

NLWJC - KAGAN

EMAILS RECEIVED

ARMS - BOX 052 - FOLDER -010

[06/14/1999-06/15/1999]

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	WAVES to Elena Kagan re Confirmation [partial] (1 page)	06/14/1999	P6/b(6), b(7)(C), b(7)(E), b(7)(F)
002. email	Richard Socarides to Elena Kagan re no subject (1 page)	06/14/1999	Personal Misfile
003. email	Michael Waldman to Elena Kagan re Year (1 page)	06/14/1999	Personal Misfile
004. email	Peter Rundlet to Elena Kagan et al re Brief [partial] (1 page)	06/15/1999	P6/b(6)

COLLECTION:

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

FOLDER TITLE:

[06/14/1999-06/15/1999]

2009-1006-F

kc200

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]
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- 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: Richard Socarides (CN=Richard Socarides/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:14-JUN-1999 11:52:09.00

SUBJECT: Re:

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

TEXT:

Unable to convert ARMS_EXT:[MESSAGE.D50]ARMS28880127U.136
The following is a HEX dump of the file:

Withdrawal/Redaction Marker

Clinton Library

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001. email	WAVES to Elena Kagan re Confirmation [partial] (1 page)	06/14/1999	P6/b(6), b(7)(C), b(7)(E), b(7)(F)

COLLECTION:

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

FOLDER TITLE:

[06/14/1999-06/15/1999]

2009-1006-F
kc200

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[001]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: WAVES_CONF@PMDF.EOP.GOV (WAVES_CONF@PMDF.EOP.GOV [UNKNOWN])

CREATION DATE/TIME:14-JUN-1999 15:14:35.00

SUBJECT: WAVES Confirmation

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

TEXT:

ADDRESSEES: ELENA_KAGAN

SUBJECT: CONFIRMATION: APPT. REQUEST FOR KAGAN, ELENA

FROM: WAVES OPERATIONS CENTER - ACO:

P6/(b)(6), (b)(7)(c), (b)(7)(f), (b)(7)(e)

Date: 06-14-1999

Time: 15:11:20

This message serves as confirmation of an appointment for the visitors listed below.

Appointment With: KAGAN, ELENA
Appointment Date: 6/15/99
Appointment Time: 1:00:00 PM
Appointment Room: WW
Appointment Building: WH
Appointment Requested by: KAGAN ELENA
Phone Number of Requestor: 65584
WAVES APPOINTMENT NUMBER: U91561

If you have any questions regarding this appointment, please call the WAVES Center at 456-6742 and have the appointment number listed above available to the Access Control Officer answering your call.

TOTAL NUMBER OF NAMES SUBMITTED FOR ENTRY : 1
TOTAL NUMBER OF NAMES OF CLEARED FOR ENTRY: 1

COLLERY, LIZA

P6/(b)(6)

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jose Cerda III (CN=Jose Cerda III/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:14-JUN-1999 18:06:12.00

SUBJECT: one more

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

READ:UNKNOWN

TO: Leanne A. Shimabukuro (CN=Leanne A. Shimabukuro/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

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

READ:UNKNOWN

TEXT:

Unable to convert ARMS_EXT:[MESSAGE.D65]ARMS20261727H.136

The following is a HEX dump of the file:

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Robert J. Pellicci@EOP@LNGTWY@LNGTWY (Robert J. Pellicci@EOP@LNGTWY@LNGTWY

CREATION DATE/TIME:14-JUN-1999 17:34:17.00

SUBJECT: Justice letter on Child Custody Bill

TO: Elena Kagan@eop (Elena Kagan@eop [OPD])

READ:UNKNOWN

TEXT:

Message Creation Date was at 14-JUN-1999 17:30:00

FYI -- the chronology of the Administration's position on the child custody bill in the 105th Congress was as follows:

June 24, 1998 - Justice letter (the one that is being circulated for clearance) was sent to the House Judiciary Committee. The letter opposed the bill as drafted.

July 8, 1998 - Chief-of-Staff Bowles sends a letter to Sen. Leahy on the Senate version of the bill strongly opposing the legislation.

July 14, 1998 - SAP noting that if the bill fails to address the Administration's concerns, the President's senior advisers would recommend that he veto it.

Last year's bill passed the House 276-150, but went no further in the Senate.

----- Forwarded by Robert J. Pellicci/OMB/EOP on 06/14/99
05:24 PM -----

Robert J. Pellicci
06/14/99 04:52:35 PM
Record Type: Record

To: See the distribution list at the bottom of this message
cc: Sandra Yamin/OMB/EOP@EOP, James J. Jukes/OMB/EOP@EOP, Janet R. Forsgren/OMB/EOP@EOP
Subject: Justice letter on Child Custody Bill

You will shortly receive via fax Justice's proposed letter for tomorrow morning's markup of HR 1218, the Child Custody Protection Act. This legislation would make it illegal to transport minors across state lines to obtain an abortion in order to circumvent parental consent laws.

The Justice letter opposes the legislation and attaches its letter from last year on HR 3682, an almost identical bill from 105th Congress.

Comments are due at 5:30 p.m.

Message Sent

To:

KAGAN_E@A1@CD@LNGTWY

Sylvia M. Mathews/OMB/EOP@EOP

Adrienne C. Erbach/OMB/EOP@EOP

Daniel N. Mendelson/OMB/EOP@EOP

Sarah Wilson/WHO/EOP@EOP

Jennifer M. Luray/WHO/EOP@EOP

Nicole R. Rabner/WHO/EOP@EOP

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jose Cerda III (CN=Jose Cerda III/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:14-JUN-1999 13:06:36.00

SUBJECT: Summary of Amendments filed is now posted on rules web page

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

READ:UNKNOWN

TO: Leanne A. Shimabukuro (CN=Leanne A. Shimabukuro/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

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

READ:UNKNOWN

CC: Cathy R. Mays (CN=Cathy R. Mays/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

CC: Courtney O. Gregoire (CN=Courtney O. Gregoire/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TEXT:

I'll also send around a hard copy to everyone...jc3

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. email	Richard Socarides to Elena Kagan re no subject (1 page)	06/14/1999	Personal Misfile

COLLECTION:

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

FOLDER TITLE:

[06/14/1999-06/15/1999]

2009-1006-F
kc200

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RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Cathy R. Mays (CN=Cathy R. Mays/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:14-JUN-1999 15:05:33.00

SUBJECT: DPC Staff Meeting

TO: Skye S. Philbrick (CN=Skye S. Philbrick/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

TO: Paul J. Weinstein Jr. (CN=Paul J. Weinstein Jr./OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

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

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

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

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

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

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

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

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

TO: Christopher C. Jennings (CN=Christopher C. Jennings/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

TO: J. Eric Gould (CN=J. Eric Gould/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

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

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

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

TO: Essence P. Washington (CN=Essence P. Washington/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

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

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

READ:UNKNOWN

TO: Ruby Shamir (CN=Ruby Shamir/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

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

READ:UNKNOWN

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

READ:UNKNOWN

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

READ:UNKNOWN

TO: Andrea Kane (CN=Andrea Kane/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TO: Teresa M. Jones (CN=Teresa M. Jones/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TO: Courtney O. Gregoire (CN=Courtney O. Gregoire/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

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

READ:UNKNOWN

TO: Jose Cerda III (CN=Jose Cerda III/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

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

READ:UNKNOWN

TEXT:

We will be holding the DPC Staff Meeting tomorrow, June 15, at 9:15 a.m.
in Room 211, OEOB.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. email	Michael Waldman to Elena Kagan re Year (1 page)	06/14/1999	Personal Misfile

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OA/Box Number: 250000

FOLDER TITLE:

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June 14, 1999

HOUSE GUN LEGISLATION EVENT

DATE: June 15, 1999
LOCATION: Rose Garden
BRIEFING TIME: 12:15pm – 12:35pm
EVENT TIME: 12:45pm – 1:30pm
FROM: Larry Stein, Bruce Reed

I. PURPOSE

To announce the findings of a Justice Department report showing that, since taking effect in 1994, the Brady Law has blocked over 400,000 illegal gun sales; and to challenge the House of Representatives to pass common-sense gun legislation.

II. BACKGROUND

The Justice Department's Bureau of Justice Statistics (BJS) will release a study showing that, under the interim provisions of the Brady Law, approximately 312,000 applications to buy handguns were rejected because background checks revealed the purchaser was prohibited by state or federal law from buying a handgun. The interim provisions of the Brady Law, which were in effect from 3/1/94 to 11/29/98, allowed designated state and local law enforcement officials up to five business days to conduct background checks of all prospective handgun purchasers.

The Justice Department will also report today that, during its first six months of operation, the National Instant Criminal Background Check System (NICS) blocked an estimated 90,000 illegal gun sales. The NICS, which was mandated by the Brady Law and replaced its interim provisions last November, allows law enforcement officials access to a more inclusive set of records than was previously available, and applies not just to handguns but to all firearms.

You will also call on the House to pass effective gun legislation that:

1. Closes the Gun Show Loophole.
2. Raises the Age of Handgun Ownership From 18 to 21.
3. Includes the Same Common Sense Gun Measures Already Passed by the Senate.

You will especially highlight the impact of gun lobby efforts to reduce the amount of time law enforcement has to complete a Brady background check at gun shows. Although more than 70 percent of background checks are completed within minutes, and nearly 95 percent within a 2-hour period, the remaining 5 percent take longer for a reason: they are much more likely to turn up a problem and result in a denial. If proposals to shorten background checks at gun shows to between 24 and 72 hours were applied to the NICS, the FBI estimates that between 9,000 and 17,000 prohibited persons would have been able to buy guns over the past six months.

III. PARTICIPANTS

Briefing Participants:

Larry Stein
Bruce Reed
Janet Murguia
Jose Cerda
Paul Glastris

Program Participants:

Rep. Carolyn McCarthy (D-NY)
Rep. Connie Morella (R-MD)

Other Stage Participants:

IV. PRESS PLAN

Open Press.

V. SEQUENCE OF EVENTS

- **YOU** will be announced into the Rose Garden, accompanied by the Members of Congress.
- **YOU** will make remarks and introduce Rep. Carolyn McCarthy.
- Rep. Carolyn McCarthy will make remarks and introduce Rep. Connie Morella.
- Rep. Connie Morella will make remarks.
- **YOU** will make concluding remarks and depart.

VI. REMARKS

To be provided by speechwriting.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Oscar Gonzalez (CN=Oscar Gonzalez/OU=OMB/O=EOP [UNKNOWN])

CREATION DATE/TIME:14-JUN-1999 16:25:32.00

SUBJECT: LRM OGG21 - - LABOR Testimony on OSHA's Draft Safety and Health Program Ru

TO: Janet R. Forsgren (CN=Janet R. Forsgren/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Brian S. Mason (CN=Brian S. Mason/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

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

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

TO: Courtney B. Timberlake (CN=Courtney B. Timberlake/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

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

TO: Melissa N. Benton (CN=Melissa N. Benton/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

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

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

TO: Steven D. Aitken (CN=Steven D. Aitken/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

TO: Cordelia W. Reimers (CN=Cordelia W. Reimers/OU=CEA/O=EOP@EOP [CEA])
READ:UNKNOWN

TO: Edward A. Brigham (CN=Edward A. Brigham/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

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

TO: Larry R. Matlack (CN=Larry R. Matlack/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: clrm (clrm @ doc.gov @ inet [UNKNOWN])
READ:UNKNOWN

CC: jwedekind (jwedekind @ nlr.gov @ inet [UNKNOWN])
READ:UNKNOWN

CC: cla (cla @ sba.gov @ inet [UNKNOWN])
READ:UNKNOWN

CC: lrm@os.dhhs.gov (lrm@os.dhhs.gov @ inet [UNKNOWN])

READ:UNKNOWN

CC: justice.lrm (justice.lrm @ usdoj.gov @ inet [UNKNOWN]) (OA)
READ:UNKNOWN

TEXT:

Following is LRM ID: OGG21. Please read and respond to it by 3:00 p.m.,
Tomorrow, Tuesday, June 15, 1999.

NOTE TO EOP STAFF: You will not receive a hard copy of this document.
----- Forwarded by Oscar Gonzalez/OMB/EOP on 06/14/99

04:18 PM -----

LRM ID: OGG21
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

Monday, June 14, 1999

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution
below
FROM: Janet R. Forsgren (for) Assistant Director for
Legislative Reference
OMB CONTACT: Oscar Gonzalez
PHONE: (202)395-7754 FAX: (202)395-6148
SUBJECT: LABOR Testimony on OSHA's Draft Safety and Health Program
Rule

DEADLINE: 3:00 Tuesday, June 15, 1999
In accordance with OMB Circular A-19, OMB requests the views of your
agency on the above subject before advising on its relationship to the
program of the President. Please advise us if this item will affect
direct spending or receipts for purposes of the "Pay-As-You-Go" provisions
of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: Attached is prepared testimony to be presented before the House
Committee on Small Business by Charles Jeffress, the Assistant Secretary
of Labor for Occupational Safety and Health, on Thursday, June 17 at 10:30
am.

