

**NLWJC - KAGAN**

**EMAILS CREATED**

**ARMS - BOX 010 - FOLDER 002**

**[9/27/1995 - 11/9/1995]**

# Withdrawal/Redaction Sheet

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Elena Kagan to Kathleen Whalen. Subject: Re: Chicago Council (1 page)	10/02/1995	P6/b(6)
002. email	Elena Kagan to Elena Kagan. Subject: Appt. request - garrett, beth [partial] (1 page)	10/11/1995	P6/b(6)
003. email	Elena Kagan to Elena Kagan. Subject: Appt. request - Raffiman, Mark [partial] (1 page)	10/17/1995	P6/b(6)
004. email	Elena Kagan to Elena Kagan. Subject: Appt. request - Hubbard, Heidi [partial] (1 page)	10/17/1995	P6/b(6)
005. email	Elena Kagan to Jennifer Klein and Todd Stern. Subject: Dinner (1 page)	10/26/1995	Personal Misfile
006. email	Elena Kagan to Mark Schwartz. Subject: Not an apparition (1 page)	11/01/1995	Personal Misfile
007. email	Elena Kagan to Marvin Krislov and Dawn Chirwa. Subject: women and such (1 page)	11/08/1995	Personal Misfile

**COLLECTION:**

Clinton Presidential Records  
 Automated Records Management System (Email)  
 WHO ([From Elena Kagan])  
 OA/Box Number: 500000

**FOLDER TITLE:**

[9/27/1995 - 11/9/1995]

2009-1006-F  
ke774

**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]
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- 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]
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- 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 (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:27-SEP-1995 17:23:37.81

SUBJECT: RE: 318 timber sales/status

TO: Dinah Bear ( BEAR\_D ) (CEQ)

READ:27-SEP-1995 17:25:02.35

TEXT:

Thanks once more for the update. Needless to say, I'd like to see the response to that interrogatory when it's done!

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:29-SEP-1995 17:44:23.63

SUBJECT: nea

TO: Cheryl D. Mills

( MILLS\_C ) (WHO)

READ:29-SEP-1995 17:46:07.63

TEXT:

I forgot to ask you: did Richard Schiffrin ever call back? What's going on with that?

# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. email	Elena Kagan to Kathleen Whalen. Subject: Re: Chicago Council (1 page)	10/02/1995	P6/b(6)

### COLLECTION:

Clinton Presidential Records  
Automated Records Management System (Email)  
WHO ([From Elena Kagan])  
OA/Box Number: 500000

### FOLDER TITLE:

[9/27/1995 - 11/9/1995]

2009-1006-F

ke774

### RESTRICTION CODES

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

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RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 6-OCT-1995 17:05:38.05

SUBJECT: misdirected message

TO: Brian E. Burke ( BURKE\_B ) (OPD)

READ:10-OCT-1995 10:32:02.97

TEXT:

Please ignore the last message I sent you. It was meant to go to Dennis Burker.  
Sorry.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 6-OCT-1995 16:45:09.95

SUBJECT: cameras in the courtroom

TO: Brian E. Burke ( BURKE\_B ) (OPD)

READ:10-OCT-1995 10:31:54.26

TEXT:

I hear you need a Q&A on cameras in the courtroom. Please see the attached.  
And feel free to call if you have any questions.

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

ATT CREATION TIME/DATE: 6-OCT-1995 16:44:00.00

ATT BODYPART TYPE:p

ATT CREATOR: Elena Kagan

TEXT:

===== END ATTACHMENT 1 =====

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 6-OCT-1995 14:13:38.89

SUBJECT: Timber cases

TO: Dinah Bear ( BEAR\_D ) (CEQ)

READ: 6-OCT-1995 15:18:39.57

TEXT:

Anything new that I should know about?

# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. email	Elena Kagan to Elena Kagan. Subject: Appt. request - garrett, beth [partial] (1 page)	10/11/1995	P6/b(6)

### COLLECTION:

Clinton Presidential Records  
Automated Records Management System (Email)  
WHO ([From Elena Kagan])  
OA/Box Number: 500000

### FOLDER TITLE:

[9/27/1995 - 11/9/1995]

2009-1006-F  
ke774

### RESTRICTION CODES

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

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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

RECORD TYPE: PRESIDENTIAL (WAVES REQUEST)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 11-OCT-1995 10:48:42.68

SUBJECT: Appt. request - garrett, beth

TO: Elena Kagan ( KAGAN\_E ) (WHO)

READ: NOT READ

TEXT:

Date	Appointment with
12-Oct-1995	KAGAN, ELENA

Room No.	Bldg.	Requested by	Phone #
125	EOB	Elena Kagan	456-7594

Comments:

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TIME	VISITOR'S LAST, FIRST NAME	BIRTHDATE	SOC. SEC. #
05:30pm	garrett beth	<span style="border: 1px solid black; padding: 2px;">P6/(b)(6)</span>	- -

[002]

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 11-OCT-1995 14:22:43.85

SUBJECT: RE: Speaking engagements

TO: Kathleen M. Whalen ( WHALEN\_K ) (WHO)

READ: 11-OCT-1995 14:24:02.42

TEXT:

Many thanks. And now, yet another question. Can I travel back to Chicago at the expense of the University of Chicago to take part in a law school event. The event is a session of the U of C "visiting committee," which is a sort of board of trustees; I would be speaking about law school issues only.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:12-OCT-1995 09:57:00.99

SUBJECT: RE: Cabazon

TO: Jennifer Palmieri ( PALMIERI\_J ) (WHO)

READ:12-OCT-1995 10:30:41.49

TEXT:

Thanks for letting me know. A good outcome.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:12-OCT-1995 08:37:23.13

SUBJECT: RE: are you doing legalized gambling stuff? if so, please

TO: Marvin Krislov ( KRISLOV\_M ) (WHO)

READ:12-OCT-1995 08:42:21.63

TEXT:

yes. many thanks.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:13-OCT-1995 18:17:23.79

SUBJECT: RE: More

TO: Thomas C. Jensen

( JENSEN\_T ) (CEQ)

READ:13-OCT-1995 18:17:50.14

TEXT:

Great; thanks.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:13-OCT-1995 18:04:24.30

SUBJECT: RE: Possible Language for Letter

TO: James C. Murr ( MURR\_J ) (OMB)

READ:13-OCT-1995 18:14:08.89

TEXT:

Many many thanks.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:13-OCT-1995 17:54:19.42

SUBJECT: RE: Reminders....

TO: Marna E. Madsen

( MADSEN\_M ) (WHO)

READ:13-OCT-1995 17:59:12.45

TEXT:

I think I'll be able to come. I'll let you know for sure next week.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:13-OCT-1995 18:06:43.20

SUBJECT: More

TO: Thomas C. Jensen ( JENSEN\_T ) (CEQ)

READ:13-OCT-1995 18:13:44.31

TEXT:

I know where we are on the phone calls.

Exactly where are we on the press release? What are we going to do when?

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:16-OCT-1995 10:12:21.14

SUBJECT: Amtrak sap

TO: Jeffrey J. Connaughton ( CONNAUGHTO\_J ) (WHO)

READ:16-OCT-1995 10:14:46.11

TEXT:

I sent in a no-objection from the counsel's office.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:16-OCT-1995 14:08:41.19

SUBJECT: RE: gambling letter

TO: Todd Stern ( STERN\_T ) (WHO)

READ:16-OCT-1995 14:44:28.07

TEXT:

That's fine with me. I also thought, on reading the letter over again, that I should replace "from which to begin" with "for." Do you now want final versions?

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:16-OCT-1995 14:56:51.48

SUBJECT: RE: F.Y.I.

TO: James Castello ( CASTELLO\_J ) (WHO)

READ:16-OCT-1995 15:21:14.24

TEXT:

Someone should talk to someone within the AMA -- just to get some better sense than we have now of how doctors view this procedure (or what the range of views is). Even if the AMA doesn't end up supporting the committee's position, it's important to know whether any but a few doctors think this is a legitimate procedure or think there may be valid reasons to perform it.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:17-OCT-1995 12:20:47.84

SUBJECT: two things

TO: Todd Stern ( STERN\_T ) (WHO)

READ:17-OCT-1995 13:43:03.55

TEXT:

1. what happened with respect to the 7:30 meeting?
2. i'm meeting with jack quinn this afternoon. (he's been talking to each of the associate counsels individually.) any advice as to what to say?

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:17-OCT-1995 13:49:27.06

SUBJECT: sorry

TO: Todd Stern ( STERN\_T ) (WHO)

READ:17-OCT-1995 14:43:08.44

TEXT:

I've eaten. And I have a 2:00 meeting. I'll be back in my office around 4:00.

# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. email	Elena Kagan to Elena Kagan. Subject: Appt. request - Raffman, Mark [partial] (1 page)	10/17/1995	P6/b(6)

### COLLECTION:

Clinton Presidential Records  
Automated Records Management System (Email)  
WHO ([From Elena Kagan])  
OA/Box Number: 500000

### FOLDER TITLE:

[9/27/1995 - 11/9/1995]

2009-1006-F  
ke774

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RECORD TYPE: PRESIDENTIAL (WAVES REQUEST)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:17-OCT-1995 09:35:40.69

SUBJECT: Appt. request - Raffman, Mark

TO: Elena Kagan ( KAGAN\_E ) (WHO)

READ:NOT READ

TEXT:

Date	Appointment with
24-Oct-1995	KAGAN, ELENA

Room No.	Bldg.	Requested by	Phone #
125	EOB	Elena Kagan	456-7594

Comments:

TIME	VISITOR'S LAST, FIRST NAME	BIRTHDATE	SOC. SEC. #
01:00pm	Raffman Mark	P6(b)(6)	[003]

# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004. email	Elena Kagan to Elena Kagan. Subject: Appt. request - Hubbard, Heidi [partial] (1 page)	10/17/1995	P6/b(6)

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Clinton Presidential Records  
Automated Records Management System (Email)  
WHO ([From Elena Kagan])  
OA/Box Number: 500000

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[9/27/1995 - 11/9/1995]

2009-1006-F  
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RECORD TYPE: PRESIDENTIAL (WAVES REQUEST)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 17-OCT-1995 09:34:51.51

SUBJECT: Appt. request - Hubbard, Heidi

TO: Elena Kagan ( KAGAN\_E ) (WHO)

READ: NOT READ

TEXT:

Date	Appointment with
19-Oct-1995	KAGAN, ELENA

Room No.	Bldg.	Requested by	Phone #
125	EOB	Elena Kagan	456-7594

Comments:

---

TIME	VISITOR'S LAST, FIRST NAME	BIRTHDATE	SOC. SEC. #
01:00pm	Hubbard Heidi	P6(b)(6)	- - [604]

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:17-OCT-1995 16:24:04.47

SUBJECT: RE: Are you working on the matter referenced in the attached?

TO: Stephen R. Neuwirth ( NEUWIRTH\_S ) (WHO)

READ:17-OCT-1995 16:27:12.04

TEXT:

Nope. Thanks for asking.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:18-OCT-1995 18:40:45.79

SUBJECT: RE: amtrak sap language

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ:19-OCT-1995 10:25:27.54

TEXT:

That's rich. I can do a conference call any time up to 12:30 or between 3:30 and 4:30.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:18-OCT-1995 16:59:49.53

SUBJECT: crime bill

TO: Dennis Burke

( BURKE\_D ) (OPD)

READ:18-OCT-1995 18:12:28.82

TEXT:

You're absolutely right: given the amendment to Subtitle A, section 20101 that you highlighted, the AG has no authority to condition grants on the existence of prisoner drug-testing programs. (Perhaps Congress realized how much free-floating authority the old version gave to the AG to condition grants.)

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:18-OCT-1995 17:45:11.36

SUBJECT: ethical question

TO: Kathleen M. Whalen

( WHALEN\_K ) (WHO)

READ:18-OCT-1995 17:57:35.47

TEXT:

So I know you have many more important things on your plate and I feel pretty bad for asking you again, but I think we left this question open: can I accept expenses from the U of Chicago for an activity stemming from my position there? Many, many thanks. If you could tell me sometime before the middle of next week, that would be great.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:18-OCT-1995 08:51:14.56

SUBJECT: fyi

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ:18-OCT-1995 10:21:20.01

TEXT:

Lois Schiffer thinks the chances are good that the 9th Circuit will grant a stay pending appeal. If not, of course, the govt will have to comply with the orders specified in (3) and (4) of Dinah's memo.

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

ATT CREATION TIME/DATE:17-OCT-1995 18:50:00.00

ATT BODYPART TYPE:B

ATT CREATOR: Dinah Bear

ATT SUBJECT: Judge Hogan's decision

ATT TO: Elena Kagan ( KAGAN\_E )

ATT TO: Ruth D. Saunders ( SAUNDERS\_R )

ATT TO: Remote Addressee ( tj at home )

TEXT:

Judge Hogan just issued his rulings:

- 1. NO CONTEMPT - MOTION DENIED!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!
- 2. ISSUED INJUNCTION - gave government until October 25th to comply. Denied motion for stay, from which we will appeal to 9th Circuit.
- 3. Ordered the government to submit to the court by Nov. 1 a list of all timber sale contracts offered or awarded prior to fy 1991, which are covered by the court's decision of Sept. 13th.
- 4. Ordered the government to submit bi-weekly progress reports beginning Oct. 25th, describing the action taken to award and release each of the sales offered or awarded between Oct. 1, 1990 and July 27, 1995, that are covered in his Sept. 13th order. "After these reports, if the parties disagree whether a sale should be released, the court retains jurisdiction over that issue."

amen

===== END ATTACHMENT 1 =====

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:18-OCT-1995 10:40:24.64

SUBJECT: amtrak sap language

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ:18-OCT-1995 15:15:37.19

TEXT:

The language I proposed to Janno -- to replace the first bullitt in the Oct. 5 draft of the SAP on HR 1788 -- is as follows:

"Provide a transition period for replacing the current Amtrak Board of Directors by applying the appointment mechanism proposed in the bill to vacancies as and when they arise. Such a transition period will prevent needless disruption of Amtrak's reform efforts."

Let me know anything you find out about the call between Pena and Harold. Ab seemed pretty out out this morning when I told him about it. He believes that Pena's position (i.e., just to keep the current appointment mechanism) is untenable and that the compromise position (i.e., to phase in a new appointments mechanism over time) is the most sensible solution.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:18-OCT-1995 16:07:18.00

SUBJECT: RE: amtrak sap language

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ:18-OCT-1995 18:32:45.92

TEXT:

I'd be perfectly amenable to that, and though I haven't talked to Ab, I suspect he would be as well. For different reasons, I think OLC also would go along: because Dellinger likes the House proposal, he has always wanted to be silent on this issue. The problem, if there is one, will come from DOT: Janno has told me that he wants to use the SAP to lay down a marker on this issue -- to declare that the appointments mechanism, as proposed in the House bill, is unacceptable. (It was because I understood DOT to want something in the SAP that I offered the substitute language -- though DOT now may prefer nothing at all.) I suspect Janno will urge us to object wholesale to the appointments provision, as the SAP does now, with the idea in mind of eventually negotiating to the compromise solution. But if we do that, of course, OLC will object, and for what Ab considers to be good reason. My bottom line, in light of all this, is either to do what you have suggested or to do what I have suggested (with a slight preference for your suggestion over mine), but not to do what Janno has suggested. What do you think? And how did the conversation go between Pena and Harold?

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 19-OCT-1995 12:10:36.73

SUBJECT: Seattle audobon v. thomas

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ: 19-OCT-1995 16:07:10.10

TEXT:

I just received the brief filed by environmental groups in the above case, which we talked about the other day. The plaintiffs say that they need the injunction reaffirmed because the logging rider in the Rescissions Act places the continued force of the injunction in some doubt. More specifically, the plaintiffs note that in the wake of the Rescissions Act, a Forest Service memo listed sales covered by the injunction as among those slated to be released -- though the plaintiffs also concede that DOJ has informed the court handling the NFRC case that the Forest Service is not currently proceeding with these sales. In addition, the plaintiffs say that the timber industry in the NFRC case is asking the court to order the release of the enjoined sales -- in effect, asking one court to undo the injunction of another. So much for why the motion was filed. If you want to see the motion or have any other questions, let me know. Are we still on for that call to Janno?

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 20-OCT-1995 11:08:54.65

SUBJECT: Takings

TO: Thomas C. Jensen ( JENSEN\_T ) (CEQ)

READ: 20-OCT-1995 11:34:29.38

TEXT:

You had mentioned a meeting. Anything new on this front?

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:20-OCT-1995 12:15:46.52

SUBJECT: yesterday's decision

TO: Thomas C. Jensen ( JENSEN\_T ) (CEQ)

READ:20-OCT-1995 12:28:00.22

TEXT:

What are the political implications of yesterday's decision? How important is it?; who's going to be mad/happy?; what's going to happen as a result of it?, etc.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 20-OCT-1995 11:32:53.30

SUBJECT: gambling letters

TO: Todd Stern ( STERN\_T ) (WHO)

READ: 20-OCT-1995 11:33:53.15

TEXT:

Do you know what's happened to them?

