

Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. draft	re: Notes for Presidential statement (Annotations) (2 pages)	n.d.	P5 3066

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Jamie Metrailler
2010-0448-F
jm789

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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- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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

RR. Document will be reviewed upon request.

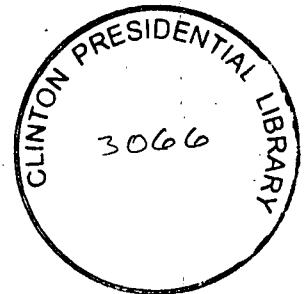
Freedom of Information Act - [5 U.S.C. 552(b)]

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hoped that she might be confirmed. ~~I am totally sympathetic with~~
their concerns.

I pledge to them that just as I have already shown
in the record number of minority appointments I have made that I
will work closely with them in the years ahead to press forward
in the civil rights struggle. I have worked in this area ~~for 20~~ ^{May 20}
years, and I want an administration that is second to none on
civil rights.

I will be consulting promptly with Attorney General
Reno, key members of the Senate and House, and civil rights
leaders about a replacement for Lani Guinier -- and I hope to
have an announcement of a replacement in the next few days. In the
meantime, I want to express to Lani Guinier once again my sorrow
at the anguish she has suffered.



Withdrawal/Redaction Sheet

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Bill Galston to President Clinton. Subject: Nomination of Lani Guinier (4 pages)	06/01/1993	P5 3067
002. list	re: List of potential civil rights nominees (1 page)	n.d.	P2
003. letter	Peter Edelman to Bernard Nussbaum. Subject: Potential civil rights nominees (1 page)	06/03/1993	P2
004. letter	Peter Edelman to Bernard Nussbaum. Subject: Potential civil rights nominees (1 page)	06/03/1993	P2
005. letter	Peter Edelman to Bernard Nussbaum. Subject: Nomination of Lani Guinier (1 page)	06/02/1993	P5
006. letter	Address (Partial) (1 page)	06/03/1993	P6/b(6)

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[Lani Guinier] [loose]

Jamie Mettrailer

2010-0448-F

jm450

RESTRICTION CODES

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THE WHITE HOUSE
WASHINGTON

June 1, 1993

MEMORANDUM FOR THE PRESIDENT

FROM: BILL GALSTON
SUBJ: NOMINATION OF LANI GUINIER

Introduction: The Purpose of this Memorandum

I have spent much of the past week carefully reading Lani Guinier's recent law review articles and other pertinent materials. On this basis, I have reached a difficult conclusion: it is my duty to recommend to you that her nomination to serve as Assistant Attorney General for Civil Rights be withdrawn. I recognize Prof. Guinier's academic accomplishments and considerable experience as a civil rights litigator. But the perspective she would bring to the Justice Department would ill serve the interests of our country and your administration.

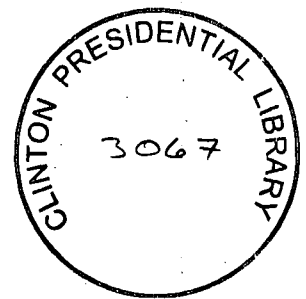
In particular, Prof. Guinier's understanding of the Voting Rights Act--which she would have principal responsibility for interpreting and enforcing--is inconsistent with the intent of Congress and far outside the mainstream of judicial opinion. An effort to implement the Act as she understands it would lead to a morass of litigation and would undermine your longstanding effort to promote reconciliation across racial and ethnic lines.

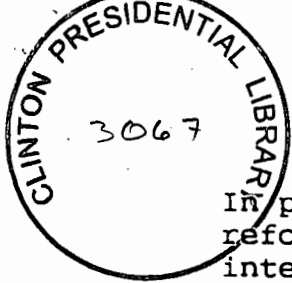
The purpose of this memorandum is to support my recommendation by presenting in some detail Prof. Guinier's positions on the critical issues. To do this fairly, I quote wherever possible from her recent writings.

Prof. Guinier's Understanding of the Voting Rights Act

Prof. Guinier argues for a conception of political equality that goes well beyond the one-person, one-vote principle of the 1960s and 1970s and the "majority minority" redistricting strategy of the 1980s and 1990s. Instead, she says, "We ought to question the inherent legitimacy of winner-take-all majority rule." The reason: "Racism excludes minorities from ever becoming part of the governing coalition, meaning that the white majority will be permanent."

