

HHS mtg - 6/16/00

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SIGN IN SHEET

MEETING:

Section 434/404

DATE:

11/29/99

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MEMORANDUM

TO: MARIA ECHAVESTE
FROM: IRENE BUENO
RE: MEETING ON SECTION 434/CONFIDENTIALITY – Tuesday, October 10, 2000 in Maria's office

PURPOSE: You are meeting with HHS and DOJ about a pending issue involving the confidentiality of information obtained by individuals in the benefit-granting context and whether HHS confidentiality laws can prohibit health and other providers from providing this information to the INS. The purposes of this meeting are:

- (1) to make sure DOJ understands that this is a priority because many individuals are not seeking important health services due to fear that they will be reported to the INS. (OR you can ask HHS representatives to make their policy and legal arguments).
- (2) to find out where DOJ is on making this decision and ask them for a timeline and/or plan when they expect to make a decision.

BACKGROUND: As you may recall, immigrants regardless of immigration status are eligible for certain health services such as those provided by community health providers and services to treat communicable diseases. HHS, health providers and immigrant advocacy groups have found that while the public charge regulations helped, immigrants are continuing to stay away from health clinics because they think their immigration status will be reported to the INS. HHS and the groups would like the Administration to clarify that immigration information will not be reported to the INS.

The section of the welfare reform law that causes concern is Section 434 that states:

Notwithstanding any other provision of Federal, State or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

There is also a similar provision in the Immigration Reform law of 1996 (section 642). On related provision, section 404 of the welfare reform law, requires mandatory reporting to the INS by three agencies. Recently, these three agencies – SSA, HHS and HUD issued guidance recently that limits their requirement to report information to INS. Section 404 is different from section 434 in that it dealt with mandatory reporting.

For sometime, HHS and immigrant groups have been actively looking for a legal hook to find that health providers are prohibited from reporting information to INS. Last year, DOJ/OLC concluded that census information obtained by individuals is not required to be reported to the INS under section 642 of the immigration reform law of 1996. The immigrant groups and HHS saw this opinion as applying to their program under a similar provision of the welfare reform law (section 434).

When Dawn, Christina and I spoke with James Castello and Dan Marcus, he did not think that the Census opinion. However, later James thought it might be possible that if HHS is given deference to interpret section 434, the confidentiality protections of the HHS programs may prevail over section 434. In early September, James agreed to look into this question. At the last IWG meeting, you asked James to get you something in two weeks – which was at least 4 weeks ago. I spoke to James two weeks ago and he said he was working on it but that he is working on other things too.

HHS makes very compelling policy and legal arguments that we should find that section 434 does not require the disclosure of this information to INS. DPC and WH Counsel staff thinks that HHS makes very compelling arguments. HHS argues the following:

- The principle of confidentiality has always been a fundamental requirement for the effective delivery of health and human services; trust between a doctor and patient, or social worker and client, is critical to successful treatment or case management.
- Any policy or legal interpretation that threatens the confidentiality and trust that are critical to HHS' health and human services programs would severely undermine the administration of those programs, could present a severe threat to the general public's health and safety, and significantly hinder HHS in carrying out its mission. Accordingly, virtually

all HHS programs have statutory and/or regulatory provisions that guarantee client information is kept confidential.¹

- The danger to public health and safety would exist even if the lack of confidentiality only applied to immigrants and their families; an increase in communicable diseases puts entire communities at risk, and increases in child abuse have negative effects on whole communities.
- For example, recent data show that nearly one-half of active TB cases in the U.S. (43 percent) are foreign born individuals; these individuals are not likely to present at public health clinics or hospitals when symptoms arise, or comply with a treatment regimen, if they have reason to fear that health facilities may be reporting them to the INS.
- Similarly, immigrant families are not likely to take their children – most of whom are citizens – to health clinics for immunizations if they fear that information on members of the family may be reported to the INS, thus undermining a significant and recent public health success story of increasing childhood immunizations that we are trying to build upon.
- Battered and abused women and children in immigrant families are not likely to access the child welfare system or shelters for victims of domestic violence if they fear information might be given to the INS, significantly exacerbating an existing problem.
- One in ten families in the U.S. are “mixed status” families (i.e., with at least 1 immigrant parent and 1 citizen child), and 90 percent of the children in these families are citizens. In California, 27 percent of all families are mixed status; and in New York 14 percent of all families are mixed status.

¹ E.g., National Center on Health Statistics/CDC (42 USC 242m(d); Community/Migrant health clinics (42 CFR 51c.110), Maternal and Child Health program (42 CFR 51a.6)); Ryan White (HIV) Care Act (42 USC 300ff-61); Agency for Health Research and Quality (42 USC 299a-1(c)); Medicaid (42 USC 1396a(a)(7); Medicare 42 USC 1395w-22(h); Foster Care and Adoption Assistance (42 USC 671(a)(8)); Child Abuse and Neglect (42 USC 5106a(b)(2)(A)(v); 5106a(c)(4)(B)); Head Start (45 CFR 1304.51(g)); Child Support Enforcement (42 USC 653(b)(2) and (3); (e); (l); (m); (n); 654(8)(B); 654(26); 654a(d); 663(c); 669a(b) and (c)); Runaway and Homeless Youth (42 USC 5714-2(a)(12) and (13); 5731); Elder Rights Protection (42 USC 3058g(d)(2)); Family Violence (42 USC 10402(a)(2)(E); (b)(2); 10413(3)).

- Demographic trends ensure that immigrant families will be a growing proportion of the population that HHS is committed to serving; but if we adopt a policy that fosters fear and mistrust in these communities, we will undermine our ability to effectively accomplish our mission in the next several years, and potentially create costly and debilitating public health and safety emergencies and crises.
- When it comes to assuring immigrant communities about confidentiality, the most effective policy is one that is simple and broad-based; limiting confidentiality to only certain services or certain programs would likely fail. For example, limiting confidentiality protections to services related to communicable diseases only would not work since an individual would not know before examination whether certain symptoms were related to an “exempt” disease that would guarantee confidentiality. Similarly, providing confidentiality only within clinics, but not hospitals, would result in fear of accessing necessary health care in communities with few or no clinics. Finally, if confidentiality was provided within the “child welfare system” but not the “welfare system”, it would be extremely difficult to try and distinguish these differences to immigrant families and caseworkers.
- Similarly, any policy or legal interpretation that undermines existing HHS confidentiality statutes and/or regulations and leads to increased reporting of individuals to the INS, would have much broader implications; we will undermine and erode public trust in government’s ability to respect confidentiality of its citizens if we try to distinguish fine points between citizen confidentiality and immigrant confidentiality; everybody will end up distrusting government to keep confidential information it gathers on people.

ATTENDEES:

You
Christina Ho
Dawn Chirwa
Irene

HHS
Anna Kraus
Andy Hyman
David Nielsen

DOJ
James Castello

Janet has spoken to OLC - unclear who has reference.

~~OLC~~
Census^{not} implicated b/c not state + local + further away in Congress indicate
OLC - officially request, how long (3 months), what's the answer.

HHS - §434 - enforcement ~~the~~ HHS confidentiality laws or reg.

MN requires report by state + local agency if aware illegal, effective date
is next year. 7/00 ... could sets up a conflict.

SD - took down the sign.

OLC requires a case-by-case analysis.

HHS/GC - ~~was~~ would want to ~~present~~ ~~to~~ OLC but depends ^{now} ~~on~~ question is asked.

Reference - 2 different kinds:

- Chevron
- Total Deference

DOT - group the top 3 priorities ... meet w/ OLC. ~~to~~ get a preliminary meeting

meet w/ OLC. If they say need to look at all ... the revision.

man - C.

HHS communicate to its offices the follow ... Does OLC have a
problem w/ that.

CONFIDENTIALITY POLICY TALKING POINTS

- The principle of confidentiality has always been a fundamental requirement for the effective delivery of health and human services; trust between a doctor and patient, or social worker and client, is critical to successful treatment or case management.
- Any policy or legal interpretation that threatens the confidentiality and trust that are critical to HHS' health and human services programs would severely undermine the administration of those programs, could present a severe threat to the general public's health and safety, and significantly hinder HHS in carrying out its mission.
- Accordingly, virtually all HHS programs have statutory and/or regulatory provisions that guarantee client information is kept confidential.¹
- The danger to public health and safety would exist even if the lack of confidentiality only applied to immigrants and their families; an increase in communicable diseases puts entire communities at risk, and increases in child abuse have negative effects on whole communities.
- For example, recent data show that nearly one-half of active TB cases in the U.S. (43 percent) are foreign born individuals; these individuals are not likely to present at public health clinics or hospitals when symptoms arise, or comply with a treatment regimen, if they have reason to fear that health facilities may be reporting them to the INS.
- Similarly, immigrant families are not likely to take their children – most of whom are citizens – to health clinics for immunizations if they fear that information on members of the family may be reported to the INS, thus undermining a significant and recent public health success story of increasing childhood immunizations that we are trying to build upon.
- Battered and abused women and children in immigrant families are not likely to access

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the child welfare system or shelters for victims of domestic violence if they fear information might be given to the INS, significantly exacerbating an existing problem.

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- Demographic trends ensure that immigrant families will be a growing proportion of the population that HHS is committed to serving; but if we adopt a policy that fosters fear and mistrust in these communities, we will undermine our ability to effectively accomplish our mission in the next several years, and potentially create costly and debilitating public health and safety emergencies and crises.
- When it comes to assuring immigrant communities about confidentiality, the most effective policy is one that is simple and broad-based; limiting confidentiality to only certain services or certain programs would likely fail. For example, limiting confidentiality protections to services related to communicable diseases only would not work since an individual would not know before examination whether certain symptoms were related to an “exempt” disease that would guarantee confidentiality. Similarly, providing confidentiality only within clinics, but not hospitals, would result in fear of accessing necessary health care in communities with few or no clinics. Finally, if confidentiality was provided within the “child welfare system” but not the “welfare system”, it would be extremely difficult to try and distinguish these differences to immigrant families and caseworkers.
- Similarly, any policy or legal interpretation that undermines existing HHS confidentiality statutes and/or regulations and leads to increased reporting of individuals to the INS, would have much broader implications; we will undermine and erode public trust in government’s ability to respect confidentiality of its citizens if we try to distinguish fine points between citizen confidentiality and immigrant confidentiality; everybody will end up distrusting government to keep confidential information it gathers on people.

DRAFT LEGAL TALKING POINTS

* The memorandum from the Office of Legal Counsel to the General Counsel of the Commerce Department, dated May 18, 1999, concludes that § 642(a) of IIRIRA does not partially repeal the confidentiality provision in the census statute that bars the disclosure of covered census information by census officials. The reasoning in this opinion is broad enough to prevent the partial repeal by § 434 of PRWORA and § 642 of IIRIRA of confidentiality provisions in HHS statutes that protect from disclosure information gathered in various health, welfare and social services programs.

- “In our view, the text of § 1373(a) [§ 642 of IIRIRA] does not manifest the kind of clear congressional intention that is ordinarily required to effect the repeal of a federal statute such as 13 U.S.C. § 9(a) [the census confidentiality provision]. Indeed, if anything, the statutory text suggests that Congress did not intend to repeal existing, federal statutory prohibitions or restrictions on disclosure.” p. 5.

- “In contrast, the terms of § 1373(a) do not clearly invest governmental officials or entities with the affirmative authority to disclose information in circumstances where they otherwise would be prohibited from doing so by a federal statute. Rather, the provision is phrased as a limitation on the authority of government entities or officials to impose prohibitions or restrictions on disclosures by government entities or officials.” p. 5.

- “We also do not believe that it would make sense to construe § 1373(a) as if it were intended to preclude federal officials or entities from implementing, through, for example, criminal prosecutions or disciplinary actions, federal statutory prohibitions or restrictions against disclosure. Such an interpretation would require one to make the dubious assumption that Congress intended to preclude federal officials from implementing statutory prohibitions or restrictions against disclosure that it had not seen fit to repeal.” p. 6.

- “These interpretive oddities do not arise if the text is construed to apply only to disclosure prohibitions or restrictions other than those imposed by federal statute.” p. 6.

- “The ‘notwithstanding’ phrase merely prefaces the substantive limitation that §1373(a) sets forth, and, as we have explained, the text of §1373(a) suggests that this substantive limitation does not apply if Congress is the source of the prohibition or restriction in question. The limitation appears instead to be intended to apply only when the source of the prohibition or restriction on disclosure is an entity or official other than Congress. The ‘notwithstanding’ phrase is thus best read to mean only that, notwithstanding a federal statute that would authorize federal officials or entities to exercise their general administrative discretion in a manner that would prohibit or restrict disclosures of the type identified in § 1373(a), such federal officials or entities may not exercise such discretion. The phrase should not be understood to refer, therefore, to federal statutes that themselves prohibit or restrict such disclosures.” p. 7.

SEC. 434. COMMUNICATION BETWEEN STATE AND LOCAL GOVERNMENT AGENCIES AND THE IMMIGRATION AND NATURALIZATION SERVICE.

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

SEC. 435. QUALIFYING QUARTERS.

For purposes of this title, in determining the number of qualifying quarters of coverage under title II of the Social Security Act an alien shall be credited with—

(1) all of the qualifying quarters of coverage as defined under title II of the Social Security Act worked by a parent of such alien while the alien was under age 18, and

(2) all of the qualifying quarters worked by a spouse of such alien during their marriage and the alien remains married to such spouse or such spouse is deceased.

No such qualifying quarter of coverage that is creditable under title II of the Social Security Act for any period beginning after December 31, 1996, may be credited to an alien under paragraph (1) or (2) if the parent or spouse (as the case may be) of such alien received any Federal means-tested public benefit (as provided under section 403) during the period for which such qualifying quarter of coverage is so credited.

Subtitle E—Conforming Amendments Relating to Assisted Housing

SEC. 441. CONFORMING AMENDMENTS RELATING TO ASSISTED HOUSING.

(a) **LIMITATIONS ON ASSISTANCE.**—Section 214 of the Housing and Community Development Act of 1980 (42 U.S.C. 1436a) is amended—

(1) by striking “Secretary of Housing and Urban Development” each place it appears and inserting “applicable Secretary”;

(2) in subsection (b), by inserting after “National Housing Act,” the following: “the direct loan program under section 502 of the Housing Act of 1949 or section 502(c)(5)(D), 504, 521(a)(2)(A), or 542 of such Act, subtitle A of title III of the Cranston-Gonzalez National Affordable Housing Act,”;

(3) in paragraphs (2) through (6) of subsection (d), by striking “Secretary” each place it appears and inserting “applicable Secretary”;

(4) in subsection (d), in the matter following paragraph (6), by striking “the term ‘Secretary’” and inserting “the term ‘applicable Secretary’”; and

(5) by adding at the end the following new subsection:

“(h) For purposes of this section, the term ‘applicable Secretary’ means—
“(1) the Secretary of Housing and Urban Development, with respect to financial assistance administered by such Secretary

and financial as
Cranston-Gonzalez

“(2) the Secretary of Housing and Urban Development, with respect to financial assistance administered by such Secretary

“(b) CONFORMING AMENDMENTS TO THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1980 (42 U.S.C. 1436a)

(1) by striking

(2) by striking

“development”; and

(3) by striking

Subtitle F—Earned Income Tax Credit

SEC. 451. EARNED INCOME TAX CREDIT.

(a) **IN GENERAL.**—Section 201 of the Internal Revenue Code of 1986 (relating to the earned income tax credit) is amended by striking—

“(F) an individual who is not eligible to claim the credit”

“(i)

ber, and

“(ii)

ing of se

of such i

(b) **SPECIAL IDENTIFICATION NUMBER.**—Section 201 of the Internal Revenue Code of 1986 (relating to the earned income tax credit) is amended by adding—

“(1) IDENTIFICATION NUMBER.—The term ‘identification number’ means a social security number issued pursuant to clause (II) of section 201 of the Internal Revenue Code of 1986 (relating to the earned income tax credit).”

(c) **EXTENSION OF THE EARNED INCOME TAX CREDIT TO CLERICAL EMPLOYEES.**—Section 201 of the Internal Revenue Code of 1986 (relating to the earned income tax credit) is amended by striking “and” at the end of subsection (b) and inserting after subsection (b)—

“(F) an

number requi

income credi

“(G) an

tion 32 with

described in

by section 1

net earnings

(d) **EFFECTIVE DATE.**—Section 201 of the Internal Revenue Code of 1986 (relating to the earned income tax credit) shall apply with respect to extensions of the credit under this Act.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

ASSISTANT SECRETARY FOR PLANNING AND EVALUATION



Date _____

From: David NielsonTo: Irene Bueno / ChristinaDivision: ASPE

Agency: _____ Ho

Phone Number: (202) 690-6461

Phone Number: _____

Fax Number: (202) 690-5514

Fax Number: 456-1907 /

Number of Pages, including Cover _____ 456-5581

REMARKS Irene - I'm sending you 2 articles about
immigrants being afraid to access services; the
old one I sent a couple days ago that is
directly relevant; and an article I found
from GW study that is more generally
relevant.

Christina - I'm just sending you the
GW article. Thanks!

Campos' case may be different because of a possible error by the INS. She said she will discuss her case with the Immigration clinic at UH, which is composed of immigration specialists.

"I'm just glad I don't have to pay out-of-district tuition for HCC," she said.

