones, with tax incentives for investment greater than those that apply in Empowerment Zones. These incentives are Sections 936 and 30A -- which provide tax credits based on income attributed to territories and based on wages, capital improvements, and local tax payments in Puerto Rico respectively. With the repeal of these incentives effective in full as of 2006, there will not be the rationale for not enabling the territories to be eligible for Empowerment Zones designation. The Administration is proposing to extend Section 30A beyond 2005 but the Congress has not accepted our Sec. 30A extension proposals twice already.

We, will, therefore, propose Empowerment Zone eligibility for the territories as the Secs. 936 and 30A benefits end.

Q. Will the proposal to provide additional relief to Caribbean and Central American areas devastated by recent hurricanes include additional aid for Puerto Rico, which endured its worst disaster in 70 years?

A. We are already providing special assistance for the recovery of Puerto Rico. The President's commitment is to be with Puerto Ricans every step of the way to full recovery. Some of the measures will be outlined in a long-term recovery plan prepared by a presidential task force -- one of the few times such an effort has ever been undertaken -- to be released shortly.

We will address needs that cannot be met through existing appropriations in our legislative proposal for additional relief.

Q. Will the President's proposal to increase the national minimum wage apply to the Northern Mariana Islands and American Samoa?

A. It would phase in coverage of the Northern Marianas consistent with the Administration's bill on the issue.

The minimum wage law includes a special process for determining wage rates in Samoa, which is very underdeveloped economically -- much less developed, for example, than the Marianas. There is some concern that the committee process for developing wages in Samoa to the national level is not accomplishing its purpose. We are going to work with Delegate Faleomavaega and Governor Sunia to ensure the intent of the law is being met and wages are increasing adequately.

Q. Will the President's proposal to obtain traditional trade negotiating authority include provisions to provide a role for the territories, which do not vote for President or have votes in the Congress, on agreements that substantially affect them?

A. The territories do not have votes in: the selection of the President, who negotiates trade agreements; the Senate, which approves treaties; or the Congress, which approves implementation legislation. They are also treated differently than the States in many trade laws and substantially affected by trade agreements, especially those with their Caribbean and Pacific regional neighbors. But it is important part of our constitutional system that the United States as a country speaks with one voice -- that of the President -- in dealing with other countries.

Still, the Administration will explore ways of increasing consultation with the unrepresented territories in trade matters that would substantially affect them consistent with preserving other national interests.

Q. Will the President's proposal to support the rights of workers apply to the tens of thousands of foreign workers in the Northern Mariana Islands, who are paid far less than the national minimum wage and who have been abused by employers to a shocking extent?

A. The Administration has proposed phasing immigration and minimum wage laws into the islands, consistent with the agreement they made when joining the U.S. family. This would eliminate the unique problem in the islands. We have also taken a number of initiatives to increase Federal enforcement of the rights that do apply, including increasing the access of the workers to Federal enforcement personnel specially detailed to the islands. These measures are detailed in a report released last month by our interagency task force.

We will also include measures to ensure the rights of workers in the Northern Marianas in our proposal.

Q. What will the Administration do to make up for many of the benefits of the President's initiatives not applying in Puerto Rico because they are provided by tax credits? Some examples are the Welfare to Work Tax Credit expansion, the expanded Child and Dependent Care Tax Credit, the Long-term Care Credit, the Stay at Home Credit, the Disabled Workers Credit, the Workplace Education Credit, and the New Markets Credit.

A. The tax code exempts Puerto Ricans from having to pay tax on local source income. They pay a locally-determined tax to the insular government instead. The benefits of the President's initiatives would only be appropriate to apply to the extent Puerto Ricans paid the underlying tax.

Q. What will the Administration do to make up for the revenue that the Virgin Islands and Guam, which already face major deficits, will lose because the tax credits the President has proposed would automatically apply in the islands since their income taxes are a 'mirror' of Federal rates by Federal law?