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:20-OCT-1995 11:13:34.42

SUBJECT: Timber litigation

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ:20-OCT-1995 11:58:37.70

TEXT:

FYI: The Justice Dept, at a meeting yesterday, decided to join Sierra Club etc. in asking the court in the Seattle Audobon case to reaffirm the injunction (thus preventing the release of sales). BLM and FWS had recommended this position; the Forest Service had indicated that it didn't much care.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 20-OCT-1995 15:14:42.86

SUBJECT: timber litigation continued

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ: 20-OCT-1995 19:26:05.85

TEXT:

As I understand it, the decision yesterday adds a little but not a lot to our other recent litigation decisions stemming from the rescissions act, in terms of pleasing enviros and commercial fishery interests and displeasing the timber industry. The decision will be viewed as one more step -- but not a terribly large or important step -- in the direction we've been going.

I've also been told that there's a very big decision to make next week in litigation taking place in Kentucky involving salvage timber sales. I take it we have to figure out how to articulate the standard we're using in making such sales. If you want, I'll let you know when I find out more about this.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:23-OCT-1995 09:33:16.76

SUBJECT: RE: NRFC Interrogatory

TO: Dinah Bear ( BEAR\_D ) (CEQ)  
READ:23-OCT-1995 09:39:55.11

CC: Thomas C. Jensen ( JENSEN\_T ) (CEQ)  
READ:23-OCT-1995 13:01:41.65

TEXT:

I agree with you, although I suspect we'll get a second question anyway. I take it the best way to handle this is for you to call Justice and register all our views? Let me know if you want me to do anything else.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 READ RECEIPT)

CREATOR: KAGAN\_E (WHO)

CREATION DATE/TIME: 23-OCT-1995 11:03:00.00

SUBJECT: Receipt Notification

TO: KALBAUGH\_D (WHO)

READ: 24-OCT-1995 07:57:49.06

TEXT:

This is a Read Receipt Notification for:

Message Title: Preparation of Your Commission

Addressee: KAGAN\_E

Date Sent: 23-Oct-1995 10:57am

Date Read: 23-Oct-1995 11:03am

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 23-OCT-1995 11:03:30.45

SUBJECT: RE: Preparation of Your Commission

TO: David E. Kalbaugh ( KALBAUGH\_D ) (WHO)  
READ: 24-OCT-1995 07:57:44.62

CC: G. Timothy Saunders ( SAUNDERS\_GT ) (WHO)  
READ: 23-OCT-1995 11:11:03.97

TEXT:  
Elena Kagan. Illinois.  
Thanks.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:23-OCT-1995 15:40:35.69

SUBJECT: RE: NRFC Interrogatory

TO: Dinah Bear ( BEAR\_D ) (CEQ)  
READ:23-OCT-1995 15:41:01.09

CC: Thomas C. Jensen ( JENSEN\_T ) (CEQ)  
READ:23-OCT-1995 18:25:57.76

TEXT:  
No; that's fine.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:23-OCT-1995 14:47:00.60

SUBJECT: lrm 2891

TO: Bruce N. Reed ( REED\_B ) (WHO)

READ:23-OCT-1995 15:11:24.88

CC: Melinda D. Haskins ( HASKINS\_M ) (OMB)

READ:23-OCT-1995 14:50:49.32

TEXT:

Bruce:

I'll leave the political calculation as to whether to send the DOJ letter (and if so, in what form) to you. (Of course, we should consider whether we want to make strong constitutional objections to provisions in the welfare bills that the President is likely to go along with.) Here's a quick and dirty legal analysis of the "constitutional concerns" noted in the DOJ letter to inform your decision. (For various reasons, I'd appreciate it if this analysis were not passed on to OLC; let me know if this is a problem.) The numbers I use are the same as the numbers used in the DOJ letter, with "H" referring to the House version and "S" referring to the Senate version:

H1. The constitutional argument here is very weak. A rational basis standard of review almost certainly would apply, and this provision almost certainly would meet it.

H2. The argument here is moderately strong. It's not an automatic winner by any means, but it is a sound position, well supported by existing precedent.

H3. I can't imagine a court reading this provision in the way OLC (rightly) thinks would raise constitutional concerns. This objection seems a bit "made up" to me.

H4. The argument here is less strong than the letter indicates, but still credible. There's a real distinction between this provision and others previously held unconstitutional: this provision limits newcomers' benefits to the level received in the former state, whereas the provisions in earlier cases denied them entirely. But there's still a decent case to be made that this provision is unlawful because a state can't discriminate among its residents based on length of time spent in the state. It probably wouldn't win, but it's a respectable argument.

H5. This (like H1) is a weak argument, because rational basis claims almost never succeed. It takes legislation far more irrational than this to move the court to take action under this standard.

H6. This fear seems overstated (as above, I don't think a court would interpret the provisions in this manner), but the amendment proposed seems sensible enough.

H7. Similarly, the change proposed here is of mere "academic" importance, but is very sensible.

S1. See H1 above.

S2. This seems as if it should be a very strong legal argument, but it's really not. I'd grade it as a plausible legal claim, but not much more than that. The problem, in a nutshell, is that this provision doesn't distinguish on its face -- but only in operation -- between naturalized and natural-born citizens, and in current constitutional law, that makes all the difference in the world. Perhaps this is one on which reasonable people can disagree, but I would rank the claim as much less strong than does OLC.

S3. See H2 above.

S4. See H3 above.

S5. See H4 above.

S6. See H6 above.

S7. See H7 above.

Please call if you have any questions, want more detailed legal analysis, etc.

And let me know what you decide to do with the letter.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 23-OCT-1995 15:52:56.46

SUBJECT: lrm 2891

TO: Melinda D. Haskins

( HASKINS\_M ) (OMB)

READ: 23-OCT-1995 16:00:38.00

TEXT:

After talking with Bruce, I propose saying something as follows to DOJ:

1. In general, we should try to prune the section on constitutional concerns. It does no good -- indeed, it weakens our credibility -- if we make a large number of constitutional arguments, some of which aren't particularly strong or particularly important.

2. In light of the above, we should

Delete H1

Keep H2, except delete the last two paragraphs

Delete H3

Keep H4

Delete H5

Delete H6

Delete H7

Delete S1

Keep S2

Keep S3

Delete S4

Keep S5

Delete S6

Delete S7

Let me know what would be most helpful to you. Should I deal with Justice directly? Should I write this up more formally so that you can pass on the comments to them? Give me a call.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:26-OCT-1995 15:39:48.63

SUBJECT: Meeting

TO: Bruce N. Reed ( REED\_B ) (WHO)

READ:26-OCT-1995 15:40:58.64

TEXT:

That was much more interesting than the usual meeting I get invited to. Thanks for involving me in this.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:26-OCT-1995 12:07:54.19

SUBJECT: RE: Revised DOJ Conferee Letter

TO: Melinda D. Haskins ( HASKINS\_M ) (OMB)

READ:26-OCT-1995 12:09:21.92

TEXT:

Has it come in yet? I haven't gotten anything.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:26-OCT-1995 09:09:41.65

SUBJECT: fyi

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ:26-OCT-1995 09:22:12.23

TEXT:

In case you haven't heard, I'm forwarding you the news that the 9th Circuit denied a stay pending appeal of Judge Hogan's ruling against the government in NFRC v. Glickman. As noted, the denial of a stay means the government must immediately begin to release large volumes of old growth timber. It is unclear what will happen to all this timber if the government eventually wins its appeal (which I view as unlikely): that is, no one really knows whether the government then could rescind its releases.

On another subject entirely, I hear Harold talked with Secretary Pena. What's happening on your end?

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

ATT CREATION TIME/DATE:25-OCT-1995 21:12:00.00

ATT BODYPART TYPE:B

ATT CREATOR: Dinah Bear

ATT SUBJECT: Bad news - we lost.

ATT TO: Elena Kagan ( KAGAN\_E )

TEXT:

The Ninth Circuit denied our motion for a stay of the district court's order. Oral argument was extremely harsh and very problematic; many of the questions directed towards the government attorney were irrelevant and argumentative (does that sound like an objection!) and directed towards the Senate's attack on Jim Lyons and issues already decided (in favor of the government) related to the contempt motion.

Argument on the appeal is set for the week of Jan. 8th.

The consensus of everyone at Justice is that there is no point in pursuing a rehearing request. Lois Schiffer is working on a statement for the press and I'll obviously fax it to you when I get it.

The consequences of this are that we will begin releasing nearly 230 million board feet of old growth tomorrow morning. There will be a dramatic increase in protests, press, criticism of the administration for signing the bill, etc.

Sorry I don't have better news!

===== END ATTACHMENT 1 =====

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 26-OCT-1995 08:52:17.97

SUBJECT: RE: Bad news - we lost.

