Withdrawal/Redaction Sheet
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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	To Lynn Hogan from Joan Silverstein re: Wellstone/Murray Amendment (3 pages)	09/12/96	P5 6341
002. memo	To Betsy Myers, Dennis Burke and Bonnie Campbell from Debbie Fine re: Meeting on Domestic Violence and Custody Issues (partial) (1 page)	06/05/96	P6/b(6)

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Cynthia Rice (Subject Files)
OA/Box Number: 15445

FOLDER TITLE:
Welfare-Domestic Violence Directive Part I [3]

Rhonda Young
2009-1414-S
ry1169

RESTRICTION CODES

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

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

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

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

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
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b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

6341

U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

September 12, 1996

MEMORANDUM

TO: Lynn Hogan
Domestic Policy Council

FROM: Joan Silverstein
Assistant Associate Attorney General

SUBJECT: Wellstone/Murray Amendment to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

DISCUSSION:

In last week's meeting on the Wellstone/Murray Amendment to the welfare legislation, two possibilities were discussed concerning the implementation of the amendment.

The first option involved a statement by the President to the states encouraging them to implement the amendment and to establish adequate programs to assist the victims of domestic violence. There was some concern that this option would not satisfy the advocacy groups. However, it would permit the President to speak out immediately in support of implementation of the amendment.

Should this first approach be taken, we should consider following the President's message with a letter to all governors reiterating the message and informing them that the federal government stands ready to assist with implementation if needed. This approach has the benefit of giving states wide latitude in the implementation of the amendment.

Under the second option, the President would issue a directive to the Attorney General and Secretary of Health and Human Services concerning the amendment. Four possible components to the directive have been identified. The three components involving HHS were crafted by HHS. Both the General Counsels' Office at HHS and the Justice Department welfare working group agree on the remaining provision on guidance to the states involving the two departments. (Further sign off within both departments may be necessary as the project progresses).

The possible components to the directive are as follows:

1. Proposed HHS Regulation on Participation Rates

The President would direct the Secretary of HHS to: (1) propose regulations providing that states that fall below the required participation rate will be found to have reasonable cause for failing to comply with the participation rate requirement and will not be penalized if the reason for the low rate is the number of domestic violence victims exempted from the work requirement and if the state has in place adequate programs to assist victims of domestic violence; and (2) to propose any other regulations necessary to ensure, to the extent allowed by law, that the penalty structure under section 409 of the PRWORA does not operate inadvertently to discourage states from exercising their option under section 402(a)(7) of the PRWORA (the Wellstone/Murray amendment) to screen, identify and assist victims of domestic violence.

2. HHS and DOJ Guidance to the States

The President should direct the Attorney General and the Secretary of HHS to develop guidance to assist the states with the implementation of the amendment. The guidance, which would be non-binding, would address such issues as what standards and procedures should apply when screening for a history of domestic violence, and for determining what is "good cause" to waive the requirements of the PRWORA. In developing the guidance, the Justice Department and Department of Health and Human Services would consult with victims services, women's advocates, law enforcement, medical professionals, and others involved in fighting domestic violence.

3. HHS Technical Assistance to the States

The President should direct the Secretary of HHS to provide states technical assistance in developing, as part of their Temporary Assistance for Needy Families programs, standards and procedures to screen, identify, and assist victims of domestic violence.

4. HHS Studies on Welfare and Domestic Violence

The President should direct the Secretary of HHS to provide discretionary funding to study the incidence of violence in the lives of welfare recipients; the impact of domestic violence on welfare program rules and requirements, and the best assessment, referral and delivery models to improve safety and self-sufficiency for welfare recipients who are victims of domestic violence.

All four of the possible components need not be included in the directive. It is the Justice Department view that it may be imprudent at this time to include the first component in the directive. The directive would also restate the President's commitment to welfare reform. In addition, the directive should not limit the agencies in any way as they take other steps in implementing PRWORA.