A. Guam and the Virgin Islands have the authority to enact local taxes to make up the revenue. The social and economic benefits of the President's initiatives should apply to these U.S. citizens as well as to the citizens of the States.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Mary L. Smith (CN=Mary L. Smith/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:28-JAN-1999 19:30:20.00

SUBJECT: Revised Final 7:00pm

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Laura Emmett (CN=Laura Emmett/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TEXT:

----- Forwarded by Mary L. Smith/OPD/EOP on 01/28/99
07:29 PM -----

Jordan Tamagni
01/28/99 07:05:10 PM
Record Type: Record

To: Jonathan Orszag/OPD/EOP, Mary L. Smith/OPD/EOP, Ruby Shamir/WHO/EOP
cc:
Subject: Revised Final 7:00pm

Final
Tamagni/Shesol

PRESIDENT WILLIAM J. CLINTON
RADIO ADDRESS ON EQUAL PAY
THE WHITE HOUSE
January 30, 1999

Good morning. Americans have always believed that people who work hard should be able to provide for themselves and their families. That is a fundamental part of America's basic bargain. Today, I want to talk to you about what we are doing to make sure that bargain works for all of our people, by ensuring that women and men earn equal pay for equal work.

We are living in a time of remarkable promise. Our economy is the strongest in a generation -- with nearly 18 million new jobs, the lowest unemployment in 29 years, family incomes rising by \$3,500, and the greatest real wage growth in over two decades. I believe we have an opportunity -- and an obligation -- to make sure that every American can benefit from this moment of prosperity.

One of the most important ways we can meet this challenge is by putting an end to wage discrimination. When President Kennedy signed the Equal Pay Act thirty-five years ago, women were entering the workforce in ever-increasing numbers -- but their work was undervalued. At the time, for every dollar a man brought home to his family in his paycheck, a woman doing the same job earned only 58 cents.

We have made a lot of progress since those days. Last June, the President's Council of Economic Advisors, reported that the gender gap has narrowed considerably -- in fact, we have nearly cut it in half.

Today, women earn 76 cents for every dollar a man earns.

We can and should be proud of this progress -- but 76 cents on the dollar is only three quarters of the way there. Americans cannot be satisfied until we are all the way there.

One big reason that the pay gap persists -- despite women's gains in education and experience -- is the demeaning practice of wage discrimination in our workplaces. There are still too many women whose work is not being fully valued by employers.

Make no mistake: When a woman is denied equal pay, it doesn't just hurt her -- it hurts her family. Between 1995 and 1996 alone, the number of families with two working parents increased by nearly two million. And in hundreds of thousands of families, the mother is the only breadwinner.

Just think what that 24 percent wage gap means in real terms. Over the course of a working year, it means hundreds, even thousands of bags of groceries ... visits to the doctor ... rent and mortgage payments. Over the course of a working life, it can mean hundreds of thousands of dollars ... smaller pensions ... and less to put aside for retirement.

To prepare our nation to meet the challenges of the 21st Century, we must do more to ensure equal pay, equal opportunity, and equal dignity for working women.

Today, I am pleased to announce a new \$14 million Equal Pay Initiative, included in my balanced budget, to help the Department of Labor and the Equal Employment Opportunity Commission expand opportunities in the workplace for women and make wage discrimination a thing of the past. With more resources to identify wage discrimination, to educate employers and workers about their rights and responsibilities, and to bring more women into better-paying jobs, we will be closer than ever to making equal pay a reality for every American.

In my State of the Union address, I called on Congress to ensure equal pay for equal work -- and it brought members of both parties to their feet in an unanimous show of support. We know that equal pay is not a political issue -- it is a matter of principle, a question of what kind of country we want American to be today, and in the 21st Century, when our daughters grow up and enter the workplace.

So once again, I ask the Congress to take the next step and pass the Paycheck Fairness Act, sponsored by Senator Daschle and Representative DeLauro -- legislation that strengthens enforcement of our equal pay laws, expands opportunity for women, and helps working families to thrive.

If we meet this challenge, if we value the contributions of all America's workers, then we will be a more productive, prosperous and proud nation in the 21st century.

