

NLWJC - KAGAN

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[6/15/1999 - 6/18/1999]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Elena Kagan to Sarah Wilson et al. re: Two q&a (1 page)	06/15/1999	P2, P5
002. email	Elena Kagan to Edward Hughes re: Congratulations (1 page)	06/17/1999	Personal Misfile
003. email	Elena Kagan to Sean Maloney re: Congratulations (1 page)	06/17/1999	Personal Misfile
004. email	Elena Kagan to Minyon Moore re: Congratulations (1 page)	06/17/1999	Personal Misfile
005. email	Elena Kagan to Beverly Barnes re: Congratulations (1 page)	06/17/1999	Personal Misfile
006. email	Elena Kagan to Jonathan Kaplan re: Congratulations (1 page)	06/17/1999	Personal Misfile
007. email	Elena Kagan to Robert Johnson re: Congratulations (1 page)	06/17/1999	Personal Misfile
008. email	Elena Kagan to Eric Angel re: New Paragraph (1 page)	06/17/1999	P2, P5
009. email	Elena Kagan to Michael Waldman re: Congratulations (1 page)	06/17/1999	Personal Misfile
010. email	Elena Kagan to Jordan Tamagni re: Congratulations (1 page)	06/17/1999	Personal Misfile

COLLECTION:

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[06/15/1999-06/18/1999]

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

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:15-JUN-1999 12:24:07.00

SUBJECT: take 2 on timber

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

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

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

TEXT:

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The following is a HEX dump of the file:

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:15-JUN-1999 16:49:04.00

SUBJECT: brief

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

READ:UNKNOWN

TEXT:

I have to go pick up my car from the shop, so will be hard to reach for the next few hours. 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: Elena Kagan (CN=Elena Kagan/OU=OPD/O=EOP [OPD])

CREATION DATE/TIME:15-JUN-1999 15:58:31.00

SUBJECT: Cureton brief

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

READ:UNKNOWN

TEXT:

Read this!!! It seems to me really important that we not express a view on the merits (i.e., on the question whether use of the sat by the ncaa is racially discriminatory) given the fire we're already under on our testing guidance. Agree?

----- Forwarded by Elena Kagan/OPD/EOP on 06/15/99 04:01 PM -----

Peter Rundlet
06/15/99 03:54:06 PM
Record Type: Record

To: Elena Kagan/OPD/EOP
cc:
Subject: Cureton brief

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 =====

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

TEXT:

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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

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

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 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).^{2/} A student with a GPA of

^{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

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

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).^{3/} 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

^{3/} Through subgrantees, the NYSP offers sports instruction and instruction in life skills, science, and math to poor and disadvantaged youths (JA 520a).

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")).

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).^{2/} 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

^{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).

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 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

^{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).

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 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

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).

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 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.^{8/}

II

THE NCAA IS SUBJECT TO THE REQUIREMENTS OF TITLE VI
BECAUSE IT RECEIVES ASSISTANCE THROUGH ANOTHER

^{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, 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.

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.

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 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).

^{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.

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 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

^{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.

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.^{1/}

^{1/} 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.^{1/}

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

^{1/} 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.

at those institutions.

The NCAA argues (Br. 38-39) that it cannot be subject to Title 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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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Elena Kagan to Sarah Wilson et al. re: Two q&a (1 page)	06/15/1999	P2, P5

COLLECTION:

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

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2009-1006-F
bm114

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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- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:16-JUN-1999 18:27:27.00

SUBJECT: Re: NCAA brief

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

READ:UNKNOWN

TEXT:

do you mean that "correctly" will be taken out of both sentences in that paragraph?

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:16-JUN-1999 16:55:38.00

SUBJECT: Education letter re: IDEA and House Juvenile Bill

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

READ:UNKNOWN

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

READ:UNKNOWN

TEXT:

what do you think?

----- Forwarded by Elena Kagan/OPD/EOP on 06/16/99 05:00
PM -----

Ronald E. Jones

06/16/99 04:18:15 PM

Record Type: Record

To: Barbara Chow/OMB/EOP, Jonathan H. Schnur/OPD/EOP, Tanya E. Martin/OPD/EOP, Elena Kagan/OPD/EOP

cc: Richard E. Green/OMB/EOP, David Rowe/OMB/EOP

Subject: Education letter re: IDEA and House Juvenile Bill

Education asked to send the attached letter to the House objecting to a proposed amendment to the House juvenile crime bill that is on the floor now. I understand that Education policy officials have discussed this with Barbara Chow or were planning to discuss it before it was sent.