Illness rears head
The Associated Press, August 28, 2000

Garden City ÷ Once relegated to darkened rooms and sanitariums, tuberculosis has returned to Kansas as a public health threat driven by changing immigration trends and a beleaguered rural medical system.

A recent study by the Garden City Telegram showed the city ÷ with its behemoth packing plants drawing thousands of immigrant Hispanic workers ÷ is on the front lines of a resurgence in tuberculosis cases in this country.

Pediatrician Stephen Meyers has seen a rise in positive skin test results this year and is treating several children with positive TB results.

"People are afraid we're going to report them to immigration. They're in our community, it's our responsibility to treat them," said Cheryl Kottke, Finney County Health Department director. "If we leave them untreated, we're actually exposing the community to greater risk."



By many estimates, tuberculosis ÷ "the great white plague" of the 19th century ÷ was the leading killer of the time and its epidemics chiefly struck people living in shabby, urban conditions.

By the early 1950s, TB rates fell by almost 75 percent.

1993 outbreak

But during a 1993 TB outbreak in Finney County, 15 active cases were reported to health officials within four months. When health officials arrived, 18 active cases were documented. In the previous decade, the norm was two cases annually, according to the

Centers for Disease Control.

An active TB case means a person was exposed to someone with the disease by breathing in its bacteria from so-called shared air, a close physical space shared with friends or co-workers for up to eight hours daily, and at least five days a week.

Marilyn Peterson, then director of the Finney County Health Department, said the 1993 sufferers tended to be new immigrants from Mexico. A cultural bias against Hispanics, she said, framed people's reactions at the time: "Not because of who they were, but where they came from. We thought we had

TB conquered in this country."

CDC officials pinpointed two separate TB clusters in 1993 in Garden City, one including 15 patients and the other three. Both were brought here by Mexicans who had visited that country during the two years prior to the outbreak.

Disease of the poor

Pediatrician Meyers and nurse Linda Roemer cared for the sick children at St. Catherine Hospital during the outbreak.

"The majority had been exposed to grandparents, friends from the meatpacking plants," Meyers said.

All the victims eventually recovered, but Garden City's reaction to the outbreak troubled health officials.

"There were lots of rumors around if it was safe to come to Garden City because of TB," said Peterson, now director of the Division of Personal Health for Sedgwick County. "TB is contagious, but it's not that contagious."

Many Hispanics coming north are fleeing the poverty on the ranchos or industrialized servitude in the Maquilladora factory zones in Mexico. For others, political unrest and persecution prompted moves from countries like Guatemala, El Salvador and Nicaragua. Seeking to fulfill the American Dream, many found homes and jobs among the meatpacking plants of southwest Kansas.

Immigration rates

In Garden City, the Hispanic population has grown to 32 percent in both Garden City and Finney County, according to the latest figures.

The American Lung Assn. says reports of TB nationwide increased by nearly 40 percent for Hispanics between 1987 and 1997. Hispanics comprised 21 percent of the 4,228 new cases of TB reported nationwide. The increase for all other races that year were 3 percent.

In 1980, Iowa Beef Processors Inc. opened the world's largest beef processing plant in nearby Holcomb, and Monfort Inc., now ConAgra, opened its slaughterhouse doors south of Garden City a few years later. Both industries quickly became the area's largest employers, employing close to 5,200.

By the mid-1990s, the Center for Immigration Studies noted the immigration rate for five counties in southwest Kansas was just as intense as population flow to California, Florida and the U.S.-Mexico border.

Elsewhere, the rates and population numbers aren't so high.

In Douglas County, for example, less than 4 percent of the population is Hispanic. About 7 percent of Shawnee County's population is Hispanic. In Franklin County it's about 3 percent. In Jefferson County, only 1.2 percent

of the population is Hispanic and in Leavenworth County, nearly 5 percent are Hispanic.

Possible explanations

Some health officials question whether fewer reported TB cases in recent years are because meatpacking plants stopped mandatory testing of its workers.

"They quit doing the test because it was too costly; when they did test, we got better figures," Kottke said.

Reported cases to the health department of latent or inactive TB infections in Finney

County were 598 in 1995, 638 in 1996 and 389 in 1997.

"I believe the numbers are down because there's not as much testing," Kottke said. Monfort required mandatory testing of existing and potential workers between 1996 and 1997.

"The health department initiated contact, based on the incidence. We stepped up and in conjunction with them, began pre-employment screening," said Brett Fox, ConAgra spokesman. "We did that after a pretty significant outbreak." IBP has refused to test and pay for worker TB tests in Storm Lake, Iowa. That also appears to be IBP's position in Garden City.

Others tested

The Health Department's Kottke and Finney County undersheriff John Andrews both were exposed to the TB germ while doing their jobs, and now show a positive TB skin test. Further tests showed both had the TB germ in their bodies, but it was inactive, meaning they were not contagious and did not have TB.

"It shocked me," said Kottke. "I probably have the least contact of anyone here with people coming in."

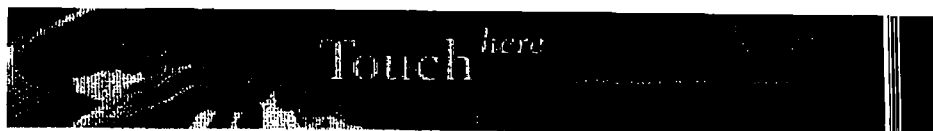
Andrews, who now has to have regular chest x-rays, said his TB exposure of more than 20 years ago probably occurred when he had contact with someone in the jail who he later found out had active TB.

About 80 Sheriff's Department employees receive annual TB skin tests. Exposing others to TB when a person has active TB and is not regularly taking the medicine has become a public safety issue in Finney County.

In 1997, Fernando Perez was arrested by sheriff's deputies after health department officials went to court because Perez wasn't coming in for TB treatments.

The 28-year-old native of El Salvador was a worker at IBP. He was charged with the criminal offense of "failed required acts regarding TB examinations-treatment," Andrews said.

Perez's case was dismissed Jan. 22, 1998.



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Immigrants Fear Using Medicaid Benefits

WASHINGTON, Aug 23 (Reuters Health) - US welfare and immigration reform laws have led to a rise in the uninsured population and heightened immigrants' fears of legitimately using Medicaid and other healthcare services, George Washington University researchers said in a study released on Tuesday.

"We concluded that the implementation of the 1996 laws increased the uninsured population, exacerbated demands on the safety net, and heightened fears about using Medicaid," Sara Rosenbaum, director of the university's Center for Health Services Research and Policy, said.

Many immigrants did not access their legitimate use of Medicaid because of fear that it could jeopardize their chances of becoming a legal, permanent resident or US citizen, researchers said. The study authors, however, did not have specific numbers. A total of 225 immigrants living in four major US cities were interviewed as part of the study.

"It is clear from our research that immigrants too often are either excluded from benefits they desperately need or don't access benefits for which they are eligible out of fear that it will adversely impact their immigration status," Dr. Kathleen Maloy, principal researcher on the study, said.

Furthermore, the researchers called "striking" the frequent reports of non-citizen parents not accessing services for their citizen children out of fear of putting themselves or other non-citizen family members at risk.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 set up new, complex eligibility rules for public benefits for legal immigrants and made several categories of previously eligible legal immigrants ineligible for most federal public benefits. For example, permanent, legal residents arriving after August 22, 1996 were no longer eligible for Medicaid and other benefits.

Meanwhile, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 established certain procedures for determining the admissibility of immigrants and heightened fears that public use of benefits could jeopardize the ability to become a permanent resident or US citizen.

Maloy said, "Despite the federal clarification about public charge-which stated that any use of Medicaid (except long-term

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care) and CHIP would not by itself subject an immigrant to the risk of being labeled a public charge—we frequently heard reports that immigration lawyers are advising their clients not to use Medicaid in order to avoid any risk of problems."

The researchers recommended several measures that would address healthcare access problems faced by immigrants, including expanding alternative enrollment locations for Medicaid, simplifying the Medicaid application procedure, improving outreach and education efforts regarding who is eligible for Medicaid and address cultural and linguistic barriers to accessing Medicaid and healthcare services.

Researchers did not collect data on uninsured rates, but they pointed to an Urban Institute study that showed that between 1995 and 1998 uninsured rates for low-income immigrants rose from 54% to 59%, while Medicaid coverage dropped from 19% to 15% for low-income immigrants.

REUTERS
HEALTH INFORMATION

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Confidentiality 8/31/00

Policy

Promulgate

Don't want OLC opinion

KM

Confidentiality - 6/16/00

3434 RROWDRA

3642 LLRKA

urgency - this could affect all HHS programs Eg
- CDC Confidentiality ~~for~~ surveillance efforts
- TB

asked
Eg. TB
10M - Ending Neglect - study - 1986 - 22% of foreign born
1998 - 43%
TB is only found by self reporting & may not show up
if concern is reporting. if not ~~enter~~ coming into system,
public health problem

Claudia - Nat'l Health Law Center & NLLC - Public Charge
Generalized fear - anecdotal info
Before P.C., surveys were done why people were not accessing
benefits - ~~see~~ generalized fear of INS.
Lots of education not P.C. & has helped
OCC - Gt application - stated will be updated to INS - OCC
Public health workers
difficulty of measure education
San Diego, MN,

Confidentiality Laws

Some
COC - only has the Privacy Act or State Privacy Act
Other NCHS - has strict ~~privacy~~ privacy out provisions.
NHANES study - health + nutrition info - released news/
INS commissioner has not signed in ~~the~~ part but not b/c of 3642

Medicaid Confidentiality Statute - Cont ~~is~~ ~~data~~ share info
Common law - strong tradition of confidentiality

Strategies - ① Legal Issues

- DOJ - census heated debate
constitutively mandated - census
Census own program - it's own people

② Legislation more complex

- Repeat both
- ~~knows~~ not with Fed Cof
- Exceptions

NY State

most similar - NHANES

• Public Policy

• example of Confidentiality

③ Lawsuit

NY City

Discrimination

Duren will speak to DOJ - TP on policy - Public Health

From: "Laura Canfield" <lcanfiel@os.dhhs.gov>
To: ASPEWISE.ASPEPO(dnielsen)
Date: 3/3/00 1:57PM
Subject: Confidentiality Provisions

Here is a list of citations of statutory confidentiality provisions in some of ACF's programs:

Federal Foster Care and Adoption Assistance -- 42 U.S.C. 671(a)(8) -- This provision is similar to the old AFDC confidentiality provision requiring that the State plan "provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with (A) the administration of the plan" or other specified purposes.

Child Support Enforcement -- 42 USC 653(b)(2) and (3); 653(e); 653(l) , (m), and (n); 653A(a)(2)(A)(ii); 654(8)(B); 654(26); 654A(d); 663(c); 669A(b) and (c).

Runaway and Homeless Youth -- 42 USC 5712(c)(10) and (11); (d)(11) and (d)(12); 42 USC 5714-2(a)(12) and (13); 42 USC 5731 ("Records containing the identity of individual youths pursuant to this chapter may under no circumstances be disclosed or transferred to any individual or to any public or private agency.")

Elder Rights Protection -- 42 U.S.C. 3058g(d)(2) prohibits the disclosure of the identity of any complainant or resident unless the person consents in writing or orally or the disclosure is required by court order.

Child Abuse and Neglect -- 42 U.S.C. 5104(c)(2); 5106a(b)(2)(A)(v), (vi), and (vii); 5106a(c)(4)(B) -- records must be kept confidential with limited statutory exceptions.

Family Violence programs -- 42 U.S.C. 10402(a)(2)(E), 42 U.S.C. 10402(b)(2) (as applied to Tribal grants), 42 U.S.C. 10413(3) (as applied to research on victims of family violence).

Head Start -- 42 U.S.C. 9837a(1).

TANF -- 42 U.S.C. 602(a)(1)(A)(iv) -- The State plan should outline how the State intends to "Take such reasonable steps as the State deems necessary to restrict the use and disclosure of information about individuals and families receiving assistance under the program attributable to funds provided by the Federal Government."

From: "David Smith" <dsmith@os.dhhs.gov>
To: ASPEWISE.ASPEPO(dnielsen)
Date: 2/17/00 5:01PM
Subject: Confidentiality statutes and HHS programs

You have asked us to provide citations of legal authority governing the confidentiality of HHS programs which is analogous to that of the Census program's authority. Since my office works with Medicare, Medicaid, and SCHIP, I have noted the relevant authorities for those provisions.

In Medicaid the authority for confidentiality is 42 U.S.C. sec. 1396a(a)(7) [1902(a)(7) of the Social Security Act.] There is no criminal penalty provision here which is equivalent to that of the Census statute.

The SCHIP programs do not contain any separate confidentiality provisions.

The Medicare statute has specific confidentiality statutes for Medicare + Choice plans under section 1852(h) of the Social Security Act, 42 U.S.C. sec. 1395w-22(h). There are also confidentiality / privacy provisions governing medical records and databases, but they are not of the type which are the subject of your request.

Section 1106 of the Social Security Act, 42 U.S.C. sec. 1306 contains restrictions on disclosure of information in the possession of Social Security Administration and under certain circumstances, "the applicable agency." However, due to some drafting problems, it is difficult to ascertain what agencies, if any, are considered to be the "applicable agency." Section 1106(a) does contain a maximum \$10,000 fine or 5 year prison sentence as punishment for violation. It is unclear whether it applies to Medicaid or Medicare and if it applies to Medicaid, whether it applies to the State agencies or only to HHS.

The provisions of the Privacy Act and Freedom of Information Act also apply to federal information. See 5 U.S.C. 552 and 552a.

The NCHS provision is 42 USC section 242m(d), which essentially says that no information collected under the three sections of the Public Health Service Act which apply to collecting health data by NCHS, which is identifiable (not identified, but identifiable) shall be released for any purpose without consent of the individual or establishment identified. Note--both individuals and establishments covered; no discretion given to Secretary; also no enforcement provisions. The Census Bureau apparently has criminal enforcement power.

The AHRQ (nee AHCPH) has a very similar provision at 42 USC 299a-1(c). They also have an enforcement provision. Our office does not have any specific expertise on the NCHS or AHRQ provisions.

Hope this will be of some use.

David R. Smith

Welfare Reform Act of 1996

169

(J) Benefits under the Head Start Act.

(K) Benefits under the Job Training Partnership Act.

(d) SPECIAL RULE FOR REFUGEE AND ENTRANT ASSISTANCE FOR CUBAN AND HAITIAN ENTRANTS.—The limitation under subsection (a) shall not apply to refugee and entrant assistance activities, authorized by title IV of the Immigration and Nationality Act and section 501 of the Refugee Education Assistance Act of 1980, for Cuban and Haitian entrants as defined in section 501(e)(2) of the Refugee Education Assistance Act of 1980.

SEC. 404. NOTIFICATION AND INFORMATION REPORTING.

(a) NOTIFICATION.—Each Federal agency that administers a program to which section 401, 402, or 403 applies shall, directly or through the States, post information and provide general notification to the public and to program recipients of the changes regarding eligibility for any such program pursuant to this subtitle.

(b) INFORMATION REPORTING UNDER TITLE IV OF THE SOCIAL SECURITY ACT.—Part A of title IV of the Social Security Act is amended by inserting the following new section after section 411:

“SEC. 411A. STATE REQUIRED TO PROVIDE CERTAIN INFORMATION.

“Each State to which a grant is made under section 403 shall, at least 4 times annually and upon request of the Immigration and Naturalization Service, furnish the Immigration and Naturalization Service with the name and address of, and other identifying information on, any individual who the State knows is unlawfully in the United States.”

(c) SSI.—Section 1631(e) of such Act (42 U.S.C. 1383(e)) is amended—

(1) by redesignating the paragraphs (6) and (7) inserted by sections 206(d)(2) and 206(f)(1) of the Social Security Independence and Programs Improvement Act of 1994 (Public Law 103-296; 108 Stat. 1514, 1515) as paragraphs (7) and (8), respectively; and

(2) by adding at the end the following new paragraph:

“(9) Notwithstanding any other provision of law, the Commissioner shall, at least 4 times annually and upon request of the Immigration and Naturalization Service (hereafter in this paragraph referred to as the ‘Service’), furnish the Service with the name and address of, and other identifying information on, any individual who the Commissioner knows is unlawfully in the United States, and shall ensure that each agreement entered into under section 1616(a) with a State provides that the State shall furnish such information at such times with respect to any individual who the State knows is unlawfully in the United States.”

(d) INFORMATION REPORTING FOR HOUSING PROGRAMS.—Title I of the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) is amended by adding at the end the following new section:

“SEC. 27. PROVISION OF INFORMATION TO LAW ENFORCEMENT AND OTHER AGENCIES.

“Notwithstanding any other provision of law, the Secretary shall, at least 4 times annually and upon request of the Immigration and Naturalization Service (hereafter in this section referred to as the ‘Service’), furnish the Service with the name and address of, and other identifying information on, any individual who the Sec-

retary knows is unlawfully in the United States, and shall ensure that each contract for assistance entered into under section 6 or 8 of this Act with a public housing agency provides that the public housing agency shall furnish such information at such times with respect to any individual who the public housing agency knows is unlawfully in the United States."

Subtitle B—Eligibility for State and Local Public Benefits Programs

SEC. 411. ALIENS WHO ARE NOT QUALIFIED ALIENS OR NON-IMMIGRANTS INELIGIBLE FOR STATE AND LOCAL PUBLIC BENEFITS.