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	To Executive Agency Civil Rights Officers from Bill Lann Lee re: Draft Policy Guidance (11 pages)	n.d.	P5 6342

COLLECTION:
Clinton Presidential Records
Domestic Policy Council
Cynthia Rice (Subject Files)
OA/Box Number: 15445

FOLDER TITLE:
Welfare-Civil Rights II

Rhonda Young
2009-1414-S
ry1168

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]
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6342

CLOSE-HOLD CLOSE-HOLD CLOSE-HOLD CLOSE-HOLD
DRAFT DRAFT DRAFT DRAFT DRAFT DRAFT

TO: Executive Agency Civil Rights Officers

FROM: Bill Lann Lee
Acting Assistant Attorney General
Civil Rights Division

SUBJECT: Policy Guidance Document: Enforcement of Title VI of the Civil Rights Act of 1964 — Discrimination Against National Origin Minority Group Individuals Who Have Limited English Proficiency

This policy directive concerning the enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, *et seq.*, is being issued pursuant to the authority granted by Executive Order No. 12250 and Department of Justice regulations. It addresses the application to recipients of Federal financial assistance of Title VI's prohibition on national origin discrimination when information is provided only in English to limited-English-proficient persons.

It is well established that a Federal aid recipient's failure to assure that people who do not speak English nonetheless can effectively participate in and benefit from programs and activities constitutes discrimination prohibited by Title VI. In order to assist Federal fund-granting agencies to ensure that their assistance recipients are complying with their responsibilities in this important regard, this policy directive addresses the appropriate standards by which to judge compliance. It is expected that each agency will utilize the standards set forth in this Policy Guidance Document to develop specific criteria applicable to its own programs and activities.

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42 U.S.C. § 2000d-1 note.

28 C.F.R. § 0.51.

Background

Title VI of the Civil Rights Act of 1964 prohibits recipients of Federal financial assistance from discriminating against or otherwise excluding individuals on the basis of race, color, or national origin in any of their activities. Section 601 of Title VI, 42 U.S.C. § 2000d, provides:

> No 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.

The term "program or activity" is broadly defined. 42 U.S.C. § 2000d-4a.

Consistent with the model Title VI regulations drafted by a Presidential taskforce in 1964, virtually every executive agency has promulgated regulations to implement Title VI that prohibit recipients from "restrict[ing] an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program" and "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have "the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."

In Lau v. Nichols, 414 U.S. 563 (1974), the Supreme Court interpreted these provisions to find that a fund recipient had an obligation to ensure that language barriers were not excluding limited-English proficient (LEP) persons from receiving the services available to similarly-situated persons who spoke English. Lau involved a group of students of Chinese origin who did not speak English to whom the recipient provided the same services -- an education provided solely in English -- that it provided students who did speak English. The Court held that Title VI was violated under these circumstances, holding that "[i]t seems obvious that the Chinese-speaking minority receive fewer benefits than the English-speaking majority from respondents' school system which denies them a meaningful opportunity to participate in the educational program -- all earmarks of the discrimination banned by the Title VI regulations. In the past 25 years, courts routinely have applied Lau both inside and outside the education context.

Link Between National Origin and Language

A vast majority of people who live in the United States speak and read English sufficiently to function in day-to-day life without any special language assistance. Thus, for these people the use by State and local governments and private entities only of English in federally assisted programs and activities poses no obstacle to full participation in these programs and activities.

Not surprisingly, the small minority who are of limited English proficiency is composed primarily of persons born in foreign countries (with a small residual of the sons and daughters of immigrants and some Native Americans). Despite efforts to gain proficiency in English, their English language proficiency may be limited for some time. Unless steps are taken to respond to this difficulty, people who do not speak and/or read English may be effectively denied access to the benefits and services for which they are otherwise qualified, and which their tax money, just like that of people who do speak English, supports.

Many recipients of Federal financial assistance recognize that the failure to provide language assistance to such persons can have the effect of preventing them from participating in federally assisted programs and activities, and thus may deny them needed access to services and benefits enjoyed by other Americans. Often, the failure of a recipient to remove language

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414 U.S. at 568. Congress manifested its approval of Lau by enacting provisions in the Education Amendments of 1974, Pub. L. No. 93-380, §§ 105, 204, 88 Stat. 503-512, 515, which provided funds to assist school districts in providing bilingual education to comply with Title VI and its regulations as interpreted in Lau. See also 20 U.S.C. § 7402(a)(15) ("the Federal Government, as exemplified by title VI of the Civil Rights Act of 1964 * * *, has a special and continuing obligation to ensure that States and local school districts take appropriate action to provide equal educational opportunities to children and youth of limited English proficiency").