The position taken is identical to the two letters cleared for the Senate on the Ashcroft amendment to S. 254, the Senate counterpart. However, because the Norwood amendment would apply to all weapons, not just to firearms this draft refers to "weapons" throughout and a paragraph has been added on page two relating to the IDEA's definition of "weapon". There are also a few editorial changes. (The changes from the Senate letter, other than the obvious changes to the bill number and the sponsor of the amendment, are shown below in red.)

Given that floor action has started and that the letter is basically a restatement of a previous position, we initially cleared the letter without recirculating it. However, Education has agreed to hold the letter to give more time for a review.

If you have any comments on this letter please forward them to me, Richard Green, and David Rowe.

Education letter follows:

I am writing to express my strong opposition to an amendment that Representative Norwood has offered to H.R. 1501, the juvenile crime bill that the House is now considering. This amendment would allow school personnel to suspend or expel children with disabilities from their

schools for unlimited periods of time, without any educational services, including behavioral intervention services, and without the impartial hearing now required by the Individuals with Disabilities Education Act (IDEA), for carrying or possessing a weapon to, or at, a school function.

The Congress need not address the particular issue that is the subject of the Norwood amendment, because it amended the IDEA just two years ago to give school officials new tools to address the precise issue of children with disabilities bringing weapons to school or otherwise threatening teachers and other students. For example, school officials may remove, for up to 45 days, a child with a disability who takes a weapon to school, and may request a hearing officer to similarly remove a child who is substantially likely to injure himself or others, if the child's parents object to a change in the child's placement. Furthermore, the IDEA allows hearing officers to keep these students out of the regular educational environment beyond 45 days if they continue to pose a threat to the rest of the student body. Finally, the 1997 amendments to the IDEA help prevent dangerous situations from arising, by encouraging schools to address misbehavior before it becomes serious, through the provision of behavioral interventions and other appropriate services. I am convinced that these new tools will be effective if given a chance to work.

I am firmly committed to ensuring that all our schools are safe and disciplined environments where all our children, including children with disabilities, can learn without fear of violence. But we should not let the tragic school shootings in Littleton, Colorado, and other communities lead us to responses, such as the Norwood amendment, that will harm children with disabilities, and that will not make our schools and communities safer.

First, the Norwood amendment would deny vital educational services to children with disabilities who are removed from school, including behavioral interventions that are designed to prevent dangerous behavior from recurring. Continued provision of educational services, including these behavioral interventions, offers the best chance for improving the long-term prospects for these children. Discontinuing educational services is the wrong decision in the short run and, in the long run, will result in significant costs in terms of increased crime, dependency on public assistance, unemployment, and alienation from society. We cannot afford to throw away a single child.

Second, the Norwood amendment would undo vital protections in the IDEA that were included to protect children with disabilities from widespread abuses of their civil rights. Under this amendment, for example, the IDEA would no longer require schools to determine, when suspending or expelling a child with a disability, whether the behavior of the child in carrying or possessing a weapon is related to the child's disability. Such a determination, which can currently be made while the child has been removed from school, is needed to ensure that children are not unjustly denied educational services during their removal without considering the effects of the child's disability on their behavior. The manifestation determination required by the IDEA is an important tool schools use to appropriately understand the relationship between a child's behavior and their disability in order to best implement behavior intervention strategies.

[NEW PARAGRAPH; SEE NOTE AT END OF DOCUMENT] Finally, the applicable definition of "weapon" (current section 615(k)(10)(D) of the IDEA) is very broad and open to subjective application, covering anything, such as a rock, a roll of coins, or a baseball bat for an after-school pick-up game, that is "readily capable of causing death or serious bodily injury", whether or not it is designed as a weapon and without regard to the student's intention in bringing it to school. Thus, a school could

exploit the Norwood amendment to expel children with disabilities who are difficult or expensive to serve, but who pose no danger to others at school.

We should be making every effort to appropriately reach out to our children and help prevent them from endangering themselves and others. It is equally important that we appropriately address the needs of children who have gone astray, violated the rules, and put others at risk. The exclusion of children with disabilities from school -- without the impartial due-process hearing and the continued services that the IDEA now requires -- is the wrong response.

I urge you to vote against the Norwood amendment.

The Office of Management and Budget advises that there is no objection to the submission of this report from the standpoint of the Administration's program.