TO: Dinah Bear ( BEAR\_D ) (CEQ)

READ: 26-OCT-1995 09:14:08.81

TEXT:

Thanks for the quick info.

# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. email	Elena Kagan to Jennifer Klein and Todd Stern. Subject: Dinner (1 page)	10/26/1995	Personal Misfile

### COLLECTION:

Clinton Presidential Records  
Automated Records Management System (Email)  
WHO ([From Elena Kagan])  
OA/Box Number: 500000

### FOLDER TITLE:

[9/27/1995 - 11/9/1995]

2009-1006-F  
ke774

### 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 (ALL-IN-1 READ RECEIPT)

CREATOR: KAGAN\_E (WHO)

CREATION DATE/TIME: 26-OCT-1995 17:24:00.00

SUBJECT: Receipt Notification

TO: HASKINS\_M (OMB)

READ: 27-OCT-1995 08:42:34.67

TEXT:

This is a Read Receipt Notification for:

Message Title: DOJ REVISED Welfare Reform Conferee Letter

Addressee: KAGAN\_E

Date Sent: 26-Oct-1995 05:18pm

Date Read: 26-Oct-1995 05:24pm

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:27-OCT-1995 10:35:16.70

SUBJECT: amtrak sap language

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ:27-OCT-1995 11:25:18.19

TEXT:

OLC proposed amending the current language in the SAP as follows:

Keep the first two sentences. ("Delete the provision which would replace the current Amtrak Board of Directors with a new Board. The current Board has proved capable of directing Amtrak during these sensitive times.")

Delete the third sentence. ( "Replacing the Board would only cause confusion and delay Amtrak's ongoing reform efforts.")

Change the fourth sentence to read: "(The Administration, however, supports removing existing restrictions on the President's authority to appoint future members of Amtrak's Board and requiring that such appointees be confirmed by the Senate.)"

(The current version of this sentence does not include the "and requiring" clause.)

I just talked to Janno and essentially told him that I thought he should accept this before OLC changed its mind. I don't think DOT is giving away anything remotely important by accepting this change of language.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 27-OCT-1995 12:16:41.94

SUBJECT: Steve's comments on DOJ letter

TO: Melinda D. Haskins ( HASKINS\_M ) (OMB)  
READ: 27-OCT-1995 12:58:07.08

TO: Stephen C. Warnath ( WARNATH\_S ) (OPD)  
READ: 27-OCT-1995 12:19:31.30

TO: Bruce N. Reed ( REED\_B ) (WHO)  
READ: 27-OCT-1995 13:05:58.21

TEXT:

1. The suggested change on pp. 12-13 looks great to me.
2. If you can get DOJ to make the suggested change on p. 9, you're a better person than I am. "Caste system" rhetoric is used all the time in equal protection law; in this part, DOJ means to plug into this well-known legal tradition (even though the argument here is not, strictly speaking, constitutional). I have no objection to deleting this phrase, but I guarantee you that it will be a battle. For OLC, as for other constitutional lawyers, this phrase has real meaning.
3. I believe I disagree with the suggested change on pp. 3-5. OLC is on shaky ground with respect to this argument: they know it, and everyone else will as well. To have any force or credibility at all, this section has to state the opposing arguments, and deal with them. (Otherwise, the whole argument will be dismissed out-of-hand.) Also, I don't think it's to our advantage to make a constitutional argument stronger than it really is in a situation where the President is likely, in the end, to ignore it.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:27-OCT-1995 14:27:51.18

SUBJECT: Bruce's comments

TO: Melinda D. Haskins ( HASKINS\_M ) (OMB)  
READ:27-OCT-1995 14:33:48.97

TO: Stephen C. Warnath ( WARNATH\_S ) (OPD)  
READ:27-OCT-1995 14:45:20.71

TO: Bruce N. Reed ( REED\_B ) (WHO)  
READ:27-OCT-1995 15:36:11.16

TEXT:

I very much agree with the p. 2 point. This morning, OLC agreed to drop the sentence starting "Our concern" and to fix and shorten the parenthetical. But the best thing would be for the paragraph to go entirely. Again, I'm sure OLC will resist.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 27-OCT-1995 12:16:41.94

SUBJECT: Steve's comments on DOJ letter

TO: Melinda D. Haskins ( HASKINS\_M ) (OMB)  
READ: 27-OCT-1995 12:58:07.08

TO: Stephen C. Warnath ( WARNATH\_S ) (OPD)  
READ: 27-OCT-1995 12:19:31.30

TO: Bruce N. Reed ( REED\_B ) (WHO)  
READ: 27-OCT-1995 13:05:58.21

TEXT:

1. The suggested change on pp. 12-13 looks great to me.
2. If you can get DOJ to make the suggested change on p. 9, you're a better person than I am. "Caste system" rhetoric is used all the time in equal protection law; in this part, DOJ means to plug into this well-known legal tradition (even though the argument here is not, strictly speaking, constitutional). I have no objection to deleting this phrase, but I guarantee you that it will be a battle. For OLC, as for other constitutional lawyers, this phrase has real meaning.
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RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:27-OCT-1995 14:27:51.18

SUBJECT: Bruce's comments

TO: Melinda D. Haskins ( HASKINS\_M ) (OMB)  
READ:27-OCT-1995 14:33:48.97

TO: Stephen C. Warnath ( WARNATH\_S ) (OPD)  
READ:27-OCT-1995 14:45:20.71

TO: Bruce N. Reed ( REED\_B ) (WHO)  
READ:27-OCT-1995 15:36:11.16

TEXT:

I very much agree with the p. 2 point. This morning, OLC agreed to drop the sentence starting "Our concern" and to fix and shorten the parenthetical. But the best thing would be for the paragraph to go entirely. Again, I'm sure OLC will resist.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:30-OCT-1995 12:23:37.96

SUBJECT: DOJ letter

TO: Melinda D. Haskins ( HASKINS\_M ) (OMB)  
READ:30-OCT-1995 12:24:48.05

CC: Bruce N. Reed ( REED\_B ) (WHO)  
READ:30-OCT-1995 14:33:49.68

CC: Stephen C. Warnath ( WARNATH\_S ) (OPD)  
READ:30-OCT-1995 12:39:30.93

CC: Kenneth S. Apfel ( APFEL\_K ) (OMB)  
READ:30-OCT-1995 15:30:19.62

TEXT:

I agree with Bruce as to the HHS view on religion and the SSA view on penalties for fraud. Apart from anything else, these are very weak constitutional claims. I also agree with Bruce as to insert A. We took this out because it seemed so weak as to discredit other arguments. I see no reason to put it back in. Insert B seems quite repetitive of the two paragraphs on p. 5. Is that insert supposed to replace those paragraphs? If not, it's not necessary. If so, it seems too brief to me (see my discussion with Steve and Bruce last week.) How about a compromise: delete the first paragraph on p.5; replace it with the first sentence of Insert B; then (in the same, rather than a new, paragraph) replace the first sentence of the second paragraph with the statement "We doubt, however, that such an argument would succeed." And then, continue on with the rest of that paragraph (starting with "First...").

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:30-OCT-1995 17:28:22.56

SUBJECT: RE: DOJ Insert to the DOJ Welfare Conferee Letter

TO: Melinda D. Haskins ( HASKINS\_M ) (OMB)

READ:30-OCT-1995 17:29:04.56

TEXT:

OK by me.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 READ RECEIPT)

CREATOR: KAGAN\_E (WHO)

CREATION DATE/TIME:30-OCT-1995 17:36:00.00

SUBJECT: Receipt Notification

TO: HASKINS\_M (OMB)

READ:30-OCT-1995 17:37:15.25

TEXT:

This is a Read Receipt Notification for:

Message Title: DOJ Insert to the DOJ Welfare Conferee Letter

Addressee: KAGAN\_E

Date Sent: 30-Oct-1995 05:27pm

Date Read: 30-Oct-1995 05:36pm

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:30-OCT-1995 11:54:54.19

SUBJECT: RE: dinner III

TO: Todd Stern ( STERN\_T ) (WHO)

READ:30-OCT-1995 12:24:22.26

TEXT:

9th. And just a reminder: if you can get me signed copies of those gambling letters, I'd appreciate it.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:30-OCT-1995 09:53:57.36

SUBJECT: RE: dinner

TO: Todd Stern ( STERN\_T ) (WHO)

READ:30-OCT-1995 10:01:46.34

TEXT:

Let's do Monday.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 READ RECEIPT)

CREATOR: KAGAN\_E (WHO)

CREATION DATE/TIME:30-OCT-1995 10:43:00.00

SUBJECT: Receipt Notification

TO: HASKINS\_M (OMB)

READ:30-OCT-1995 11:47:28.93

TEXT:

This is a Read Receipt Notification for:

Message Title: Additional Comments to DOJ Welfare Reform Conferee Letter

Addressee: KAGAN\_E

Date Sent: 30-Oct-1995 10:41am

Date Read: 30-Oct-1995 10:43am

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:30-OCT-1995 10:04:25.86

SUBJECT: RE: dinner

TO: Stephen R. Neuwirth ( NEUWIRTH\_S ) (WHO)  
READ:30-OCT-1995 10:05:49.39

CC: Christopher D. Cerf ( CERF\_C ) (WHO)  
READ:30-OCT-1995 10:37:59.52

TEXT:

I can do it Thursday; not tomorrow.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME:30-OCT-1995 15:26:38.78

SUBJECT: RE: DOJ letter

TO: Stephen C. Warnath ( WARNATH\_S ) (OPD)  
READ:30-OCT-1995 15:58:24.01

CC: Melinda D. Haskins ( HASKINS\_M ) (OMB)  
READ:30-OCT-1995 15:27:55.42

CC: Bruce N. Reed ( REED\_B ) (WHO)  
READ:31-OCT-1995 09:39:44.01

CC: Kenneth S. Apfel ( APFEL\_K ) (OMB)  
READ:30-OCT-1995 15:29:16.78

TEXT:

1. On the length of the equal protection analysis, I still think we should go with the compromise I proposed. But I wouldn't be terribly upset if someone shortened that yet a little further.
2. On the "caste system" point, Steve has a good point. (You'll remember that I didn't defend this language; I just explained it -- and warned that DOJ might well resist its removal.) As noted before, I'd be perfectly content -- even pleased -- to see this language go.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 31-OCT-1995 11:49:43.52

SUBJECT: meeting

TO: Jack M. Quinn ( Jack M. Quinn@EOP\_OVP@CCGATE@EOPMRX )  
READ: NOT READ

TEXT:

Jack: Can you come to this? It would be great if you could -- and if we could talk about the timber situation a bit beforehand. The precise issue here concerns a list of pre-1990 timber sales that DOJ is supposed to submit to the district court tomorrow. (The court hasn't yet decided whether to force the government to release those sales.) Some around the White House (most notably, Martha Foley) want DOJ to ask for further time before submitting the list; DOJ (assuming it has the info it needs from the agencies) doesn't want to delay any further. More generally, there seems to be a battle royal shaping up over DOJ litigation strategy. As you know, many people were pissed off on Friday; that anger doesn't seem to be going away. Let me know if you can come. Thanks.  
Elena

===== ATTACHMENT 1 =====  
ATT CREATION TIME/DATE: 31-OCT-1995 11:21:00.00

ATT BODYPART TYPE: B

ATT CREATOR: John O. Sutton

ATT SUBJECT: Timber meeting Today

ATT TO: R. Lawton Jordan III ( JORDAN\_RL )

ATT TO: Alice E. Shuffield ( SHUFFIELD\_A )

ATT TO: Kris Balderston ( BALDERSTON\_K )

ATT TO: Sheila D. Turner ( TURNER\_S )

ATT TO: Robert C. Vandermark ( VANDERMARK\_R )

ATT TO: Ray Martinez ( MARTINEZ\_R )

ATT TO: Elena Kagan ( KAGAN\_E )

ATT TO: Thomas C. Jensen ( JENSEN\_T )

ATT TO: Martha Foley ( FOLEY\_M )

TEXT:

Harold Ickes will be having a timber meeting TODAY (Tuesday) at 3:30 pm in Room 180. Attendance is MANDATORY. Please clear your schedules to be there.

Attendees:

Ickes  
Gorelick  
Babbitt  
Glickman  
T.J. Glauthier  
Martha Foley  
Kitty  
Tom Jensen

Katie McGinty + staff

Kagan

Marcia Hale

Ray Martinez

===== END ATTACHMENT 1 =====

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 1-NOV-1995 14:02:46.98

SUBJECT: fyi

TO: James Castello ( CASTELLO\_J ) (WHO)

READ: 1-NOV-1995 15:44:46.49

TEXT:

Re the message to you and Martha. I had to make a snap judgment while she was on the phone with OMB that the "const concerns" language was OK. I hope you agree with what I did. OLC, as noted, accepted the language, although they obviously (as do I) have some questions about the constitutional argument.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 1-NOV-1995 11:19:20.60

SUBJECT: RE: language for Amtrak SAP on Board

TO: James A. Brown ( BROWN\_JA ) (OMB)

READ: 1-NOV-1995 11:19:41.90

TEXT:

Yes, that's the compromise we worked out. Thanks.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 1-NOV-1995 18:20:36.70

SUBJECT: fyi on timber

TO: Martha Foley ( FOLEY\_M ) (WHO)  
READ: 1-NOV-1995 18:31:20.34

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)  
READ: 1-NOV-1995 21:48:50.85

TEXT:

I haven't gotten the complete story on this yet, but it appears that:

1. The four BLM sales on today's list (of 5 1/2) may not be pre-1990 Hogan sales after all; they may be real 318 sales. If so, of course, we should have reported them to the court before now.
  2. The Forest Service may not have completed searching its records for pre-1990 Hogan sales. If so, we'll have to tell the court that the search is not done and file a supplemental pleading when it is.
- Hard to believe...  
I'll let you both know when I learn more.

# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
006. email	Elena Kagan to Mark Schwartz. Subject: Not an apparition (1 page)	11/01/1995	Personal Misfile

### COLLECTION:

Clinton Presidential Records  
Automated Records Management System (Email)  
WHO ([From Elena Kagan])  
OA/Box Number: 500000

### FOLDER TITLE:

[9/27/1995 - 11/9/1995]

2009-1006-F  
ke774

### 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 (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 1-NOV-1995 14:00:25.59

SUBJECT: foreign ops sap

TO: Martha Foley ( FOLEY\_M ) (WHO)

READ: 1-NOV-1995 14:59:47.54

TO: James Castello ( CASTELLO\_J ) (WHO)

READ: 1-NOV-1995 15:44:30.23

TEXT:

OLC has agreed to a SAP saying we have constitutional concerns (NOT serious constitutional concerns). But OLC stresses (and I agree) that this is a fairly tenuous argument: we should not rely upon it heavily in the future.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 1-NOV-1995 20:50:33.21

SUBJECT: fyi on timber

TO: Martha Foley

( FOLEY\_M ) (WHO)

READ: 2-NOV-1995 08:40:51.16

TEXT:

The latest news, in case you haven't heard, is:

1. The Forest Service has not completed its search. In fact, there may be as much as 500 million bd ft -- yes, 500 million -- of pre-1991 Hogan sales that the Forest Service hasn't quite found yet. Of course, there may not be nearly so much. We don't know. The judge is being told we will file a supplemental pleading by November 15.

2. The four BLM sales are being reported to the Court as something other than 318 sales, though some will say they look suspiciously like 318 sales. BLM is arguing that they are not 318 sales because the original purchasers walked away from the contracts.

I suspect the district court judge is going to be one upset man tomorrow.

And, of course, we may have a huge problem coming down the road with respect to the as yet undiscovered Forest Service sales.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 1-NOV-1995 10:52:21.84

SUBJECT: timber

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ: 1-NOV-1995 21:03:32.73

TEXT:

Justice has agreed to provide, by early afternoon, (1) a list of the 4 1/2 sales (with accompanying information) and (2) an options paper on what to do if the judge orders their release. We shall see.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 1-NOV-1995 14:08:34.37

SUBJECT: FYI on timber

TO: Martha Foley ( FOLEY\_M ) (WHO)  
READ: 1-NOV-1995 15:00:40.74

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)  
READ: 1-NOV-1995 21:22:29.02

TEXT:

Lois Schiffer called to say that a district court in Washington yesterday ordered oral argument for this afternoon in a case involving six more timber sales. As I understand it, four of these sales are under a prior injunction issued by the Washington district court; the other two, although not themselves under the injunction, were withdrawn as a direct consequence of its issuance. Schiffer thinks we might have a ruling on whether the government must also release these six sales as early as today. I asked her to start compiling, along with the rest of the things she's supposed to be putting together, an inventory of these sales as well.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 1-NOV-1995 17:11:46.53

SUBJECT: RE: lunch tomorrow

TO: Stephen R. Neuwirth ( NEUWIRTH\_S ) (WHO)

READ: 1-NOV-1995 17:12:53.13

CC: Christopher D. Cerf ( CERF\_C ) (WHO)

READ: 1-NOV-1995 17:17:43.93

TEXT:

I can do it Tuesday.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 2-NOV-1995 09:53:13.85

SUBJECT: timber legislation meeting

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ: 2-NOV-1995 14:46:36.05

TEXT:

Have you set this up yet? Can I be included? I know the effort was to keep this meeting small, and if it's getting too big, you should feel free to tell me no. But I think it would help me, in dealing with the legal aspects of this mess, to understand our legislative strategy as well. Let me know. Thanks.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 READ RECEIPT)

CREATOR: KAGAN\_E (WHO)

CREATION DATE/TIME: 2-NOV-1995 13:25:00.00

SUBJECT: Receipt Notification

TO: FOLEY\_M (WHO)

READ: 2-NOV-1995 13:39:04.56

TEXT:

This is a Read Receipt Notification for:

Message Title: Do you get these notices? I can't go but am asking for  
Addressee: KAGAN\_E  
Date Sent: 02-Nov-1995 01:24pm  
Date Read: 02-Nov-1995 01:25pm

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 READ RECEIPT)

CREATOR: KAGAN\_E (WHO)

CREATION DATE/TIME: 2-NOV-1995 13:02:00.00

SUBJECT: Receipt Notification

TO: HASKINS\_M (OMB)

READ: 2-NOV-1995 13:02:46.95

TEXT:

This is a Read Receipt Notification for:

Message Title: DOJ's Redraft of its Conferee Letter

Addressee: KAGAN\_E

Date Sent: 02-Nov-1995 01:00pm

Date Read: 02-Nov-1995 01:02pm

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 2-NOV-1995 09:32:21.63

SUBJECT: RE: lunch tomorrow

TO: Stephen R. Neuwirth ( NEUWIRTH\_S ) (WHO)

READ: 2-NOV-1995 09:32:35.48

CC: Christopher D. Cerf ( CERF\_C ) (WHO)

READ: 2-NOV-1995 10:01:19.00

TEXT:

Which, by god, is poetry!

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 2-NOV-1995 08:54:34.05

SUBJECT: RE: Timber

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ: 2-NOV-1995 13:04:27.73

TEXT:

Justice can't get material ready in time to have a Thursday meeting, so Friday it is. Schiffer said something about a Rose Garden ceremony she wanted to attend on Friday morning and requested that the meeting be held after that finished.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 2-NOV-1995 18:25:29.99

SUBJECT: Today's revelations on timber

TO: Martha Foley

( FOLEY\_M ) (WHO)

READ: 2-NOV-1995 18:25:35.07

TEXT:

1. The Forest Service mess is still not resolved. At one point in the afternoon, the Forest Service swore it knew what was as yet unreported: 150 million bd. ft of 1990 sales. Then it turned out at the 2:00 meeting that the Forest Service was unaware of an obligation to list sales that occurred prior to 1990. So the Forest Service now has to start a search for these earlier sales. There may be none; there may be a lot. It's impossible right now to know. It also seems highly uncertain whether there are really 150 million bd ft of unreported 1990 sales. I have suggested to Jennifer that Harold call over to the Forest Service to tell it to get its act together. It's obviously very difficult to figure out what we want to do on any front -- litigation, legislation, or administrative action -- until we know the full scope of the problem.

2. There's no word yet from Judge Hogan. Lois is convinced that Mark Rutzick, attorney for the plaintiffs, will respond to DOJ's pleading of last night by filing a motion for contempt and/or sanctions today. He hasn't filed anything yet, but Lois thinks the shoe will probably drop at any moment.

3. At the 2:00 meeting, which is attended by lots of agency and DOJ people, there was much sentiment for greater guidance from the White House. (A bit ironic in light of our experience with Justice, but...) Some participants at the meeting argued: they are, as a matter of course, making decisions every day about how to interpret and enforce this statute; they have received conflicting signals from the White House; they have no principles to guide their decisions' what they really need is a clear guiding principle -- e.g., interpret the statute as narrowly as possible.

4. I haven't had a chance to look at the Option 9 language/legislative history, but will try to do so tonight or tomorrow. You're right, of course, as to its importance.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 READ RECEIPT)

CREATOR: KAGAN\_E (WHO)

CREATION DATE/TIME: 2-NOV-1995 17:17:00.00

SUBJECT: Receipt Notification

TO: HASKINS\_M (OMB)

READ: 2-NOV-1995 17:26:05.31

TEXT:

This is a Read Receipt Notification for:

Message Title: HHS' Comments to DOJ Welfare Reform Conferee Letter.

Addressee: KAGAN\_E

Date Sent: 02-Nov-1995 03:33pm

Date Read: 02-Nov-1995 05:17pm

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 6-NOV-1995 16:23:48.18

SUBJECT: Option 9

TO: Martha Foley ( FOLEY\_M ) (WHO)

READ: 7-NOV-1995 08:01:57.75

TEXT:

I am sending you a copy of Rutzick's remarks on the Option 9 provision of the Rescissions Act (2001(d)). It is unclear to me exactly what Rutzick is saying in these remarks. He is, of course, making the same sort of argument as he did in the 318 context, pointing out that the language of the Act refers to the area described in the Forest Plan and not to the particular sales contemplated by that Plan. But he seems unsure how far to take this argument. He might be saying that 2001(d) ALLOWS the administration to make sales that do not comply with the Forest Plan when those sales are on lands described in the Forest Plan. Alternatively, he might be saying that 2001(d) MANDATES the administration to make sales that do not comply with the Forest Plan when those sales are on lands described in the Forest Plan. I THINK that in this transcript he's making the first (permissive) argument, rather than the second (mandatory) argument -- but even if so, I suspect we'll hear the second argument sooner or later.

His argument on this score seems to me weaker than it was in the 318 context. The language of 2001(d) suffers from similar problems as the ones we've seen before: the terms "covered by Option 9" and "described in" Option 9 follow the word "land," not "sales." But the legislative history is very good for us: both the Conference Report and the Senate report refer to "sales allowed under the Forest Plan" and most (though not all) of the floor statements are to the same effect. The intent was pretty clearly to ensure that the Administration would meet the commitment of the Forest Plan, rather than force the Administration to go beyond it. (And what exactly would 2001(d) require if Rutzick is right? That the government make all possible sales within this area? If not that, what? That is, if the standards of the Forest Plan do not continue to govern sales within this area, what standards do apply? What sales is the government to make?) I would bet that notwithstanding the language, most courts would rule against Rutzick on this point.

Let me know whether you disagree or want to discuss this matter further.

Meantime, Judge Dwyer retained jurisdiction over the six previously enjoined or withdrawn sales, but indicated pretty strongly that he was waiting to see whether Judge Hogan believes these sales to fall within the scope of his order. I would bet that in the next few days (1) Hogan will make clear that those sales fall within his order and (2) Dwyer will then lift his injunction. If that happens, these sales become essentially the same as all the other sales released, and the case for NOT releasing them becomes difficult.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 6-NOV-1995 16:43:37.29

SUBJECT: Timber

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ: 6-NOV-1995 16:44:53.45

TEXT:

Lois Schiffer says:

1. DOJ decided against a press release. Shelley and Dinah are in the midst of preparing some talking points for Lois to take with her to Oregon. I have left a msg for Dinah to fax these to me.
2. Lois is not calling Harold today because after reviewing the procedural posture, she does not think anything could happen tomorrow on the enjoined sales, and she thinks she will be able to report more fully in a day or so. (The thinking here, which seems right to me, is that even if Hogan rules against us, Dwyer still must lift his injunction -- and that won't happen for a little while.) At any rate, she does know that she must talk to Harold before releasing any sales -- and that she must give him a reasonable amount of time to make a decision.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 6-NOV-1995 15:10:39.09

SUBJECT: EO on Civil Justice Reform

TO: Jack M. Quinn

( QUINN\_J ) (WHO)

READ: 7-NOV-1995 17:59:07.76

TEXT:

1. This proposed EO probably looks more impressive than it is. Large parts of it are identical to the current EO on Civil Justice Reform. Only a handful of provisions have been amended. If you want I can send you a redlined version (which I thought OMB would circulate) making clear exactly what is different.
2. The most important change concerns the ability of the government to enter into binding arbitration. The current EO does not allow the government to enter into binding arbitration; this position reflects a longstanding OLC view that the acceptance of binding arbitration violates the appointments clause. The new EO reverses this position, based on a recent OLC analysis concluding that binding arbitration raises no appointments clause concern.
3. The proposed EO also removes certain provisions on attorneys' fees meant to discourage plaintiffs from bringing suit to enforce civil rights, environmental, and similar statutes; and it corrects the restatement of law on the admissibility of expert testimony to reflect the S. Ct.'s recent opinion in *Daubert v. Merrell Dow*.
4. Notwithstanding the cover sheet from OMB, John Schmidt's office really prepared this EO. But for some reason, John and Ab agreed that we would do the processing.
5. I know that John would like to do a lot to publicize this. He thinks the EO fits perfectly with recent ADR efforts that have been receiving a great reaction. What do you think?