See, e.g., Sandoval v. Hagan, 7 F. Supp. 2d 1234 (M.D. Ala. 1998); Pabon v. Levine, 70 F.R.D. 674 (S.D.N.Y. 1976); Mendoza v. Lavine, 412 F. Supp. 1105 (S.D.N.Y. 1976).

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barriers is attributable to nothing more than ignorance of the fact that some members of the community are unable to communicate in English, to a general attachment to the status quo, or a lack of awareness of their obligation to address this situation. In some cases, however, the failure to address language barriers may not be simply an oversight, but rather may be attributable, at least in part, to invidious discrimination on the basis of national origin and race. While there is not always a one-to-one relationship between the language one speaks and one's national origin, often language does serve as an identifier not only of one's national origin, but also that one may be new to this country. The same sort of prejudice and xenophobia that may be at the root of discrimination against persons from other nations may be invoked when a person speaks the language of another nation. Indeed, the Supreme Court has recognized that many times reactions to persons speaking languages other than English is linked to invidious discrimination.

> Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn. Reactions of the latter type all too often result from or initiate racial hostility. . . . It may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis.

Title VI itself prohibits only intentional discrimination on the basis of national origin. But Congress intended that the agencies charged with promulgating regulations to effectuate Title VI would have authority to extend the prohibition to those actions and inactions with the greatest potential to be rooted in

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A close relationship often exists between language and national origin minority group status. As the Supreme Court observed, "[l]anguage permits an individual to express both a personal identity and membership in a community, and those who share a common language may interact in ways more intimate than those without this bond. Hernandez v. New York, 500 U.S. 352, 370 (1991) (plurality opinion).

Hernandez v. New York, 500 U.S. 352, 371 (1991) (plurality opinion).

Alexander v. Choate, 469 U.S. 387, 293 (1985).

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invidious discrimination. Time and again in the legislative history of Title VI are references to the provision's broader prophylactic purposes — not just to prohibit discrimination, but to "prevent," "preclude," "end," or "get away from" discrimination; to "insure" or "make sure" that discrimination does not occur; to avoid the use of funds to "perpetuate" or "cause" discrimination; and to prevent the use of funds in a way that has the effect of excluding persons, or denying them benefits, based on their race, color, or national origin. For this reason, the Supreme Court has consistently held that agency regulations prohibiting discriminatory effects are valid.

Because the effect of a language barrier on an LEP person is the same regardless of the intent of the fund recipient, the Department of Justice adheres to the Supreme Court's determination in Lau that the failure to take reasonable steps to provide "meaningful opportunity" for LEP individuals to participate in a recipient's programs and activities violates a recipient's obligations under Title VI and its regulations.

Meaningful Opportunity

The holding of Lau is that recipients must take reasonable steps to provide "meaningful" access to the information and services they provide. What constitutes reasonable steps to meet this obligation will be contingent on a number of factors, including the size of the population that is being denied access, and the nature of the program. This analysis requires a fact-intensive inquiry into the actual effects of the recipient's actions and inactions on LEP persons.

Id. at 293-294.

See, e.g., Civil Rights: Hearings before the House Comm. On the Judiciary, 88th Cong., 1st Sess. 2683-2684, 2774 (1963); Civil Rights: Hearings before the House Comm. On Rules, 88th Cong., 2d Sess. 94, 321, 330, 336, 343, 346-348, 422 (1964); Civil Rights - the President's Program, 1963: Hearings before the Senate Comm. on the Judiciary, 88th Cong., 1st Sess. 328, 330, 397-403, 413 (1963); 110 Cong. Rec. 1519-1520, 1527-1528 (Rep. Celler), 1542 (Rep. Lindsay), 1599 (Rep. Minish), 1613 (Rep. Celler), 1629 (Rep. Halpern), 1677 (Rep. Celler), 2595 (Rep. Donahue), 6562 (Sen. Kuchel), 7065.

Alexander v. Choate, 469 U.S. at 293-294.