Yours sincerely,

Richard W. Riley

[Note to reviewers: Current section 615(k)(10)(D) of the IDEA (20 U.S.C. 1415(k)(10)(D)), which would apply to the term "weapon" as used in the Norwood amendment, says that "the term 'weapon' has the meaning given the term 'dangerous weapon' under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code". [There's actually only one subsection (g) of 18 USC 930 now, because the second (g) was redesignated as (h) by P.L. 104-294, sec. 603(u), on Oct. 11, 1996.]

18 USC 930(g), in turn, defines "dangerous weapon" as "a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length".]

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

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

CREATION DATE/TIME:16-JUN-1999 14:00:35.00

SUBJECT: RECEIVED: Last call for comments on DOJ Q&As on Hate Crimes

TO: Ronald E. Jones (CN=Ronald E. Jones/OU=OMB/O=EOP [OMB])

READ:UNKNOWN

TEXT:

RETURN RECEIPT

Your Document:

Last call for comments on DOJ Q&As on Hate Crimes
was successfully received by:

CN=Elena Kagan/OU=OPD/O=EOP

at:

06/16/99 02:04:58 PM

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:16-JUN-1999 10:21:37.00

SUBJECT: hyde language

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

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

TEXT:
Here's the OLC-approved language on the Hyde amendment:

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

TEXT:
Unable to convert ARMS_EXT:[ATTACH.D48]ARMS25860547C.136 to ASCII,
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1A5C154CCDAD3F0A03A4988557B8DE914999381623635CE37ED3793A92FABA964ADC703EB2945C
02B38D44D556ED2007C289D0B58F3F7B9CB5C40533021D468953E475CEA4CF489F8BEE75D1CA53
4018DD05A3CED5098600D5E931C8CF66D05558F39D6D163DA22C6774C61F64D661D0D9F922656E
2EC5A7001E976BC43409D8AAB277DE5B82D0FCF01765DDB0D37A34B7FE28B6A6B9AF8D2FE0B0A3
18C7A194AD484074D53F5CD68A912176B62AA757AD8511723631185D5E826329DA68147E31E550
5146C42DCE2364136661B63A8C38D8659675B5858931A58C8C2CC0A40CC99EFEF3ECB236E179AC
E0923C82B802000800
4E0000007B03000009250100000006000000C90300000B300200000028000000CF030000087701
00000040000000F703000008340100000014000000370400000802010000000F0000004B040000
00984C006F00630061006C0020004800500020004C0061007300650072004A0065007400200035
0020006F006E0020004C0050005400310005749
4E53504F4F4C0000000000C800C8002C012C012C012C01C800C800300000000000000000000000
00
00
0005E0037132800C8196810
480D000011090000005A000B010000103600540069006D006500730020004E0065007700200052
006F006D0061006E00200052006500670075006C0061007200000000000000000000000010002005802
010000000400280011202002400A1000000A1000
000A0000005D00010002005E00010045005F00010002006000100170061000100450062000200
0200630002004500640002000200650001000200660010002006AA1152500000000000000000
000000000000000008337C00780000020000660000003DD0A100083010400030000200211000DDDD
0B0B00030000040B00DD46696E616C6C792C807468658041646D696E697374726174696F6E8073
7570706F72747380F1005B00F174686F7567687466756CF1015B00F1F1025C00F1736572696F75
73F1035C00F1806566666F72747380746F806164647265737380746865806973737565806F6680
6D656469618076696F6C656E636580616E6480697473CF65666665637473806F6E80796F756E67
8070656F706C652E808054686174806973807768798074686580507265736964656E7480686173
8074616B656E80746865806C65616480696E806368616C6C656E67696E6780746865CF656E7465
727461696E6D656E7480696E64757374727980746F806C69766580757080746F80697473807265
73706F6E736962696C697469657380616E64F1005500F1F1025200F180686173F1035200F180F1
015500F1F1025600F180F1035600F1696E6974696174F1025700F1696E67F1035700F1F1005800
F1F1025300F16564F1035300F1F1015800F1F1005400F1696E67F1015400F180626F7468806180

Finally, the Administration supports serious efforts to address the issue of media violence and its effects on young people. That is why the President has taken the lead in challenging the entertainment industry to live up to its responsibilities and initiating both a Surgeon General's report on youth violence and a joint FTC/DOJ study of the industry's marketing practices. The Administration, however, opposes an expected amendment to ban the distribution of certain violent material to teenagers. A broad prohibition of this kind on the sale or exhibition of violent materials would raise profound First Amendment concerns -- so much so that the drafters of this provision have included expansive loopholes that insofar as they address constitutional problems would render the provision, in critical respects, unenforceable and meaningless.