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In place of majority rule, Prof. Guinier believes, political reform should be guided by the principle of "proportional interest representation." The principle is complex, but the bottom line is clear. Minorities define their own interests-- that is, their position on issues of greatest importance to them, such as minority set-asides on municipal contracts and public funding for drug treatment programs. If those interests are systematically thwarted in the legislative process by white majority voting, then the norm of proportional interest representation has been violated, and remedies may be provided under the Voting Rights Act.

Specifically, rules governing both elections and legislative procedures should be systematically altered so that permanent, isolated minorities can successfully oppose "domination by a hostile, permanent majority." In particular, "decisional rules other than either simple majority rule or one legislator/one vote may be required," including a "minority veto on critical minority issues," and the Justice Department and the courts should actively intervene to pursue such remedies.

This thesis is not advanced simply as an academic theory about what ought to be the case. Prof. Guinier contends that proportional interest representation is "an appropriate remediation principle for sections 2 and 5 of the Voting Rights Act." Not only is this approach "consistent" with the text and purpose of the Act; the "focus and basic remedial approach I propose has been mandated by Congress." In particular, the statute's norms of equality and empowerment affirmatively "require" the implementation of her more expansive interpretation.

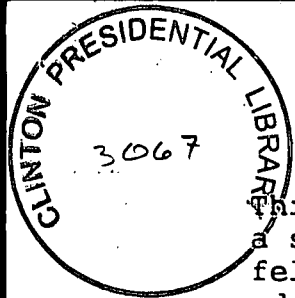
Substantive Difficulties with Prof. Guinier's Views

There are a number of decisive objections to this approach.

First, it cannot be sustained as a matter of statutory interpretation. One well-known liberal writer on legal issues has labelled Prof. Guinier's views "extraordinarily far-fetched" and observes that "it is absurd to pretend that Congress intended anything like such a mandate when it re-enacted the Voting Rights Act in 1982." I know of no one who disagrees. → Who?

statement
Second, the implementation of Prof. Guinier's views would imply that virtually every aspect of state and local governance would be subject to Civil Rights Division preclearance, including committee and committee chair assignments, legislative rules governing the offering of amendments and the reporting of legislation by committees, the determination of voting majorities, and the outcome of votes in areas involving key minority interests. This would mean an unprecedented degree of federal micromanagement, and the ensuing orgy of litigation could bring government in regions subject to preclearance to a virtual standstill.

Attua - objected to opinion



Third, Prof. Guinier's theory of the Voting Rights Act flows from a startling worldview that would be rejected by most of her fellow citizens as well as most members of your party and administration. In that view:

- o white racism is pervasive and all but intractable;

- o black electoral advances since the 1960s represent "the triumph of tokenism" that has failed to produce "real shifts of power";

- o black officials who appeal successfully to biracial coalitions tend to become coopted, forfeit their "authenticity," and lose their "ability and enthusiasm for advocating on behalf of their black constituents";

- o the current two-party system "stifles minority interests" and should be deemphasized in favor of a "community-based, minority political party";

- o equality of opportunity is a bogus "ideology"; and

- o genuine anti-discrimination policy is directed to "more than the basic process of decision-making. It incorporates a result-oriented inquiry, in which roughly equal outcomes, not merely an apparently fair process, are the goal."

Political Objections to Prof. Guinier's Nomination

Prof. Guinier's views are far outside the mainstream and very hard to defend. For many, they are particularly troubling because she would be in a strong position to promote them as Assistant Attorney General for Civil Rights. For this reason, her nomination is almost certain to produce serious difficulties for your administration.

- o Rather than promoting national harmony, reconciliation, and the search for common ground, it will exacerbate racial divisions.

- o Rather than reuniting our party, it will drive a new wedge between southern and non-southern Democrats.

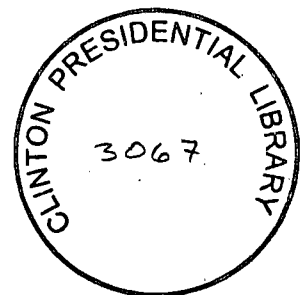
- o Rather than strengthening your presidency, it will raise new questions about your identity as a "new Democrat" committed to the politics of fair procedures and equal opportunities rather than mandated results.

The month of June represents a critical juncture for your presidency. You have the opportunity for a new beginning that effectively refocuses the administration's energies on core issues such as the economy and health care. And you have the opportunity to refurbish your credentials as a different kind of Democrat who governs from the progressive center of our country.

A bitter and protracted Senate struggle over Prof. Guinier would undermine these opportunities by diverting precious energy and attention of key administration officials and by reinforcing the impression of an administration that has somehow lost touch with the mainstream of the American people.