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One important factor in determining the reasonableness of these steps is the number of people who will be excluded from the program or activity unless the language barriers are lessened. What may be reasonable steps for a recipient who serves one LEP person a year will be different than what is reasonable for a recipient that serves several LEP persons a day. For this reason, the Department of Justice has imposed a higher burden on recipients who served a significant number of LEP persons, or where a significant proportion of the population consists of persons not proficient in English.

1) Recipients often communicate with the public in writing, either on paper and over the Internet. Written translations are a highly effective way of communicating with large numbers of people who do not speak or read English. To assist executive agencies in defining the circumstances in which Federal aid recipients must provide written language assistance, the Department of Justice, shortly after Lau, specified the standard to be used (28 C.F.R. § 42.405(d)(1)):

> Where a significant number or proportion of the population eligible to be served or likely to be directly affected by a federally assisted program (e.g., affected by relocation) needs service or information in a language other than English in order effectively to be informed of or to participate in the program, the recipient shall take reasonable steps, considering the scope of the program and the size and concentration of such population, to provide information in appropriate languages to such persons. This requirement applies with regard to written material of the type which is ordinarily distributed to the public.

This Coordination Regulation grew out of the Supreme Court decision in Lau, where the Court found it significant that 1,800 non-English speaking students had been precluded from effectively participating in the federally assisted school program because

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This provision is contained in the Department's regulation entitled "Coordination of Enforcement of Non-discrimination in Federally Assisted Programs," 28 C.F.R. Subpt. F (hereinafter "Coordination Regulation"), issued in 1976, which, by its terms, "govern[s] the respective obligations of Federal agencies regarding enforcement of title VI." 28 C.F.R. § 42.401. It expands upon the basic prohibitions on discriminatory conduct first set forth in the model Title VI regulations and then incorporated in each agency's Title VI regulations, in particular the prohibitions cited by the Supreme Court in Lau.

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language assistance was not provided; those 1,800 students represented less than two percent of the school district's total student population. As Justice Blackmun underlined in his concurring opinion in Lau (joined by Chief Justice Burger) that was "a very substantial group" and a different question would be presented only where there were "very few" limited-English-proficient individuals or just one. In our view, then, the "significant number or proportion" test is meant to include all programs and activities where more than relatively few limited-English-proficient individuals are "eligible to be served or likely to be directly affected," or where limited-English-proficient individuals constitute more than a slight percentage of those "eligible to be served or likely to be directly

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The San Francisco school district had approximately 100,000 students at that time, according to the opinion of the court of appeals in Lau. 483 F.2d 791, 793 (9th Cir. 1973).

414 U.S. at 572.

Our conclusion as to the meaning of "significant number or proportion" is buttressed by the approach taken by the Department of Agriculture in implementing the Food Stamp Act of 1977. 7 U.S.C. § 2020(e)(1) & (2). The Act requires States to provide written and oral language assistance in areas where "a substantial number of members of low-income households speak a language other than English." The Agriculture Department has interpreted "substantial number" generally to mean any amount more than a relatively few.

Specifically, the Agriculture Department requires that both bilingual written materials and bilingual staff or interpreters be provided as follows: in food stamp certification offices serving an area with about 100 or more low-income households in which a language other than English is spoken and there is no adult fluent in English; and, in areas with fewer than 100 low-income households, if a majority of the low-income households consist of persons who speak a language other than English and the household includes no adult fluent in English. In addition, written bilingual materials on program informational activities must be provided outside certification offices as follows: in areas with small low-income populations (less than 2,000 low-income households) if there are about 100 or more low-income households in which a language other than English is spoken and there is no adult fluent in English; and, in areas with larger low-income populations, if about five percent or more of the low-income households consist of non-English speakers. 7 C.F.R. § 272.4(b).

affected."

2) A recipient's obligation to provide meaningful opportunity is not limited to written translation. Although the Coordination Regulation addresses requirements for provision of written language assistance, the experience of agencies in carrying out their Title VI compliance activities has been that oral communication between recipients and program beneficiaries often is an integral part of the exchange of information. Thus, recipients that limit language assistance only to the provision of written materials may not be allowing limited-English-proficient persons "effectively to be informed of or to participate in the program."