(a) **IN GENERAL.**—Notwithstanding any other provision of law and except as provided in subsections (b) and (d), an alien who is not—

- (1) a qualified alien (as defined in section 431),
- (2) a nonimmigrant under the Immigration and Nationality Act, or
- (3) an alien who is paroled into the United States under section 212(d)(5) of such Act for less than one year, is not eligible for any State or local public benefit (as defined in subsection (c)).

(b) **EXCEPTIONS.**—Subsection (a) shall not apply with respect to the following State or local public benefits:

(1) Assistance for health care items and services that are necessary for the treatment of an emergency medical condition (as defined in section 1903(v)(3) of the Social Security Act) of the alien involved and are not related to an organ transplant procedure.

(2) Short-term, non-cash, in-kind emergency disaster relief.

(3) Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(4) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (C) are necessary for the protection of life or safety.

(c) **STATE OR LOCAL PUBLIC BENEFIT DEFINED.**—

(1) Except as provided in paragraphs (2) and (3), for purposes of this subtitle the term "State or local public benefit" means—

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

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ERIA.—With respect to clause (I), the State may criteria for applying program.

SION.—The provisions of the recertification apply with respect to program for months of recertification, if is Act the alien is and is receiving such date of enactment.

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D. FEDERAL PRO-

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REFUGEES AND

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ALIENS.—An alien

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3. Social B-

(ii)(I) has worked 40 qualifying quarters of coverage as defined under title II of the Social Security Act or can be credited with such qualifying quarters as provided under section 435, and (II) in the case of any such qualifying quarter creditable for any period beginning after December 31, 1996, did not receive any Federal means-tested public benefit (as provided under section 403) during any such period.

(C) VETERAN AND ACTIVE DUTY EXCEPTION.—An alien who is lawfully residing in any State and is—

(i) a veteran (as defined in section 101 of title 38, United States Code) with a discharge characterized as an honorable discharge and not on account of alienage,

(ii) on active duty (other than active duty for training) in the Armed Forces of the United States, or

(iii) the spouse or unmarried dependent child of an individual described in clause (i) or (ii).

(D) TRANSITION FOR THOSE CURRENTLY RECEIVING BENEFITS.—An alien who on the date of the enactment of this Act is lawfully residing in any State and is receiving benefits under such program on the date of the enactment of this Act shall continue to be eligible to receive such benefits until January 1, 1997.

(3) DESIGNATED FEDERAL PROGRAM DEFINED.—For purposes of this title, the term "designated Federal program" means any of the following:

(A) TEMPORARY ASSISTANCE FOR NEEDY FAMILIES.—The program of block grants to States for temporary assistance for needy families under part A of title IV of the Social Security Act.

(B) SOCIAL SERVICES BLOCK GRANT.—The program of block grants to States for social services under title XX of the Social Security Act.

(C) MEDICAID.—A State plan approved under title XIX of the Social Security Act, other than medical assistance described in section 401(b)(1)(A).

✓ SEC. 403. FIVE-YEAR LIMITED ELIGIBILITY OF QUALIFIED ALIENS FOR FEDERAL MEANS-TESTED PUBLIC BENEFIT.

(a) IN GENERAL.—Notwithstanding any other provision of law and except as provided in subsections (b), (c), and (d), an alien who is a qualified alien (as defined in section 431) and who enters the United States on or after the date of the enactment of this Act is not eligible for any Federal means-tested public benefit for a period of five years beginning on the date of the alien's entry into the United States with a status within the meaning of the term "qualified alien".

(b) EXCEPTIONS.—The limitation under subsection (a) shall not apply to the following aliens:

(1) EXCEPTION FOR REFUGEES AND ASYLEES.—

(A) An alien who is admitted to the United States as a refugee under section 207 of the Immigration and Nationality Act.

(B) An alien who is granted asylum under section 208 of such Act.

(C) An alien whose deportation is being withheld under section 243(h) of such Act.

(2) **VETERAN AND ACTIVE DUTY EXCEPTION.**—An alien who is lawfully residing in any State and is—

(A) a veteran (as defined in section 101 of title 38, United States Code) with a discharge characterized as an honorable discharge and not on account of alienage,

(B) on active duty (other than active duty for training) in the Armed Forces of the United States, or

(C) the spouse or unmarried dependent child of an individual described in subparagraph (A) or (B).

(c) **APPLICATION OF TERM FEDERAL MEANS-TESTED PUBLIC BENEFIT.**—

(1) The limitation under subsection (a) shall not apply to assistance or benefits under paragraph (2).

(2) Assistance and benefits under this paragraph are as follows:

(A) Medical assistance described in section 401(b)(1)(A).

(B) Short-term, non-cash, in-kind emergency disaster relief.

(C) Assistance or benefits under the National School Lunch Act.

(D) Assistance or benefits under the Child Nutrition Act of 1966.

(E) Public health assistance (not including any assistance under title XIX of the Social Security Act) for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(F) Payments for foster care and adoption assistance under parts B and E of title IV of the Social Security Act for a parent or a child who would, in the absence of subsection (a), be eligible to have such payments made on the child's behalf under such part, but only if the foster or adoptive parent (or parents) of such child is a qualified alien (as defined in section 431).

(G) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (i) deliver in-kind services at the community level, including through public or private nonprofit agencies; (ii) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (iii) are necessary for the protection of life or safety.

(H) Programs of student assistance under titles IV, V, IX, and X of the Higher Education Act of 1965, and titles III, VII, and VIII of the Public Health Service Act.

(I) Means-tested programs under the Elementary and Secondary Education Act of 1965.

(J) Benefits under the Head Start Act.

(K) Benefits under the Job Training Partnership Act.

(d) **SPECIAL RULE FOR REFUGEE AND ENTRANT ASSISTANCE FOR CUBAN AND HAITIAN ENTRANTS.**—The limitation under subsection (a) shall not apply to refugee and entrant assistance activities, authorized by title IV of the Immigration and Nationality Act and section 501 of the Refugee Education Assistance Act of 1980, for Cuban and Haitian entrants as defined in section 501(e)(2) of the Refugee Education Assistance Act of 1980.

SEC. 404. NOTIFICATION AND INFORMATION REPORTING.

(a) **NOTIFICATION.**—Each Federal agency that administers a program to which section 401, 402, or 403 applies shall, directly or through the States, post information and provide general notification to the public and to program recipients of the changes regarding eligibility for any such program pursuant to this subtitle.

(b) **INFORMATION REPORTING UNDER TITLE IV OF THE SOCIAL SECURITY ACT.**—Part A of title IV of the Social Security Act is amended by inserting the following new section after section 411:

"SEC. 411A. STATE REQUIRED TO PROVIDE CERTAIN INFORMATION.

"Each State to which a grant is made under section 403 shall, at least 4 times annually and upon request of the Immigration and Naturalization Service, furnish the Immigration and Naturalization Service with the name and address of, and other identifying information on, any individual who the State knows is unlawfully in the United States."

(c) **SSI.**—Section 1631(e) of such Act (42 U.S.C. 1383(e)) is amended—

(1) by redesignating the paragraphs (6) and (7) inserted by sections 206(d)(2) and 206(f)(1) of the Social Security Independence and Programs Improvement Act of 1994 (Public Law 103-296; 108 Stat. 1514, 1515) as paragraphs (7) and (8), respectively; and

(2) by adding at the end the following new paragraph:

"(9) Notwithstanding any other provision of law, the Commissioner shall, at least 4 times annually and upon request of the Immigration and Naturalization Service (hereafter in this paragraph referred to as the 'Service'), furnish the Service with the name and address of, and other identifying information on, any individual who the Commissioner knows is unlawfully in the United States and shall ensure that each agreement entered into under section 1616(a) with a State provides that the State shall furnish such information at such times with respect to any individual who the State knows is unlawfully in the United States."

(d) **INFORMATION REPORTING FOR HOUSING PROGRAMS.**—Title of the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) is amended by adding at the end the following new section:

"SEC. 27. PROVISION OF INFORMATION TO LAW ENFORCEMENT AND OTHER AGENCIES.

"Notwithstanding any other provision of law, the Secretary shall, at least 4 times annually and upon request of the Immigration and Naturalization Service (hereafter in this section referred to as the 'Service'), furnish the Service with the name and address and other identifying information on, any individual who the S



DAVID NIELSEN <dnielsen@OSASPE.DHHS.GOV>
02/15/2000 10:30:08 AM

Record Type: Record

To: Irene Bueno/OPD/EOP

cc:

Subject: re: Fwd: Sect. 434

Received: from hhs-mx01.os.dhhs.gov ([158.70.254.120]) by OSASPE.DHHS.GOV (GroupWise SMTP/MIME daemon 4.1 v3) ; Tue, 15 Feb 00 10:27:18 EST

Received: from b11wdc-ov08b.os.dhhs.gov (B11WDC-OV08B.os.dhhs.gov [158.70.253.48]) by hhs-mx01.os.dhhs.gov (Pro-8.9.3/8.9.3/hhs-1.0) with SMTP id KAA25631 for <dnielsen@OSASPE.DHHS.GOV>; Tue, 15 Feb 2000 10:24:31 -0500 (EST)

Received: by b11wdc-ov08b.os.dhhs.gov with VINES-ISMTP; Tue, 15 Feb 2000 10:29:11 -0500 X-Incognito-SN: 1361

Date: Tue, 15 Feb 2000 10:29:10 -0500

From: "Laura Canfield" <lcanfiel@OS.DHHS.GOV>

Subject: re: Fwd: Sect. 434

To: dnielsen@OSASPE.DHHS.GOV

Errors-to: <lcanfiel@os.dhhs.gov>

Reply-to: <lcanfiel@os.dhhs.gov>

Message-id: <vines.ai06+51LesA@b11wdc-ov08b.os.dhhs.gov>

MIME-version: 1.0

Content-type: text/plain; CHARSET=US-ASCII

Content-disposition: inline

Content-transfer-encoding: 7BIT

X-Priority: 3 (Normal)

X-Incognito-Version: 5.1.0.58

David -- I took a quick look at your talking points, and I think they'll be helpful in getting the conversation started. I have a few other questions that could be put on the table, too:

* How does section 434 of PRWORA fit with section 642 of IIRIRA?

* The OLC opinion concludes that section 642 does not manifest the kind of clear congressional intention that is ordinarily required to effect the repeal of a federal statute. The Conference Report to section 434 of PRWORA (p. 391 in the Conference Report to accompany H.R. 3734) clearly references Federal laws that deny funds to States and local agencies that disclose a protected individual's immigration status. Is that a clear enough congressional intent?

* In reading the initial few pages and the statement of the issue to be resolved on page 5 of the OLC opinion, it seemed that the fact that violations of the Census privacy provision could result in criminal sanctions was going to have some bearing in the analysis. However, the analysis itself

seems to be much broader. Is that right?

----- Original Message -----

Laura, Irene left me a message that they (DPC, WH/GC) had scheduled a meeting Tuesday (I'm not sure of exact time) with DoJ to raise the issue of section 434. She was asking for some general talking points from our perspective and I sent her the following. If you take issue with my summary, or want to add something, please let me know and I'll forward to Irene. Hopefully I hit the high points accurately, but I'm not totally confident. Thanks!!

----- End of Original Message -----



DAVID NIELSEN <dnielsen@OSASPE.DHHS.GOV>
02/13/2000 11:34:12 AM

Record Type: Record

To: Irene Bueno/OPD/EOP

cc:

Subject: Sect. 434

Irene, I got your message and look forward to hearing about the meeting. I think the following points, related to the 5/18/99 OLC memo, are relevant for a discussion about the effect of section 434 of PRWORA, or section 642 of IIRIRA, on statutory restrictions on disclosures of information.

- The memo clearly, and apparently generally, concludes that the reporting provisions in section 642 of IIRIRA (and by analogy, section 434 of PRWORA) "does not repeal federal statutory prohibitions or restrictions on disclosure to the INS of information concerning an individual's citizenship or immigration status." (pg. 8 of memo, 1st full paragraph). It concludes this for a couple of reasons:

(1) The general reporting provisions in IIRIRA do not repeal (explicitly or implicitly) previous federal statutes, and such repeal could have been easy to do as part of enacting IIRIRA (and PRWORA). Therefore, using rules of statutory construction requires considering finding interpretations that allow for "co-existence" of statutes (pg. 5).

(2) Congress may not, by statute, direct Congress not to enact certain laws in the future, nor can the reporting language be construed to apply only retroactively to federal statutes, but presumably retroactively and prospectively to state/local statutes. This type of interpretation would also lead to the "dubious" result of precluding federal officials from implementing statutory restrictions against disclosure that Congress had not seen fit to repeal. (pg. 6)

Therefore, the OLC memo concludes that the best interpretation for the IIRIRA section 642 reporting authorities (and by extension, we believe, PRWORA section 434), is that it applies "only to disclosure prohibitions or restrictions other than those imposed by federal statute" (pg. 6), i.e., state and local statutory prohibitions, or potentially federal discretionary (as opposed to statutory/regulatory) prohibitions.

As you know, we think there is great merit to this analysis, and that it appears to apply to any federal statute the prohibits or restricts disclosure of information to INS, or otherwise specifies the limited types of disclosure that is permitted (e.g., under Medicaid statute). Given the very clear conclusions of the memo regarding IIRIRA section 642 vis-a-vis Census statute, we would expect the same reading of the analysis by DoJ, and if not, would be very interested in why that straightforward, general, and compelling analysis would not apply to other federal statutory restrictions against disclosure.

Thanks, and good luck!!

!

- 434 ^{report} history - did want to it out a repeal but it's vague
+ generally

- 434 relation to 642?

Does 642 supersede 434?

-

Andrea Kane

Record Type: Record

To: Irene Bueno/OPD/EOP@EOP

cc:

Subject: Re: Briefing on Deconcentration Rule

we're on for 6 pm in 9226 neob (good cover there in the hall, by the way)

----- Forwarded by Andrea Kane/OPD/EOP on 02/15/2000 09:59 AM -----

Francis S. Redburn

02/15/2000

08:58:06 AM

Record Type: Record

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

cc: Elizabeth M. DiGennaro/OMB/EOP@EOP

Subject: Re: Briefing on Deconcentration Rule

Please come here at 6 p.m. today for a briefing/Q and A on the deconcentration rule.

----- Forwarded by Francis S. Redburn/OMB/EOP on 02/15/2000 08:53 AM -----



Rod Solomon <Rod_Solomon@HUD.GOV>

02/15/2000 08:44:35 AM

Record Type: Record

To: Francis S. Redburn/OMB/EOP

cc: Andrea E. Jacobson/OMB/EOP

Subject: Re: Briefing on Deconcentration Rule

We can come at 6:00 today. It's Deborah Vincent and me.

Francis_S._Redburn@omb.eop.gov on 02/14/2000 01:15:20 PM

To: Rod Solomon/PIH/HHQ/HUD@HUD

cc: Andrea_E._Jacobson@omb.eop.gov

Subject: Re: Briefing on Deconcentration Rule

Can you all make it either between 2 and 4 or after 6 tomorrow (Tuesday)?

----- Forwarded by Francis S. Redburn/OMB/EOP on
02/14/2000 01:10 PM -----

(Embedded image moved to file: PIC11742.PCX) Eugenia Chough
02/14/2000 01:13:40 PM

Record Type: Record

To: Francis S. Redburn/OMB/EOP@EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: Briefing on Deconcentration Rule (Document link not
converted)

Between 1-4pm and after 6pm.

Francis S. Redburn
02/14/2000 01:10:58 PM

Record Type: Record

To: Andrea Kane/OPD/EOP@EOP
cc: andrea e. jacobson/omb/eop@eop, james f. jordan/omb/eop@eop, joseph
f. lackey jr./omb/eop@eop, eugenia chough/opd/eop@eop
Subject: Re: Briefing on Deconcentration Rule (Document link not
converted)

Can you suggest other times tomorrow?

Message Copied

To: _____

andrea kane/opd/eop@eop
andrea e. jacobson/omb/eop@eop

james f. jordan/omb/eop@eop
joseph f. lackey jr./omb/eop@eop
eugenia chough/opd/eop@eop



- PIC11742.PCX

Message Sent To:

Andrea E. Jacobson/OMB/EOP@EOP
James F. Jordan/OMB/EOP@EOP
Andrea Kane/OPD/EOP@EOP
Joseph F. Lackey Jr./OMB/EOP@EOP
Eugenia Chough/OPD/EOP@EOP



Cynthia A. Rice

11/09/99 10:13:00 AM

Record Type: Record

To: Irene Bueno/OPD/EOP@EOP
cc: j. eric gould/opd/eop@eop, Eugenia Chough/OPD/EOP@EOP
bcc:
Subject: Re: Sections 434 and 404

Yes I think a meeting like this makes sense
Irene Bueno

Irene Bueno



11/08/99 08:26:27 PM

Record Type: Record

To: cynthia a. rice/opd/eop@eop
cc: J. Eric Gould/OPD/EOP@EOP
bcc:
Subject: Re: Sections 434 and 404

I spoke to Dawn Chirwa about this and she would like to meet with the revelant agencies to better understand what they are doing. The issue is the proposed SSA reg on determining whether someone is "unlawfully in the country" (sect. 404 of welfare reform) and whether agencies must report to the INS undocumented immigrant in light of an OLC opinion in the census context that confidentiality laws prohibit agencies from reporting undocumented immigrant notwithstanding section 434 and Sect 642 of the Illegal Immigration reform bill. I think this makes sense because it will help Dawn understand the legal issues and get her to focus on it - it has been difficult to get an answer from Dawn given other things that have been going on. Please let me know if you have any concerns with Dawn scheduling this meeting and of course we should be in this meeting. Thanks.