DISTRIBUTION LIST

- AGENCIES:
61-JUSTICE - Jon P. Jennings - (202) 514-2141
80-National Labor Relations Board - John E. Higgins Jr. - (202) 273-2910
52-HEALTH & HUMAN SERVICES - Sondra S. Wallace - (202) 690-7760
25-COMMERCE - Michael A. Levitt - (202) 482-3151
107-Small Business Administration - Jane P. Merkin - (202) 205-6700

- EOP:
Larry R. Matlack
Melissa N. Benton
Daniel J. Chenok
Stuart Shapiro
Edward A. Brigham
Courtney B. Timberlake
Cordelia W. Reimers
Karen Tramontano

Steven D. Aitken
Elena Kagan
Sarah Rosen Wartell
Brian S. Mason
Broderick Johnson
Janet R. Forsgren

LRM ID: OGG21 SUBJECT: LABOR Testimony on OSHA's Draft Safety and Health Program Rule
RESPONSE TO
LEGISLATIVE REFERRAL
MEMORANDUM

If your response to this request for views is short (e.g., concur/no comment), we prefer that you respond by e-mail or by faxing us this response sheet. If the response is short and you prefer to call, please call the branch-wide line shown below (NOT the analyst's line) to leave a message with a legislative assistant.

You may also respond by:

- (1) calling the analyst/attorney's direct line (you will be connected to voice mail if the analyst does not answer); or
- (2) sending us a memo or letter

Please include the LRM number shown above, and the subject shown below.

TO: Oscar Gonzalez Phone: 395-7754 Fax: 395-6148
Office of Management and Budget
Branch-Wide Line (to reach legislative assistant):
395-7362

FROM: _____ (Date)
 _____ (Name)
 _____ (Agency)
 _____ (Telephone)

The following is the response of our agency to your request for views on the above-captioned subject:

- _____ Concur
- _____ No Objection
- _____ No Comment
- _____ See proposed edits on pages _____
- _____ Other: _____
- _____ FAX RETURN of _____ pages, attached to this response sheet

- shptest4.wpd===== ATTACHMENT 1 =====
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:
Unable to convert ARMS_EXT:[ATTACH.D14]ARMS26365527X.136 to ASCII,
The following is a HEX DUMP:

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draft -- June 14, 1999 -- 11:15 am

**STATEMENT OF CHARLES N. JEFFRESS
ASSISTANT SECRETARY OF LABOR
FOR OCCUPATIONAL SAFETY AND HEALTH
before the
HOUSE COMMITTEE ON SMALL BUSINESS**

June 17, 1999

Mr. Chairman, Members of the Committee, thank you for inviting me to testify about OSHA's effort to promulgate a rule on safety and health programs. Safety and health programs are systematic, common sense approaches to managing workplace safety and health to provide effective protection for workers. They are widely recognized as fruitful ways to reduce the number of job-related injuries and illnesses and the number of job-related fatalities. And in the words of Occidental Chemical's Vice President for Health, Safety and Responsible Care, Stephen Kemp, safety and health programs "not only help you improve safety, but [also help] in many other areas of your business. We firmly believe that good safety performance leads to higher productivity, better product quality and overall improved performance as a company." However, even with OSHA's growing emphasis on safety and health programs, widespread action at the State level, and strong insurance company encouragement, many employers either are not aware of the benefits of such programs or have not elected to establish their own programs voluntarily.

OSHA's interest in workplace safety and health programs has grown steadily since the early 1980's, when the Agency first developed its Voluntary Protection Program (VPP) to recognize companies in the private sector with outstanding records in the area of worker safety and health. It became apparent that these worksites, which had achieved injury and illness rates

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markedly below those of other companies in their industries, were relying on safety and health programs to produce those results. At VPP worksites, which today routinely achieve injury and illness rates as much as 60 percent below those of other firms in their industry, safety and health programs--and thus the protection of the safety and health of the workforce--have become self-sustaining systems that are fully integrated into the day-to-day operations of the facility. At these worksites, worker safety and health, instead of being relegated to the sidelines or delegated to a single individual, is a fundamental part of the company's business, a value as central to success as producing goods and services or making a fair profit.

The evidence has continued to accumulate as OSHA's stakeholders from industry, labor, State governments, small businesses, trade associations, insurance companies and safety and health organizations have all gained experience with safety and health management systems. OSHA has applied what it learned about safety and health programs from VPP companies and our other stakeholders to smaller businesses, through the addition of the agency's Safety and Health Achievement Recognition Program (SHARP), which is directed at high hazard businesses with 250 or fewer employees.

In 1989, OSHA published its voluntary *Safety and Health Programs Management Guidelines* to help employers establish and maintain management systems to protect their workers. OSHA's guidelines and others like them have helped thousands of companies adopt systematic, ongoing approaches to safety and health, which achieve injury and illness rates markedly below those of other companies in their industries, reduce their workers' compensation costs, improve employee morale, and increase worksite productivity. In fact, OSHA has found

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that programs implemented by individual employers reduce total job-related injuries and illnesses by an average of 45 percent and lost worktime injuries and illnesses by an average of 75 percent. For example, Mereen-Johnson Machine Co. worked with its 95 employees in Minneapolis, Minnesota to implement a program and achieve a lost workday injury rate 60 percent below the industry average. Applied Engineering, Inc., a manufacturer of specialties materials with 74 employees, located in Yankton, SD, reduced its lost workday injury rate from 6.0 in 1993 to 0.0 in 1997, a success the company's president attributes to implementing a safety and health program.

Today, thirty-two states have some form of safety and health program provision, though few are as comprehensive as OSHA's draft proposed rule. In four States that mandate comprehensive programs that have core elements similar to those in OSHA's draft proposal and that cover businesses of all sizes within the State, injury and illness rates fell by nearly 18% over the five years after implementation, in comparison with national rates over the same period. Several States have studied the effectiveness of these programs and found that average workers' compensation costs were reduced by as much as 20 percent per year, and that these benefits were even greater several years later when the program had matured. For example, Colorado evaluated a program that provides premium discounts to firms instituting safety and health programs. Over 50 percent of the more than 500 participants had fewer than 100 employees. Colorado's review found that in all of the five years after the program was established, lost work-time injury rates declined by at least 10% per year and the costs of workers' compensation claims declined by at least 20% per year. The State of North Dakota determined that participants

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in its program, which provided premium discounts to employers who implemented safety and health programs, reduced lost work-time injury claims by 42 percent over 4 years, with significant reductions occurring in each year of the program. The Texas Workers' Compensation Commission implemented requirements for safety and health programs for firms identified as "extra-hazardous." The program averaged 325 participants per year, and these employers reduced injuries and illnesses by an average of 61 percent in each year of the program's existence.

Experience with safety and health programs demonstrates that systematic, common sense efforts to protect workers have a direct impact on workplace injury and illness rates and on compliance with existing worker protections. However, more than 6 million reportable injuries and illnesses continue to occur each year. More than 6000 job-related fatalities are reported to BLS annually, with tens of thousands more job-related fatalities resulting from chronic occupational illnesses. The common sense advantages provided by safety and health programs will reduce these injuries, illnesses, fatalities and associated workers' compensation costs, bringing a clear new benefit to the many establishments that have yet to establish such programs.

COMMON SENSE SOLUTIONS

It is common sense to apply proven solutions to basic problems. Common sense has not only led many businesses to implement safety and health programs, but has also encouraged business associations to adopt their own model programs and recommend them to their members.

The National Federation of Independent Business's (NFIB) Ohio chapter has developed a

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comprehensive document entitled *Workplace Safety Program Guidelines*, which explains to NFIB members how to design and implement an effective safety program. The guidelines include the same elements that OSHA has identified as the keys to a successful program: leadership by top management; responsibility and accountability by managers, supervisors and employees; training in safety and health; identifying, reporting, investigating and controlling hazards; and involvement of employees. According to the NFIB guidelines, "Serious accidents or injuries can be very disruptive to any successful operation and to the lives of people involved. An important step that an employer can take to effectively prevent these losses is the development of an organized safety plan or accident prevention program."

The Synthetic Organic Chemical Manufacturers Association (SOCMA) has also developed *SOCMA's Model Safety and Health Program*, a document intended to help member companies, many of which are small, implement their own safety and health programs. Like the NFIB guidelines, SOCMA's model program calls for: management commitment and employee involvement; worksite analysis; hazard prevention and control; and safety and health training. The manual recommends that a company tailor its safety and health program to the company's site-specific needs and argues that "SOCMA member companies who incorporate this program into their operations will receive benefits by:

- reducing injuries, illnesses, accidents and property loss;
- saving time and resources by not having to develop a program from scratch;
- demonstrating management commitment to safety and health;
- giving employees an alternative means to address safety and health concerns before calling OSHA
- avoiding a wall-to-wall OSHA inspection;
- assisting in conforming with the Responsible Care Employee Health and Safety Code."

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Similar approaches are found in the safety and health programs advanced by other professional associations, trade associations and employers. The National Fire Protection Association, the American Society of Safety Engineers, the American Dental Association, the National Spa & Pool Institute, the BF Goodrich Specialty Chemicals division, the American Industrial Hygiene Association, and Argonaut Insurance Company have all developed model safety and health programs. OSHA has borrowed directly from these associations and employers in fashioning our draft safety and health programs rule. In fact, many companies have already put such model programs to good use. For example, in 1994 the Ryder Company instituted a safety and health program modeled after programs advocated by the International Loss Control Institute, the National Safety Council, and OSHA's own 1989 *Safety and Health Program Guidelines*. Between 1994 and 1998, Ryder reduced lost time cases by 50 percent, lost workdays by 58 percent and its lost workday incidence rate by 42 percent.

Earlier this year, the National Association of Manufacturers, in testimony before the Senate Subcommittee on Employment, Safety and Training, echoed the sentiments of those who proclaim the value of safety and health programs. At the hearing, Robert Cornell from Mon Valley Petroleum in McKeesport, Pennsylvania, told the subcommittee that, "Today, we have an effective safety program resulting in fewer injuries and reduced workers' compensation costs." Mr. Cornell's company used a comprehensive analysis of its safety and health violations and employee involvement proactively to address potential hazards. As a result, they reduced lost workdays from 70 between 1992 and 1994 to zero from 1995 through 1998. Mr. Cornell did not testify on behalf of OSHA's proposal. However, he illustrated quite effectively the value of

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instilling safety and health in the culture of his workplace.

Although the preceding examples generally involve companies that implemented programs voluntarily, the results for mandatory programs are equally impressive. Data from the four States with mandates covering most employers in the State show an 18 percent decline in injury and illness rates relative to national rates in the 5 year period after they required employers to adopt safety and health programs. OSHA's enforcement experience, which has emphasized safety and health programs during inspections at establishments of all sizes and in many different industries, also points overwhelmingly to the effectiveness of the programmatic approach. The General Accounting Office, in 1992, concurred with earlier OSHA assessments of the value of comprehensive safety and health programs. GAO also said consideration should be given to requiring high risk employers to have safety and health programs "because the potential number of lives saved or injuries and illnesses averted is high." OSHA believes that every employer, not just high risk employers, should be covered by such a requirement, but is continuing to examine this issue.

At its heart, a safety and health program promotes the exercise of reasonable diligence in the workplace in order to protect workers. When Congress enacted and President Nixon signed the bipartisan OSH Act in 1970, they imposed on employers a general duty to provide employees with a workplace free of serious recognized hazards and a specific duty to adhere to rules promulgated by OSHA. Because State occupational safety and health and workers' compensation laws provided insufficient incentive to protect workers, the OSH Act, as some courts have held, required employers to exercise reasonable diligence in complying with these

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duties. Through its draft proposed rule, OSHA seeks to assure that employers exercise reasonable diligence in protecting their workers.

THE DRAFT PROPOSED RULE

OSHA has worked extensively with stakeholders from industry, labor, safety and health organizations, State governments, trade associations, insurance companies and small businesses to develop its draft proposal. The draft rule reflects the experience and suggestions of many of these participants and would require that safety and health programs include five “core” elements: management leadership and employee participation; hazard identification and assessment; hazard prevention and control; training; and evaluation of the program’s effectiveness. The elements are simple and straightforward. Reduced to their basic level, the elements require an employer to work credibly with its employees to find workplace hazards and fix them, and to ensure that workers, supervisors and managers can recognize a hazard when they see it. The rule creates no new obligations for employers to control hazards that they have not already been required to control under the General Duty Clause of the OSH Act or existing OSHA standards.

The required elements in OSHA’s draft mirror those included in the models produced by the NFIB of Ohio, SOCMA, and many other associations, insurance companies and employers. As those on the front lines have found, the elements all support each other. All five must be present to ensure success. They are common sense.

The Agency recognizes that many companies have already embraced the program

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approach to managing safety and health in their workplaces. Because the draft proposed rule only includes those elements that are essential for program effectiveness, and because the rule is framed in broad and flexible performance language, OSHA believes that existing programs that are effective will already meet the proposal's requirements. To reassure those employers, OSHA has incorporated a grandfather clause into the draft proposed rule that would allow such programs to be "grandfathered in."