For example, a federally assisted health-care provider would face substantial problems in providing medical care to limited-English-proficient patients if the provider were unable to understand the patients' oral description of their symptoms and could not orally communicate the course of treatment being recommended. Similarly, a federally assisted law enforcement agency would face substantial problems in providing protection and service to a community that includes individuals who are limited-English-proficient if the agency were not able to communicate orally with these citizens. In such cases, "meaningful opportunity" to benefit from the service requires the recipient to take steps to assure that translation services are promptly available.

3) For those who do not serve a LEP population of "significant number or proportion," the general obligation to take reasonable steps to provide meaningful opportunity still applies. While there is no justification for these recipients to choose not to provide any language assistance at all, each recipient's responsibilities generally are defined on a flexible case-by-case basis taking into account the nature and scope of the federally assisted program, and the size, concentration, and other characteristics of the limited-English-proficient population. In other words, both the needs of the limited-English-proficient population and the needs of the recipient in

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Title VI does not require recipients to remove language barriers when English is an essential aspect of the program (such as providing civil service examinations in English when the job requires person to communicate in English, see Frontera v. Sindell, 522 F.2d 1215 (6th Cir. 1975)), or there is another "substantial legitimate justification for the challenged practice." Elston v. Talladega County Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 1993). Similar balancing tests are used in other nondiscrimination provisions that are concerned with effects of an entity's actions. For example, under Title VII of the Civil Rights Act of 1964, employers need not cease practices

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conducting its program or activity are taken into account.

The appropriate mix of written and oral language assistance also is judged according to this rule of reasonableness. Thus, instead of translating all written materials, a recipient may meet its obligation by making available oral assistance, or by commissioning translations on request. For example, whether a particular form or instruction has to be in a language other than English may depend on whether it is expected that the form be filled out ░on the spot,░ or whether it may be returned at a later time or by mail, thus allowing the individual to seek his or her own translation services. In addition, neither Title VI nor its regulations requires recipients to provide interpreters if none are needed, or to translate documents that no members of the public will read. It is the responsibility of Federal assistance-granting agencies, in conducting their Title VI compliance activities, to make more specific judgments by applying their program expertise to concrete cases.

As another example, a hospital serving a significant non-English speaking Vietnamese population needs to provide translation services to that population. In addition, it needs to provide a quality of translation service appropriate for the program, i.e., someone who can interpret the medical terminology appropriate to the situation. However, this does not mean that a hospital has to have immediately available translation services

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that have a discriminatory effect if they are "consistent with business necessity" and there is no "alternative employment practice" that is equally effective. 42 U.S.C. § 2000e-2(k). Under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, recipients need to provide access to persons with disabilities if such steps do not impose an undue burden on the recipient. Alexander v. Choate, 469 U.S. at 301.

The January 29, 1998, Department of Health and Human Services (HHS) Guidance Memorandum entitled ░Title VI Prohibition Against National Origin Discrimination - Persons with Limited-English Proficiency░ sets forth factors that should be considered in providing oral non-English services. This document can be found at the HHS website at *http://www.hhs.gov/progorg/ocr/lepfinal.htm*. They include the size of the LEP population eligible for the program in question, the setting in which interpreter services are needed, the availability of staff members and/or volunteers to provide interpreter services during its hours of operation, and the proficiency of available staff members or volunteers available to provide the needed services.

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for every conceivable language it might encounter, if it has no reason to believe it will encounter such languages on other than an extremely intermittent basis. Even in this situation, though, a hospital should have a procedure to provide such translation services within a reasonable amount of time. Moreover, as written translations are only required for material "ordinarily distributed to the public," likewise recipients are required to provide oral language assistance only with regard to matters within the scope of ordinary program business. Again, the reasonableness of the translation services required is going to be fact-driven. Moreover, the type of program may be significant. The obligations of a federally assisted hospital that offers crucial medical services may differ from those of a federally assisted zoo or theater.