Irene Bueno

Irene Bueno



09/09/99 06:19:32 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP@EOP

cc: J. Eric Gould/OPD/EOP@EOP
Subject: Sections 434 and 404

I have reviewed my notes on section 434 and a similar provision section 642 of the immigration reform law and recalled that I had asked WH Counsel (Dawn Chirwa) to review an OLC opinion that section 642 did not repeal the confidentiality laws of the Census. Specifically, I had asked Dawn if the OLC reasoning could be applied more broadly to other federal programs. Also, I sent Dawn the draft of the SSA reg on section 404.

I had mentioned these issues in a team leaders meeting awhile ago but since I had not heard back from Dawn or the groups - it had fallen off my radar screen until Ag, Andy Hyman and the groups raised this issue again. I agree we should bring up again in the team leaders meeting. In the meantime, I would like touch base with Dawn.

Please let me know if you have any questions. Thanks.

Irene Bueno

11/12/99 11:31:37 AM

Record Type: Record

To: Eugenia Chough/OPD/EOP

cc: Maura M. Pally/WHO/EOP

Subject: Meeting

Please try to schedule a meeting with these folks next week to discuss SSA proposal for section 404 of the PROWRA and begin discussions about section 434 of PROWRA. The meeting would be for about an hour (I will bring you a copy of my schedule for next week). Thanks.

WH participants:

Dawn Chirwa (Maura Palley is her assistant)

Cynthia

Eric

me

Agency participants include:

- ✓ Barbara Strack, INS 514-8860
- ✓ Andy Hyman, ASL: 690-6060
- ✓ Anna Kraus, OGC: 690-6318
- ✓ Tom Perez, OCR: 619-0403
- ✓ Laura Canfield, OGC: 690-8005
- David Smith, OGC: 619-3601
- Lavinia Limon, ACF: 401-9246
- David Nielsen, ASPE: 401-6642
- Kelley O'Dell, ASL: 260-5017
- Agriculture
- Art Foley: (703) 305-2494
- SSA
- Arthur Fried: (410) 965-0600 →
- HUD

*Donna.hamilton@ssa.gov
arthur.fried*

SOCIAL SECURITY ADMINISTRATION; DEPARTMENT of HEALTH and HUMAN SERVICES; DEPARTMENT of HOUSING and URBAN DEVELOPMENT; IMMIGRATION and NATURALIZATION SERVICE

Responsibility of Certain Entities to Notify the Immigration and Naturalization Service of Any Alien Who the Entity "Knows" is Not Lawfully Present in the United States

AGENCIES: Social Security Administration; Department of Health and Human Services; Department of Housing and Urban Development; Immigration and Naturalization Service

ACTION: Notice

SUMMARY: Section 404 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, as amended, requires certain Federal and State entities, at least four times annually and upon request of the Immigration and Naturalization Service (Service), to notify the Service of any alien the entity "knows" is not lawfully present in the United States. The Federal agencies responsible for implementing section 404 are providing notice of how this provision is being implemented.

FOR FURTHER INFORMATION CONTACT:

INS Contact Person

SUPPLEMENTARY INFORMATION:

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P. L. 104-193 (hereinafter Welfare Reform) and the Illegal Immigration Reform and Immigrant Responsibility

Act of 1996, P. L. 104-208 (Immigration Reform), include significant provisions affecting the entitlement of aliens in the United States to and their eligibility for public benefits. (See the Federal Register notice on "Interpretation of Federal Public Benefit," 63 Fed. Reg. 41658 (August 4, 1998)). Section 401 of Welfare Reform generally provides that, with some exceptions, only "qualified aliens" are entitled to receive Federal public benefits. Welfare Reform and Immigration Reform also include significant provisions specifically limiting the eligibility of aliens for certain specified Federal programs, including Supplemental Security Income (SSI) under title XVI of the Social Security Act. Finally, section 403 of Welfare Reform limits the eligibility of qualified aliens for certain "Federal means-tested public benefits." (See Federal Register Notice on "Interpretation of 'Federal Means-tested Public Benefit'" 62 Fed. Reg. 45256 (August 26, 1997).

Section 404 of Welfare Reform, as amended by Pub. L. 105-33, requires each entity or type of entity specified in that statute to report to the Service any individual who the entity, under certain specified programs, "*knows* is not lawfully present in the United States," at least 4 times annually and upon request of the Service (emphasis supplied). The entities required to report under this provision and the programs involved are: (1) any State agency that administers a block grant *the name?* under part A of title IV of the Social Security Act, as amended, 42 U.S.C. §601 et seq. (Temporary Assistance for Needy Families); (2) the Social Security Administration (with respect only to the Supplemental Security Income (SSI) program under title XVI of the Social Security Act, 42 U.S.C. §1381 et seq.); (3) any State agency responsible for an SSI Optional State Supplementation under the SSI program if the State has entered into an agreement with the

Social Security Administration for Federal administration of payments under that program pursuant to section 1616(a) of the Social Security Act, as amended, 42 U.S.C. §1382e(a); (4) the Department of Housing and Urban Development (with respect only to the General Program of Assisted Housing provided under the United States Housing Act of 1937, as amended, 42 U.S.C. §1437 et seq.); and, (5) any public housing agency that enters into a contract for assistance under section 6 or 8 of title I of the United States Housing Act 1937, as amended, 42 U.S.C. §1437 et seq. No other Federal, state, or local benefit program is required to report under the provisions of Title IV of Welfare Reform.

Section 404 of Welfare Reform is not explicit with respect to the meaning of the term "knows." After consultation, the responsible Federal agencies have determined that, for purposes of section 404, an entity will "know" that an alien is not lawfully present in the United States only when the unlawful presence is a finding of fact or conclusion of law that is made by the entity as part of a formal determination on an alien's claim for any of the statutorily specified programs set out above and is documented by the Service, such as in a Final Order of Deportation. For example, a Federal benefit program usually involves an initial eligibility determination subject to administrative review, with a formal determination being made at each level. The determinations may involve questions such as an individual's eligibility for benefits, suspension, reduction or termination of an individual's benefits, or whether an overpayment of benefits must be paid back to the program. Under such an administrative review process, an agency will "know" any factor of eligibility clearly and with certainty only at the time a formal determination involving the factor is made. Equating "knowing" under section 404 of Welfare Reform with a formal

determination under any of the statutorily specified programs affected by section 404 gives rational substance to an arguably ambiguous term and is not inconsistent with the legislative history of this provision.

✓
Out your
info.

This notice is not meant to suggest that a benefit granting agency is required to make a determination as to an applicant's lawful presence if that determination is not otherwise necessary in order to determine whether the applicant is eligible for the benefit. Nor is it meant to suggest that a finding or conclusion as to immigration status made by a benefit granting agency has any weight outside the context of the alien's eligibility for that particular benefit. Determinations of status for purposes of the Immigration and Nationality Act are the responsibility of the Department of Justice, not of any other agency.

The reporting entity that makes a report to the Service will include in its report the name, address and other identifying information in its possession regarding the individual who the reporting entity knows is not lawfully present in the United States. The reports will be sent to the Service at the following address [to be specified by INS]:

(Signatures)

Susan M. Daniels, Ph.D
Deputy Commissioner for Disability and Income
Security Programs
Social Security Administration

(Name)
 (Title)
 Department of Health and Human Services

(Name)
 Deputy Assistant Secretary for Public and Indian Housing
 Department of Housing and Urban Development

Doris Meissner
 Commissioner
 Immigration and Naturalization Service

U.S. CENSUS BUREAU

DRAFT

Embargoed For Release

Tuesday, June 2, 1999 2:00 p.m. EDT

CENSUS BUREAU DIRECTOR KENNETH PREWITT STATEMENT ON JUSTICE DEPARTMENT CENSUS CONFIDENTIALITY MEMORANDUM

Washington, D.C. — Census Bureau Director Kenneth Prewitt issued the following statement on a recent memorandum by the Department of Justice concerning the confidentiality of information given by respondents to the Census 2000 form:

"We are delighted with the opinion by the Office of Legal Counsel of the Department of Justice. The memorandum reaffirms the longstanding position of the Census Bureau to protect—without exception—the confidentiality of each person's answers to the census under the provisions of Title 13 of the U.S. Code.

We are also pleased that Doris Meissner, Commissioner of the Immigration and Naturalization Service, has reiterated the INS understanding that confidentiality stands as a bedrock guarantee upon which all U.S. citizens and residents can rely, and that this guarantee is essential to the success and integrity of the census process."



U.S. Department of Justice
Immigration and Naturalization Service

Office of the Commissioner

425 I Street NW
Washington, DC 20536

MAY 26 1999

The Honorable William M. Daley
Secretary of Commerce
Washington, DC 20230

Dear Mr. Secretary:

I am writing in response to your letter of May 21, concerning the effect of section 642(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) on the longstanding ban on disclosure by census officials of census information. I am aware that the Office of Legal Counsel of the Department of Justice (OLC), after its thorough review of this issue, has confirmed that the provisions of 13 U.S.C. § 9(a), which prohibit the Census Bureau from disclosing individually identifiable census information to the Immigration and Naturalization Service (INS), are not affected by section 642(a) of IIRIRA, and remain fully in effect. The INS agrees with OLC's opinion in this matter.

I can assure you that INS officials, as in the past, will not seek or accept any census information provided in violation of 13 U.S.C. § 9(a). We at the INS understand that the assurance of the confidentiality of census information has stood as a bedrock guarantee upon which all U.S. citizens and residents can rely. Further, the INS agrees that this guarantee is essential to the success and integrity of the census process. If you have any concerns regarding this or any other matter, please do not hesitate to contact me.

Sincerely,

Doris Meissner
Commissioner



THE SECRETARY OF COMMERCE
Washington, D.C. 20230

May 21, 1999

The Honorable Doris Meissner
Commissioner
Immigration and Naturalization Service
U.S. Department of Justice
Washington, DC 20530

Dear Commissioner Meissner:

As you know, the United States has an extraordinarily longstanding tradition of protecting the confidentiality of information provided to the Census Bureau. The Supreme Court observed in Baldrige v. Shapiro, 455 U.S. 345 (1982), that "[a]lthough Congress has broad power to require individuals to submit responses, an accurate census depends in large part on public cooperation. To stimulate that cooperation, Congress has provided assurances that information furnished to the Secretary [of Commerce in connection with the census] by individuals is to be treated as confidential" (455 U.S. at 354). The Court's opinion in that case recounts in detail Congress's consistent efforts to protect the confidentiality of census information (*id.* at 356-358).

The current confidentiality provisions are contained in Sections 9 and 214 of the Census Act, 13 U.S.C. 9 & 14.

In the upcoming decennial census – Census 2000 – the Census Bureau will ask a variety of questions including, on the long form, questions regarding respondents' country of birth and United States citizenship. (The long form is delivered to 17% of households; most households are asked to fill out the "short form," which asks only for the names, ages, sex, relationship, and race or ethnicity of the persons living at that address.) Responses to these questions are, of course, covered by the confidentiality obligation.

Recently, questions have been raised about the effect on the confidentiality requirement of 8 U.S.C. 1373, a provision of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). We believe strongly that the confidentiality requirement was not affected and asked the Office of Legal Counsel for its view of the effect of that statute. OLC concluded that the IIRIRA provision "does not repeal" the census confidentiality provision, and that the confidentiality requirement therefore remains in full force and effect. (I have enclosed a copy of the opinion for your information.)

The Honorable Doris Meissner
May 21, 1999
Page Two

In view of the fact that the INS is responsible for administering the Nation's immigration laws, including IIRIRA, I would be interested in your reaction to the OLC opinion – in particular, whether you believe it to be the proper interpretation of IIRIRA. I look forward to hearing from you on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Daley", with a stylized flourish at the end.

William M. Daley

Enclosure



U.S. Department of Justice

Office of Legal Counsel

VIA FAX

Office of the Assistant Attorney General

Washington, D.C. 20530

May 18, 1999

MEMORANDUM FOR ANDREW J. PINCUS
GENERAL COUNSEL
DEPARTMENT OF COMMERCE

From: Randolph D. Moss *RDM*
Acting Assistant Attorney General

Re: The Effect of 8 U.S.C.A. § 1373(a) on the Requirement Set Forth in 13 U.S.C. § 9(a)
That Census Officials Keep Covered Census Information Confidential

You have inquired about the relationship between two federal statutes. The first provision is 13 U.S.C. § 9(a) (West 1994 & Supp. 1999), which sets forth the longstanding requirement that census officials must, with certain express exceptions, keep covered census information confidential. The second provision is section 642(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-707, which now appears as 8 U.S.C.A. § 1373(a) (West 1999), and which concerns the authority of federal, state, and local government officials and entities to disclose to the Immigration and Naturalization Service ("INS") information regarding an individual's citizenship or immigration status. You have asked whether 13 U.S.C. § 9(a) has been partially repealed by 8 U.S.C.A. § 1373(a).¹ We conclude that it has not.

I.

It is useful at the outset to describe the two federal statutes that are at issue. We begin by describing the longstanding confidentiality provision that has been codified as 13 U.S.C. § 9(a). We then describe the recently enacted provision that addresses the disclosure of certain information to the INS that now appears as 8 U.S.C.A. § 1373(a).

Section 9(a) of title 13 represents the most recent codification of a statutory confidentiality requirement that dates back more than a century and that bars the disclosure of covered census information by census officials. See Baldrige v. Shapiro, 455 U.S. 345,

¹ See Letter from Andrew J. Pincus, General Counsel, United States Department of Commerce, to Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, United States Department of Justice, Re: Effect of the Illegal Immigration Reform and Immigrant Responsibility Act on the Confidentiality of Census Information (May 14, 1999) ("Pincus Letter").

356-59 (1982) (reviewing the history of the requirement); Census Data Unavailable to Women's Bureau of Department of Labor and Individuals, 36 Op. Att'y Gen. 362, 363-66 (1930) (same). The core of this requirement has remained essentially unchanged since its initial enactment and generally prohibits census officials from disclosing covered information. The provision has been understood, in the absence of clear exceptions, to impose a broad requirement of confidentiality. See Baldrige, 455 U.S. at 359 (holding that lists of addresses collected and utilized by the Bureau of the Census are exempt from disclosure by civil discovery or under the Freedom of Information Act); United States v. Bethlehem Steel Corp., 21 F.R.D. 568, 572 (S.D.N.Y. 1958) (barring disclosure to the Department of Justice); Confidential Treatment of Census Records, 40 Op. Att'y. Gen. 326 (1944) (subjecting Archivist to statutory confidentiality requirement); Census Data Unavailable to Women's Bureau of Department of Labor and Individuals, *supra* (barring disclosure of census information to the Women's Bureau of the Department of Labor and Individuals).

At present, the provision enumerates certain express exceptions to the confidentiality requirement, the most recent of which were added by two amendments that Congress enacted in 1997. One of these amendments added a cross-reference to a contemporaneously enacted provision that permits certain otherwise prohibited disclosures to be made to the Census Monitoring Board. See Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 210(k), 111 Stat. 2471, 2487 (1997) (amending the face of 13 U.S.C. § 9(a)); *id.*, § 210(e)(3), 111 Stat. at 2485 (permitting disclosure to Census Monitoring Board). The other added a cross-reference to a contemporaneously enacted provision that permits certain otherwise prohibited disclosures to be made to the Department of Agriculture for the purpose of facilitating the agriculture census. See Census Agriculture Act of 1997, Pub. L. No. 105-113, § 4(a)(1), 111 Stat. 2274, 2276 (amending the face of 13 U.S.C. § 9(a)); *id.*, § 2(f), 111 Stat. at 2275 (permitting disclosure to the Agriculture Department).²

The statutory prohibition against the disclosure of census information now codified as 13 U.S.C. § 9(a) not only protects the personal privacy of persons who respond to the census, but also, in doing so, facilitates the administration of the census, which the Constitution commands the federal government to perform every ten years. See U.S. Const. art. I, § 2, cl. 3. As the Supreme Court observed in Baldrige v. Shapiro, "[a]lthough Congress has broad power to require individuals to submit responses, an accurate census depends in large part on public cooperation. To stimulate that cooperation Congress has provided assurances that information furnished to the Secretary [of Commerce] by individuals is to be treated as confidential." 455 U.S. at 354. Not surprisingly, therefore, federal law provides that census officials who violate the terms of the statutory confidentiality requirement may be subject to criminal prosecution for the commission of a felony, and, upon conviction, may face a

² Congress did not reenact the substantive confidentiality requirement itself, however, in amending the provision to include these express exceptions.

maximum prison term of five years. See 13 U.S.C. § 214 (1994).

The text of § 9(a) provides:

(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, or local government census liaison, may, except as provided in section 8 or 16 or chapter 10 of this title or section 2(f) of the Census of Agriculture Act of 1997 or section 210 of the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 -

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.³

In contrast to 13 U.S.C. § 9(a), section 1373(a) of title 8, entitled "Communication between Government agencies and the Immigration and Naturalization Service," is a recent enactment, and there is little in the way of legislative history that illuminates its scope.