I cannot say for sure that Prof. Guinier is unconfirmable. But highly skeptical comments from moderate and liberal Democratic senators (Biden, Leahy, and others) who should form the core of her support suggest, at best, a very tough struggle.

Whatever the eventual outcome may be, this is the wrong fight at the wrong time. I urge you to withdraw her nomination before the damage mounts. No doubt withdrawal would be painful and would expose your administration to some heated short-term criticism. But for the reasons advanced in this memorandum, I strongly believe that such a decision would be correct on the merits and would serve the longer-term interests of the country as well as your presidency.



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Withdrawal/Redaction Sheet Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Bill Galston to President Clinton. Subject: Abortion related issues (Annotations) (6 pages)	05/20/1993	P5 4104
002. note	Phone No. (Partial) (1 page)	n.d.	P6/b(6)
003. notes	re: Views and nomination of Lani Guinier (2 pages)	05/22/1993	P5

COLLECTION:

Clinton Presidential Records
Scheduling Office
Ricki Seidman
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FOLDER TITLE:

Lani Guinier [Folder 2] [2]

Jamie Metrailler
2010-0448-F
jm452

RESTRICTION CODES

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THE WHITE HOUSE

WASHINGTON

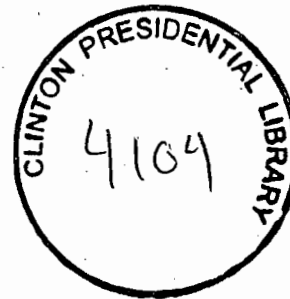
May 20, 1993

20 P8:52

MEMORANDUM FOR THE PRESIDENT

FROM: BILL GALSTON

SUBJ: ABORTION-RELATED ISSUES



Action-forcing Events

During the next few months, you will face a long list of decisions concerning abortion and abortion-related issues. Many of these decisions relate to federal funding, an issue that arises in at least half a dozen appropriations bills (see Tab A). Chairman Natcher has requested guidance from the White House concerning these bills by early next week. Other key decisions involve the Freedom of Choice Act, the content of the health care basic benefits package, and the Supreme Court nomination.

Many of the appropriations issues are likely to be narrowed, or eliminated altogether, when health care reform is enacted. Nonetheless, they must be addressed as freestanding issues this year in the context of the annual appropriations process.

In recent weeks, pressures to clarify our substantive positions and strategic intentions concerning abortion-related questions have been steadily intensifying. In response, the Domestic Policy Council has brought together an informal working group representing numerous departments within the White House as well as HHS and OMB. The members of this group include Ricki Seidman (Communications), Melanne Verveer (Office of the First Lady), Charlotte Hayes (Office of the Vice President), Doris Matsui (Public Liaison), Christine Varney (Cabinet Affairs), Susan Brophy (Legislative Affairs), Joan Baggett (Political Affairs), Carol Rasco (Domestic Policy Council), Steve Neuwirth (Counsel's Office), Jerry Klepner (HHS), Harriet Rabb (HHS), and Nancy-Ann Min (OMB). This memorandum--the first of a series--contains background information on key issues as well as recommendations and options for your consideration.

Political Context

Within your administration, there is a broad consensus that while we should deal with choice issues in a principled and consistent manner, we must make every reasonable effort to lower their public profile for the remainder of this year. There are two principal justifications for this view.

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First, it is essential, so far as possible, to keep focused on the economic plan until it has made it through the Congress. The last thing we need is an ongoing heated controversy that divides our energies and diverts the public's attention while reinforcing their view that we're not spending enough time on the economy.

Second, it is essential to regain our balance on cultural matters. During your campaign, you reassured the American people that you identified with mainstream/heartland values, but the first four months of the administration have sown some doubts on that score. There may be worse to come. We face the possibility of a summer in which the political dialogue is largely framed by issues such as gays in the military, political correctness on campus, quotas, and reproductive services contained within a health care proposal. For this reason, while the administration should remain true to its principles, we should not go out of our way to emphasize issues that reinforce the impression that we are somehow outside the cultural mainstream.

In this connection, it is worth noting that the people now distinguish fairly sharply between choice, which they support within broad limits, and public funding, which they are much less likely to support. Even when our position on public funding is carefully framed, we are sure to encounter substantial difficulties in forging sustainable majorities in the Congress and in the court of public opinion.

An Easy Case: Federal Employee Health Benefit (FEHB) Plans

Under current law, FEHB plans (affecting federal employees and dependents) may not cover abortions unless the life of the mother is in danger. The DPC working group recommends that this restriction be eliminated. The result would be that FEHB plans would be allowed but not required to cover a wider range of abortion services. In most circumstances, federal employees would be able to choose among several plans with varying levels of coverage.