4) Finally, in evaluating whether Title VI requires a particular type of bilingual service, it should be remembered that other Federal statutes may impose more stringent standards. For example, the Voting Rights Act, among other things, sets forth specific requirements as to when bilingual ballots must be provided. To the extent that these requirements are more stringent than those required by Title VI or this guidance, the requirements of such statutes would be controlling.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Mark C. Van Norman to Lynn Cutler re: Collection of Child Support from Tribal Casino Awards (2 pages)	02/14/00	P5 6339

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Cynthia Rice (Subject Files)
OA/Box Number: 15429

FOLDER TITLE:

Child Support-Gambling [1]

Richard Stalcup

rx22

RESTRICTION CODES

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

P1 National Security Classified Information [(a)(1) of the PRA]
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U.S. Department of Justice

Office of Tribal Justice

6339

Room 2229A, Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

(202) 514-8812
FAX (202) 514-9078

February 14, 2000

TO: Lynn Cutler

FR: Mark C. Van Norman, Director
Office of Tribal Justice

RE: Collection of child support from tribal casino awards

This memorandum briefly sets forth some preliminary considerations that should be taken into account when deciding whether the United States should require tribal casinos to develop a mechanism to deduct overdue child support obligations from reportable awards at tribal casinos.

- The United States recognizes that Indian tribes are "domestic dependent nations" with "inherent sovereign powers over their members and territory." Executive Order No. 13084, Consultation and Coordination with Indian Tribal Governments (May 14, 1998).

- It is well-established that "[t]he United States has a unique legal relationship with Indian tribal governments." EO 13084. This "unique" relationship is akin to the relationship between a trustee and beneficiary, pursuant to which the United States "has charged itself with moral obligations of the highest responsibility" toward tribes. Seminole Nation v. United States, 316 U.S. 286, 297 (1942).

- This general "trust responsibility" arises from two primary sources. First, the United States pledged protection to tribes in treaties. Second, the United States engaged in a course of dealing with tribes that left them in a dependent position, given rise to a moral obligation to promote tribal interests.

- This "trust responsibility" includes a federal responsibility to protect "the sovereignty of each tribal government" and to protect tribal resources. See 25 U.S.C. sec. 3601.

- These principles temper United States' dealings with tribes. The United States deals with tribes on a government-to-government basis, based primarily on federal consultation with tribes when proposed federal actions might affect tribal interests, see EO 13084, and tribal consent when tribal action might be required to promote a federal interest. Thus, the federal government is cautious not to require tribes to administer federal programs unless the tribe involved chooses to take on that responsibility. This is true even in cases where the federal program is primarily designed to benefit the tribe involved. See, e.g., 25 U.S.C. sec. 450f (requiring tribal request before responsibility for federal programs may be contracted to tribes); id., sec.2503(d) (providing that tribal administration of federal schools programs is "strictly voluntary").

- As in the case with state governments,[1] the federal government can, and does, require tribes to undertake generally applicable minimal administrative burdens to promote federal interests. See, e.g., 25 U.S.C. sec. 2719(d) (requiring tribal casinos to apply federal income tax reporting and withholding laws to tribal casino awards); cf. 26 U.S.C. sec. 3402(q) (setting forth requirements for withholding from winnings from state lotteries). Where more extensive tribal action is necessary, consistent with the trust responsibility, the federal government ordinarily offers the tribe a choice to operate the program with federal support or to leave the program operation to a federal agency.

- Collecting overdue child support would potentially be more burdensome than withholding federal income tax. At a minimum, it would require tribal casinos to have access to the appropriate data base – presumably computerized – and undertake an individualized check for overdue child support each time a payout is made. Consistent with the trust relationship, the federal government would ordinarily consult with tribes prior to imposing a burden on tribal economic development efforts, even where the burden furthers such laudable purposes as child support enforcement.

[1] This policy of restraint is analogous in purpose to the Tenth Amendment. The Tenth Amendment limits the federal government's ability to require states to regulate, unless that requirement is tied to states' acceptance of federal funds. See Printz v. United States, 521 U.S. 898 (1997) (holding that requiring local officials to conduct background checks on prospective handgun purchasers violates the Tenth Amendment). While the Tenth Amendment applies, by its precise terms, only to states, the federal policy of restraint has caused the federal government to avoid requiring tribes to regulate unless tribes consent to undertake that regulatory obligation.