Program Elements

Management Leadership and Employee Involvement. A safety and health program will only work if management is fully committed to it and communicates that commitment to the entire organization. According to Michael Seitel from Norwalt Design, a 38-employee, New Jersey company that manufactures high-speed assembly machinery for the plastics industry, "One of the biggest things, I think, in regard to the safety and health program that a company needs is management commitment ... you're going to save money on your insurance and on workers not being out due to injury."

Employee involvement means actively engaging front-line employees, who are closest to workplace operations and have the highest stake in preventing job-related accidents, in developing, implementing and evaluating the safety and health program. In the words of Bill Harvey, Senior Vice President of Alliant (formerly Wisconsin Power & Light), "you must build a corporate culture that conditions employees to think of safety as their job, not someone else's job." According to the NFIB of Ohio's guidelines, "Many times employees who are most

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familiar with a job will be excellent sources of solutions to safety problems, just as they are for production or quality problems.” Employee involvement spreads the responsibility for safety and health and ensures that more eyes seek and identify problems and more perspectives are used to develop solutions. When OSHA held stakeholder meetings on the draft proposal in 1996, there was widespread agreement that employee participation is crucial to an effective safety and health program.

Hazard Identification and Assessment. Hazard identification and assessment means, among other things, that the employer reviews workplace safety and health information, inspects the workplace, identifies hazards, and prioritizes covered hazards for elimination or control. Front-line employees are empowered to avert injuries and accidents by identifying and bringing hazards to the attention of their supervisors. In essence, this element calls on employers to look for hazards, decide how serious they are, and prioritize their control or elimination.

Hazard Prevention and Control. Once hazards covered by OSHA standards and the general duty clause are identified and assessed, they must be controlled. Put simply, the element calls for a workplace to obey the law as it already exists--fix identified hazards in accordance with the relevant OSHA standards or the general duty clause. Hazard prevention and control provides the solutions to the safety and health problems discovered by the program’s hazard identification and assessment activities. Unless hazards are prevented, controlled or eliminated, workers who are exposed to them will continue to be killed, hurt, or made ill.

Information and Training. Information and training ensure that both workers and management have the information, knowledge and skills to recognize identified hazards,

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understand what controls are in place to prevent exposure, and understand their roles in preventing or minimizing exposures. People need to know hazards when they see them, so they can protect themselves and their co-workers.

Program Evaluation. Program evaluation simply tells an employer to assess how well its safety and health program works, to ensure that it protects workers. Where the employer identifies deficiencies, they should be corrected.

ISSUES RAISED BY SMALL BUSINESS

Since OSHA last testified before the Small Business Committee regarding this issue, a Small Business Advocacy Review Panel has reviewed the draft proposed rule, as required by the Small Business Regulatory Enforcement Fairness Act. The Panel, which consisted of personnel from OSHA, SBA's Office of Advocacy and OMB's Office of Information and Regulatory Affairs, submitted its report to me on December 18, 1998. The panel report was based in part on the advice and recommendations provided by 18 small entity representatives (SERs).

The version analyzed by the SBREFA panel was different from the one OSHA described to you when last we testified before your Committee. At that hearing, members of the Committee raised a number of questions about the rule. Since that time, OSHA has continued to respond to suggestions made by members of this Committee, small businesses and other stakeholders. OSHA incorporated a number of changes into the draft proposed rule the agency ultimately provided to the SBREFA panel. For example, when OSHA testified before you two years ago, the draft called for employers to conduct hazard assessments at a frequency

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“appropriate to safety and health conditions at the workplace.” The draft discussed by the SBREFA panel provided that such assessments should occur at least every 2 years and when changes in workplace conditions indicate that a new or increased hazard may be present. The agency also added the “grandfather clause” discussed earlier in my testimony to the version of the draft proposal provided to the SBREFA panel. The grandfather clause responded to concerns raised by the Chairman and various small businesses that employers who already operate effective programs should not be required to change them.

OSHA has been clarifying the regulatory text wherever possible. In part because of the flexibility the rule provides, some small businesses questioned whether it incorporated sufficient guidance to help them comply without unnecessary difficulty. Several recommendations in the Panel’s report suggested that OSHA further clarify certain portions of the rule and its accompanying analyses. For example, the Panel suggested that OSHA should clarify in its preamble how the Safety and Health Program rule interacts with other OSHA rules, with the existing requirements of the General Duty Clause, and with National Labor Relations Act (NLRA) requirements. The Panel also recommended that OSHA “solicit comment on the possibility of providing guidance that contains all cross-references in the rule and explains such concepts as the General Duty Clause so that small firms can understand these issues without having to go to other sources.”

OSHA is responding to the issues raised by SERs and the Panel as it readies the proposal for publication in the *Federal Register*. In some cases, we will provide additional explanations in the preamble to the proposed rule and in the accompanying analyses. In other cases, we are

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clarifying language in the rule that some SERs thought to be too vague. For example, the draft provided to the SBREFA panel required training to be provided “as often as necessary to ensure that employees are adequately informed and trained.” OSHA is considering a modification that would require training when the employer “has reason to believe” that employees lack the knowledge or understanding they need. With regard to evaluating program effectiveness, the Panel draft included language requiring an evaluation “as often as necessary to ensure program effectiveness.” We likely will replace this requirement with language calling for a review “when the employer has reason to believe” that all or part of the program is ineffective. These changes both clarify that an employer need not guess when a reevaluation or new training should be conducted, but instead must exercise reasonable care. Issues concerning cost and coverage also were raised. The issues raised by SERs and the Panel are important and OSHA is considering them all carefully.

In addition, when the final rule is published in a few years, OSHA will provide a variety of informational and outreach materials to simplify compliance. Materials will include checklists, model programs, decision logics and other materials to help employers determine how to comply and when they have met their obligations under the rule. For example, the agency is already developing a new “Expert Advisor” to provide computerized guidance to employers who are attempting to implement or improve safety and health programs. Last year, OSHA released its Hazard Awareness Advisor, which has received excellent reviews from small businesses and is referenced on the Home Page of the National Federation of Independent Business. In addition to this extensive array of informational materials, small businesses will continue to have

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available to them free consultation services through OSHA's 50 state consultation programs. OSHA will also provide intensive training to its compliance officers to ensure that their enforcement of the rule is consistent with OSHA's intent to provide maximum flexibility to employers.

Because OSHA has drafted a performance-based rule rather than a one-size-fits all requirement, it has not specified every action a business must take to comply. Nor should it. However, the agency is committed to providing the most instructive materials possible to help small businesses comply with ease. As Bill Pritchard from MASCO, which has facilities ranging in size from 5 to 2,700 employees, points out, "The program must be performance oriented. Give companies the flexibility to allow them to develop the process which will work for each facility. Don't specify the process, specify the key elements... let companies decide the way to implement the elements." Many models similar to the one OSHA is proposing already exist and should prove invaluable as businesses develop their own programs. Clearly, the flexibility OSHA has built into its draft proposal is preferable to a one-size-fits-all approach.

A particular area of interest to small businesses where the rule will provide significant flexibility is documentation. The program for small businesses, for example, need not be written. And employers with fewer than 10 employees are exempt even from those minimal requirements. Although some small businesses have expressed skepticism, feeling they will need to maintain written records regardless of this exemption, that is emphatically not OSHA's intent. Small businesses will have many ways to demonstrate their compliance. For example, they can simply describe to a compliance officer the hazards that have been or are being

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identified and what has been or is being done to identify, assess and control them. They may also demonstrate their compliance using receipts, order forms and other documents developed or obtained in the normal course of business.

Some small business stakeholders have questioned whether the rule should be universally applicable. OSHA believes there is strong evidence to support such coverage. Many stakeholders have expressed a similar point of view. For example, John Cheffer of the Travelers Insurance Company testified in 1995 before the National Advisory Committee on Occupational Safety and Health that, "We consider any proposed safety and health standard to be the centerpiece from which all other rules and standards flow, in effect, the ultimate safety and health guideline document for the nation. If that view is accepted, by its very nature it must be generic, flexible and universally applicable." Another significant reason for applying the rule to establishments of all sizes is the risk currently posed to employees working in small businesses. Although small businesses with 10 or fewer employees account for only about 15 percent of employees, 30 percent of all work-related fatalities reported to the BLS in 1997 occurred in these very same workplaces. By comparison, businesses with 100 or more employees accounted for approximately 45 percent of employees, but experienced only 20 percent of all work-related fatalities in 1997. Based on these numbers, the risk of fatalities in businesses with 10 or fewer employees is 4 to 5 times higher than the risk in businesses with 100 or more employees. Although most stakeholders opposed exempting small businesses from coverage, they agreed with OSHA that every effort should be made to ease compliance burdens for small businesses. The compliance assistance materials that OSHA is now developing will address that need.

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CONCLUSION

Safety and health programs already make a significant difference in the lives of many of our nation's workers and in the financial bottom line of many businesses. But many businesses have yet to recognize their value. To fill this gap, OSHA is designing a rule that provides a general framework for employers to follow but leaves each individual employer free to add workplace-specific procedures and to adopt management practices that suit the characteristics of that particular workplace. Safety and health programs are common sense for the workplace. OSHA is committed to working with employers of all sizes, both during and after development of its rule, to ensure that the rule provides sufficient flexibility, OSHA's compliance guidance furnishes suitable information to meet the compliance needs of employers, and that workers are protected.

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CREATION DATE/TIME:14-JUN-1999 17:00:17.00

SUBJECT: Justice letter on Child Custody Bill

TO: Elena Kagan@eop (Elena Kagan@eop [OPD])

READ:UNKNOWN

TEXT:

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CREATION DATE/TIME:14-JUN-1999 18:04:34.00

SUBJECT: Sure would've been nice to know this was in the hopper...jc3

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

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

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

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

CC: Paul D. Glastris (CN=Paul D. Glastris/OU=WHO/O=EOP@EOP [WHO])
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CREATION DATE/TIME:14-JUN-1999 16:00:05.00

SUBJECT: AMeriCorps

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

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

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

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

TO: JGompert@cns.gov (JGompert@cns.gov @ inet [UNKNOWN])
READ:UNKNOWN

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

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

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

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

CC: Cathy R. Mays (CN=Cathy R. Mays/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

CC: Aprill N. Springfield (CN=Aprill N. Springfield/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: Carolyn T. Wu (CN=Carolyn T. Wu/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

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CREATION DATE/TIME:14-JUN-1999 14:46:31.00

SUBJECT: Rules committee on CSPAN now...jc3

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

READ:UNKNOWN

TO: Leanne A. Shimabukuro (CN=Leanne A. Shimabukuro/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

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READ:UNKNOWN

TEXT:

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Peter Rundlet (CN=Peter Rundlet/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:15-JUN-1999 15:54:12.00

SUBJECT: Cureton brief

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

READ:UNKNOWN

TEXT:

Chuck thought you might like to see this, too.

----- Forwarded by Peter Rundlet/WHO/EOP on 06/15/99
03:53 PM -----

Peter Rundlet
06/15/99 03:04:19 PM
Record Type: Record

To: Charles F. Ruff/WHO/EOP@EOP
cc:
Subject: Cureton brief

I just received this draft of Justice's brief in the NCAA case (in which the E.D. of Pennsylvania struck down the NCAA's use of the SAT as being discriminatory under Title VI). Apparently, Justice and Education are in agreement with the positions taken regarding: (1) the existence of a private right of action for a disparate impact claim under Title VI and (2) the NCAA's liability under Title VI because it receives federal financial assistance through another entity (the National Youth Sports Program) or because it has been ceded controlling authority by a recipient over a program or activity receiving federal financial assistance. However, there is some disagreement (see Anita Hodgkiss's note below) about what position, if any, to take on the merits (i.e., whether the court correctly applied the law to the facts in this case in finding the NCAA violated Title VI).

Anita said that Judy Winston and Norma did not want Justice to take a position on the merits because it would hurt our efforts on issuing the high-stakes testing guidance (this view isn't entirely clear to me, but it may be that so much attention on the Title VI disparate impact regs may invite Congressional meddling with them). Steve Winnick of Judy's office stated that their concern is that some portions of the record are under seal and so that it is imprudent to take a position on the merits absent complete knowledge of the facts. With the exception of the sentence cited in Anita's note, Justice has agreed not to address the merits in any detail, but there is some concern there that the absence of support for the merits will undermine the plaintiffs' argument.

The brief is due to be filed tomorrow. If you have any questions or comments on it, please call.

----- Forwarded by Peter Rundlet/WHO/EOP on 06/15/99
02:45 PM -----

Anita Hodgkiss <Anita.Hodgkiss@usdoj.gov>
06/15/99 02:27:00 PM

Record Type: Record

To: Peter Rundlet/WHO/EOP
cc:
Subject: Cureton brief

Attached is our draft. The Department of Education was concerned about the last sentence in the first paragraph of section 3 in the "Introduction and Summary of Argument" (pp. 13-14 on my printed version). We are all in agreement that this section should be expanded to better explain the legal standard that the court applied. The brief must be filed tomorrow. I can explain in greater detail why this is so late if that's a question.