Decision on FEHB Recommendation

✓

Accept

Reject

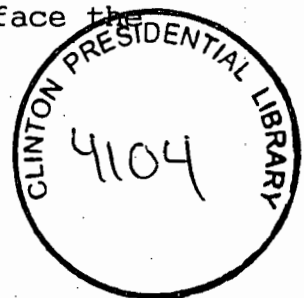
Discuss

A Harder Case: The Hyde Amendment

A. Substantive Issues

Your campaign made a determined effort to subsume federal funding issues under the rubric of national health care reform. You recognized, however, that they would persist as free-standing issues until the enactment of that reform. You now face the question of how to deal with the Hyde amendment.

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During the campaign you opposed laws that prohibit federal funding for abortion. At the same time, you favored substantial leeway for the states to chart their own course. That is why your proposed budget simultaneously deletes the Hyde amendment and declares that "the Administration will work with the Congress to facilitate an approach that is compatible with both Federal and State law."

The difficulty is that these two bodies of law are frequently incompatible. For example, Medicaid requires states to provide all "medically necessary" services to eligible beneficiaries. Simply removing the Hyde amendment from federal legislation would almost certainly compel many states to fund abortions that they now exclude through either statutory or (as in the case of Arkansas) constitutional provisions. There is no way of fully harmonizing federal and state law as now written. The question, rather, is how they can be adjusted to reach mutual consistency.

Your DPC working group recommends that all states be required to fund Medicaid abortions in cases of rape, incest, and when the mother's life is endangered. Beyond these cases, each state should be left free to make its own determination.

The rationale is as follows: Even the Hyde amendment permitted abortions to relieve threats to mothers' lives, while rape and incest represent conditions for publicly funded abortion that enjoy substantial public support. A move to restore the original Hyde amendment would probably succeed in Congress if the alternative is simple deletion; substitute language that includes rape and incest would offer a better chance of defeating Hyde. Our proposal would establish that language as a federal baseline while not tying the hands of the states (now numbering 15) that want to go farther.

Decision on Hyde Language

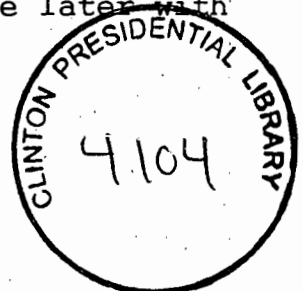
✓
Accept

Reject

Discuss

B. Strategic Issues

There are two options for reaching this language as a legislative result. The first is to take the lead--to announce our legislative objective promptly and forthrightly, starting with Chairman Natcher, and to deploy our resources on the Hill to reach that objective during the next two months. The second is simply to restate our commitment to deleting Hyde and to working with the Congress to craft more satisfactory language. Under the second option, we would in effect be asking the Congress to make the opening bid, and we would be prepared to intervene later with our language as an alternative to reinstating Hyde.



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OKCWL
Nun-
The advantage of the first option is that it allows you to demonstrate leadership by acting clearly and decisively in a hotly contested arena. The disadvantage is that it could offend nearly everyone, at least initially. In particular, it would dismay many of your pro-choice supporters by putting you in the position of sponsoring abortion coverage that is arguably narrower than the criterion of "medical necessity" built into the Medicaid statute.

An advantage of the second option is that it preserves your freedom of action to forge consensus over time. Another advantage is when you offer your substantive recommendation during the course of the Hyde debate, it might well be seen, not as selling out our pro-choice supporters, but rather as rescuing them from a straightforward reinstatement of the Hyde amendment. A disadvantage of this option is that it could be seen, and represented, as evasive and lacking in principled leadership.

The DPC working group recommends option two, with two conditions. First, we cannot say that we are working with the Congress unless we are actually doing so. To implement option two, we would have to enter substantive discussions on this matter with key congressional leaders--promptly.

Second, you would need a public articulation of your position that takes account of the undeniable difficulties and that you could sustain until the actual legislative resolution. We recommend the following as a response to questions:

"As I made clear in my budget proposal, I don't think the Hyde amendment should be reinstated. I've also stated that my administration is committed to working with the Congress to find an approach that respects both federal and state law. I'm well aware of the fact that these bodies of law aren't fully consistent, but I'm confident that we can work out a solution that both protects the principle of choice and respects the deep and legitimate differences that exist among the states as well as among individual citizens. Discussions to achieve this result are now underway."