³ Subsection (b) sets forth an additional, express exception to the limited ones that are contained in the body of subsection (a). This provision is not at issue in this matter. The subsection provides:

(b) The provisions of subsection (a) of this section relating to the confidential treatment of data for particular individuals and establishments, shall not apply to the censuses of governments provided for by subchapter III of chapter 5 of this title, nor to interim current data provided for by subchapter IV of chapter 5 of this title as to the subjects covered by censuses of governments, with respect to any information obtained therefor that is compiled from, or customarily provided in, public records.

Congress adopted the provision in the course of passing IRIRA in 1996, well after 13 U.S.C. § 9(a) had been enacted but just prior to the enactment of the recent amendments to 13 U.S.C. § 9(a) described above. The limitation was originally set forth as section 642(a) of IRIRA and is codified as section 1373(a) of title 8.

The text of § 1373(a) provides:

(a) In general

Notwithstanding any other provisions of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.

Subsection (b) places an additional limitation on attempts to restrict a federal, state, or local government "entity" from making certain uses of information regarding the immigration status, lawful or unlawful, of any individual. Subsection (b) provides:

(b) Additional authority of Government entities

Notwithstanding any other provision of Federal, State, or local law, no person or agency may prohibit, or in any way restrict, a Federal, State, or local government entity from doing any of the following with respect to information regarding the immigration status, lawful or unlawful, of any individual:

- (1) Sending such information to, or requesting or receiving such information from, the Immigration and Naturalization Service.
- (2) Maintaining such information.
- (3) Exchanging such information with any other Federal, State, or local government entity.⁴

⁴ Subsection (c) of section 1373 imposes a duty upon the INS to respond to certain requests for information about the citizenship or immigration status of individuals that it receives from governmental agencies. That portion of the provision is not at issue here. It provides:

(c) Obligation to respond to inquiries

The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information.

II.

The question that we must resolve concerns the relationship between these two federal statutes, one of which sets forth a longstanding bar to the disclosure of sensitive information by census officials that may be enforced with criminal penalties, and the other of which sets forth a limitation intended to facilitate the disclosure of certain information to the INS.

We begin with the text of the statute that might be construed to have effected a repeal of prior law. We are mindful in doing so that "repeals by implication are not favored," United States v. United Continental Tuna Corp., 425 U.S. 164, 168 (1976); Morton v. Mancari, 417 U.S. 535, 551 (1974) ("When two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective"), and that it is "[a] long-standing maxim of statutory construction that statutes are enacted in accord with the legislative policy embodied in prior statutes, and that therefore statutes dealing with the same subject should be construed together." Memorandum for Glen E. Pommerening, Assistant Attorney General for Administration, from Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, Re: Establishing a Maximum Entry Age Limit for Law Enforcement Officer Positions in the Department of Justice at 3 (Apr. 3, 1975).

Here, by virtue of its more recent enactment, and notwithstanding the 1997 amendments to 13 U.S.C. § 9(a), the potential repealer is 8 U.S.C.A. § 1373(a), the text of which provides that federal, state, or local governmental "entit[ies]" or "official[s]" may not "prohibit, or in any way restrict," certain types of disclosures to federal, state, or local government entities or officials. In our view, the text of § 1373(a) does not manifest the kind of clear congressional intention that is ordinarily required to effect the repeal of a federal statute such as 13 U.S.C. § 9(a). Indeed, if anything, the statutory text suggests that Congress did not intend to repeal existing, federal statutory prohibitions or restrictions on disclosure.

There would be nothing impermissible about a federal statute that took the form of a repeal of prior federal statutory disclosure prohibitions or restrictions. The question, here, however, is whether 8 U.S.C.A. § 1373(a) is such a federal statute, and textual evidence suggests that it is not. There is a straightforward way in which 8 U.S.C.A. § 1373(a) might have been drafted to repeal federal statutes prohibiting or restricting disclosure and to establish an interpretive background for future federal statutes that would favor disclosure: "Notwithstanding any provision of law, a federal, state, or local official or entity may provide information, without restriction" In contrast, the terms of § 1373(a) do not clearly invest governmental officials or entities with the affirmative authority to disclose information in circumstances where they otherwise would be prohibited from doing so by a federal statute. Rather, the provision is phrased as a limitation on the authority of government entities or officials to impose prohibitions or restrictions on disclosures by government entities or officials. The phrasing therefore requires that we determine, in order to discern the scope of the provision, the government "entities" to which Congress has directed this bar. A consideration of that question, in turn, reveals the problem with construing § 1373(a) to

supersede federal statutory prohibitions or restrictions on the disclosure of information.

One could read the text of § 1373(a) to supersede federal statutory prohibitions or restrictions on disclosure by concluding that the phrase a "federal, state, or local government entity or official may not prohibit, or in any way restrict" includes within its terms the United States Congress acting pursuant to its lawmaking authority in the same way that it would include within its terms states or local governments acting pursuant to their lawmaking authority. Such a construction would be at odds, however, with the fact that Congress may not, by statute, direct the Congress not to enact certain laws in the future. See, e.g., Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.) ("The principle asserted is that one legislature . . . cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted."). That is not to say, of course, that Congress may not enact a statutory prohibition that Congress could lift only by subsequently repealing it. It is rather to say that Congress has no power to command itself by statute not to enact a law in the future, and thus that it would be odd to construe the command contained in § 1373(a) to have been intended to apply to Congress's own power to enact prohibitions or restrictions on disclosure. It would appear from the text, therefore, that the provision is intended to constrain the lawmaking discretion of other government officials and entities but not of the very governmental entity that is constitutionally vested with the lawmaking power of the federal government.

other
Govt
officials

It is not possible, moreover, to construe § 1373(a) as if it were intended to apply only to federal statutory disclosure prohibitions or restrictions that had been enacted prior to the passage of § 1373(a). Such a construction would avoid the problem that we have just mentioned, but only by giving rise to a new one. It would be quite strange to conclude that Congress intended for § 1373(a) to apply only retroactively as a general matter, and the statutory text simply does not permit the provision to be construed to apply both prospectively and retroactively to state and local laws, but only retroactively to federal statutes.

We also do not believe that it would make sense to construe § 1373(a) as if it were intended to preclude federal officials or entities from implementing, through, for example, criminal prosecutions or disciplinary actions, federal statutory prohibitions or restrictions against disclosure. Such an interpretation would require one to make the dubious assumption that Congress intended to preclude federal officials from implementing statutory prohibitions or restrictions against disclosure that it had not seen fit to repeal.

These interpretive oddities do not arise if the text is construed to apply only to disclosure prohibitions or restrictions other than those imposed by federal statute. For example, § 1373(a) may be comfortably construed to displace conflicting state or local non-disclosure laws, even if they have been enacted by statute or ordinance;⁵ state and local

⁵ See infra, note 7.

governments must legislate in this area in accord with federal law, City of New York v. United States, 971 F. Supp. 789 (S.D.N.Y. 1997) (rejecting a Tenth Amendment challenge to the application of § 1373(a) to preempt a city executive order prohibiting city officials from disclosing certain information to the INS), and the rule that Congress may not bind its future lawmaking power is obviously not implicated by a federal statute that has such preemptive effect. Section 1373(a) also may be comfortably construed to limit the discretionary authority of federal officers or employees, or federal entities like administrative agencies, to adopt disclosure prohibitions or restrictions; federal officials or entities generally may exercise discretionary authority of this sort only to the extent that Congress allows by statute. The ease with which the provision may be read to cover these applications stands in marked contrast to the struggle that would be required to read the provision to cover federal statutory prohibitions or restrictions on disclosure.

To be sure, the presence of the prefatory phrase "notwithstanding any other provisions of Federal, State, or local law" does reflect a congressional intention to displace inconsistent law. It does not, however, support a broad construction of the substantive provision that would give rise to such inconsistencies. See Moyle v. Director, Office of Worker's Compensation Programs, 147 F.3d 1116, 1119 (9th Cir. 1998) ("The fact that [a statute] provides that it is effective '[no]twithstanding any other provision of law' also does not evidence an express repeal of [the other] statute."), cert. denied, 67 U.S.L.W. 3641 (U.S. Apr. 19, 1999) (No. 98-927); Kee Leasing Co. v. McGahan, 944 F.2d 577, 582 (9th Cir. 1991) ('notwithstanding' phrase by itself did not in and of itself indicate a congressional intent to repeal other statute). The "notwithstanding" phrase merely prefaces the substantive limitation that § 1373(a) sets forth, and, as we have explained, the text of § 1373(a) suggests that this substantive limitation does not apply if Congress is the source of the prohibition or restriction in question. The limitation appears instead to be intended to apply only when the source of the prohibition or restriction on disclosure is an entity or official other than Congress. The "notwithstanding" phrase is thus best read to mean only that, notwithstanding a federal statute that would authorize federal officials or entities to exercise their general administrative discretion in a manner that would prohibit or restrict disclosures of the type identified in § 1373(a), such federal officials or entities may not exercise such discretion. The phrase should not be understood to refer, therefore, to federal statutes that themselves prohibit or restrict such disclosures.⁶

Nor do the terms of the title of subsection (b) of section 1373 of title 8, which employs similar language to subsection (a), reflect a congressional intention to cover federal statutory prohibitions or restrictions on disclosure. The subsection is entitled, "Additional Authority of

⁶ Questions may arise in some circumstances as to whether a federal statute constitutes a prohibition or restriction on disclosure or merely confers general administrative authority upon subordinate officials or entities that would enable them to determine in their discretion whether to adopt such prohibitions or restrictions. We have no need to address such questions here, however, because there is no question that 13 U.S.C. § 9(a) constitutes a federal statutory bar against disclosure.

Governmental entities." This language should not be read to suggest that Congress intended for the text of both subsections to authorize governmental entities or officials to make disclosures in contravention of otherwise applicable federal statutes. Section 1373 confers "additional authority" on state and local governmental entities to the extent that it preempts state or local disclosure prohibitions that would otherwise apply to them. Thus, even if the title to subsection (b) should be given interpretive weight, its terms are consistent with the construction of the text of § 1373(a) that we have set forth above.⁷

III.

The remaining evidence of congressional intent supports the inference that the text invites: that 8 U.S.C.A. § 1373(a) does not repeal federal statutory prohibitions or restrictions on disclosure to the INS of information concerning an individual's citizenship or immigration status.

As an initial matter, Congress amended the version of 13 U.S.C. § 9(a) that pre-dated the enactment of § 1373(a) after § 1373(a) had been enacted. The amendments, as we have already explained, added two express exceptions to the confidentiality requirement for census information that 13 U.S.C. § 9(a) had previously set forth. This recent history of express amendment is consistent with Congress's past practice of expressly identifying the relationship between the confidentiality requirement that 13 U.S.C. § 9(a) sets forth and other federal statutes. *See, e.g.*, 42 U.S.C. § 11608 (1994) (setting forth the manner in which otherwise confidential covered census information may be disclosed to implement a certain treaty); 42 U.S.C. § 6274 (1994) (specifically abrogating protections conferred by section 9 of title 13 to implement a different statutory policy); 50 App. U.S.C. § 2411 (1994) (providing express exemption for covered census information from general disclosure requirement); *see* Pincus Letter, at 1 (noting that "the few statutory exceptions to this requirement are explicit and limited"). Because "this particular problem of statutory construction arises in a context in which Congress has historically legislated with care and specificity," Exchange Authority for Kaloko Honokohau National Historical Park, 6 Op. O.L.C. 251, 255 (1982), the absence of a

⁷ In concluding that the text of § 1373(a) should not be understood to repeal federal statutory prohibitions or restrictions on disclosure, we express no view as to whether other limitations on the scope of the provision may also be warranted by either its text or its purposes. We note, however, that, although, as we explain below, the legislative history comports with our conclusion that Congress did not intend § 1373(a) to supersede legislatively enacted federal prohibitions or restrictions on disclosure, *see infra* 11-12, the legislative history also suggests that Congress intended to supersede state and local prohibitions or restrictions on disclosure without regard to whether such prohibitions or restrictions had been enacted legislatively or adopted pursuant to the exercise of administrative discretion. *See* H.R. Rep. No. 104-469, pt. 1, at 277 (1996) (explaining that the House version of the measure "is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS"). Thus, the legislative history casts doubt upon a construction of § 1373(a) that would leave in place all legislatively enacted prohibitions or restrictions on disclosure, including state and local ones.

reference in either statute to the other suggests that the text of 13 U.S.C. § 9(a) should be construed to mean just what it says, and that 8 U.S.C. § 1373(a) should be understood to have left in place the confidentiality requirement that 13 U.S.C. § 9(a) establishes.⁸

The fact that neither statutory provision refers to the other is also significant because it has long been assumed that, if Congress were to cut back on the confidentiality provision set forth in 13 U.S.C. § 9(a), it would do so clearly. In rejecting a request by the United States Department of Justice that census officials be ordered to disclose census information relevant to an investigation, Judge Weinfeld explained that "the purpose to protect the privacy of the information furnished to the Government is so clear and the public policy underlying the purpose so compelling that, absent a clear Congressional grant, there is no basis upon which to direct the Department of Commerce to make available to the Department of Justice or to any person the reports here sought." See Bethlehem Steel Corp., 21 F.R.D. at 572. The Attorney General employed a similar requirement of clarity in determining that a statute that granted custody of federal records to the Archivist did not displace the confidentiality requirement set forth in a predecessor to 13 U.S.C. § 9(a). "The policy of insuring by legislative and executive action that no unauthorized use is made of information obtained in the census, and the compelling reasons therefor, are set forth in the Attorney General's opinion of September 29, 1930, to the Secretary of Commerce. It would require very clear language in a general statute relating to the custody of records to justify attributing to the Congress an intention to depart from its policy, and there is no such clear indication in the Archives Act." 40 Op. Att'y Gen. at 327-28.⁹

The presumption employed in these cases arises from the important governmental interests that first prompted the enactment of a statutory requirement of confidentiality. Indeed, the Supreme Court emphasized the long history of this statutory requirement, and the

⁸ Shortly after § 642(a) of IIRIRA had been enacted, the Department of Justice submitted a legislative proposal to Congress that contained various technical amendments to IIRIRA and that would have expressly provided that § 642(a) did not repeal 13 U.S.C. § 9(a). See Letter to the Honorable Newt Gingrich, Speaker of the United States House of Representatives, from Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, (July 3, 1997), with attached legislative proposal entitled, "Technical Immigration and Naturalization Amendments of 1997." The fact that Congress did not enact this legislative proposal into law does not, of course, suffice to indicate that Congress intended for § 642(a) to repeal a portion of the confidentiality requirement set forth in 13 U.S.C. § 9(a). See Helvering v. Hallock, 309 U.S. 106, 121 (1940) (Frankfurter, J.) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle").

⁹ The Supreme Court's decision in St. Regis Paper Company v. United States, 368 U.S. 208 (1962), is not to the contrary. In that case, the Court held that the Federal Trade Commission was entitled to order a private corporation to submit certain census-related information that it had maintained, but the Court did so on the basis of a determination that 13 U.S.C. § 9(a) imposes a confidentiality requirement that applies to government officials and not private persons or entities. See St. Regis Paper Company, 368 U.S. at 217-18. The question before us, by contrast, concerns whether the recent enactment of 8 U.S.C.A. § 1373(a) makes permissible the disclosure of census information by government officials who would otherwise be subject to the confidentiality requirement that 13 U.S.C. § 9(a) imposes.

important role that it plays in encouraging the public to cooperate with census officials, in the course of holding that Congress, in enacting the Freedom of Information Act or conferring authority on federal district courts to order the discovery of non-privileged information, could not have intended to override the requirement in a manner that would permit the disclosure of the lists of addresses that had been collected and utilized by the Bureau of the Census. See Baldrige, 455 U.S. at 356-62. The Attorney General also emphasized the important function that the confidentiality requirement performs in describing a nearly identical predecessor to the current, non-disclosure requirement: "There can be no doubt that the Congress intended in the act of June 18, 1929 . . . to give effective assurance to all persons required under penalty of law to furnish information to the Bureau of the Census for statistical purposes, that the identity of the informant and the information furnished would be held in complete confidence by the Bureau." Seventeenth Decennial Census, 41 Op. Att'y Gen. 120, 124 (1953); see also Bethlehem Steel Corp., 21 F.R.D. at 570-71 (explaining that a "purpose [of the requirement] was to encourage citizens to submit freely all data desired in recognition of its importance in the enactment of laws and other purposes in the national interests.").

The confidentiality provision to which the Attorney General referred was itself predated by section 25 of the Act of July 2, 1909, ch. 2, 36 Stat. 1, 9, which set forth the non-disclosure requirement in similar terms to the current requirement. The congressional committee that reported the bill that became the Act of July 2, 1909 explained that the provision was intended to secure "a more effective guaranty than heretofore of the confidential character of the returns as needed in many cases and desirable in all to enlist that public confidence without which census inquiries must fail." H.R. Rep. No. 60-960, at 23 (1908).