- CUREBRF.WPD

===== ATTACHMENT 1 =====
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No. 99-1222

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TAI KWAN CURETON, et al.,

Plaintiffs-Appellees

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING APPELLEES URGING AFFIRMANCE

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STATEMENT OF THE ISSUES

The United States will address the following issues:

1. Whether there is a private right of action for a claim of discrimination based upon disparate impact under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq..

2. Whether the National Collegiate Athletic Association (NCAA) is subject to the requirements of Title VI because it either receives federal financial assistance through another recipient or has been ceded controlling authority by a recipient over a program or activity receiving federal financial assistance.

IDENTITY AND INTEREST OF THE AMICUS CURIAE

The United States Department of Education extends financial assistance to educational programs and activities and is authorized by Congress to ensure compliance with Title VI, 42 U.S.C. 2000d-1, in the operation of those programs and activities. Pursuant to that authority, the Department of Education has issued regulations that define a recipient, 34 C.F.R. 100.13(i), and regulations that prohibit use of criteria for determining the type of services, financial aid, or other benefits a recipient will provide that have a disparate impact based upon race, 34 C.F.R. 100.3(b)(2).

The United States Department of Health and Human Services (HHS) provides federal financial assistance to the National Youth Sports Program Fund, an entity that the district court found to be controlled by the NCAA. HHS has also issued a regulation defining a recipient that tracks the definition in the regulation issued by the Department of Education, 45 C.F.R. 80.13(i), and a regulation that prohibits the use of criteria that have a disparate impact based upon race. 45 C.F.R. 80.3(b)(2).

The United States Department of Justice coordinates enforcement of Title VI by executive agencies. Exec. Order No. 12,250, 28 C.F.R. 0.51. The Department of Justice also has authority to enforce Title VI in federal court upon a referral by an agency that extends federal financial assistance to an education program or activity.

This appeal presents the issue whether a private individual

may file a judicial action to enforce agency regulations that prohibit the use by recipients of federal financial assistance of criteria or methods of administration that have a disparate impact based upon race. Because of the inherent limitations on administrative enforcement mechanisms and on the litigation resources of the United States, the United States has an interest in ensuring that both Title VI and its implementing regulations may be enforced in federal court by private parties acting as "private attorneys general." Such private suits are critical to ensuring optimal enforcement of the mandate of Title VI and the regulations. See Cannon v. University of Chicago, 441 U.S. 677, 705-706 (1979) (permitting private citizens to sue under Title VI is "fully consistent with -- and in some cases even necessary to -- the orderly enforcement of the statute"). The United States filed a brief as amicus curiae on that issue in Chester Residents Concerned For Quality Living v. Seif, 132 F.3d 925 (3d Cir. 1997), vacated as moot, 119 S. Ct. 22 (1998); Powell v. Ridge, No. 98-2096 (3d Cir.); and Sandoval v. Hagan, No. 98-6598 (11th Cir.).

This appeal also presents the issue whether the NCAA is subject to coverage under Title VI. The United States filed a brief as amicus curiae in National Collegiate Athletic Association v. Smith, 119 S. Ct. 924 (1999), which argued (at 19-20) that the NCAA could be a recipient of federal financial assistance through a grant from the Department of Health and Human Services, and (at 20-27) that it could be subject to coverage under Title IX of the Education

Amendments of 1972, 20 U.S.C. 1681, et seq., without being a recipient if it had been ceded control by a recipient over a program or activity receiving federal financial assistance.^{1/} The district court has held that the NCAA is subject to Title VI under both of those theories, and this Court's resolution of this issue could affect the enforcement of Title VI by the United States.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below

In January 1997, plaintiffs Tai Kwan Cureton and Leatrice Shaw filed a complaint individually and on behalf of a class of African-American student-athletes claiming that the minimum requirements of the National Collegiate Athletic Association (NCAA) for freshman students to compete in intercollegiate activities and to receive athletic scholarships discriminate against them on the basis of race in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, et seq., and its implementing regulations. Cureton v. National Collegiate Athletic Association, C.A. No. 97-131 (E.D. Pa.).

The NCAA filed a motion to dismiss the complaint, arguing that (1) disparate impact discrimination is not actionable under Title VI or its implementing regulations; (2) the NCAA is not a "program or activity" within the meaning of 42 U.S.C. 2000d-4a; and (3) the

^{1/} The Supreme Court's decision did not address the validity of either of these theories. NCAA v. Smith, 119 S. Ct. at 930.

NCAA is not subject to Title VI because it does not receive federal financial assistance. Plaintiffs opposed the motion to dismiss and also filed a motion for partial summary judgment. On October 9, 1997, the district court entered an order denying the NCAA's motion to dismiss. The court also granted plaintiffs' motion for partial summary judgment, holding that there is a private right of action under the Title VI regulations for a claim of discrimination based upon disparate impact. 1997 WL 634376, at *2. The district court denied defendant's motion to certify the question for immediate appeal, pursuant to 28 U.S.C. 1292(b), stating that there is not a substantial ground for difference of opinion in light of the "overwhelming circuit law" supporting the reasoning of its decision. Cureton v. NCAA, Civ. A. No. 97-131, 1998 WL 726653, at *1. (E.D. Pa., Oct. 16, 1998).

The October 9 order found that "the NCAA appears to be a program or activity covered by Title VI" under the definition in 42 U.S.C. 2000d-4a(4), but found that the record was not sufficiently developed to determine whether the NCAA receives federal financial assistance. 1997 WL 634376, at *2-*3. The court therefore left that determination to a trial on the merits. Id. at *3.

The NCAA thereafter filed a motion for summary judgment, and plaintiffs filed a cross-motion for summary judgment on the merits of the alleged Title VI violation. On March 8, 1999, the district court granted plaintiffs' motion for summary judgment.

The NCAA filed a timely notice of appeal on March 17, 1999 (JA 1250a). On April 8, 1999, plaintiffs filed a cross-appeal (JA 1414a).

B. Statement Of Facts

1. Background.

The NCAA is a voluntary, unincorporated association of approximately 1200 members, consisting of colleges and universities, conferences and associations, and other educational institutions. Cureton v. NCAA, 37 F. Supp.2d 687, 690 (3d Cir. 1999). The NCAA is responsible for promulgating rules governing all aspects of intercollegiate athletics, including recruiting, eligibility of student-athletes, and academic standards. Its member institutions agree to abide by and enforce those rules. Id. at 695 & n.6. The four-year colleges and universities that are the active members of the NCAA are divided into Divisions I, II, and III. Id. at 690. Some bylaws of the NCAA are applicable to all divisions. Each division may, however, adopt additional bylaws applicable only to that division. This case involves a bylaw that is applicable only to Division I schools. Ibid.

In response to public perception that student athletes were inadequately prepared to succeed academically and to receive an undergraduate degree, the Division I membership adopted requirements for high school graduates seeking to participate in athletics and to receive athletically-related financial assistance during their

freshman year. Proposition 48, which was implemented during the 1986-1987 academic year, required high school graduates to have a 2.0 GPA in 11 core academic courses and a minimum score of 700 on the SAT (or a composite score of 15 on the ACT) in order to participate in freshman intercollegiate athletics. 37 F. Supp.2d at 690.

In 1992, these initial eligibility rules were modified through the adoption of Proposition 16. As fully implemented effective August 1, 1996, Proposition 16 increased the number of core courses required to 13 and introduced an initial eligibility index. Under the index, a student-athlete could establish eligibility with a GPA of 2.0 only if combined with an SAT score of 1010 (or an ACT sum score of 86).^{1/} A student with a GPA of 2.5 or higher was required to have an SAT score of 820 (or an ACT sum score of 68). Since the core GPA cutoff score of 2.0 is two standard deviations below the national mean, while the SAT/ACT cutoff score is only one standard deviation below the national mean, Proposition 16 results in a "heavier weighting of the standardized test." 37 F. Supp.2d at 691.

2. Federal financial assistance

^{2/} In 1995, the College Board recentered the score scales for the SAT. After recentering, a test score of 700 on the old scale is approximately equivalent to a score of 830 on the recentered scale. Cureton v. NCAA, 37 F. Supp.2d at 690 n.2.

In 1969, the NCAA began receiving federal financial assistance for the operation of the National Youth Sports Program (NYSP).^{2/}

From that time until 1991, the NCAA was a direct recipient of federal financial assistance from the Department of HHS to operate the NYSP (JA 145a-146a; JA 511a-516a). On October 3, 1989, the NCAA created the NYSP Foundation as a nonprofit corporation under the laws of Missouri (JA 506a-509a). It was later renamed the NYSP fund (see JA 147a, Marshall 7/2/97 Dep. at 29-30). The Fund was created "to insure that [the NCAA] is not a recipient or a contractor of the federal government" (JA 147a-148a, Marshall 7/2/97 Dep. at 31-33).

On August 9, 1991, Edward Thiebe, the Director of Youth Sports for the NCAA, sent a letter to HHS requesting that its Fiscal Year 1991 grant application for the NYSP be amended to designate the NYSP Fund as the grantee (JA 151a-152a). From 1992 to the present, the federal grant has been made to the NYSP Fund. In Fiscal Year 1996, the federal grant from HHS was \$11,520,000 (JA 74a, see also JA 261a (HHS press release announcing that "\$11,520,000 was awarded to the NCAA")).

^{2/} Through subgrantees, the NYSP offers sports instruction and instruction in life skills, science, and math to poor and disadvantaged youths (JA 520a).

Nonetheless, "Guidelines for the 1993 National Youth Sports Program," which are prepared by the NYSP Committee as a required part of the grant application process, listed the NCAA, not the Fund, as the grantee of the HHS grant (JA 254a-259a; see Marshall 6/30/97 Dep. at 28-30). The guidelines stated that "[t]he NCAA has been awarded a grant by the [Office of Community Services]" of HHS (JA 258a). The guidelines also stated that a "specified amount of funds shall be made available to participating institutions through the National Collegiate Athletic Association to conduct projects" (JA 257a) and invited applications to be submitted to the NCAA at its office address in Overland, Kansas (ibid.).^{1/}

Pursuant to its Bylaws, the Fund has four directors, three of whom are NCAA officers or employees (JA 229a).^{1/} The Fund itself has no offices, no employees, and no letterhead (JA 143a, JA 161a, Marshall 7/2/97 Dep. at 13, 85; JA 196a, Thiebe Dep. at 44). The Fund has never had a Board of Directors meeting, but rather has "handled any business that needed to be taken care of through * * * consent minutes" (JA 158a). The Fund's bank account is entitled: "The National Collegiate Athletic Association -- The National Youth

^{4/} In a document dated 2/3/95 that was attached to one of its own pleadings in the district court, the NCAA is listed as the "Applicant organization" for the NYSP grant (JA310a - Assurances given in connection with grant).

^{5/} The bylaws mandate that the Executive Director and Assistant Executive Director of the NCAA, and the chairperson of the NYSP Committee of the NCAA be members of the NYSP Fund Board (JA 229a).

Sports Program" (JA 505a). The staff of the NCAA, as well as the fund, has authority to draw from the federal government's grant through that account (JA 156a-157a, Marshall 7/2/97 Dep. at 68-69).

Through 1994, the NCAA, "d/b/a the National Youth Sports Program," was the named insured on liability policies covering the activities of the NYSP (JA 526a-629a).^{6/} The Fund's Articles of Incorporation provide that upon the dissolution of the Fund, the assets of the Fund shall be distributed exclusively to the NCAA, provided the NCAA continues to be an education organization within the meaning of § 501(c)(3) of the Internal Revenue Code (JA 508a).

Perhaps most important, it is the NCAA's NYSP committee, and not the Fund, that makes all of the decisions about the NYSP and the use of the federal funds. For example, the NYSP committee has final approval over which colleges and universities receive subgrants to operate the NYSP's instructional and educational programs (JA 200a). The NCAA stipulated that once the NCAA's NYSP committee makes a decision, no further action is required to implement that decision (JA 209a-210a).

The NCAA's Executive Director has stated that "[t]he NYSP is one of the NCAA's best-kept secrets, yet it is consistently one of our most successful and influential programs. Our partnership with

^{6/} In the NCAA's 1995-1996 Annual Report, the Fund is included in the NCAA's financial statements (JA 517a-520a). In contrast, the NCAA Foundation is described in the Annual Report as "a separate legal entity" not included in the NCAA's financial statements (JA 520a).

the federal Government, local civic organizations and individual colleges and universities perfectly embodies the NCAA's team spirit" (JA 263a).

C. The Decision Below

In granting summary judgment to the plaintiffs, the district court held that the NCAA is subject to Title VI, and that Proposition 16 violates the disparate impact prohibition of the Title VI regulations. The court's earlier partial grant of summary judgment held that plaintiffs have a private right of action to enforce the Title VI regulation prohibiting disparate impact discrimination (see page , supra).

1. Coverage of NCAA under Title VI.

Plaintiffs raised several theories under which the NCAA would be subject to Title VI. First, they contended that the NCAA receives federal financial assistance indirectly through the receipt of dues from its member schools, all of whom receive federal financial assistance. The district court rejected that theory based upon the Supreme Court's decision in NCAA v. Smith, 119 S. Ct. 924 (1999). 37 F. Supp.2d at 693.