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Judy Chesser and Web Phillips to Jack Smalligan and Melinda Haskins re: Prisoner Provision in Jeffords/Kennedy (1 page)	06/09/99	P5
002. email	Sandra Yamin to Janet Murguia, Fredrickson, Chow, et. Al. re: Work Incentives Improvement Act (partial) (1 page)	06/04/99	P5
003. fax	Melinda Haskins fax re: Draft Program Integrity and Administrative Reforms (1 page)	04/20/99	P5
004. letter	Dennis Burke to Jacob Lew re: Work Incentives Improvement Act of 1999 (4 pages)	02/09/99	P5 6343

COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Cynthia Rice (Subject Files)
OA/Box Number: 15431

FOLDER TITLE:

Disability-Work Incentives Improvement Act-T.A. to Hill-Part II

Richard Stalcup

rx56

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

U.S. Department of Justice

Office of Legislative Affairs

#3

8

Office of the Assistant Attorney General

Washington, D.C. 20530

6343

February 9, 1999

Honorable Jacob J. Lew
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Lew:

This sets forth the comments of the Department of Justice on S. 331, the "Work Incentives Improvement Act of 1999". Our comments are limited to constitutional issues raised by provisions in the bill (§ 402(b), (d)) expanding the existing provisions for the suspension of social security benefits of prisoners and other confined persons presently codified at 42 U.S.C. § 402(x).

Section 402(x) presently provides, inter alia, that monthly social security benefits shall not be paid to a person for any month in which that individual "is confined in a jail, prison, or other penal institution or correctional facility pursuant to his conviction of an offense punishable by imprisonment for more than 1 year (regardless of the actual sentence imposed), . . ." 42 U.S.C. § 402(x)(1)(A)(i). Section 402(b) of the bill would amend that provision by providing that the prison confinement triggering suspension of benefits need no longer be based upon an offense punishable by imprisonment for more than one year. Under this amendment, prison or jail confinement will trigger suspension of benefits when confinement is based upon conviction of any "criminal offense" (including, for example, confinement in jail for a misdemeanor).

Section 402(x)'s current provisions for suspension of benefits during periods of confinement based on conviction for felony offenses have been challenged on a variety of constitutional grounds, including claims that such suspension violates the due process (including its equal protection component) and ex post facto clauses of the Constitution. However, as we are aware, all such constitutional challenges have been rejected by the courts. See, e.g., Butler v. Apfel, 144 F.3d 622 (9th Cir. 1998); Davis v. Bowen, 825 F.2d 799 (4th Cir. 1987); Wiley v. Bowen, 824 F.2d 1120 (D.C. Cir. 1987); Andujar v. Bowen, 802 F.2d 404 (11th Cir. 1986); Jensen v. Heckler, 766 F.2d 383 (8th Cir. 1985).

Because section 402(b) of the bill would substantially expand the class of persons whose confinements would subject them to suspension of benefits, it should be anticipated that it will be subject to further constitutional challenge on grounds similar to those raised raised against section 402(x). We believe, however, that the expanded suspension of benefits provision proposed by section 402(b) is likely to be sustained against constitutional challenge on essentially the same grounds cited by the courts in upholding the current suspension provisions of section

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402(x). Indeed, because section 402(b) more uniformly denies benefits to those in prison than did prior law, we believe it is even less vulnerable to equal protection and other constitutional challenge than the prior law. See Casalvera v. Comm'r of Social Security, 998 F. Supp. 411, 416 (D. Del. 1998).

We do have constitutional concerns regarding the provisions of section 402(d) of the bill ("Continued Denial of Benefits to Sex Offenders Remaining Confined to Public Institutions Upon Completion of Prison Term"). That subsection would expand the current provisions for suspension of benefits to a person who

> (iii) immediately upon completion of confinement as described in clause (I) pursuant to conviction of a criminal offense an element of which is sexual activity, is confined by court order in an institution at public expense pursuant to a finding that the individual is a sexually dangerous person or a sexual predator or a similar finding.