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 6-NOV-1995 10:28:45.90

SUBJECT: RE: National Gambling Commission Bill

TO: Ronald E. Jones ( JONES\_RE ) (OMB)

READ: 6-NOV-1995 10:37:25.05

TEXT:

That sounds fine to me.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 READ RECEIPT)

CREATOR: KAGAN\_E (WHO)

CREATION DATE/TIME: 6-NOV-1995 10:29:00.00

SUBJECT: Receipt Notification

TO: JONES\_RE (OMB)

READ: 6-NOV-1995 10:37:30.01

TEXT:

This is a Read Receipt Notification for:

Message Title: National Gambling Commission Bill  
Addressee: KAGAN\_E  
Date Sent: 06-Nov-1995 10:04am  
Date Read: 06-Nov-1995 10:29am

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 7-NOV-1995 08:57:50.80

SUBJECT: partial birth

TO: James Castello ( CASTELLO\_J ) (WHO)

READ: 7-NOV-1995 08:58:04.38

TEXT:

So what happened?

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 7-NOV-1995 10:43:38.59

SUBJECT: lunch

TO: Christopher D. Cerf ( CERF\_C ) (WHO)  
READ: 7-NOV-1995 15:49:49.13

TO: Stephen R. Neuwirth ( NEUWIRTH\_S ) (WHO)  
READ: 7-NOV-1995 10:45:31.64

TEXT:

I have to be back by 2:00. Also, the Red Sage fills up pretty quickly. So why don't we go at 12:00?

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 7-NOV-1995 10:47:14.63

SUBJECT: RE: lunch

TO: Stephen R. Neuwirth ( NEUWIRTH\_S ) (WHO)

READ: 7-NOV-1995 10:48:47.21

TEXT:

I see -- you're having a pre-lunch meeting to which I have not been invited.  
Now I know where I stand.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 7-NOV-1995 17:03:46.82

SUBJECT: trees

TO: Dinah Bear ( BEAR\_D ) (CEQ)

READ: 7-NOV-1995 17:34:45.78

TEXT:

I just gave Jennifer O'Connor a rundown on the continuing Forest Service/DOJ confusion on pre-1990 sales. (By the by, she pointed out to me that the Forest Service previously has said there are 153 mbf of unreported 1990 sales. Is this the same 153 mbf as was reported to us as 1986-89 sales?) She told me that she had asked Shelley for an update (for Leon and Harold) on all the numbers -- basically, an expanded and updated version of TJ's document. Would you make sure whoever's doing that memo is aware of the continuing uncertainty as to this category of sales? Thanks.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 8-NOV-1995 13:18:45.27

SUBJECT: welfar letter

TO: Melinda D. Haskins

( HASKINS\_M ) (OMB)

READ: 8-NOV-1995 13:25:29.17

TEXT:

looks AOK to me. What's the story on when and whether it's going out?

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 8-NOV-1995 12:18:46.93

SUBJECT: timber

TO: Dinah Bear ( BEAR\_D ) (CEQ)  
READ: 8-NOV-1995 13:35:57.07

TO: Thomas C. Jensen ( JENSEN\_T ) (CEQ)  
READ: 8-NOV-1995 13:48:40.73

TEXT:

I'm attaching a DRAFT analysis of the legal issues raised by what I take to be the 3 versions of the Garamendi proposal. Tom: As we discussed, this is supposed to be plugged into a larger document describing the proposals and analyzing them from a political and policy perspective. Dinah and Tom: Please let me know of mistakes and misunderstandings, and feel free to propose any other edits.

===== ATTACHMENT 1 =====  
ATT CREATION TIME/DATE: 8-NOV-1995 12:15:00.00

ATT BODYPART TYPE:p

ATT CREATOR: Elena Kagan

TEXT:

PRINTER FONT 12\_POINT\_COURIER

No version of the Garamendi proposal is free from legal difficulties. But there is a perfectly credible, if not necessarily winning, argument that the Administration has authority either to use Option 9 timber as replacement timber under 2001(k)(3) (Version 1) or to offer Option 9 timber in exchange for other timber recently or soon to be released under 2001(k)(1) (Version 2). By contrast, the legal support for simply reducing the volume of Option 9 timber by the amount of timber released under 2001(k) (Version 3) is much more scanty.

The legality of the various Garamendi schemes rests largely on two sections of the Rescissions Act -- 2001(d) and 2001(k) -- and the relationship between them. Section 2001(d) -- the Option 9 section -- provides that the Administration "shall expeditiously prepare, offer, and award timber sale contracts" covered by the Forest Plan, often referred to as Option 9. Section 2001(k)(1) -- the Section 318 section -- provides that the Administration shall release all contracts previously offered or awarded in the area subject to Section 318 of a prior appropriations bill. (The scope of this provision -- specifically, whether it orders the release only of the particular sales referenced in Section 318 or of all sales ever awarded in the area covered by that section -- is currently before the Ninth Circuit.) Section 2001(k)(3) provides that if any of the sales under 2001(k)(1) cannot be awarded -- most notably, because of the existence of an endangered bird species known as the marbled murrelet -- the Administration shall provide the purchaser "an equal volume of timber, of like kind and value."

The question whether the Administration (pursuant to Version 1) can use Option 9 timber as replacement timber under 2001(k)(3), should the Administration win the marbled murrelet case and thus come under an obligation to provide replacement timber, is genuinely difficult. No language in 2001(d) or 2001(k) specifically prevents the Administration from using

Option 9 timber as the source of replacement timber. Nor is there any legislative history specifically addressing this issue. The Administration, it might be argued, thus has the discretion to implement the statute in this way. (Of course, the Option 9 timber substituted -- like any other timber substituted -- will have to be of equal volume and like kind and value, as required by 2001(k)(3).) Timber industry lawyers will argue, however, that such a scheme subverts the broadest goals of the statute. Congress, it will be argued, intended for two sets of sales

-  
-Option 9 sales and 318 sales -- to go forward as expeditiously and completely as possible: to use one as substitution for the other is a form of double

-counting that undermines this purpose.

Reasonable people can disagree as to the strength of these

arguments. DOJ lawyers handling this issue believe that industry lawyers will have the better of this argument. (See DOJ memo attached.) Lawyers from the White House Counsel's Office and CEQ think this analysis slightly overstates the strength of the industry's position. What is clear, as DOJ lawyers agree, is that there is at least a credible claim that the Administration has authority to adopt Version 1 of the Garamendi proposal.

The legal analysis relating to Version 2 of the Garamendi proposal proceeds in a similar manner, but with one prefatory caution. It is important to note that the Administration has no authority to force purchasers of timber released or soon to be released under 2001(k) to take Option 9 timber in its place. The purchasers of these sales have a property right to them; the most the Administration can do is to offer the purchasers the opportunity to take Option 9 timber instead. The ability of the Administration to make this offer turns on the same arguments discussed above. Again, nothing in the statute or legislative history specifically prevents this approach; but the approach does undermine the apparent intention of Congress to get out two separate sets of timber sales.

The proposal to reduce Option 9 output by the amount of timber released under 2001(k) (Version 3 of the Garamendi plan) presents a different set of questions; the legality of such an approach is far more dubious. First, this proposal might be thought to violate the specific directive of 2001(d) to award Option 9 contracts expeditiously. Second, the proposal appears to violate 2001(l), which prevents any revisions to land management plans, including the President's Forest Plan (Option 9), "because of implementation or impacts" of sales required by 2001. And even if this action were legal, adopting it might invite further challenge to the President's Forest Plan, because the action seems to concede that significant new circumstances, vitally affecting the Plan, have arisen.