Plaintiffs also argued that the NCAA directly receives federal financial assistance through the National Youth Sports Program Fund because the Fund is nothing more than the alter ego of the NCAA. The district court found that plaintiffs "failed to sustain their heavy burden of 'piercing the corporate veil' sufficient to have

the Fund construed as the NCAA's alter ego." 37 F. Supp.2d at 694.

However, the court found "overwhelming evidence" supporting the fact that "the Fund is ultimately being controlled by the NCAA," ibid., and thus concluded that plaintiffs had sustained their burden of proving that the NCAA "exercises effective control and operation of the" grant given by HHS to the Fund "to be construed as an indirect recipient of federal financial assistance." Ibid. The court found that "although the Fund is the named recipient of the block grant, it is merely a conduit through which the NCAA makes all of the decisions about the Fund and the use of the federal funds." Ibid.

Finally, the court found that plaintiffs also proved that the NCAA is subject to suit under Title VI regardless of whether it receives federal financial assistance, "because member schools (who themselves indisputably receive federal funds) have ceded controlling authority over federally funded programs to the NCAA."

37 F. Supp.2d at 694. It found that the "member colleges and universities have granted to the NCAA the authority to promulgate rules affecting intercollegiate athletics that the members are obligated to abide by and enforce." Id. at 696. Accordingly, "because there is a nexus between the NCAA's allegedly discriminatory conduct with regards to intercollegiate athletics and the sponsorship of such programs by federal fund recipients, the NCAA is subject to Title VI for a challenge to Proposition 16." Ibid.

2. The decision on the merits

The district court held that the disparate impact standard developed under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., in the employment context is applicable to a claim of disparate impact in educational testing. 37 F. Supp.2d at 696-697. Applying that standard, the court held that Proposition 16 causes a racially disproportionate effect on African-Americans (id. at 697-701); that Proposition 16 is not justified by any legitimate educational necessity (id. at 701-712); and that, in any event, plaintiffs had demonstrated that there are equally effective alternative practices to Proposition 16 having less adverse effect upon African-Americans (id. at 713-714). Accordingly, the court granted plaintiffs' motion for summary judgment (id. at 714).

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This Court in Chester Residents Concerned For Quality Living v. Seif, 132 F.3d 925 (1997), vacated as moot, 119 S. Ct. 22 (1998), correctly held that "private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964," and that decision should be reinstated as the law in this Circuit. The reasoning of Chester Residents is still persuasive authority. See Polychrome Int'l Corp. v. Krigger, 5 F.3d 1522, 1534 (3d Cir. 1993); Finberg v. Sullivan, 658 F.2d 93, 100 n.14 (3d Cir. 1981) (en banc). Moreover, the holding in Chester

Residents was consistent with that of every other court of appeals to consider the issue. 132 F.3d at 936-937. The NCAA has presented no "compelling basis" for this Court to disregard that holding. Wagner v. PennWest Farm Credit, ACA, 109 F.3d 909, 912 (3d Cir. 1997).

2. In Part II, we argue that the NCAA is subject to coverage under Title VI both because it receives federal financial assistance indirectly through the NSYP Fund, which it controls, and because it has been conceded controlling authority over the intercollegiate athletics programs of its member colleges and universities, which receive federal financial assistance directly.

3. With respect to the district court's ruling that the minimum standardized test score cutoff in Proposition 16 violates Title VI of the Civil Rights Act of 1964, the court correctly held (37 F. Supp. 2d at 696-697) -- and the NCAA does not dispute -- that the disparate impact standards developed in employment discrimination cases under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) apply to claims brought pursuant to the regulations implementing Title VI. See, e.g., Georgia State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1985); NAACP v. Medical Center, Inc., 657 F.2d 1322, 1331 (3d Cir. 1981); Larry P. v. Riles, 793 F.2d 969, 982 nn.9-10 (9th Cir. 1984). Thus, if the facts relied upon in the district court's rulings (which are based in large measure on the NCAA's own studies) are right, it would appear that the district

court correctly held that Proposition 16's cutoff score violates the effects test of the Title VI regulation.¹⁷

We do not take a position on the factual questions raised in this appeal. Because parts of the record relating to this issue remain under seal (see NCAA Br. at 8 n.3), we have not had access to the information necessary to ascertain whether the district court correctly determined that Proposition 16's cutoff score causes a racially disproportionate effect; that the NCAA had not demonstrated that the cutoff score significantly serves the goal of raising student-athlete graduation rates; and that, in any event, the plaintiffs established the existence of alternative practices that serve the goal of raising student-athlete graduation rates and that have less of an adverse impact upon African-Americans. These are

¹⁷ The district court mentioned, but did not apply to Title VI, the 1991 amendments to Title VII that require a defendant to bear both a burden of production and persuasion on its business necessity justification. 37 F. Supp. 2d at 697. See 42 U.S.C. 2000e(m), 2000e-2k(1)(A). Although the alleged discrimination in this case occurred after 1991, the court appears to have applied the previous standard, set out in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989), that the defendant bears only a burden of producing evidence that the challenged employment practice has a legitimate business justification. If this Court agrees with the district court's ruling that the NCAA failed to meet its burden under Wards Cove because it "has not produced any evidence demonstrating that the cutoff score used in Proposition 16 serves, in a significant way, the goal of raising student-athlete graduation rates" (37 F. Supp. at 712), it will be unnecessary for the Court to determine whether the district court erred in failing to require the NCAA to satisfy the heavier burden imposed by the Civil Rights Act of 1991. Cf. Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 n.14 (11th Cir. 1993). In any event, this Court should not resolve this important issue without the benefit of full briefing from the parties (see NCAA Br. at 47 n.19, Cureton Br. at 36 n.19).

highly fact-bound determinations, and we believe the parties are in the best position to assist the Court in determining whether the district court erred in any of these rulings.

ARGUMENT

I

PRIVATE PLAINTIFFS MAY SUE TO ENFORCE THE DISPARATE IMPACT STANDARD IN AGENCY REGULATIONS IMPLEMENTING TITLE VI

Plaintiffs sought to enforce regulations of the Departments of Education and Health and Human Services promulgated under Section 602 of Title VI of the Civil Rights Act, 42 U.S.C. 2000d-1 (JA 28a). Those regulations prohibit a recipient of federal financial assistance from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race." 34 C.F.R. 100.3(b)(2); 45 C.F.R. 80.3(b)(2) (emphasis added). This Court in Chester Residents Concerned For Quality Living v. Seif, 132 F.3d 925 (1997), vacated as moot, 119 S. Ct. 22 (1998), held that "private plaintiffs may maintain an action under discriminatory effect regulations promulgated by federal administrative agencies pursuant to section 602 of Title VI of the Civil Rights Act of 1964." Although that decision is no longer binding circuit precedent, the opinion in Chester Residents retains its persuasive authority. See Polychrome Int'l Corp. v. Krigger, 5 F.3d 1522, 1534 (3d Cir. 1993); Finberg v. Sullivan, 658 F.2d 93, 100 n.14 (3d Cir. 1981) (en banc) ("Even if a decision is vacated, however, the force of its reasoning remains,

and the opinion of the Court may influence resolution of future disputes."). In addition, the holding in Chester Residents was consistent with that of every other court of appeals to consider the issue. 132 F.3d at 936-937 (collecting cases from the First, Second, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits). This Court has noted that "[i]n light of such an array of precedent, [it] would require a compelling basis to hold otherwise before effecting a circuit split." Wagner v. PennWest Farm Credit, ACA, 109 F.3d 909, 912 (3d Cir. 1997).

The NCAA has provided no such "compelling basis." All of the arguments raised by the NCAA (Br. 17-25) were correctly rejected by the panel in Chester Residents and should likewise be rejected here.

First, the NCAA (Br. 18-20) attacks the district court's decision for relying on an overly broad reading of Guardians. The district court, however, issued its decision concluding that there is a private right of action to enforce the Title VI regulations in October 1997, some two months before the decision in Chester Residents. Thus, its conclusion that the Supreme Court in Guardians had resolved the issue could not have anticipated this Court's conclusion in Chester Residents that Guardians is not dispositive, 132 F.3d at 930, and that the Supreme Court's decision in Alexander v. Choate provided "no direct authority * * * that either confirms or denies the existence of a private right of action," 132 F.3d at 931. In any event, the district court's holding that there is a private right of action to

enforce the disparate impact regulation is, of course, entirely consistent with this Court's Chester Residents holding.

Second, the NCAA argues (Br. 20-23) that Section 602 does not permit an implied private right of action, in part because Section 602 "prohibits any enforcement of the regulations" until the federal funding agency gives the alleged violator notice and an opportunity to comply voluntarily (Br. 22, emphasis in original). But, as the Court noted in Chester Residents, 132 F.3d at 935, "a private lawsuit also affords a fund recipient similar notice." Moreover, the requirements of Section 602 "were designed to cushion the blow of a result that private plaintiffs cannot effectuate," i.e., termination of funding. Id. at 936. The Court in Chester Residents therefore properly found that "a private right of action would be consistent with the legislative scheme of Title VI." Ibid. In addition, if the NCAA were correct in its reading of the statute, then a private right of action to enforce the prohibition on intentional discrimination (which the federal government also enforces through the procedures established in Section 602) would also be barred, a result clearly foreclosed by the Supreme Court's decision in Cannon v. University of Chicago, 441 U.S. 677 (1979).

Finally, the NCAA argues (Br. 23-25) that the legislative history of Title VI does not support the implication of a private right of action for unintentional discrimination. It attempts to diminish the import of the legislative history of the Civil Rights Restoration

Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988), discussed by this Court in Chester Residents, noting (NCAA Br. at 24) that Chester Residents relied on comments from opponents of the 1987 legislation that "do not shed light on the purpose or intent behind Title VI."

But Chester Residents was following the well-accepted rule that when there is evidence that Congress understands that a private right of action was available under a statutory scheme, and amends the statute without demonstrating any intent to disapprove of such suits, it has ratified that private right of action. See Herman & MacLean v. Huddleston, 459 U.S. 375, 386 (1983); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 381-382 (1982); see also Cannon, 441 U.S. at 687 n.7; Lindahl v. OPM, 470 U.S. 768, 787-788 (1985).

And while much of the discussion of private enforcement of the discriminatory effects regulations came from opponents to the bill, "they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response." Arizona v. California, 373 U.S. 546, 583 n.85 (1963).

The NCAA has not articulated a compelling basis for this Court to discard the holding of Chester Residents and reject the result reached by the other circuits that have addressed the question. This Court should reinstate the holding of Chester Residents here.^{1/}

^{8/} By the time this Court considers the issue whether there is a private right of action to enforce the disparate impact regulations under Title VI in this case, the issue may have been resolved by the panel in Powell v. Ridge, No. 98-2096 (3d Cir.), in which oral argument was held on June 9, 1999. The panel in Powell, however,

II

THE NCAA IS SUBJECT TO THE REQUIREMENTS OF TITLE VI BECAUSE IT RECEIVES ASSISTANCE THROUGH ANOTHER RECIPIENT AND BECAUSE IT HAS BEEN CEDED CONTROLLING AUTHORITY BY A RECIPIENT OVER A PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE

- A. The NCAA Receives Federal Financial Assistance Through Another Recipient.

does not need to reach that issue if it decides that the Title VI discriminatory effect regulations may be enforced through 42 U.S.C. 1983.

The regulations of the Departments of Education and HHS define a recipient of federal financial assistance as any entity "to whom Federal financial assistance is extended directly or through another recipient, for any program" (34 C.F.R. 100.13(i); 45 C.F.R. 80.13(i)).

From 1969 through 1991, the NCAA directly received federal financial assistance for the NYSP in its own name. After passage of the Civil Rights Restoration Act, the NCAA named the NYSP Fund to be the grant recipient for federal funding in order "to insure that [the NCAA] is not a recipient or a contractor of the federal government" (JA 147a-148a, Marshall 7/2/97 Dep at 31-33). The evidence relied upon by the district court, some of which is recited at pp. , supra, demonstrates, however, that the incorporation of the NYSP Fund was largely a formality and that the NCAA itself, through the NYSP Committee, continues to administer the grant program. The NYSP Fund as the listed grantee is itself a direct recipient of federal financial assistance subject to coverage under Title VI. But the NCAA receives federal financial assistance indirectly through its continued control of the NYSP grant, notwithstanding its attempt to distance itself from federal oversight.^{2/} Indeed, the Department of HHS has on two

^{2/} The NCAA's assertion (Br. 32) that "there is no evidence to suggest that the NCAA has diverted any federal funds to its own coffers" is beside the point. A recipient of federal financial assistance is required by law to use that assistance to fulfill the ultimate purpose of the grant, and there is no allegation here that the NCAA has not done so. The claim here is not that the NCAA has violated the law by setting up the NYSP Fund as the named grantee, but rather that it cannot escape responsibility under Title VI if it controls the administration of the grant.

occasions (in 1994 and 1998) taken the position that the NCAA is a recipient of federal financial assistance through a Community Development Block Grant from HHS and has accepted complaints of discrimination for investigation (JA 1257a-1261a).