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

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

CREATION DATE/TIME:16-JUN-1999 07:32:21.00

SUBJECT: RECEIVED: FINAL CLEARANCE -- Draft SAP -- S. 1205 -- Military Construction Approp

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

READ:UNKNOWN

TEXT:

RETURN RECEIPT

Your Document:

FINAL CLEARANCE -- Draft SAP -- S. 1205 -- Military Construction Approps Bill, FY00
was successfully received by:

CN=Elena Kagan/OU=OPD/O=EOP

at:

06/16/99 07:36:42 AM

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

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

CREATION DATE/TIME:16-JUN-1999 10:28:05.00

SUBJECT: RECEIVED: Draft Juvenile Justice SAP

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

READ:UNKNOWN

TEXT:

RETURN RECEIPT

Your Document:

Draft Juvenile Justice SAP

was successfully received by:

CN=Elena Kagan/OU=OPD/O=EOP.

at:

06/16/99 10:31:14 AM

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

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

CREATION DATE/TIME:16-JUN-1999 13:47:06.00

SUBJECT: RECEIVED: FINAL CLEARANCE -- Draft SAP - H.R. 1501 Juvenile Justice

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

READ:UNKNOWN

TEXT:

RETURN RECEIPT

Your Document:

FINAL CLEARANCE -- Draft SAP - H.R. 1501 Juvenile Justice

was successfully received by:

CN=Elena Kagan/OU=OPD/O=EOP

at:

06/16/99 01:50:48 PM

Finally, the Administration supports serious efforts to address the issue of media violence and its effects on young people. That is why the President has taken the lead in challenging the entertainment industry to live up to its responsibilities and initiating both a Surgeon General's report on youth violence and a joint FTC/DOJ study of the industry's marketing practices. The Administration, however, opposes an expected amendment to ban the distribution of certain violent material to teenagers. A broad prohibition of this kind on the sale or exhibition of violent materials would raise very serious First Amendment concerns -- so much so that the drafters of the provision have included expansive loopholes that insofar as they mitigate the constitutional problems would render the provision, in critical respects, virtually impossible to apply or enforce.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:17-JUN-1999 18:17:35.00

SUBJECT: Re: Thanks

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

TEXT:

Thanks a ton. If you do get up to Cambridge, please give me a call. I'll be at the law school.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. email	Elena Kagan to Edward Hughes re: Congratulations (1 page)	06/17/1999	Personal Misfile

COLLECTION:

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

FOLDER TITLE:

[06/15/1999-06/18/1999]

2009-1006-F
bm114

RESTRICTION CODES

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

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

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

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]

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.

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

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

CREATION DATE/TIME:17-JUN-1999 07:43:10.00

SUBJECT: RECEIVED: FINAL Draft House Rules SAP for H.R. 2084 -- Transportation and Related

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

READ:UNKNOWN

TEXT:

RETURN RECEIPT

Your Document:

FINAL Draft House Rules SAP for H.R. 2084 -- Transportation and Related Agencies Appropria
was successfully received by:

CN=Elena Kagan/OU=OPD/O=EOP

at:

06/17/99 07:46:33 AM

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. email	Elena Kagan to Sean Maloney re: Congratulations (1 page)	06/17/1999	Personal Misfile

COLLECTION:

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

FOLDER TITLE:

[06/15/1999-06/18/1999]

2009-1006-F

bm114

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004. email	Elena Kagan to Minyon Moore re: Congratulations (1 page)	06/17/1999	Personal Misfile

COLLECTION:

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

FOLDER TITLE:

[06/15/1999-06/18/1999]

2009-1006-F
bm114

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

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

CREATION DATE/TIME:17-JUN-1999 12:52:00.00

SUBJECT: RECEIVED: URGENT NEED COMMENTS NO LATER THAN 1:00PM -- FINAL CLEARANCE -- FOREIGN

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

READ:UNKNOWN

TEXT:

RETURN RECEIPT

Your Document:

URGENT NEED COMMENTS NO LATER THAN 1:00PM -- FINAL CLEARANCE -- FOREIGN OPS APPROPS BILL,
was successfully received by:

CN=Elena Kagan/OU=OPD/O=EOP

at:

06/17/99 12:54:53 PM

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. email	Elena Kagan to Beverly Barnes re: Congratulations (1 page)	06/17/1999	Personal Misfile

COLLECTION:

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

FOLDER TITLE:

[06/15/1999-06/18/1999]

2009-1006-F

bm114

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006. email	Elena Kagan to Jonathan Kaplan re: Congratulations (1 page)	06/17/1999	Personal Misfile

COLLECTION:

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

FOLDER TITLE:

[06/15/1999-06/18/1999]

2009-1006-F
bm114

RESTRICTION CODES

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

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

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

- 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]

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.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
007. email	Elena Kagan to Robert Johnson re: Congratulations (1 page)	06/17/1999	Personal Misfile

COLLECTION:

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

FOLDER TITLE:

[06/15/1999-06/18/1999]

2009-1006-F
bm114

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

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

CREATION DATE/TIME:17-JUN-1999 07:43:09.00

SUBJECT: RECEIVED: FINAL CLEARANCE -- Draft letter on Ag/Rural Development Approps Bill

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

READ:UNKNOWN

TEXT:

RETURN RECEIPT

Your Document:

FINAL CLEARANCE -- Draft letter on Ag/Rural Development Approps Bill
was successfully received by:

CN=Elena Kagan/OU=OPD/O=EOP

at:

06/17/99 07:46:37 AM

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
008. email	Elena Kagan to Eric Angel re: New Paragraph (1 page)	06/17/1999	P2, P5

COLLECTION:

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

FOLDER TITLE:

[06/15/1999-06/18/1999]

2009-1006-F
bm114

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:17-JUN-1999 12:11:44.00

SUBJECT: Re:

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

READ:UNKNOWN

TEXT:

yes, that's good.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
009. email	Elena Kagan to Michael Waldman re: Congratulations (1 page)	06/17/1999	Personal Misfile

COLLECTION:

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

FOLDER TITLE:

[06/15/1999-06/18/1999]

2009-1006-F
bm114

RESTRICTION CODES

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

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

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

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

RR. Document will be reviewed upon request.

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

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

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
010. email	Elena Kagan to Jordan Tamagni re: Congratulations (1 page)	06/17/1999	Personal Misfile

COLLECTION:

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

FOLDER TITLE:

[06/15/1999-06/18/1999]

2009-1006-F
bm114

RESTRICTION CODES

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

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

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

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]

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.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:18-JUN-1999 11:23:32.00

SUBJECT: 5th commandment

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

TEXT:

----- Forwarded by Elena Kagan/OPD/EOP on 06/18/99 11:28 AM -----

Bruce N. Reed
06/17/99 08:28:42 PM
Record Type: Record

To: Karen Tramontano/WHO/EOP
cc: Jose Cerda III/OPD/EOP, Elena Kagan/OPD/EOP
Subject: 5th commandment

Jose checked the Catholic Web page, and Thou shalt not kill IS the 5th Commandment, so John gets the VP's award for Faith-Based Person of the Week.

Here's a longer Q&A for the 10 Commandments question:

Q. Will the President support the amendment passed by the House to let schools post the 10 Commandments?

A. If the House were serious, they would have remembered the Fifth Commandment -- Thou Shalt Not Kill -- and voted to make it harder for criminals to buy guns.

[Longer answer if pressed: Our administration has worked hard to expand religious liberty and make religious expression easier in the workplace and in the schools, consistent with the First Amendment. (We developed guidelines on religious expression for every school, and the President signed an executive order on religious expression in the federal workplace.) But the Supreme Court struck down a law just like this one in Kentucky. If Congress is serious about reducing youth violence, they'd pass common-sense measures to keep guns out of the wrong hands instead of feel-good measures that will be struck down instantly in court.]

One other general point for John to make in the morning, since the vote will be so late: Back in '92 we made a lot out of the "midnight pay raise". This time, John should stress the point that Congress voted on this in the dark of night, trying to hide from the American people. This vote won't stand the light of day.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:18-JUN-1999 10:05:34.00

SUBJECT: Re: - no subject (01JCJEWCFN1E005G5E) -

TO: kmoran (kmoran @ exchange.usia.gov @ INET @ LNGTWY [UNKNOWN])

READ:UNKNOWN

TEXT:

Thank you so much. Cross your fingers so that it comes true!