===== END ATTACHMENT 1 =====

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 8-NOV-1995 13:11:01.11

SUBJECT: timber

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ: 8-NOV-1995 14:09:28.72

TEXT:

I've done a short legal analysis of the Garamendi proposal(s) and given it to CEQ to plug into a larger document that also addresses policy and political concerns. Let me know if you want to see it. Also let me know if you'd like me to prepare anything else at this juncture.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 8-NOV-1995 08:45:36.87

SUBJECT: timber message forwarded

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)  
READ: 8-NOV-1995 14:03:19.57

TO: Martha Foley ( FOLEY\_M ) (WHO)  
READ: 8-NOV-1995 09:25:13.79

TEXT:

=====  
ATT CREATION TIME/DATE: 7-NOV-1995 20:05:00.00

ATT BODYPART TYPE:B

ATT CREATOR: Dinah Bear

ATT SUBJECT: today's "knownh to be nesting" arguments

ATT TO: Kathleen A. McGinty ( MCGINTY\_K )

ATT TO: T J Glauthier ( GLAUTHIER\_T )

ATT TO: Thomas C. Jensen ( JENSEN\_T )

ATT TO: Elena Kagan ( KAGAN\_E )

ATT TO: Shelley N. Fidler ( FIDLER\_S )

ATT TO: Ruth D. Saunders ( SAUNDERS\_R )

TEXT:

Reports from Eugene, Oregon, re today's arguments in front of Judge Hogan:

- o he didn't rule today; indicated that he will rule next week;
- o our attorneys did a terrific job;
- o but Hogan is clearly predisposed against the government;
- o he also ordered additional briefing on the issue of the enjoined sales that are before him;
- o unclear about the specifics on this one, but apparently enviro plaintiffs filed something in Hogan's court today seeking information regarding the methods we're using to identify the pre-FY 91 sales

=====  
END ATTACHMENT 1

# Withdrawal/Redaction Marker

## Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
007. email	Elena Kagan to Marvin Krislov and Dawn Chirwa. Subject: women and such (1 page)	11/08/1995	Personal Misfile

### COLLECTION:

Clinton Presidential Records  
Automated Records Management System (Email)  
WHO ([From Elena Kagan])  
OA/Box Number: 500000

### FOLDER TITLE:

[9/27/1995 - 11/9/1995]

2009-1006-F

ke774

### 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 (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 8-NOV-1995 17:53:44.81

SUBJECT: Garemandi plan

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ: 8-NOV-1995 21:10:51.09

TEXT:

On garemandi: One question, of course, is whether to include authority to do this kind of tree-swapping in proposed legislation. Another, separate question is whether to just do it, irrespective of legislation.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 8-NOV-1995 18:06:54.51

SUBJECT: geremendi memo

TO: Thomas C. Jensen ( JENSEN\_T ) (CEQ)

READ: 9-NOV-1995 07:11:55.29

TEXT:

In future editions of the Geremendi memo, could you use the attached section? I've deleted a couple of sentences relating to the particular positions of particular lawyers. Also, I'm going to fax to you the new, final Boling memo on this subject.

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

ATT CREATION TIME/DATE: 8-NOV-1995 18:04:00.00

ATT BODYPART TYPE:p

ATT CREATOR: Elena Kagan

TEXT:

PRINTER FONT 12\_POINT\_COURIER

No version of the Garemendi proposal is free from legal difficulties. But there is a perfectly credible, if not necessarily winning, argument that the Administration has authority either to use Option 9 timber as replacement timber under 2001(k)(3) (Version 1) or to offer Option 9 timber in exchange for other timber recently or soon to be released under 2001(k)(1) (Version 2). By contrast, the legal support for simply reducing the volume of Option 9 timber by the amount of timber released under 2001(k) (Version 3) is much more scanty. (For further discussion of these issues, see the DOJ memo attached.)

The legality of the various Garemendi schemes rests largely on two sections of the Rescissions Act -- 2001(d) and 2001(k) -- and the relationship between them. Section 2001(d) -- the Option 9 section -- provides that the Administration "shall expeditiously prepare, offer, and award timber sale contracts" covered by the Forest Plan, often referred to as Option 9. Section 2001(k)(1) -- the Section 318 section -- provides that the Administration shall release all contracts previously offered or awarded in the area subject to Section 318 of a prior appropriations bill. (The scope of this provision -- specifically, whether it orders the release only of the particular sales referenced in Section 318 or of all sales ever awarded in the area covered by that section -- is currently before the Ninth Circuit.) Section 2001(k)(3) provides that if any of the sales under 2001(k)(1) cannot be awarded -- most notably, because of the existence of an endangered bird species known as the marbled murrelet -- the Administration shall provide the purchaser "an equal volume of timber, of like kind and value."

The question whether the Administration (pursuant to Version 1) can use Option 9 timber as replacement timber under 2001(k)(3), should the Administration win the marbled murrelet case and thus come under an obligation to provide replacement timber, is genuinely difficult. No language in 2001(d) or 2001(k) specifically prevents the Administration from using Option 9 timber as the source of replacement timber. Nor is there any legislative history specifically addressing this issue. The Administration, it might be argued, thus has the discretion

to implement the statute in this way. (Of course, the Option 9 timber substituted -- like any other timber substituted -- will have to be of equal volume and like kind and value, as required by 2001(k)(3).) Timber industry lawyers will argue, however, that such a scheme subverts the broadest goals of the statute. Congress, it will be argued, intended for two sets of sales

-Option 9 sales and 318 sales -- to go forward as expeditiously and completely as possible: to use one as substitution for the other is a form of double

-counting that undermines this purpose.

Reasonable people can disagree as to the strength of these arguments. What is clear is that there is at least a credible claim that the Administration has authority to adopt Version 1 of the Garamendi proposal.

The legal analysis relating to Version 2 of the Garamendi proposal proceeds in a similar manner, but with one prefatory caution. It is important to note that the Administration has no authority to force purchasers of timber released or soon to be released under 2001(k) to take Option 9 timber in its place. The purchasers of these sales have a property right to them; the most the Administration can do is to offer the purchasers the opportunity to take Option 9 timber instead. The ability of the Administration to make this offer turns on the same arguments discussed above. Again, nothing in the statute or legislative history specifically prevents this approach; but the approach does undermine the apparent intention of Congress to get out two separate sets of timber sales.

The proposal to reduce Option 9 output by the amount of timber released under 2001(k) (Version 3 of the Garamendi plan) presents a different set of questions; the legality of such an approach is far more dubious. First, this proposal might be thought to violate the specific directive of 2001(d) to award Option 9 contracts expeditiously. Second, the proposal appears to violate 2001(l), which prevents any revisions to land management plans, including the President's Forest Plan (Option 9), "because of implementation or impacts" of sales required by 2001. And even if this action were legal, adopting it might invite further challenge to the President's Forest Plan, because the action seems to concede that significant new circumstances, vitally affecting the Plan, have arisen.

===== END ATTACHMENT 1 =====

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 9-NOV-1995 08:43:08.63

SUBJECT: RE: Garemandi plan

TO: Jennifer M. O'Connor ( OCONNOR\_J ) (WHO)

READ: 9-NOV-1995 09:40:33.90

TEXT:

Right. If we decide we want to do this kind of tree-swapping, it would be best to get legislation making clear that we have the authority. But even in the absence of such legislation (or pending such legislation), we might want to go ahead anyway, arguing that we already have the requisite authority. As noted in the legal section of the memo on the Garemandi proposal, that argument (at least as to two of the three versions of the proposal) is a close but credible one.

RECORD TYPE: PRESIDENTIAL (ALL-IN-1 MAIL)

CREATOR: Elena Kagan ( KAGAN\_E ) (WHO)

CREATION DATE/TIME: 9-NOV-1995 13:19:52.39

SUBJECT: shutdown

TO: Jack M. Quinn ( QUINN\_J ) (WHO)

READ: 9-NOV-1995 19:36:24.51

TEXT:

Chris passed on to me your note on the shutdown issue, because he knew I'd done a fair bit of work on this 6 weeks ago. (When you asked Chris to get up to speed on debt limit questions, he and I agreed that that was easily severable and that he should just do it.) I hope it's OK with you for me to continue on this matter. If not, that's fine too.

I've been in pretty close touch with Bob Damus and Chris Schraeder (of OLC) and talked to them again this morning. Not much new is happening. Agencies (and the EOP) completed shutdown plans the last time this loomed, and they presumably will implement those plans on Tuesday if there's no new CR. OMB is preparing a memo to be sent out today to all agency heads, telling them to prepare to implement their plans. And Alice Rivlin will reiterate that message in the context of a larger presentation she is giving at today's Cabinet meeting on budgetary issues.

Bob told me that a question came up at one of the morning meetings concerning how a shutdown would affect the President's scheduled trip to Japan. I imagine this is much more a political issue than a legal issue, but I did spend some time talking with Chris Schraeder about it this morning. As you know, certain activities are excepted from a shutdown: though the government can't actually pay any money to conduct these activities, the government can obligate itself to make payment. Among the excepted activities are those necessary to protect life or property (the emergency exception) and -- more to the point here -- those integral to the carrying out of the President's core constitutional powers, such as foreign policy. The critical questions in determining whether a trip of this sort falls within the "core executive powers" exception are whether the trip serves a significant foreign policy interest and whether postponement of the trip (until after the shutdown is expected to end) would compromise that interest. Assuming the trip is authorized under this standard, there is a more-than-ordinary burden to examine the level of staffing to ensure it is as lean as possible, consistent with the foreign policy interest. This is a preliminary analysis -- Chris S. said he'd like to do some more thinking about the issue -- but it's probably pretty close to the final product.

If you would like additional briefing on any shutdown issues, either in person or on paper, just let me know.