Thanks for listening.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Barry J. Toiv (CN=Barry J. Toiv/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:28-JAN-1999 20:21:40.00

SUBJECT: CBO surpluses

TO: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Sylvia M. Mathews (CN=Sylvia M. Mathews/OU=OMB/O=EOP @ EOP [OMB])
READ:UNKNOWN

TO: Linda Ricci (CN=Linda Ricci/OU=OMB/O=EOP @ EOP [OMB])
READ:UNKNOWN

TO: Martha Foley (CN=Martha Foley/OU=WHO/O=EOP @ EOP [WHO])
READ:UNKNOWN

TO: Melissa G. Green (CN=Melissa G. Green/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TO: Jake Siewert (CN=Jake Siewert/OU=OPD/O=EOP @ EOP [OPD])
READ:UNKNOWN

TEXT:

CBO Projects \$2.6T Federal Surplus

By ALAN FRAM Associated Press Writer

fuel this

Office projected

trillion over the

more than was

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Security is

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from the

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for a bitter

lawmakers should

WASHINGTON (AP) -- Unleashing figures certain to year's budget fight, the Congressional Budget Thursday that federal surpluses will total \$2.6 next decade, hundreds of billions of dollars expected just five months ago.

Significantly, the nonpartisan budget office discounting the mammoth annual surpluses Social running, the rest of the budget will fall into

Over the decade ending in 2009, CBO said nearly the \$2.6 trillion -- \$787 billion -- would come non-Social Security side of the budget. The mere that enormous sum is already opening the door partisan fight over what to do with that money.

After a year of President Clinton insisting that

in Congress
Social Security
program.

the rest of the
Thursday.

balance the
Domenici,

\$787 billion in
government doesn't need
`We better send it
will spend it. It

Democrat on the
Clinton's

our nation's
means saving
cutting taxes for

Clinton proposed
years for Social
-- about \$1.7
program for the
accounts for Americans;

reference to cutting
accounts plus other
care, which

`save Social Security first,' many Republicans
generally agree that surpluses generated by
should be set aside for the massive retirement

But Republicans have signaled they want to use
surplus for tax cuts, a position they reiterated

`We've clearly succeeded in our long battle to
budget,' Senate Budget Committee Chairman Pete
R-N.M., said in a statement.

`Now we have a new test -- what to do with the
excess federal tax revenues, money the
to maintain current services,' Domenici said.
back to the taxpayers quickly, or Washington
shows we can save SS and cut taxes.'

Sen. Frank Lautenberg of New Jersey, the top
Senate Budget Committee, said the figures showed
policies were working.

`Now we have to build on them and prepare for
future,' Lautenberg said in a statement. `That
Social Security, strengthening Medicare and
ordinary Americans to encourage savings.'

In his State of the Union address on Jan. 19,
setting aside \$2.7 trillion over the next 15
Security. He would use the rest of the surplus
trillion -- for Medicare, the health insurance
elderly; to help set up private retirement
and for defense and domestic programs.

An aide to Lautenberg said the senator's
taxes indicated support for the retirement
reductions like tax breaks for long-term health

2000 on Monday.
projections, which

expected for
economy was
faster than
produced a \$70
last Sept. 30, the first
ever.

1999 surplus
that figure
above the 1998

Through the
estimated that the figure
2009, the last year for

trillion in surpluses
lower
the budget then: a

Clinton also has proposed.

Clinton will release his own budget for fiscal
It will include his own updated surplus
analysts expect to roughly track the CBO figures.

The Congressional Budget Office numbers were
weeks as analysts concluded that the healthy
continuing to pour money into federal coffers
previously expected. That same phenomenon
billion surplus for fiscal 1998, which ended
federal surplus in three decades and the largest

Even so, the new numbers are impressive.

Just three weeks ago, Clinton announced that the
would be at least \$76 billion. But CBO projected
would be \$107 billion -- more than 50 percent
total.

CBO projected a 2000 surplus of \$131 billion.
following nine years, the budget office
would rise annually, hitting \$381 billion in
which numbers were calculated.

Last August, the budget office projected \$1.5
between 1999 and 2008. It also projected much
surpluses for the non-Social Security part of
10-year total of just \$31 billion.

□#AP-NY-01-28-99 1925EST