Based upon the "overwhelming evidence," 37 F. Supp.2d at 694, the district court properly found that "the Fund is ultimately being controlled by the NCAA," and thus that the NCAA is the indirect recipient of federal financial assistance through the NYSP Fund.

Ibid.

B. The NCAA Is Subject To Title VI Because It Has Been Ceded Controlling Authority Over The Intercollegiate Athletic Programs Of Its Member Colleges And Universities, Which Receive Federal Financial Assistance.

The district court found that "the NCAA is subject to suit under Title VI irrespective of whether it receives federal funds, directly or indirectly, because member schools (who themselves indisputably receive federal funds) have ceded controlling authority over federally funded programs to the NCAA." 37 F.3d at 694.

Although the district court did not articulate the statutory basis for this theory of coverage, the United States believes that it is firmly rooted in the text of Title VI.

Title VI proves in relevant part that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving

Federal financial assistance." 42 U.S.C. 2000d. As that statutory text makes clear, Title VI, like Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), was not drafted "simply as a ban on discriminatory conduct by recipients of federal funds." Cannon v. University of Chicago, 441 U.S. 677, 691-692 (1979); see Chowdhury v. Reading Hospital and Medical Center, 677 F.2d 317, 318 & n.2 (3d Cir. 1982) (language of Cannon applicable to Title VI). Instead, the "unmistakable focus" of the statutory text is on the protection of "the benefitted class." Id. at 691. The text itself does not specifically identify the class of potential violators. But given the focus of the text on protection for the individual, and the absence of any language limiting the class of violators to recipients, Title VI is most naturally read as prohibiting any entity that has governing authority over a program from subjecting an individual to race-based discrimination under it.^{10/}

Although recipients are the principal class of entities that may subject an individual to discrimination under a program, they

^{10/} Congress has constitutional authority to reach the conduct of anyone who threatens "the integrity and proper operation of [a] federal program." See Salinas v. United States, 118 S. Ct. 469, 475 (1997) (upholding constitutionality of a statute that prohibits the acceptance of bribes by employees of state and local agencies that receive federal funds, as applied to a case in which a county received funds for the operation of a jail and the sheriff and deputy sheriff at the jail accepted bribes in violation of the statute). Since the NCAA's actions, if discriminatory, pose a threat to the integrity and proper operation of the federally assisted programs at member schools, Congress had constitutional authority to subject the NCAA to liability for such discrimination.

are not the only ones. When a recipient cedes governing authority over a program receiving assistance to another entity, and that entity subjects an individual to discrimination under the program, that entity violates Title VI, regardless of whether it is a recipient itself.

That commonsense reading of Title VI furthers its central purposes -- "to avoid the use of federal resources to support discriminatory practices" and to "provide individual citizens effective protection against those practices." Cannon, 441 U.S. at 704. Several considerations support that conclusion. First, as the district court recognized, 37 F. Supp.2d at 695, intercollegiate athletics is unique in that it is "one of the few educational programs of a college or university that cannot be conducted without the creation of a separate entity to provide governance and administration." Out of the necessity for a supervising authority comes the NCAA's power to establish the rules, such as Proposition 16, governing eligibility for intercollegiate athletics at member schools. "By joining the NCAA, each member agrees to abide by and to enforce such rules." NCAA v. Tarkanian, 488 U.S. 179, 183 (1988).

Because the NCAA has effective control over eligibility determinations for intercollegiate athletics, it is the entity most responsible for any discrimination that enters into those determinations.

If there is discrimination in the NCAA's rules, a member school

may attempt to persuade the NCAA to change the rules, but if it is unsuccessful, its only option is to withdraw from the NCAA. Since the NCAA has a virtual monopoly on intercollegiate athletics, a school that has withdrawn from the NCAA in order to satisfy its own Title VI obligations could no longer offer intercollegiate athletic opportunities to its students. That would leave victims of discrimination without an effective remedy and deprive innocent third parties of intercollegiate athletic opportunities as well. Those harsh consequences may be avoided if victims of the NCAA's discrimination may seek relief against the NCAA directly.

Finally, because of its unique power over intercollegiate athletics, discrimination by the NCAA in the promulgation of its rules has the capacity to result in discrimination at numerous member schools simultaneously. Permitting a private right of action against the NCAA provides a mechanism for stopping discrimination at its source before it becomes entrenched at member schools.^{11/}

^{11/} A member school, of course, remains liable for any discriminatory decision of the NCAA that it implements. For the reasons discussed above, however, when the NCAA is the source of the discrimination and uses its power over member schools to implement that discrimination, a remedy against the NCAA is more appropriate and efficacious than a remedy against member schools.

Permitting a judicial cause of action against the NCAA is consistent with the principle that entities should not be subjected to liability under Title VI without adequate notice. See Gebser v. Lago Vista Indep. School Dist., 118 S. Ct. 1989, 1997-1999 (1998).

Unlike the situation in Gebser, plaintiffs do not seek to hold the NCAA liable for discrimination committed by others; rather, plaintiffs seek to hold the NCAA liable for its own alleged discrimination in the promulgation and continued use of Proposition 16. The text of the Title VI regulations provides sufficient notice to the NCAA that it had an obligation not to use its authority over an education program receiving federal assistance to subject an individual to race-based discrimination under that program.^{12/}

If the NCAA did not wish to subject itself to Title VI obligations on the basis of its relationship to member institutions that receive assistance, it could have refrained from exercising governing authority over intercollegiate athletics at those institutions. Once the NCAA assumed that governing role, it also assumed an obligation not to use that authority to discriminate on the basis of race against individuals seeking access to intercollegiate athletic programs at those institutions.

The NCAA argues (Br. 38-39) that it cannot be subject to Title

^{12/} Moreover, this case involves a claim for injunctive relief only, and not money damages, and so many of the "notice" concerns that played a particularly significant role in Gebser are not so compelling in this context.

VI coverage because it did not assume a contractual commitment not to discriminate. The text of Title VI, however, is not framed exclusively in contract terms, and a contractual commitment not to discriminate is not a precondition to application of the statute.

If a contract analogy were needed, the relevant one would be to the tort of intentional interference with a contract. Restatement of Torts, § 766 (one who intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract is subject to liability to the other). When an entity that has been ceded controlling authority over a recipient requires the recipient to act in a discriminatory manner by, for example, imposing a discriminatory requirement for eligibility, it effectively causes the recipient to breach its agreement with the federal funding agency.

Moreover, when an entity created by recipients makes and enforces rules for recipients, it is on ample notice that it cannot do so in a way that subjects an individual to discrimination under the programs of the recipients.

Finally, contrary to the NCAA's contention (Br. 37-39) subjecting non-recipients that have been ceded controlling authority over federally assisted programs to coverage under Title VI is not in conflict with the Supreme Court's decision in United States Department of Transportation v. Paralyzed Veterans, 477 U.S. 597 (1986). There are statements in that opinion that support the NCAA's

argument that federal funding statutes like Title VI apply only to recipients of federal financial assistance. 477 U.S. at 605-606.

The context of those statements makes clear, however, that the Court was addressing only whether coverage should extend past recipients to beneficiaries. The Court did not purport to address the entirely different question whether an entity that has been ceded controlling authority over a program receiving federal assistance violates Title VI when it subjects an individual to discrimination under that program. Because the airlines did not have controlling authority over the federally assisted airport programs, the question at issue here was simply not presented in Paralyzed Veterans.

Equally important, the Court's crucial concern in Paralyzed Veterans was that expanding the funding statutes to reach beneficiaries of federal assistance would have resulted in "almost limitless coverage" -- a result that was clearly at odds with Congress's intent. 477 U.S. at 608-609. The situation here is fundamentally different. The class of non-recipients that has governing authority over programs receiving assistance is limited, and permitting a private right of acting against such entities when they subject persons to discrimination under those programs advances the purposes of Title VI.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed insofar as it (1) permits plaintiffs to bring an action to enforce

the Title VI disparate impact regulations and (2) finds that the NCAA is subject to Title VI coverage. Since the district court properly determined that the disparate impact standards developed in employment discrimination cases under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) apply to claims brought pursuant to the regulations implementing Title VI, the judgment should also be affirmed if the facts relied upon in the district court's rulings are correct

-- a determination that the parties are in the best position to assist the Court in making.

Respectfully submitted,

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**House Gun Event
Questions and Answers
June 14, 1999**

Automated Records Management System
Hex-Dump Conversion

Brady Report

Q: If the Brady Law has helped to detect and block over 400,000 illegal gun sales, how many of these persons who tried to buy guns illegally have you prosecuted? The gun lobby and its supporters say that if you really wanted to strengthen the Brady Law, you would focus on putting all of these criminals behind bars. What is your response?

A: We do focus on putting gun criminals behind bars. Since the NICS was implemented 6 months ago, the FBI has been actively referring cases to ATF and state and local law enforcement for further investigation and potential prosecution. Ultimately, we won't take every case, but we have asked Congress for more funds to hire ATF agents and federal prosecutors to do the best follow-up possible. I would also note that, prior to the NICS' implementation, Brady denials were the responsibility of designated state and local law enforcement officials. With the NICS now up and running, we expect to take more Brady-related cases.

Unfortunately, some of you in the press have been taking the gun lobby at its word, and you simply have not gotten the full story on this issue. Let's review the facts:

1. The Brady Law has stopped over 400,000 illegal gun sales. By surveying local law enforcement officials and tracking the number of gun applications rejected by the FBI, we know this to be true. Prior to Brady background checks, guns were bought and sold on the honor system.
2. Two-thirds of the illegal gun sales we stop involve persons who have been previously convicted or are currently indicted for a felony crime. The remaining third involve domestic violence misdemeanors and restraining orders, drug addicts, mental deficient, and other prohibitions in state and federal law. Although some of these persons may not be serious criminals – or may have committed their crimes many years ago and are no longer a threat to public safety – it is very reasonable to assume that, by stopping them from buying a gun, we have prevented gun crimes and violence.
3. Gun crimes are down by virtually every measure. FBI crime statistics confirm that, since 1993, gun-related crime is down by more than 25 percent. The overall number of violent crimes is down, and so too is the percentage of violent crimes committed with guns.
4. The number of gun criminals doing time in state and federal prisons is up by 25 percent since 1992 (from 20,681 to 25,186), and the number of serious gun criminals (those serving sentences of 5 or more years) in federal prison is up by nearly 30 percent. This is because we work more closely with state and local law enforcement – who investigate and prosecute most gun crimes – to vigorously enforce gun laws.

5. This Administration has increased funding for state and local law enforcement by more than 500 percent, helped local law enforcement trace a record number of crime guns, proposed increased funds for new ATF agents and federal prosecutors, and more. We need these resources to investigate and prosecute more gun cases. Unfortunately, the gun lobby and critics of our enforcement record have not backed up their tough talk with resources.

Q: Have all 400,000 of these attempted gun purchases been referred to law enforcement for further investigation?

A: The FBI refers all persons who are denied guns to the ATF. The ATF then screens these potential cases, and sends a portion of those cases to appropriate ATF field offices for further investigation. At the field level, ATF works with their local U.S. Attorney's office to determine which potential cases warrant the additional investment of federal resources and prosecution. Federal prosecutors and ATF attempt to target the most serious and dangerous offenders for prosecution.

Q: The report states that 312,000 sales were stopped through background checks through 11/29/98. How did you arrive at the 400,000 total?

A: While the report only contains information during the interim Brady period, today, the Justice Department released additional, up-to-date information on background checks since the NICS took effect in late November. The FBI keeps current information on the number of background checks conducted by the NICS and by state points of contact. Thus, the 400,000 total includes an additional 90,000 gun sales that have been blocked in the first 6 months of the NICS.

During this six month period, over 4.1 million background checks were conducted – about half by the FBI (2 million), and the other half by the states (2.1 million). The FBI confirms that it has denied over 42,000 applications for gun sales of the total number of checks it conducted, and estimates that state points-of-contact have denied another 48,000 applications for gun sales.

Q: The 400,000 gun sales stopped is based on an estimate that States have denied about 48,000 applications for gun sales since the National Instant Check System took effect. What did you base the 48,000 figure on?

A: The Bureau of Justice Statistics (BJS) based the 48,000 figure on two key pieces of information. First, the FBI can confirm that states conducted about 2.1 million background checks in the first six months of NICS. BJS then applied the average denial rate during the entire

interim Brady period (2.4 percent) to the total number of state checks conducted (2.1 million) – which comes to an estimated total of 48,000 gun sales denied.

Q: The report contains some state breakout data on the number of gun sales denied. Why is there so much variance between states in their denial rates?

A: There are a number of factors that can impact state denial rates. For instance, states may have in place additional laws to disqualify individuals from buying guns that exceed federal law. For instance, some states may prohibit gun sales to individuals based on arrests alone, without requiring a conviction. In addition, law enforcement access to, and computerization of records on critical information which impacts gun eligibility (e.g., mental illness, domestic violence misdemeanors) can have a significant impact on denial rates.