In addition, soon after the enactment of the 1929 statute, Act of June 18, 1929, ch. 46, 28 Stat. 21, 25, and consistent with its broad purpose, President Herbert Hoover assured the public by proclamation of November 22, 1929, that the statutory provisions barring the disclosure of census information made clear that:

[t]he sole purpose of the Census is to secure general statistical information regarding the population and resources of the country, and replies are required from individuals only to permit the compilation of such general statistics. No person can be harmed in any way by furnishing the information required. The Census has nothing to do with taxation, with military or jury service, with the compulsion of school attendance, with the regulation of immigration, or with the enforcement of any national, state, or local law or ordinance. There need be no fear that any disclosure will be made regarding any individual person or his affairs. For the due protection of the rights and interests of the persons furnishing information every employee of the Census Bureau is prohibited, under heavy penalty, from disclosing any information which may thus come to his knowledge.

Proclamation No. 1898 (1929).

In light of the federal government's longstanding commitment to confidentiality in this area, there is every reason to expect that Congress would have spoken with particular clarity if it had intended to cut back on the scope of 13 U.S.C. § 9(a) in enacting 8 U.S.C.A. § 1373(a). The plain terms of 13 U.S.C. § 9(a) certainly make clear the nature of this federal governmental commitment to confidentiality, as they render covered census information immune from legal process. A broad construction of 8 U.S.C.A. § 1373(a), however, would permit census officials to disclose to INS employees otherwise protected census information even in the absence of a court order requiring them to do so. It is unlikely that, in light of past practice, Congress would have adopted such a significant limitation on the scope of the census confidentiality requirement without either referring to it expressly in 8 U.S.C.A. § 1373(a) or an amendment to 13 U.S.C. § 9(a), or, at the least, using more direct language than it has employed here.

Finally, the discussion in the legislative reports that directly concerns 8 U.S.C.A. § 1373(a) accords with the conclusion that Congress did not intend to effect the repeal of federal statutory prohibitions or restrictions such as 13 U.S.C. § 9(a). The conference report to IRIRA, for example, states that section 642(a), which now appears as 8 U.S.C.A. § 1373(a), "provides that notwithstanding any other provision of Federal, State, or local law, no State or local government entity shall prohibit or in any way restrict any government entity or official from sending to or receiving from the INS information regarding the immigration status of any individual in the United States." H.R. Conf. Rep. No. 104-828, at 249 (1996). The report's failure to refer to prohibitions or restrictions by federal government entities may have been the result of an oversight, but the omission nonetheless makes it difficult to discern from the conference report a congressional intention to repeal federal statutory prohibitions or restrictions against disclosure, such as the one contained in 13 U.S.C. § 9(a).

In addition, the Senate Report appears to be focused on state and local disclosure prohibitions and restrictions. Although the report provides that the provision that would later become section 642(a) "[p]rohibits any restriction on the exchange of information between the Immigration and Naturalization Service and any Federal, State, or local agency regarding a person's immigration status," S. Rep. No. 104-249, at 19 (1996), the next two sentences suggest that Congress was concerned with state and local restrictions, not federal statutory ones: "Effective immigration law enforcement requires a cooperative effort between all levels of government. The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and of potentially considerable assistance to, the Federal regulation of immigration and the achieving of the purposes and objectives of the Immigration and Nationality Act." *Id.* at 19-20.

The House Report also fails to provide support for construing 8 U.S.C.A. § 1373(a) to effect the repeal of federal statutory prohibitions or restrictions on disclosure. Indeed, at the time of the report, the bill applied only to state and local prohibitions or restrictions on disclosure, not federal ones. H.R. Rep. No. 104-469, pt. 1, at 104 (1996). To the extent that the report may be understood to shed any light on the kind of prohibitions or restrictions on

disclosure that Congress had in mind in enacting § 642(a), moreover, it suggests that a narrow construction is appropriate. The report states, for example, that "[t]he Committee believes that immigration law enforcement is as high a priority as other aspects of Federal law enforcement, and that illegal aliens do not have the right to remain in the U.S. undetected and unapprehended." H.R. Rep. No. 104-469, pt. 1, at 277 (1996). The report appears to suggest, therefore, that Congress intended to ensure that the INS would not be placed at a comparative disadvantage in performing its law enforcement responsibilities. If § 1373(a) were construed to repeal the applicable portion of 13 U.S.C. § 9(a), however, the INS would be capable of obtaining census information relevant to its law enforcement mission even though other federal agencies would not. The report provides no support for a construction of § 1373(a) that would have the consequence of thus privileging the INS.¹⁰

V.

For the reasons set forth above, we conclude that 8 U.S.C.A. § 1373(a) does not repeal 13 U.S.C. § 9(a).

¹⁰ This evidence from the legislative history may suggest that 8 U.S.C.A. § 1373(a) is not intended to apply to any provision of law, whether federal, state, or local, that imposes a confidentiality requirement that applies to bar disclosures not simply to the INS, but to government agencies generally. We do not address here, however, whether such a distinction between types of confidentiality requirements would be compatible with the text of 8 U.S.C.A. § 1373(a). Cf. Employment Div., Dept. of Human Res. v. Smith, 494 U.S. 872, 878 (1990) (interpreting the word "prohibiting" in the Free Exercise Clause to incorporate an implicit distinction between direct and indirect prohibitions). We do note that while it is clear that Congress intended for 8 U.S.C.A. § 1373(a) to displace state or local provisions that specifically targeted disclosures to the INS for special prohibition, see City of New York v. United States, 971 F. Supp. 789, 792 (S.D.N.Y. 1997), the federal statutory bar to disclosure that is set forth in 13 U.S.C. § 9(a) is not similarly targeted. It applies without regard to whether the information to be protected concerns an individual's citizenship or immigration status or whether the disclosure is to be made to the INS or some other law enforcement agency.



● **Eugenia Chough**

11/29/99 04:26:44 PM

Record Type: Record

To: Irene Bueno/OPD/EOP

cc:

bcc:

Subject: Re: CONFIRM: Sections 434 and 404 

I'm so sorry to hear about your flight -- I'm glad you made it back finally!

The meeting went well -- Dawn and Cynthia led. It was a good educational session for us to understand where the agencies were with the SSA notice. INS owes them comments, and we asked to be included in the next round of clearance. In particular, INS (Strack and Smith) said may comment on page 3 of SSA's notice requiring formal determination of legal presence AND documentation by the Service, such as in a Final Order of Deportation. This standard may be difficult to meet, and may be seen as circumventing purposes of the (sec 404) law. Dawn pointed out that this could be circular requirement, and HHS noted that (1) the point of agency's reporting could be to help locate the unlawful immigrants that are already on INS's list, (2) the "such as" clause makes it illustrative and helps states understand what we mean, and (3) Food Stamps has used this standard since 1982. INS said that this in not a fall-on-their-sword issue, as the whole method is not going to be that helpful, and it is more of an indirect issues for INS and a direct issue for other agencies.

Let me know if you have questions. I'll put the sign-in sheet in your box.
Irene Bueno

Irene Bueno



● 11/29/99 03:17:00 PM

Record Type: Record

To: Dawn M. Chirwa/WHO/EOP@EOP, Cynthia A. Rice/OPD/EOP@EOP

cc: Eugenia Chough/OPD/EOP@EOP, J. Eric Gould/OPD/EOP@EOP

Subject: CONFIRM: Sections 434 and 404

Sorry I missed this meeting today. I will catch up with you later today. Thanks.

----- Forwarded by Irene Bueno/OPD/EOP on 11/29/99 03:16 PM -----



● **Eugenia Chough**

11/22/99 04:22:47 PM

§404 + §434 - 12/2

§404 - Agencies would not doing a reporting at all but there's a process in place.

SSA, HHS - seem prepared to take political hit

INS will fiddle around w/ language -

§434 + §442 - Agencies will go back to ~~the~~ check this conflict w/ organic statute

- Dan Maricle - Assoc - will discuss

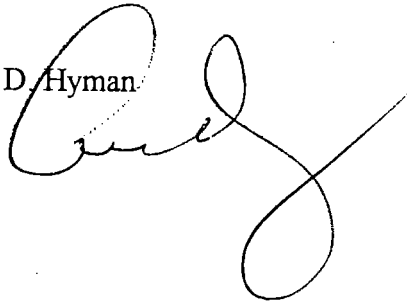
August 24, 1999

NOTE TO: Tom Perez
David Nielsen
Laura Canfield
Christy Quigley

Attached is a copy of the latest draft of the "section 404" notice. So far, HUD, SSA, HHS, and INS have all given an initial thumbs up. Please take a look at the draft. You may want to compare it to the earlier version and our comments, which I've also attached. Of particular note, you'll see that they've taken our recommendation on page 3 regarding documentation by INS, such as a Final Order of Deportation. It makes me wonder whether INS has truly cleared this, but so be it.

I'm assuming that we'll want to send this out to the entire IWG, but I'll follow up with Christy regarding the appropriate process. Thanks.

Andrew D. Hyman

A handwritten signature in black ink, appearing to read "Andrew D. Hyman", with a large, stylized loop at the end.

FACSIMILE TRANSMISSION
ROOM 616 ALTMAYER BUILDING

TELEFAX: (410) 597-0137

SOCIAL SECURITY ADMINISTRATION
OFFICE OF THE GENERAL COUNSEL

TO: Andrew D. Hyman / HHS
OFFICE PHONE NO.: (202) 690-6060
TELEFAX NO.: (202) 205-2727

FROM: Steve Exum
OFFICE PHONE NO.: (410) 965-3183
DATE: 8/23/99

TOTAL NUMBER OF PAGES: 6 (INCLUDING FAX COVER SHEET)

Re: Section 404 of Welfare Reform

COMMENTS: Here is what we hope to be a near-final
version of the Fed Reg notice, which you reviewed
previously, regarding notifying INS of aliens "not
lawfully present" in the U.S. Once all of the agencies
involved approve a final version, we plan to submit
the notice for publication. Could you provide us
with any additional revisions, and/or your approval of
this version, by 8/30/99? Thanks again for
your help and cooperation. If you have any
questions, please contact me at the above number
or our Assoc. Gen. Counsel, John Watson, at

99/10/14 1510 160 016

SOCIAL SECURITY ADMINISTRATION; DEPARTMENT of HEALTH and HUMAN SERVICES; DEPARTMENT of HOUSING and URBAN DEVELOPMENT; IMMIGRATION and NATURALIZATION SERVICE

Responsibility of Certain Entities to Notify the Immigration and Naturalization Service of Any Alien Who the Entity "Knows" is Not Lawfully Present in the United States

AGENCIES: Social Security Administration; Department of Health and Human Services; Department of Housing and Urban Development; Immigration and Naturalization Service

ACTION: Notice

SUMMARY: Section 404 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, as amended, requires certain Federal and State entities, at least four times annually and upon request of the Immigration and Naturalization Service (Service), to notify the Service of any alien the entity "knows" is not lawfully present in the United States. The Federal agencies responsible for implementing section 404 are providing notice of how this provision is being implemented.

FOR FURTHER INFORMATION CONTACT:

INS Contact Person

SUPPLEMENTARY INFORMATION:

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P. L. 104-193 (hereinafter Welfare Reform) and the Illegal Immigration Reform and Immigrant Responsibility

Act of 1996, P. L. 104-208 (Immigration Reform), include significant provisions affecting the entitlement of aliens in the United States to and their eligibility for public benefits. (See the Federal Register notice on "Interpretation of Federal Public Benefit," 63 Fed. Reg. 41658 (August 4, 1998)). Section 401 of Welfare Reform generally provides that, with some exceptions, only "qualified aliens" are entitled to receive Federal public benefits. Welfare Reform and Immigration Reform also include significant provisions specifically limiting the eligibility of aliens for certain specified Federal programs, including Supplemental Security Income (SSI) under title XVI of the Social Security Act. Finally, section 403 of Welfare Reform limits the eligibility of qualified aliens for certain "Federal means-tested public benefits." (See Federal Register Notice on "Interpretation of 'Federal Means-tested Public Benefit'" 62 Fed. Reg. 45256 (August 26, 1997).

Section 404 of Welfare Reform, as amended by Pub. L. 105-33, requires each entity or type of entity specified in that statute to report to the Service any individual who the entity, under certain specified programs, "*knows* is not lawfully present in the United States," at least 4 times annually and upon request of the Service (emphasis supplied). The entities required to report under this provision and the programs involved are: (1) any State agency that administers a block grant under part A of title IV of the Social Security Act, as amended, 42 U.S.C. §601 et seq. (Temporary Assistance for Needy Families); (2) the Social Security Administration (with respect only to the Supplemental Security Income (SSI) program under title XVI of the Social Security Act, 42 U.S.C. §1381 et seq.); (3) any State agency responsible for an SSI Optional State Supplementation under the SSI program if the State has entered into an agreement with the

Social Security Administration for Federal administration of payments under that program pursuant to section 1616(a) of the Social Security Act, as amended, 42 U.S.C. §1382e(a); (4) the Department of Housing and Urban Development (with respect only to the General Program of Assisted Housing provided under the United States Housing Act of 1937, as amended, 42 U.S.C. §1437 et seq.); and, (5) any public housing agency that enters into a contract for assistance under section 6 or 8 of title I of the United States Housing Act 1937, as amended, 42 U.S.C. §1437 et seq. No other Federal, state, or local benefit program is required to report under the provisions of Title IV of Welfare Reform.

Section 404 of Welfare Reform is not explicit with respect to the meaning of the term "knows." After consultation, the responsible Federal agencies have determined that, for purposes of section 404, an entity will "know" that an alien is not lawfully present in the United States only when the unlawful presence is a finding of fact or conclusion of law that is made by the entity as part of a formal determination on an alien's claim for any of the statutorily specified programs set out above and is documented by the Service, such as in a Final Order of Deportation. For example, a Federal benefit program usually involves an initial eligibility determination subject to administrative review, with a formal determination being made at each level. The determinations may involve questions such as an individual's eligibility for benefits, suspension, reduction or termination of an individual's benefits, or whether an overpayment of benefits must be paid back to the program. Under such an administrative review process, an agency will "know" any factor of eligibility clearly and with certainty only at the time a formal determination involving the factor is made. Equating "knowing" under section 404 of Welfare Reform with a formal

determination under any of the statutorily specified programs affected by section 404 gives rational substance to an arguably ambiguous term and is not inconsistent with the legislative history of this provision.

This notice is not meant to suggest that a benefit granting agency is required to make a determination as to an applicant's lawful presence if that determination is not otherwise necessary in order to determine whether the applicant is eligible for the benefit. Nor is it meant to suggest that a finding or conclusion as to immigration status made by a benefit granting agency has any weight outside the context of the alien's eligibility for that particular benefit. Determinations of status for purposes of the Immigration and Nationality Act are the responsibility of the Department of Justice, not of any other agency.

The reporting entity that makes a report to the Service will include in its report the name, address and other identifying information in its possession regarding the individual who the reporting entity knows is not lawfully present in the United States. The reports will be sent to the Service at the following address [to be specified by INS]:

(Signatures)

Susan M. Daniels, Ph.D
Deputy Commissioner for Disability and Income
Security Programs
Social Security Administration

(Name)

(Title)

Department of Health and Human Services

(Name)

Deputy Assistant Secretary for Public and Indian Housing
Department of Housing and Urban Development

Doris Meissner

Commissioner

Immigration and Naturalization Service

FAX

**U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES
OFFICE OF INTERGOVERNMENTAL AFFAIRS**

PHONE: (202) 690-6060
FAX: (202) 205-2727
E-MAIL: ahyman@os.dhhs.gov

DATE: June 2, 1999

TO: STEVE EXUM
fax: 410-597-0137

FROM: ANDREW D. HYMAN
Acting Director
Office of Intergovernmental Affairs, Room 600E
U.S. Department of Health and Human Services
200 Independence Ave., SW
Washington, D.C. 20201

COMMENTS: Thanks for the opportunity to comment on this. As I mentioned on the phone, I'd like another opportunity to send this through full departmental clearance after we've discussed this with INS and we're sure everyone is comfortable with our direction. Please call me with any questions, etc. Thanks again.

SOCIAL SECURITY ADMINISTRATION; DEPARTMENT of HEALTH and HUMAN SERVICES; DEPARTMENT of HOUSING and URBAN DEVELOPMENT; IMMIGRATION and NATURALIZATION SERVICE

Responsibility of Certain Entities to Notify the Immigration and Naturalization Service of Any Alien Who the Entity "Knows" is Unlawfully in the United States

AGENCIES: Social Security Administration; Department of Health and Human Services; Department of Housing and Urban Development; Immigration and Naturalization Service

ACTION: Notice

SUMMARY: Section 404 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, ^{as amended} requires certain Federal and State entities, at least four times annually and upon request of the Immigration and Naturalization Service (INS), to notify INS of any alien the entity "knows" is unlawfully in the United States. The Federal agencies responsible for implementing section 404 are providing notice of how this provision is being implemented. ✓

FOR FURTHER INFORMATION CONTACT:

John B. Watson, Associate General Counsel, Office of the General Counsel, Social Security Administration, 6401 Security Boulevard, Room 617 Altmeyer Building, Baltimore, MD 21235

SUPPLEMENTARY INFORMATION:

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P. L. 104-193 (hereinafter Welfare Reform) and the Illegal Immigration Reform and Immigrant Responsibility

Act of 1996, P. L. 104-208 (Immigration Reform), include significant provisions affecting the entitlement ^{and eligibility} of aliens in the United States to public benefits. Section 401 of Welfare Reform generally provides that, with some exceptions, only "qualified aliens" are entitled to receive Federal public benefits. Welfare Reform and Immigration Reform also include significant provisions specifically limiting the eligibility of aliens for certain specified Federal programs, including Supplemental Security Income (SSI) under title XVI of the Social Security Act.