Decision on Hyde Strategy

What for Hillary
Thurs

Option 1

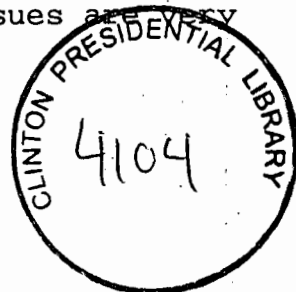
Option 2

Discuss

Other Appropriations Issues

The remaining appropriation bills differ from Medicaid in that they do not raise federal-state issues. (Some, such as DC appropriations, now restrict the use of local as well as federal funds.) Otherwise, the substantive and strategic issues are very similar.

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Our recommendation concerning these bills is that we declare our willingness to work with the Congress and that we adopt as our practical objective (1) the relaxation of restrictions on federal funding to include rape and incest as well as the life of the mother, and (2) where appropriate, local choice in determining the use of local funds.

Two forthcoming bills raise special issues. We have just been informed that the Department of Defense is prepared to include a repeal of the Hyde amendment in its Authorization Bill. We will work with them to ensure, so far as possible, that the language respects the particular circumstances and sensibilities of the military.

Funding for abortion in foreign aid programs also raises a distinctive issue. As you know, the People's Republic of China has come under persistent criticism for alleged use of involuntary sterilization and forced abortion as part of a population control strategy. Your budget proposal deletes language that forbids U.S. funding for overseas programs that provide abortions as an element of voluntary family planning. But the remaining language is unequivocal in its rejection of coercive measures. Public testimony by AID officials and others should be crystal-clear on this point. And if, as some have suggested, the U.N Population Fund is sufficiently disturbed by Chinese practices to consider withdrawing from that country altogether, we should be supportive of their decision to do so.

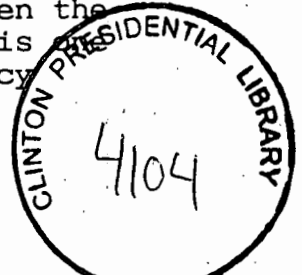
Freedom of Choice Act

As you know, the Freedom of Choice Act represents a major effort to codify the holding of Roe as interpreted prior to the Webster and Casey decisions. The Senate version of the bill has already been marked up by the full Labor and Human Resources Committee. It allows states to require parental involvement with minors' decisions and to decline to pay for the performance of abortions. It also includes a so-called "conscience clause" preventing states from imposing an obligation to perform abortions on individual doctors and institutions (such as Catholic hospitals) with principled objections to this practice. The House version of the bill, which was marked up and passed out this Wednesday, incorporates the conscience and parental involvement clauses but not the provision allowing states to decline to pay for the performance of abortions.

While these points are opposed by some advocacy groups, they are consistent with Roe and are supported by mainstream advocacy groups such as NARAL. (For additional details, see Tab B.)

During the campaign, you pledged to sign a Freedom of Choice Act along the lines of the bills reported out of the Senate and House committees. While there is a significant difference between the two versions, at this point the principal issue before us is of timing and legislative strategy, not substance. Advocacy

COPY



groups who are longstanding supporters take the position that they refrained from bringing the bill to the floor last fall in deference to the campaign's request for delay. Now, they say, we owe it to them to intervene with the House and Senate leadership to move the bill quickly; the leadership is looking for a signal from the White House and is unlikely to move forward without one.

The counterargument runs as follows:

(1) We are already being criticized for an overly crowded agenda, and we don't need another big, controversial item that further diverts attention from the economic plan.

(2) You have already acted aggressively to further the pro-choice agenda, and you face a large number of abortion-related appropriations votes in the next few months. If you encourage a postponable abortion debate to surface during this period, it will rivet public attention on this issue and reinforce your emerging cultural disconnect with ethnic and other swing voters.

Could also be Hyle A. Norton (3) We should focus our attention this summer on the unavoidable battle over the inclusion of reproductive services in the basic health benefits package.

(4) The principal reason why FOCA didn't come to the floor last year was that its backers didn't have the votes, and it's still not clear that they do. Speaker Foley has said that he will not bring the bill to the floor unless he is confident that it can pass without killer amendments. The number of close votes in the Judiciary Committee this Wednesday suggests that this is not yet the case and that more work needs to be done.

On balance, we believe that the arguments for delay are stronger than the arguments for moving forward at this time, and we so recommend. You should be aware, however, that many of your pro-choice supporters are likely to regard a decision not to proceed at this time as a deep disappointment--if not an outright betrayal. Should you choose to delay the bill significantly, they may go public with very vocal objections.

Decision on FOCA Strategy

✓
Delay

Go Forward

Discuss

COPY