Misc. Gun

Q: Yesterday, the Vice President said that youths between the ages of 18 to 20 years-old could go into gun stores, pawn shops and gun shows and legally buy a handgun. Isn't this wrong?

A: As the Vice President's office clarified yesterday, currently, 18 to 20 year olds can legally buy handguns from gun shows, friends, neighbors, private collectors and other unlicensed sellers. However, they may not legally purchase handguns from federally-licensed gun shops and pawnshops. This is already prohibited under current law.

More importantly, however, current law allows 18 to 20 year-olds to possess handguns regardless of where they obtained them. The Vice President strongly believes that we should close this loophole by making it illegal for 18 to 20 year-olds to generally possess handguns. The Justice-Treasury report the Vice President released yesterday on the disproportionate amount of gun crime committed by 18 to 20 year –olds confirms the importance of passing into law the Administration's proposal to ban transfer to and possession of handguns by this age group.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:15-JUN-1999 19:03:10.00

SUBJECT: VA Property Disposal

TO: Paul J. Weinstein Jr. (CN=Paul J. Weinstein Jr./OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

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

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

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

TEXT:

Following up on letting the Administration comment on the VA Property Disposal demonstration project where the homeless groups will get cash, not property, we have heard back from the Hill. Vento is strongly opposed; Frank and Waxman are ambivalent; and LaFalce's staffer on this issue has left so we weren't able to get an opinion from him. The homeless groups are opposed to this demonstration project, including the homeless veterans group (National Coalition for Homeless Veterans). Both the House and the Senate have submitted their own versions of this proposal, and the Senate Mark-up of the VA Property bill is Tuesday, June 22. Both OMB and VA would like to comment on the proposal in the bill (at least to correct some administrative details). In light of this opposition, do you think we should comment to at least make the proposal better in the details or remain silent? Let me know, Mary

----- Forwarded by Mary L. Smith/OPD/EOP on 06/15/99
06:47 PM -----

Mary L. Smith
06/11/99 02:02:29 PM
Record Type: Record

To: Bruce N. Reed/OPD/EOP@EOP, Elena Kagan/OPD/EOP@EOP, Thomas L. Freedman/OPD/EOP@EOP, Paul J. Weinstein Jr./OPD/EOP@EOP
cc: Courtney O. Gregoire/OPD/EOP@EOP
Subject: VA Property Disposal

VA has a demonstration project that would allow them to sell 30 properties, keep 90 percent of the proceeds, and give the remaining 10 percent to the homeless. Currently, the homeless receive property, not cash, through the McKinney Act process. Both the House and Senate Veterans committees have included their own versions of this VA proposal. While the homeless groups prefer to receive property not cash, there are a few reasons why we should let this demonstration go forward. First, the Veterans Committees on the Hill are very favorable on this proposal. (In fact, both the House and the Senate have already introduced their own versions of this and we would like to replace the Hill version

with the Administration version). Second, VA, unlike most other agencies, does give property to the homeless through other programs. In fact, VA has conveyed more properties to homeless groups than the entire government in the past 12 years.

HUD, while initially objecting to this proposal, has agreed to it on the condition that a more broad-based GSA proposal to reform the Property Act include the homeless groups "right of first refusal" to receive actual property. I am working to make sure that happens.

However, Reps. LaFalce, Vento, and Frank (all of the House Banking Committee) have written a letter, expressing their support for the homeless groups to maintain a "right of first refusal" to receive surplus government property. Legislative Affairs is checking whether these congresspeople would be OK to let us send up the VA demo because we will preserve the right of homeless groups to receive property in the broader proposal.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Oscar Gonzalez (CN=Oscar Gonzalez/OU=OMB/O=EOP [UNKNOWN])

CREATION DATE/TIME:15-JUN-1999 16:18:46.00

SUBJECT: REMINDER on LRM OGG21 - - LABOR Testimony on OSHA's Draft Safety and Health

TO: Brian S. Mason (CN=Brian S. Mason/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

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

READ:UNKNOWN

TO: Karen Tramontano (CN=Karen Tramontano/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Yvette M. Dennis (CN=Yvette M. Dennis/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Broderick Johnson (CN=Broderick Johnson/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TO: Brian V. Kennedy (CN=Brian V. Kennedy/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

TO: Steven D. Aitken (CN=Steven D. Aitken/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TO: Cordelia W. Reimers (CN=Cordelia W. Reimers/OU=CEA/O=EOP@EOP [CEA])

READ:UNKNOWN

TO: Edward A. Brigham (CN=Edward A. Brigham/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TEXT:

This is a reminder that your comments on the Labor testimony on OSHA's Draft Safety and Health Program Rule (LRM ID OGG21) were due today. I just got word that the OSHA hearing has been postponed, so I'm extending the deadline until 3pm tomorrow. Please provide any comments to me by then. If I don't hear from you, I'll assume you have no objection to the testimony in its current form.

Thanks

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Adriene K. Elrod (CN=Adriene K. Elrod/OU=ONDCP/O=EOP [ONDCP])

CREATION DATE/TIME:15-JUN-1999 16:35:50.00

SUBJECT: USA Today Article - USCM

TO: Beth A. Viola (CN=Beth A. Viola/OU=CEQ/O=EOP@EOP [CEQ])
READ:UNKNOWN

TO: George T. Frampton (CN=George T. Frampton/OU=CEQ/O=EOP@EOP [CEQ])
READ:UNKNOWN

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

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

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

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

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

TO: Wesley P. Warren (CN=Wesley P. Warren/OU=CEQ/O=EOP@EOP [CEQ])
READ:UNKNOWN

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

CC: Adriene K. Elrod (CN=Adriene K. Elrod/OU=ONDCP/O=EOP@EOP [ONDCP])
READ:UNKNOWN

CC: Raynell K. Morris (CN=Raynell K. Morris/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: Patrice L. Stanley (CN=Patrice L. Stanley/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

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

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

CC: Maria E. Soto (CN=Maria E. Soto/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: Barbara B. Hunt (CN=Barbara B. Hunt/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

CC: Todd A. Bledsoe (CN=Todd A. Bledsoe/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TEXT:

Mickey wanted everyone to see the following article from today's USA Today:

USA Today
June 15, 1999

Mayors prefer fewer strings to more money

As the U.S. Conference of Mayors got ready for its meeting last weekend in New Orleans, USA TODAY's Richard Benedetto discussed urban issues with five mayors. Their conversation, below, was edited for length and for clarity.

Webb: 'I have never heard a mayor say, 'Don't hold me accountable.'

Richard Benedetto: Mayor Menino, you are concerned about what is going on in Congress right now with regard to budget cuts. And you have expressed a desire to have money with fewer strings attached to it. Talk a little bit about that.

Thomas Menino: Well, there are budget caps we have down in Washington now. I'll just tell you, if these budget caps stay in place, Washington will lose \$15 million in aid to our cities, all the way from job training to summer jobs to welfare-work, all those programs that are so necessary to make a city work.

Let's not have a cookie-cutter approach to money coming into cities. Every city here, five different cities, we are all different. Let's give us the flexibility in that money that comes to the cities directly. Why does it have to go to the state? Then when it goes to the state, it becomes political. You know, Mayor Webb's in good shape with his governor today, and gets some money. Mayor O'Neill, she's in terrible shape. She won't get the money. Let's stop the politics.

Benedetto: But lawmakers would say that they want to

give a lot of flexibility to the local governments. Do you see it in action?

Menino: I don't see it in action. I don't see any coming back to us.

Michael Guido: But for all the pandering and the wailing about Congress, probably if you ask most mayors, to a T they'd say, "Oh, I like my congressman. It's the other congressman that is the problem."

Benedetto: Mayor Webb, you're the incoming president of the organization. You're going to have to work a lot with Washington's White House and Congress. What do you plan to do in terms of making them more responsive to what you see as the needs of the city?

Wellington Webb: I'm going to try to redefine the paradigm that cities are <ellipsis> the 67 urban districts. The cities are the economic engines of metropolitan areas. We have to talk about helping working families. We have to talk about helping the people who have been left behind with policies that have come out of Washington.

We have to give mayors and local governments less strings, hold us accountable. I have never heard a mayor say, "Don't hold me accountable." What I've said and what I've heard them say is, "Don't say you are going to give it to us and then actually give us more strings with less resources to do it." In some cases, I would rather have less money and more flexibility to use what I have.

Menino: In the 1980s, when we had record deficits, we were told we had to take cuts in urban programs. Well, in the 1990s, for the record surpluses, we're told again, "You have to take cuts." I mean, it doesn't make a lot of sense. The 1980s, I can understand that. But 1999, we've got surpluses all over the place.

Sharon Goldsworthy: I would go back to the tax issue. Some of us believe that if you leave more money in the pockets of people, then they will support local needs rather than sending it all to

Washington, but that's
philosophical.

to be changed
were where we
actually working
cities. And we are right
have ever been.

O'Neill: I think that the perception of mayors needs
because we are not what we were. We are not what we
were accepting things and saying, "Thank you." We are
and being very aggressive in trying to revitalize the
there with the people, I think probably more than we

Littleton, Colo.,
nation, the concern of the
react in some way or do
something in your own communities.

Benedetto: Let me get to a specific problem. The
shootings really galvanized the attention of the
of the
nation. And I am sure that all of you have had to
do

with some of the
advocating: Where do
gun? We know they
controls on those
it for personal
accessible. We took a
youngsters said if they
police -- there's more
right now.

Menino: We have had counselors in schools, working
kids that needed the help. But, we are continually
the kids get the guns? How does a 15-year-old get a
brought them out of their homes. Why wasn't there some
guns? Guns should only be for hunters, and if you need
safety. But the problem you have is they're too
survey in Boston just recently where 60% of the
needed a gun, they could get one on the streets. The
visibility. But, you know, there are a lot of copycats

actually care. I spend a
school kids or going
to talk to the high school kids.

Guido: I think it gets to letting kids know that you
lot of time in the school either reading to elementary
to talk to the high school kids.

Goldsworthy: We all do.

are telling everyone
loved.

Guido: It's a therapy session for a mayor, I think. We
we are out educating, but we were there just to be

that you want to be
to bring families
working order so

But those kinds of programs, just to let kids know
engaged with them and that you care, and you're trying
into the school programs, and making sure parks are in

that they have diversions for their energies, to have other extracurricular activities for them -- I think that is really important.

Benedetto: Mayor O'Neill?

O'Neill: Specifically, we have done a couple of things. One is that each high school had student groups that worked together at having discussions on what is going to make them feel safe. And it was really interesting. Some say, "There are too many people here watching us," and others say, "There aren't enough." So you just ran the gamut. But it was a session where they discussed the things that would make them feel safe, and many things were done as a result of that.

The second thing is -- and this had been actually planned before the Littleton incident happened -- we had a day, a planned day of listening that was going to be on a cable station. It went for five hours, which was a little too long -- it probably should have been three -- but safety was the biggest issue. It was very interesting hearing them speak and the attitudes they had about safety.

I asked them one question. I said, "Is there one person at the high school that you could go to and feel comfortable with, one adult?" And they all raised their hand. Now that helps, because they at least feel that they can relate to somebody.

But we are trying very hard to bring the awareness that it is safe. We have a dog that goes through the schools, and rather than have them look as though he's checking up on people, they love to see him come. So that's a nonthreatening way of looking at this. But we did have a young man that had made threats, and he was taken out of school. And that calms some fears, that you know we are doing something about it.

Benedetto: Mayor Webb?

Webb: Some of our schools were the closest, geographically, to Littleton, to Columbine. Those schools were all let off for a few days. We had a series of sessions in other schools. We increased the

police presence to
talking with kids.

deal with some of the kids. And we did a lot of

was going on in the
debate on guns,
suing gun manufacturers,
you can't carry assault
of these things. I
people in Denver
Legislature and they
weren't real happy

It also had an interesting effect on a gun debate that
Legislature. The Legislature was going through a real
repealing local ordinances, preventing cities from
repealing most of Denver's ordinances that say that
weapons, you can't have gun shows in the city and many
took out a four-page ad in both papers talking to the
about what was about to happen to them in the
should call the Legislature, the governor. And they
when I printed their name.

were killed. And I
either, because now
urban city problems
raged in areas that
suburban areas.

And then Columbine happened. And then all the bills
don't think they're going to come back next year,
the
debate is no longer that these issues are only in
with
minority kids and poor kids. Now the debate is being
are predominantly white areas, upper-income areas, and
And it's really taken the community apart.

education than they

Benedetto: Why are mayors taking a greater role in
used to?

a key to all
system that works, you

Menino: I think mayors today realize that education is
successful cities. If you don't have an education
don't have a city.

school, it's before
programs. And that's
understand that
you might have 25
teach all those kids the
necessary.

It's not just the five hours that a kid spends in
school,
and it's after school. And mayors can create those
how the mayors want to go get involved, because they
support system. In an urban school system, you know,
or 30 different cultures. It's tough for a teacher to
same. That's why these after-school programs are so

posts or pillars for a

Webb: I believe very strongly that the two major goal
city that mayors have to be involved in is, one,

public safety. The second one is mayors normally get blamed for what goes on with education, whether they have control of the school board or they don't have control.