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

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

CREATION DATE/TIME:18-JUN-1999 11:44:42.00

SUBJECT: RECEIVED: LRM OGG25 - - LABOR Report on HR987 Workplace Preservation Act

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

READ:UNKNOWN

TEXT:

RETURN RECEIPT

Your Document:

LRM OGG25 - - LABOR Report on HR987 Workplace Preservation Act
was successfully received by:

CN=Elena Kagan/OU=OPD/O=EOP

at:

06/18/99 11:48:09 AM

RECORD TYPE: PRESIDENTIAL (NOTES READ RECEIPT)

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

CREATION DATE/TIME:18-JUN-1999 11:44:41.00

SUBJECT: RECEIVED: LRM OGG25 - - LABOR Report on HR987 Workplace Preservation Act

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

READ:UNKNOWN

TEXT:

RETURN RECEIPT

Your Document:

LRM OGG25 - - LABOR Report on HR987 Workplace Preservation Act
was successfully received by:

CN=Elena Kagan/OU=OPD/O=EOP

at:

06/18/99 11:48:17 AM

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elena Kagan@EOP@LNWTWY@LNWTWY (Elena Kagan@EOP@LNWTWY@LNWTWY [OPD])

CREATION DATE/TIME:18-JUN-1999 17:59:59.00

SUBJECT: Read Receipt: Justice Testimony on HR 1304

TO: Robert J. Pellicci@EOP (Robert J. Pellicci@EOP [OMB])

READ:UNKNOWN

TEXT:

Message Creation Date was at 18-JUN-1999 17:57:00

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:18-JUN-1999 17:57:29.00

SUBJECT: Re: FYI

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

TEXT:

Thanks a lot. Keep your fingers crossed for me.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

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

CREATION DATE/TIME:18-JUN-1999 17:58:48.00

SUBJECT: PRESIDENT CLINTON TO NOMINATE SALLY KATZEN AS DEPUTY DIRECTOR FOR MANAGEMENT AT

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

READ:UNKNOWN

TEXT:

congratulations for becoming official

----- Forwarded by Elena Kagan/OPD/EOP on 06/18/99 06:03
PM -----

Heather M. Riley

06/18/99 05:17:59 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: PRESIDENT CLINTON TO NOMINATE SALLY KATZEN AS DEPUTY
DIRECTOR FOR MANAGEMENT AT THE OFFICE OF MANAGEMENT AND BUDGET

THE WHITE HOUSE

Office of the Press Secretary
(Cologne, Germany)

For Immediate
Release
June 18, 1999

PRESIDENT CLINTON TO NOMINATE SALLY KATZEN AS DEPUTY DIRECTOR FOR
MANAGEMENT AT THE OFFICE OF MANAGEMENT AND BUDGET

The President today announced his intent to nominate Sally Katzen
as Deputy Director for Management at the Office of Management and Budget
(OMB).

"I am especially proud to name Sally Katzen to this important
position," the President said. "She brings an impressive record of public
service as well as a strong understanding of management issues. I have
worked closely with Sally throughout the Administration and have full
confidence that she will continue to provide leadership, hard work and
common sense to the important management and regulatory issues that OMB
coordinates. Her strong background in policy will serve her well in
integrating the important functions related to both the budget and
management at OMB."

Sally Katzen is currently the Deputy Assistant to the President
for Economic Policy and Deputy Director of the National Economic Council.
She has previously served in the Clinton Administration as the
Administrator of the Office of Information and Regulatory Affairs at the
Office of Management and Budget. She also served in various positions

during the Carter Administration.

Prior to joining the Clinton Administration, Ms. Katzen was a partner in the Washington, DC, law firm of Wilmer, Cutler, and Pickering, specializing in regulatory and legislative issues. She has also worked extensively in the field of administrative law, both in her law practice and in professional activities.

Ms. Katzen was born and raised in Pittsburgh, Pennsylvania, and graduated Magna Cum Laude from Smith College and the University of Michigan Law School, where she was Editor-in-Chief of the Michigan Law Review. Following graduation from law school, she clerked for Judge J. Shelly Wright of the U.S. Court of Appeals for the District of Columbia Circuit.

The Office of Management and Budget evaluates and formulates management procedures and program objectives within Federal departments and agencies. The Deputy Director for Management oversees the Office of Information and Regulatory Affairs, the Office of Federal Procurement Policy, and the Office of Federal Financial Management. In addition, the position has overall responsibility for management practices and procedures throughout the Federal government.

-30-30-30-

Message Sent

To: _____

Denver R. Peacock/WHO/EOP
Karen C. Burchard/WHO/EOP
Paul J. Cusack/OVP @ OVP
Jenni R. Engebretsen/WHO/EOP
Lindsey E. Huff/NSC/EOP
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Anne M. Edwards/WHO/EOP
David E. Kalbaugh/WHO/EOP
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