Finally, section 403 of Welfare Reform limits the eligibility of qualified aliens for certain

"Federal means-tested public benefits." (see Federal Register Notice on "Interpretation of Federal Means-Tested Public Benefits") (Vol. 62, No. 165, August 26, 1997, pg 45256-45258.) Also SSA notices

, as amended by Pub. L. 105-33,

Section 404 of Welfare Reform requires each entity or type of entity specified in that statute to

report to INS any individual who the entity, under certain specified programs, "knows is

not lawfully present

unlawfully

in the United States," at least 4 times annually and upon request of INS (emphasis

supplied). The entities required to report under this provision and the programs involved are: (1)

any State receiving a block grant under part A of title IV of the Social Security Act, as amended,

42 U.S.C. 601 et seq. (Temporary Assistance for Needy Families); (2) the Social Security

Administration (the Supplemental Security Income (SSI) program under title XVI of the Social

Security Act, 42 U.S.C. 1381 et seq.); (3) any State which has entered into an agreement with the

Social Security Administration under section 1616(a) of the Social Security Act, as amended,

42 U.S.C. 1382e(a) (Optional State Supplementation under the SSI program); (4) the Department

of Housing and Urban Development (the General Program of Assisted Housing provided under

the United States Housing Act of 1937, as amended, 42 U.S.C. 1437 et seq.); and, (5) any public

housing agency that enters into a contract for assistance under section 6 or 8 of title I of the

[see 5564

+ 5581]

Pub. L 105-33]

United States Housing Act 1937, as amended, 42 U.S.C. 1437 et seq. - No other Federal, state, or local benefit program is required to report under the provisions of Title IV of PAMORA

Section 404 of Welfare Reform is not explicit with respect to the meaning of the term "knows."

After consultation, the responsible Federal agencies ^{have determined} ~~give notice~~ that, for purposes of section 404, an entity will ^{not lawfully} ~~know~~ that an alien is ^{not lawfully} ~~unlawfully~~ present in the United States only when the unlawful presence is a finding of fact or conclusion of law that is made by the entity as part of a formal determination on an alien's claim for any of the statutorily specified programs set out above ^{and is documented by the INS, such as in a Final Order of Deportation.} For example, a Federal benefit program usually involves an initial ^{eligibility} ~~determination~~ subject to administrative review, with a formal determination being made at each level. The determinations may involve questions such as an individual's eligibility for benefits, suspension, reduction or termination of an individual's benefits, or whether an overpayment of benefits must be paid back to the program. Under such an administrative review process, an agency will "know" any factor of eligibility clearly and with certainty only at the time a formal determination involving the factor is made. Equating "knowing" under section 404 of Welfare Reform with a formal determination under any of the statutorily specified programs affected by section 404 gives rational substance to an arguably ambiguous term, is not inconsistent with the legislative history of this provision, and most importantly affords a claimant due process rights before an Agency would report ^{that he/she is not lawfully present} ~~his/her unlawful presence status~~ to the INS.

The reporting entity that makes a report to INS will include in its report the name, address and other identifying information in its possession regarding the individual who the reporting entity knows is ^{not lawfully present} ~~unlawfully~~ in the United States. The reports will be sent to INS at the

following location: [to be specified by INS-the following is for example]

General Counsel
Immigration and Naturalization Service
Room 6100
425 I Street, NW
Washington, DC 20536

(Signatures)

Susan Daniels
Deputy Commissioner for Disability and Income
Security Programs
Social Security Administration

(Name)
(Title)
Department of Health and Human Services

(Name)
(Title)
Department of Housing and Urban Development

(Name)
(Title)
Immigration and Naturalization Service

Irene Bueno

08/27/99 11:25:21 AM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP

cc: Jeanne Lambrew/OPD/EOP, J. Eric Gould/OPD/EOP, Eugenia Chough/OPD/EOP

Subject: Public Charge mtg

While you were out we had a meeting with the Hill and advocates on public charge and CHIP/Medicaid outreach in the immigrant communities. The meeting went well and we will continue to follow up on some ideas and issues that were raised.

In the area of immigration/welfare, these things were discussed:

1. Need for 1 pager on INS letter head that describes in simple terms the public charge issue. You should have a draft in your box. Please give your comments to Genie so she can send them back to Barbara Strack (Genie- I will leave you my comments.)

2. Section 404 and section 434 of PROWRA - reporting and application issue - the concern is that immigrants may be deterred from applying b/c they or their family member may be reported to the INS. HHS, INS, SSA and HUD have been meeting and drafting guidance on this issue - I left you a draft in your box. I have not reviewed it yet. Also, we learned that USDA was planning to issue a reg on these sections but Clare French realized that they should coordinate with the other agencies. I think we will need coordinate a policy process on this issue but let's discuss how to proceed when I return. (see attached)

3. CHIP/Medicaid immigrant kids and pregnant women proposal - at the end of the meeting, we had a brief discussion about strategy on this issue. Joanne (?) from Families USA mentioned that she is working with a coalition and they have been working pm Republican House members to sponsor legislation. They have been working on Bilbray and Lazio. Janet suggested they also try to get Bilirakis. Laurie Rubiner was there and she informed us that she is working very hard to get more Republican support and she is specifically working on Abraham but she mentioned that she needs to spend more time with Roth. Janet indicated if this proposal was part of an appropriate bill, the Administration would be in a better position to push for this later. She concluded by asking their advice on how we can be helpful and that we need to keep talking about how to move this proposal forward.

Jeanne - let me know if you have anything to add from the CHIP/Medicaid area.

I'll be back 9/7 so I will discuss with you then.

Comments
- Looks ok

- needs some gs + ac on why consistent
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2/25/2000

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(J) Benefits under the Head Start Act.

(K) Benefits under the Job Training Partnership Act.

(d) SPECIAL RULE FOR REFUGEE AND ENTRANT ASSISTANCE FOR CUBAN AND HAITIAN ENTRANTS.—The limitation under subsection (a) shall not apply to refugee and entrant assistance activities, authorized by title IV of the Immigration and Nationality Act and section 501 of the Refugee Education Assistance Act of 1980, for Cuban and Haitian entrants as defined in section 501(e)(2) of the Refugee Education Assistance Act of 1980.

SEC. 404. NOTIFICATION AND INFORMATION REPORTING.

(a) NOTIFICATION.—Each Federal agency that administers a program to which section 401, 402, or 403 applies shall, directly or through the States, post information and provide general notification to the public and to program recipients of the changes regarding eligibility for any such program pursuant to this subtitle.

(b) INFORMATION REPORTING UNDER TITLE IV OF THE SOCIAL SECURITY ACT.—Part A of title IV of the Social Security Act is amended by inserting the following new section after section 411:

"SEC. 411A. STATE REQUIRED TO PROVIDE CERTAIN INFORMATION.

"Each State to which a grant is made under section 403 shall, at least 4 times annually and upon request of the Immigration and Naturalization Service, furnish the Immigration and Naturalization Service with the name and address of, and other identifying information on, any individual who the State knows is unlawfully in the United States."

(c) SSI.—Section 1631(e) of such Act (42 U.S.C. 1383(e)) is amended—

(1) by redesignating the paragraphs (6) and (7) inserted by sections 206(d)(2) and 206(f)(1) of the Social Security Independence and Programs Improvement Act of 1994 (Public Law 103-296; 108 Stat. 1514, 1515) as paragraphs (7) and (8), respectively; and

(2) by adding at the end the following new paragraph:

"(9) Notwithstanding any other provision of law, the Commissioner shall, at least 4 times annually and upon request of the Immigration and Naturalization Service (hereafter in this paragraph referred to as the 'Service'), furnish the Service with the name and address of, and other identifying information on, any individual who the Commissioner knows is unlawfully in the United States, and shall ensure that each agreement entered into under section 1616(a) with a State provides that the State shall furnish such information at such times with respect to any individual who the State knows is unlawfully in the United States."

(d) INFORMATION REPORTING FOR HOUSING PROGRAMS.—Title I of the United States Housing Act of 1937 (42 U.S.C. 1437 et seq.) is amended by adding at the end the following new section:

"SEC. 27. PROVISION OF INFORMATION TO LAW ENFORCEMENT AND OTHER AGENCIES.

"Notwithstanding any other provision of law, the Secretary shall, at least 4 times annually and upon request of the Immigration and Naturalization Service (hereafter in this section referred to as the 'Service'), furnish the Service with the name and address of, and other identifying information on, any individual who the Sec-

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retary knows is unlawfully in the United States, and shall ensure that each contract for assistance entered into under section 6 or 8 of this Act with a public housing agency provides that the public housing agency shall furnish such information at such times with respect to any individual who the public housing agency knows is unlawfully in the United States."

Subtitle B—Eligibility for State and Local Public Benefits Programs

SEC. 411. ALIENS WHO ARE NOT QUALIFIED ALIENS OR NON-IMMIGRANTS INELIGIBLE FOR STATE AND LOCAL PUBLIC BENEFITS.

(a) **IN GENERAL.**—Notwithstanding any other provision of law and except as provided in subsections (b) and (d), an alien who is not—

- (1) a qualified alien (as defined in section 431),
 - (2) a nonimmigrant under the Immigration and Nationality Act, or
 - (3) an alien who is paroled into the United States under section 212(d)(5) of such Act for less than one year,
- is not eligible for any State or local public benefit (as defined in subsection (c)).

(b) **EXCEPTIONS.**—Subsection (a) shall not apply with respect to the following State or local public benefits:

(1) Assistance for health care items and services that are necessary for the treatment of an emergency medical condition (as defined in section 1903(v)(3) of the Social Security Act) of the alien involved and are not related to an organ transplant procedure.

(2) Short-term, non-cash, in-kind emergency disaster relief.

(3) Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(4) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or resources; and (C) are necessary for the protection of life or safety.

(c) **STATE OR LOCAL PUBLIC BENEFIT DEFINED.**—

(1) Except as provided in paragraphs (2) and (3), for purposes of this subtitle the term "State or local public benefit" means—

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and

(B) any assisted housing, unemployment compensation, or other benefit which payable to an individual, household, or family, or to a State or local government.

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SEC. 434. COMMUNICATION BETWEEN STATE AND LOCAL GOVERNMENT AGENCIES AND THE IMMIGRATION AND NATURALIZATION SERVICE.

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States.

SEC. 435. QUALIFYING QUARTERS.

For purposes of this title, in determining the number of qualifying quarters of coverage under title II of the Social Security Act an alien shall be credited with—

(1) all of the qualifying quarters of coverage as defined under title II of the Social Security Act worked by a parent of such alien while the alien was under age 18, and

(2) all of the qualifying quarters worked by a spouse of such alien during their marriage and the alien remains married to such spouse or such spouse is deceased.

No such qualifying quarter of coverage that is creditable under title II of the Social Security Act for any period beginning after December 31, 1996, may be credited to an alien under paragraph (1) or (2) if the parent or spouse (as the case may be) of such alien received any Federal means-tested public benefit (as provided under section 403) during the period for which such qualifying quarter of coverage is so credited.

Subtitle E—Conforming Amendments Relating to Assisted Housing

SEC. 441. CONFORMING AMENDMENTS RELATING TO ASSISTED HOUSING.

(a) **LIMITATIONS ON ASSISTANCE.**—Section 214 of the Housing and Community Development Act of 1980 (42 U.S.C. 1436a) is amended—

(1) by striking “Secretary of Housing and Urban Development” each place it appears and inserting “applicable Secretary”;

(2) in subsection (b), by inserting after “National Housing Act,” the following: “the direct loan program under section 502 of the Housing Act of 1949 or section 502(c)(5)(D), 504, 521(a)(2)(A), or 542 of such Act, subtitle A of title III of the Cranston-Gonzalez National Affordable Housing Act,”;

(3) in paragraphs (2) through (6) of subsection (d), by striking “Secretary” each place it appears and inserting “applicable Secretary”;

(4) in subsection (d), in the matter following paragraph (6), by striking “the term ‘Secretary’” and inserting “the term ‘applicable Secretary’”; and

(5) by adding at the end the following new subsection:

“(h) For purposes of this section, the term ‘applicable Secretary’ means—

“(1) the Secretary of Housing and Urban Development, with respect to financial assistance administered by such Secretary

and financial assistance under Cranston-Gonzalez National Affordable Housing Act.

“(2) the Secretary of Agriculture, with respect to financial assistance administered by such Secretary.”

(b) **CONFORMING AMENDMENTS.**—Section 32(c)(2) of the Act of 1949 (42 U.S.C. 1471(h)) is amended—

(1) by striking “(1)”;

(2) by striking “by the Secretary of Housing and Urban Development”; and

(3) by striking paragraph (2).

Subtitle F—Earned Income Credit and Employment

SEC. 451. EARNED INCOME CREDIT DEDUCTIONS AUTHORIZED TO BE EMPLOYED.

(a) **IN GENERAL.**—Section 32(c)(2) of the Act of 1949 (relating to individuals eligible for the earned income credit) is amended by adding at the end the following:

“(F) **IDENTIFICATION NUMBERS.**—An individual who is an ‘eligible individual’ does not include an individual who—

“(i) such individual is a minor, and

“(ii) if the individual is an individual described in section 7703), the individual is not an individual of such individual’s spouse.”

(b) **SPECIAL IDENTIFICATION NUMBERS.**—Section 32(c)(2) of the Act is amended by adding at the end the following:

“(I) **IDENTIFICATION NUMBERS.**—A social security number issued by the Social Security Administration (other than a social security number issued pursuant to clause (II) (or that relates to clause (II)) of section 205(c)(2) of the Act).”

(c) **EXTENSION OF PROCEDURES FOR CORRECTING CLERICAL ERRORS.**—Section 621 of the Act is amended by striking the definition of mathematical or clerical errors and inserting “and” at the end of subparagraph (E) and inserting after subparagraph (E) the following:

“(F) an omission of a number required under section 32(c)(2) (relating to earned income credit) to be included in the return.”

“(G) an entry on a return with respect to net earnings described in section 32(c)(2) (relating to net earnings) that has not been paid.”

(d) **EFFECTIVE DATE.**—The amendments made by this section shall apply with respect to returns filed after the date of enactment of this Act.

Justices Allow Segregation of Inmates With H.I.V.

By LINDA GREENHOUSE

WASHINGTON, Jan. 18 — The Supreme Court today left intact a lower court's ruling permitting Alabama prisons to segregate hundreds of H.I.V.-positive inmates and keep them from educational programs and even from religious services where they might mix with other prisoners.

The justices turned down the prisoners' appeal without comment, in an action that does not set a legal precedent.

The inmates, supported by a coalition of public health organizations and specialists in AIDS treatment, had argued that the segregation violated federal disability law. They said the law required individual assessments of each inmate's personality and medical profile rather than a blanket assumption that all H.I.V.-positive inmates presented such a danger that there was no "reasonable accommodation" that could allow any to participate in normal prison life.

Under the Americans with Disabilities Act of 1990, those who pose a "direct threat to the health and safety of others" can be excluded from a program. The law defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation" or by modifying existing policies.

The lawsuit by the Alabama inmates was filed in 1985 under an earlier federal law, the Rehabilitation Act, which also required assessments of significant risk.

The Federal Court of Appeals for the 11th Circuit, in an 8-to-3 ruling last April, concluded that the prison system's policy was justified because AIDS is fatal, and "death itself makes the risk significant." The dissenting judges argued that the majority had essentially adopted a "no risk" standard, instead of requiring the state to demonstrate that a "significant" risk could not be accommodated.

Alabama was the only state prison system to segregate its H.I.V.-positive inmates when the suit was filed, but Mississippi and South Carolina have now adopted similar policies. Alabama told the Supreme Court that it has been notably more successful than states without segregation policies in preventing the spread of AIDS within its prisons.

The Federal Bureau of Prisons does not use a segregation policy, generally presuming that H.I.V.-positive inmates can suitably be housed and placed in programs with other inmates unless there is evidence to the contrary. Nonetheless, the Clinton administration, asked by the Supreme Court for its views on the Alabama case, urged the justices last month not to hear the appeal.

The administration said in its brief that while it had doubts about the breadth of the appeals court's ruling, that judges were generally correct to defer to prison officials' judgments about their ability "to control prisoners in various settings and programs." Determinations about specific programs were not appropriate for Supreme Court review, the brief said, especially in the absence of a conflict on the issue among the lower federal courts.

The case, *Davis v. Hopper*, No. 98-9663, had challenged the inmates' exclusion from some 70 programs, including job training, education and work-release. While the prison offers the H.I.V.-positive inmates some alternative educational programs, these were much more limited, the inmates' brief said.

There were also these developments at the court today.

State Immunity

There was considerable fallout from the court's two rulings last week on the balance of federal-state authority. The justices dealt with several cases raising related questions that had backed up while those two were under consideration.

Four were age discrimination cases, like the case from Florida last week in which the court ruled that states are constitutionally immune from suit by the employees under the law against age discrimination.

Connecticut, Illinois, New Mexico and Tennessee had all appealed rulings that had rejected their claims of immunity, and the justices summarily vacated those rulings while also turning down a challenge to an immunity decision that Minnesota had won in the lower court. The court also disposed of several cases under the Drivers Privacy Protection Act, the law barring states from selling motorists' personal information, which the justices upheld unanimously last week.