Initially, this provision appears to assume that persons may be constitutionally confined pursuant to a post-service-of-sentence court order based solely upon "a finding that the individual is a sexually dangerous person or a sexual predator or a similar finding." Such an assumption may be inconsistent with the Supreme Court's recent articulation of the permissible predicates for such confinement in Kansas v. Hendricks, 117 S.Ct. 2072 (1997). There, the Court held that a noncriminal commitment statute is constitutionally sustainable if it couples proof of dangerousness to public health and safety with proof of causal conditions such as mental illness, mental abnormality, or other volitional impairment rendering the confinee dangerous beyond his or her control. Id. at 2079-81. See also Heller v. Doe, 509 U.S. 312, 314-15 (1993). The Hendricks opinion also expressly stated that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment." 117 S.Ct. at 2080. We therefore recommend that section 402(d)'s description of the findings upon which a post-sentence confinement warranting suspension of benefits may be based be modified to conform to the standards set forth in Hendricks -- e.g., a finding that the person is dangerous to himself or to others due to mental illness, mental abnormality, or other volitional impairment rendering him dangerous beyond his control.

Our further concerns respecting section 402(d) are based upon the narrowness and selectivity of the classification defining the category of post-sentence confinees subject to suspension of benefits by this provision. The underinclusive and narrowly selective nature of that classification could subject the provision to plausible constitutional challenge on equal protection and/or ex post facto grounds.

If challenged on equal protection grounds, this provision would be subject to the lowest level of constitutional scrutiny -- i.e., it would be upheld if defensible on any "rational basis." See, e.g., Butler v. Apfel, 144 F.3d at 625. The current provisions of section 402(x), for example, were challenged on the grounds that there was no rational basis for suspending benefits with respect to felony prisoners while not doing so with respect to misdemeanor prisoners. In Casalvera v. Comm'r of Social Security, the court upheld the provision on the grounds that

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"[s]uspending benefits for the short period of time that those convicted of misdemeanors are incarcerated would do little to help preserve the solvency of the social security trust funds." 998 F. Supp. at 416.

Here, section 402(d) would draw de facto legislative classifications (a) between persons confined by post-sentence court order related to a criminal offense "an element of which is sexual activity," and persons confined by orders related to all other criminal offenses; and (b) between persons confined pursuant to a finding that the individual is "sexually dangerous" or a "sexual predator," and persons confined pursuant to findings of dangerousness or threat unrelated to sexual considerations. We believe courts may find it difficult to find a rational basis for this distinction, which seems to render the provision underinclusive in its coverage. Inasmuch as the legitimate basis for the suspension of benefits is to prevent the payment of benefits that are unnecessary and redundant because the person's support is provided at public expense while confined, there seems no rational basis to distinguish between persons confined by court order based on sexual dangerousness as opposed to persons confined by court order based on other forms of dangerousness or threat. The distinction appears to be unrelated to the legitimate basis for the suspension – i.e., protection of the social security trust fund against unnecessary expenditures.

Further, we believe that this underinclusive classification could also render section 402(d) more vulnerable to challenge on ex post facto grounds as well. The absence of a rational regulatory justification for the classification of persons subject to suspension of benefits would lend support to contentions that the provisions is clearly punitive in intent and thus, when applied on the basis of offenses committed before enactment of the penalizing provision, violative of the ex post facto clause. See Wiley v. Bowen, 824 F.2d at 1121 ("By singling out felons for the disability, Congress makes one quite suspicious that its intent was punitive").

These constitutional concerns may be substantially addressed, however, by modifying section 402(d) to ameliorate the questionable classification. In order to address these concerns (as well as those noted above with respect to the standards of Kansas v. Hendricks), while at the same time encompassing persons who are lawfully confinable due to sexual dangerousness, the provision could be modified to provide as follows, or language to the same effect:

> (iii) immediately upon completion of confinement as described in clause (i) pursuant to conviction of a criminal offense, is confined by court order in an institution at public expense pursuant to a finding that the individual is dangerous to others or to himself due to mental illness, mental abnormality, or other volitional impairment.

Thank you for requesting our views. If we can be of further assistance in this matter, please do not hesitate to contact this office.

Sincerely,

Georgia Verdugo for

Dennis K. Burke
Acting Assistant Attorney General

Withdrawal/Redaction Sheet
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. fax	Dennis Burke to Jacob Lew re: Work Incentives Improvement Act of 1999 (4 pages)	02/09/99	P5 6343 Dup

COLLECTION:
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Disability-Work Incentives Improvement Act-T.A. to Hill-Part I

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