But I also believe, regardless of the political inferences, that what happens to the kids in our schools in our cities has a direct correlation to the vitality of that city. You cannot have a great city without having good schools. And I believe that in order to have good schools, there has to be a relationship between the city and the school board. People will move out of your city if they do not believe that the quality of education their children is receiving is adequate.

Goldsworthy: I came to politics through PTA, and that's not an unusual thing to happen for women. I have always had a commitment and a passion for public education. As a mayor, I'm not responsible for our city's schools. We are part of a county school system. Nevertheless, from City Hall, we support financially and in many other ways -- we have school-resource officers, which were godsend in the aftermath of some of the school violence episodes. We desperately need more money for our public schools in Shelby County; we also have a Memphis City School system. And in January, several of us came together, a large committee that I co-chaired, and proposed an initiative to promote the equivalent of a 75-cent property-tax increase across the county.

Menino: The business community says, "Hey, we have to educate those kids. If they're not educated, who is going to work on our banks? Who is going to work in the financial-service industry?"

Goldsworthy: You have collaboration between the business community, the city government and the school system that I think is unprecedented. And, you know, it's everything from the after-school programs, youth and athletics, and now increasingly the arts. Kids are busy. We know that when school lets out for Christmas vacation, vandalism in the parks goes like that (pointing up). And so we see the connections. <ellipsis> It's

helping the entire community.

Guido: I think that education, arts and culture,
public safety; all of those
things tie together as the environment that we try to
create as mayors.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:15-JUN-1999 16:24:35.00

SUBJECT: Re: Cureton brief

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

READ:UNKNOWN

TEXT:

I agree.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Karin Kullman (CN=Karin Kullman/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:15-JUN-1999 18:01:22.00

SUBJECT: WTW Convention

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

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

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

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

TEXT:

I know that Eli has been calling people regarding the August WTW Convention in Chicago. I spoke with Stephanie Streett, and while she knows the President will participate in some way, she does not want to confirm until we have figured out the format a little more specifically.

At any rate, apparently the Partnership is going to print invitations, and asked Scheduling whether they could put the President's name on it. She is going to call the Partnership and tell them that while we will participate in some way she is not comfortable having them put the President's name on it this far out.

Please call or page me with any questions.

kk

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004. email	Peter Rundlet to Elena Kagan et al re Brief [partial] (1 page)	06/15/1999	P6/b(6)

COLLECTION:

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

FOLDER TITLE:

[06/14/1999-06/15/1999]

2009-1006-F
kc200

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]

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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]

[004]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Peter Rundlet (CN=Peter Rundlet/OU=WHO/O=EOP [WHO])

CREATION DATE/TIME:15-JUN-1999 16:55:17.00

SUBJECT: Re: brief

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

READ:UNKNOWN

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

READ:UNKNOWN

CC: Charles F. Ruff (CN=Charles F. Ruff/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

TEXT:

I spoke to Chuck and then Justice. They will take out the offending sentence and rewrite the section to reflect that we are not taking a position on the merits. They will share iterations with us as they go, and I will be sure that you all see them. We have until midnight tomorrow night.

Elena Kagan

06/15/99 04:48:58 PM

Record Type: Record

To: Peter Rundlet/WHO/EOP@EOP

CC:

Subject: brief

P6/(b)(6) P6/(b)(6)

If you have a problem and you can't get me, please make sure to get hold of Bruce. Thanks.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:15-JUN-1999 19:38:01.00

SUBJECT: Durbin Hearing on eggs

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

READ:UNKNOWN

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

READ:UNKNOWN

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

READ:UNKNOWN

TEXT:

On July 1, Durbin, along with Voinovich, will hold a hearing and release a GAO report, criticizing the Administration's policies on egg safety. The title of the GAO report is tentatively "Nation Lacks a Consistent, Farm-to-Table Approach to Egg Safety," and the hearing's title is "Are There Cracks in the Federal Food Safety System?" Both FDA and USDA will be asked to testify. We will work to make sure we have a consistent message, and prepare some Q&A on the report. While the hearing will focus on eggs, Durbin's staff has told us that they are going to use eggs as an example to push for their single food safety agency legislation, which they will introduce sometime before the hearing.

Durbin's staff is willing to work with us on a possible egg announcement for the July 3 radio address. I'm still waiting to hear from OMB on whether it will be ready. You all might want to make a call to make sure it is ready --- I have emphasized to them that we really want to do it.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Karin Kullman (CN=Karin Kullman/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:15-JUN-1999 11:42:33.00

SUBJECT: Members Attending Gun Event

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

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

TO: Jose Cerda III (CN=Jose Cerda III/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

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

TEXT:

Unable to convert ARMS_EXT:[MESSAGE.D32]ARMS27356337J.136

The following is a HEX dump of the file:

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Sandra Yamin (CN=Sandra Yamin/OU=OMB/O=EOP [OMB])

CREATION DATE/TIME:15-JUN-1999 19:19:42.00

SUBJECT: FINAL CLEARANCE -- Draft SAP -- S. 1205 -- Military Construction Approps B

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

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

TO: George T. Frampton (CN=George T. Frampton/OU=CEQ/O=EOP@EOP [CEQ])
READ:UNKNOWN

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

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

TO: Wesley P. Warren (CN=Wesley P. Warren/OU=CEQ/O=EOP@EOP [CEQ])
READ:UNKNOWN

TO: Ron Klain (CN=Ron Klain/O=OVP@OVP [UNKNOWN])
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

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

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

TO: Miles M. Lackey (CN=Miles M. Lackey/OU=NSC/O=EOP@EOP [NSC])
READ:UNKNOWN

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

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

TO: Jeffrey M. Smith (CN=Jeffrey M. Smith/OU=OSTP/O=EOP@EOP [OSTP])
READ:UNKNOWN

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

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

TO: Sally Katzen (CN=Sally Katzen/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

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

CC: Wendy E. Gray (CN=Wendy E. Gray/OU=NSC/O=EOP@EOP [NSC])
READ:UNKNOWN

CC: Courtney O. Gregoire (CN=Courtney O. Gregoire/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

CC: James J. Jukes (CN=James J. Jukes/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: Sandra Yamin (CN=Sandra Yamin/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: William G. Dauster (CN=William G. Dauster/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

CC: Dawn L. Smalls (CN=Dawn L. Smalls/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

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

CC: Rebecca L. Walldorff (CN=Rebecca L. Walldorff/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: Robert L. Nabors (CN=Robert L. Nabors/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: Paul J. Weinstein Jr. (CN=Paul J. Weinstein Jr./OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

CC: Lisa Zweig (CN=Lisa Zweig/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: Shannon Mason (CN=Shannon Mason/OU=OPD/O=EOP@EOP [OPD])
READ:UNKNOWN

CC: Mindy E. Myers (CN=Mindy E. Myers/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: Scott R. Hynes (CN=Scott R. Hynes/O=OVP@OVP [UNKNOWN])
READ:UNKNOWN

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

CC: Mara E. Rudman (CN=Mara E. Rudman/OU=NSC/O=EOP@EOP [UNKNOWN])
READ:UNKNOWN

CC: Adrienne C. Erbach (CN=Adrienne C. Erbach/OU=OMB/O=EOP@EOP [OMB])
READ:UNKNOWN

CC: Carolyn T. Wu (CN=Carolyn T. Wu/OU=WHO/O=EOP@EOP [WHO])
READ:UNKNOWN

CC: Leslie Bernstein (CN=Leslie Bernstein/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

CC: Lisa M. Kountoupes (CN=Lisa M. Kountoupes/OU=WHO/O=EOP@EOP [WHO])

READ:UNKNOWN

CC: Mark J. Tavlarides (CN=Mark J. Tavlarides/OU=NSC/O=EOP@EOP [NSC])

READ:UNKNOWN

CC: Victoria A. Wachino (CN=Victoria A. Wachino/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

CC: Peter A. Weissman (CN=Peter A. Weissman/OU=OPD/O=EOP@EOP [OPD])

READ:UNKNOWN

CC: Judy Jablow (CN=Judy Jablow/OU=CEQ/O=EOP@EOP [CEQ])

READ:UNKNOWN

CC: Elizabeth Gore (CN=Elizabeth Gore/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

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

READ:UNKNOWN

CC: Charles E. Kieffer (CN=Charles E. Kieffer/OU=OMB/O=EOP@EOP [OMB])

READ:UNKNOWN

TEXT:

Attached for your sign-off is the final draft SAP on S. 1205 -- Military Construction Appropriations Bill, FY00. S. 1205 will be on the Senate floor for consideration Tues, June 16. Please provide sign-off and/or comments to me no later than 8:30AM Tues morning. Our aim is to transmit the SAP by 9:30AM. Appreciate your quick review. Thank you!

Please note that Jack Lew has not had an opportunity to review this draft.

===== ATTACHMENT 1 =====

ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS_EXT:[ATTACH.D2]ARMS28125147X.136 to ASCII,
The following is a HEX DUMP:

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S. 1205 -- MILITARY CONSTRUCTION APPROPRIATIONS BILL, FY 2000

(Sponsors: Stevens (R), Alaska; Burns (R), Montana)

This Statement of Administration Policy provides the Administration's views on S. 1205, the Military Construction Appropriations Bill, FY 2000, as reported by the Senate Appropriations Committee. Your consideration of the Administration's views would be appreciated.

Section 129: Bluegrass Chemical Demilitarization Facility

The Administration strongly opposes section 129, which would require the demonstration of six alternative technologies to chemical weapons incineration before construction of the Chemical Demilitarization facility at Bluegrass, Kentucky, could begin. Prompt construction of the Bluegrass site is critical to ensuring U.S. compliance with the deadline for chemical weapons destruction agreed to under the Chemical Weapons Convention. The Department of Defense has demonstrated three alternative technologies, one more than required by P.L. 104-208, the Omnibus Consolidated Appropriations Act of 1997. This provision would delay construction of the Bluegrass site by at least one year, resulting in a breach in the Chemical Weapons Convention deadline.

Overall Funding Level

The Administration commends the Committee for developing a bill that funds most of the construction projects requested in the President's FY 2000 Budget. However, the Administration is concerned that the Committee bill, which exceeds the President's budget by \$2.8 billion, will drain critical resources from other programs. The Administration believes that the President's budget request correctly addresses our most important FY 2000 military construction and housing needs and that additional funding is not required.

Unrequested Projects

The Administration questions the Committee's increase of over \$650 million to the President's request for approximately 70 unrequested FY 2000 projects. Though much of the unrequested funding is for projects that are funded in DoD's Future Years Defense Program (FYDP), about \$125 million is added for projects that are not in DoD's FYDP. While many of these unrequested projects may have some military utility, they are of much lower priority than

the projects requested in the FY 2000 Budget and contained in DoD's FYDP. The Administration urges the Senate to delete the funding added for unrequested projects, especially those not in the FYDP.

Restriction on the Use of NATO Security Investment Program Funds

The Administration objects to section 121 which would prohibit the use of NATO Security Investment Program (NSIP) funds for Partnership for Peace programs or to provide support to non-NATO countries. No NSIP funds have been, or are proposed to be, spent on projects that do not have direct military benefit to the Alliance. Indeed, NSIP-funded proposals for projects that happen to be located in non-NATO countries must meet the same NATO military criteria as NSIP projects located in NATO member nations. The Alliance must have the flexibility to allocate NSIP funds as needed to satisfy NATO military requirements. Restrictions of the type included in the Committee bill could invite other NATO members to restrict their NSIP contributions according to narrow national concerns. The restriction could adversely affect future NATO-led military operations. The Administration urges the Senate to remove this restriction from the bill.

Family Housing Improvement Fund

The Administration strongly objects to the Committee's \$52.2 million reduction to the Family Housing Improvement Fund (FHIF). Adequate family housing is critical to recruiting and retaining a quality force. To supplement existing Military Construction funds to revitalize DoD's housing inventory in a cost effective and timely manner, the Administration has sought through privatization to leverage Federal dollars with private sector capital. Subsequent to submission of the President's budget, the Department reviewed congressional concern over the scope of its privatization program, and responded by readjusting its proposed FHIF program. The proposed reduction to this fund would limit the ability of DoD to execute its planned FY 2000 program.

Counter-drug Forward Operating Location Construction

The Administration objects to the \$37.8 million reduction to the \$42.8 million request for Counter-drug Forward Operating Locations. Any delay in funding for new construction at these locations would reduce our ability to detect, and ultimately intercept, illicit drugs being brought into the United States. Plans are moving ahead, and this funding is needed now to meet pressing needs.

General Transfer Authority

The Administration urges the Senate to provide the requested transfer authority that would enable the Secretary of Defense to transfer appropriations among Military Construction Appropriations Act accounts. Similar transfer authority in Defense Appropriations Acts has been used with great success to meet unplanned requirements, without reducing the opportunity for congressional oversight.

Automated Records Management System
Hex-Dump Conversion