Somewhat less expected was the court's action in vacating the decisions in two cases applying the Equal Pay Act to the states. The justices ordered the two lower courts to study the cases again in light of last week's ruling in an age discrimination case.

The lower courts in both cases had rejected claims of immunity that New York and Illinois had raised in defending suits under this 1963 law. In both cases, female professors sued state universities on the ground that male colleagues in similar positions were being paid more.

In both *State University of New York v. Anderson*, No. 98-1845, and *Illinois State University v. Varner*, No. 98-1117, federal appeals courts

had ruled that in passing the Equal Pay Act, Congress had acted within its authority to enforce the equal protection guarantee of the 14th Amendment and overcome the states' immunity from suit.

Last week, in *Kimel v. Florida Board of Regents*, the court ruled that the Age Discrimination in Employment Act could not overcome the states' immunity because age was not a category to which the Constitution gives special protection. Sex is

such a category, however, with official discrimination on the basis of sex having been accorded "heightened judicial scrutiny" under the court's precedents. So it appeared that the age discrimination ruling might not dictate the outcome of the equal pay cases.

However, questions remain because while the 14th Amendment's equal protection guarantee bars only those official actions that amount to intentional discrimination, the Equal

Pay Act bars pay differences on the basis of sex without requiring proof of motive. Following the court's instructions today, the United States Courts of Appeals for the Second Circuit, in New York, and Seventh Circuit, in Chicago, will study this question and decide how these cases fit with last week's ruling.

The court took no action today on the question of whether states are immune from suit under the Americans with Disabilities Act, raised in a

pending case from Florida on which the justices have evidently decided to deliberate further. That case is *Florida v. Dickson*, No. 98-829.

Immigrants' Privacy

The court let stand a ruling that New York City cannot bar its employees from sharing information with federal immigration officials about the immigration status of foreigners who seek city services.

The dispute revolved around the interaction of an executive order issued by Mayor Edward I. Koch in 1989 and the revision of federal welfare law that Congress passed in 1996. Under the executive order, a city welfare worker could not reveal

that an applicant was not in the country legally. Under the federal welfare law, state and local officials are prohibited from restricting the transmission of such information.

Immediately after that provision became law, New York challenged it in federal court on the ground of state sovereignty. But both the federal district court, in 1997, and the Second Circuit, in a ruling last May, rejected the city's lawsuit and found that the federal law pre-empted the executive order. In its appeal, *New York City v. United States*, No. 99-328, the city argued that Congress had, in violation of the principles of federalism, "commandeered the city's legislative and executive policy-making apparatus."

**United States Department of Agriculture
Food and Consumer Service
Supplemental Food Programs Division**

**Special Supplemental Nutrition Program
for Women, Infants and Children (WIC)**

FAX COVER SHEET



TO:

Irene Bueno

DPC - White House
Organization

Fax Telephone Number

FROM:

Clara L French

Policy Section

DATE SENT:

9/24/99

Of Pages (Including Cover Sheet): 5

Commercial Telephone Number: (703) 305-2747

Facsimile (FAX) Telephone Number: (703) 305-2196

Attached, per your request, is a copy of our draft
presubmit regulatory text on the issue of sharing
information with the INS. There are certainly
other programs more affected by the provisions in
DDI/NOA than WIC. The DDI/NOA have more at stake

DRAFT**Confidentiality – Optional Information Sharing 246.26**

Congress mandated in section 404(b) of Public Law 104-193, codified at 42 U.S.C. 611a, that certain programs report information to the INS; WIC and other Child Nutrition Programs were not included in that mandate. However, section 434 of Public Law 104-193, codified at 8 U.S.C. 1644, provides that "[n]otwithstanding any other Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States." Additionally, section 642(a) of Public Law 104-208, codified at 8 U.S.C. 1373(a), specifies that "[n]otwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service, information regarding the citizenship or immigration status, lawful or unlawful, of any individual." Section 642(b) also provides that no individual or entity may prohibit, or restrict, a Federal, State, or local government entity from: (1) sending to, or requesting or receiving information on immigration status, lawful or unlawful, from the INS; (2) maintaining such information; and (3) exchanging such information with any other Federal, State, or local government entity.

Although section 642 was enacted following section 434, both sections have been codified in the United State Code and must be given legal effect. Unfortunately, there are minor conflicts between the two provisions. The Department has employed two long-accepted canons of statutory construction to remedy these conflicts. If two statutes addressing the same point may not be harmonized, then, all things being equal: (1) the statute enacted later in time controls over the earlier enacted provision; and (2) the statute more specifically addressing the point controls over the more general provision. Section 642 was enacted on September 30, 1996, while section 434 was signed into law on August 22, 1996. Also, section 642 much more extensively addresses the question of information sharing in that it authorizes government entities to engage in specific information sharing activities and requires the INS to respond to inquiries from government agencies seeking to verify citizenship or immigration status information. Therefore, to the extent there are minor conflicts between the provisions, as outlined below, the Department has determined section 642 is controlling.

There are three minor conflicts between section 642 and section 434. The first conflict concerns the breadth of coverage of each provision. Section 434 provides that no Federal, State, or local law may be read to restrict a State or local government entity from sharing information with INS. Therefore, under section 434 Federal, but not State or local, government entities may be prohibited from sharing information. However, under section 642 no government entity or official (including Federal entities and officials) may be restricted in sharing information with INS.

The second conflict involves the type of individual about whom information may be shared. Under section 434 a State or local government entity may only share information

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concerning an alien in the United States. But section 642 permits any Federal, State, and local entity or official from sharing information about any individual (including aliens, nationals, and citizens).

The third conflict concerns the type of information that may be shared or requested. Section 434 allows for the sharing of only "immigration status" information. Section 642 permits the sharing of both "citizenship" and "immigration" status information.

Section 642 also contains an internal conflict. This involves who may request from, or share with, INS (and other governmental entities) certain types of information. Section 642(a) (entitled, "[i]n general") provides that either the "governmental entity or official" may send to or request from INS "citizenship or immigration status" information. The scope of section 642(b) (entitled, "[a]dditional authorities of governmental entities") is more narrow. Section 642(b) states that it is the "governmental entity," not the individual official, that may send to or request from INS "immigration," but not citizenship, status information. Therefore, subsections (a) and (b) conflict as to whether an individual State or local governmental agency official or employees may decide independently to share immigration status information. The Department has determined subsection (b), as the more specific of the conflicting provisions, is controlling. As a result, either a State or local government agency or an official or employee acting independently of the agency may share or request citizenship status information. Conversely, only the State or local government agency (acting through the official authorized under State law to act on behalf of the agency) may share or request immigration status information. Pre-existing WIC confidentiality requirements remain applicable to individual officials or employees acting independently to request immigration status information.

Section 434 and 642 do **not** require any government WIC State or local agency to send to or share information with the INS and/or other Federal, State, or local government entities. Rather, in the WIC Program, State and local government entities are given the option to share immigration information with the INS. State and local government WIC agencies include Indian Tribal Organizations. Section 434 of the legislation, therefore, overrides WIC confidentiality rules or any other State or local law that may prohibit or restrict such information sharing to the extent described in this rulemaking.

This option does **not** apply to non-governmental entities, i.e., private, contract local WIC agencies. Non-governmental WIC agencies, and any governmental WIC agencies which choose not to implement the option, must continue to comply with, and are subject to, applicable Federal, State, and local confidentiality requirements including WIC confidentiality requirements in §246.26, FNS Instruction 800-1, and other program policies pertaining to confidentiality. Under these provisions, therefore, while WIC State agencies, which are part of a State government, could opt to share citizenship or immigration information with the INS and/or other Federal, State, or local government entities, any of its non-governmental private contract local agencies would not be authorized to share such information.

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If a WIC State and/or local government agency is approached by INS or other Federal, State, or local government entities and asked to share citizenship or immigration information, such WIC agencies may choose whether or not to share such information. If a WIC State/local government agency opts to send to or share citizenship or immigration data with the INS and/or other Federal, State, or local government entities, only that data necessary to reveal an individual's citizenship status or immigration classification can be shared. All data concerning an individual could potentially reveal something about whether that individual is a citizen or their immigration classification. For example, a medical history memorializing weekly chemotherapy treatments at a particular United States hospital could be said to be evidence (certainly not dispositive but evidence nonetheless) of the patient's continuous physical presence within the United States. Physical presence within the United States may be an important component of an alien's immigration classification or even a prerequisite for citizenship. If sections 434 and 642 were read as permitting the sharing of all information that could potentially provide some remote insight on an individual's citizenship or immigration classification, a medical history would be shareable data. This reading would constitute a blanket repeal of all Federal, State, and local privacy and confidentiality protections. We note, that section 642, unlike section 434, applies to citizens and nationals as well as aliens. Therefore, the broadest possible interpretation of what constitutes shareable "information" would override all the privacy and confidentiality protections of all types of personal data concerning all persons. The Department does not believe such a radical result was intended. Therefore, the Department has made the following limiting interpretation as to what data constitutes citizenship or immigration information: Such information shall include only the name, address and citizenship status or immigration classification of the individual. This provision does not authorize WIC State and local government agencies, for example, to send to or share with the INS, a listing of all WIC applicants/participants, social security numbers, or health or income information. Any disclosure to INS beyond individual name, address and citizenship status or immigration classification would continue to violate WIC confidentiality rules and policies.

The Department is concerned that only data possessing what have, historically, been considered acceptable indicia of reliability be shared with INS or other governmental entities. To address this concern the Department has further interpreted the term "information" to exclude third part reports (i.e., hearsay). This interpretation will help ensure the reliability and accuracy, and thus protect important due process considerations, of all shared information. Consequently, the information shared cannot be based on hearsay, but rather must be based on statements provided by the WIC applicant or participant or documentation obtained by or provided to WIC agencies. In those local or State government WIC agencies that opt to send to or share citizenship status or immigration classification information with INS or other Federal, State, or local government entities, WIC applicants and participants must be given prior notification of such disclosure. Therefore, the option to share cannot be implemented retroactively. The Department believes prohibiting retroactive application of the sharing authority and requiring State and local government entities to give prior notification serve to protect the due process rights of both WIC applicants and

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participants. Individuals must be apprised in the rights and responsibilities statement at application or reapplication that program information on the citizenship status or immigration classification of an individual may be sent to INS and/or other Federal, State, or local government entities as permitted in Public Laws 104-193 and 104-208 and that such information to be shared will only include name, address, and citizenship status or immigration classification. WIC applicants must also be apprised in writing that participation in the WIC Program will not affect their immigration status. WIC policy was issued in March 1998 to clarify this issue. In addition, this policy was further clarified by the INS in proposed regulations and field guidance published in the Federal Register on May 26, 1999 (64FR 28675).

Any WIC State or local government agency that shares citizenship status or immigration classification information with INS and/or other Federal, State, or local government entities cannot prohibit such entities from sharing the information with these third parties. Such action would be viewed as violating the provisions of section 642.

Section 246.26 has been amended to add a new paragraph (e) to address the option for State and local government WIC agencies to share citizenship status or immigration classification information as noted above.

Proposed Amendatory Language for this Provision:

Section 246.26 Other Provisions – add a new paragraph (e) as follows:

Citizenship and Immigrant Information. Notwithstanding § 246.26(d), State or local WIC government agencies may send to or receive from the Immigration and Naturalization Service information regarding the citizenship status or immigration classification, lawful or unlawful, of an individual. Such information may also be exchanged with any other Federal, State, or local government entity. For the purposes of this paragraph, information shall only include the name, address and citizenship status or immigration classification of the individual. Only information based on statements directly provided by WIC applicants and participants about themselves or on behalf of their infants and/or children or documentation obtained by or provided to WIC agencies shall be shared with, or form the basis for a request to, any Federal State, or local government entity. Further, Program applicants and participants shall be given notification of such disclosure prior to certification and recertification.

17/99

- 4 agency notice in the Fed Register
- SSA drafted something that INS review
- until you come to that conclusion - P.D. box #
- Agency did not answer whether other inquiry
- ~~other~~ other agency - proposal - non-starter

§ 42

- (c) Obligation to Respond Inquiry - c does not override
the Privacy Act. It looks to privacy Act to see if releasable
but if agency
- (b) ~~INS Act~~ to INS. Privacy Act grounds ^{exemption} - law enforcement
purpose.

FAX TRANSMISSION

CENTER ON BUDGET AND POLICY PRIORITIES

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cc Rob Weiner
Emil Parker
Jule Fernandez
& rest of
distribution
list

To: Diana Fortuna **Date:** July 27, 1998
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From: David A. Super/Stacy Dean
Subject: Immigrant Reporting and San Diego County

COMMENTS: At our meeting earlier this month on San Diego's proposed actions against immigrant families, concerns were raised about whether the Administration had legal authority to intervene in this matter.

This memo sets out the legal authority we believe would permit the Administration to act. It addresses legal issues concerning three separate parts of San Diego's plan: (1) the county's requirement that parents applying only for their U.S. citizen children specify their own immigration status in order to obtain benefits for their children; (2) the county's plan to send a letter to immigrant parents who are not receiving food stamps for themselves (and whose legal status the county considers questionable) threatening to report the parents to the INS unless their citizen children cease to receive benefits; and (3) the county's plan actually to report parents to the INS. The memo focuses on food stamps because of our particular expertise with this program; the civil rights issues it raises generally are equally applicable to TANF.

The memo concludes that: (1) the Administration can prohibit San Diego from requiring immigrant parents to describe their specific immigration status in order to obtain food stamps for their children; (2) the Administration can prohibit the county from sending letters to immigrant households threatening to report them to the INS; and (3) although section 434 of the 1996 welfare law allows counties to communicate with the INS about immigrants, the Administration can require the county to follow appropriate civil rights and Food Stamp Act protections in the manner in which it makes such communication.

We hope this is helpful to you.



CENTER ON BUDGET AND POLICY PRIORITIES

July 27, 1998

THE LEGALITY OF SAN DIEGO COUNTY'S POLICIES ON IMMIGRANT PARENTS OF CITIZEN CHILDREN RECEIVING FOOD STAMPS

I. Introduction

San Diego County is threatening action that would effectively prevent the U.S. citizen children of many undocumented immigrant parents (as well as some citizen and legal immigrant children of legal immigrants) from receiving food stamps and other benefits even though those children are eligible and entitled under federal law.

The California application form that San Diego uses for TANF, food stamps and Medicaid requires immigrant parents to specify their immigration status even when they are applying only for their children and not for themselves. Where immigrant parents about whose legal status San Diego is uncertain are receiving TANF or food stamps only for their children, the county intends to send the parents a letter saying that their names will be given to INS unless they remove their citizen children from TANF and food stamps by the end of the month or prove to the county's satisfaction that they are legally in the United States. San Diego had intended to send this letter on July 10; its plans now have been delayed, perhaps until early September.

If San Diego sends out these letters, word is likely to spread through the immigrant community in California, and probably nationwide, that immigrant parents cannot apply for food stamps even for their citizen children without risking being reported to the INS. Undocumented parents will fear deportation, causing them to withdraw their eligible citizen children. The chilling effect is likely to extend to legal immigrant parents as well, since many of them likely will not be convinced that San Diego will limit its reporting to undocumented parents. Many legal immigrant parents may fear that being reported to the INS for their children's receipt of benefits may lead INS to treat them as "public charges" and deny them either re-entry into the United States after visiting relatives abroad or adjustment of their immigration status. If the parents of large numbers of legal immigrant children remove the children from the food stamp program (or fail to apply), the Administration's hard-fought victory to restore food stamp eligibility for these children will be jeopardized.¹

It appears the INS lacks the administrative capacity to act on the information that San Diego plans to provide. Nonetheless, the effect of San Diego's actions will be to

¹Although the restoration of federal food stamp eligibility to legal immigrant children does not become effective until November 1, California currently issues food stamps to legal immigrant children and reimburses USDA for the cost. See Food Stamp Act § 7(j); 7 U.S.C. § 2016(j).

chill immigrant parents from applying for TANF and food stamp benefits for their citizen children (or eligible legal immigrant children) and to induce immigrant parents whose children already receive benefits to withdraw their children from these programs.

Other states and counties may follow San Diego's example, thereby aggravating the problem. The chilling effect is likely to extend beyond TANF and food stamps, also discouraging immigrant parents from enrolling their children in other health and nutrition programs for which the children are eligible. Although San Diego's actions target general assistance, TANF and food stamp recipients, undocumented immigrant families are likely to fear that their citizen children's receipt of Medicaid, coverage under the new CHIP block grant, or receipt of other benefits could lead to reporting to INS. Some may believe they will be deported or detained. Like all parents, immigrant parents will seek to avoid splitting up their families and being separated from their children at virtually all costs. Therefore, the practical effect of this policy will essentially be the same as if these children, most of whom are U.S. citizens, were made formally ineligible for these benefits.

In 1996, the House passed an immigration bill that would deny certain classes of immigrant parents the right to apply for benefits on behalf of their citizen children. In the face of strong Administration pressure, this provision was dropped from the final immigration law. If San Diego carries out its plan, it will effectively accomplish through the back door what the Administration prevented Congress from doing by statute in 1996.

This paper analyzes the legal issues that San Diego's proposed actions raise. Although these actions are part of a common design, San Diego County is, in fact, engaged in or proposing three different sets of activities:

- Requiring parents who are not applying for benefits for themselves to describe specifically their immigration status on the application form, with one option being "undocumented";²
- Sending letters to non-recipient immigrant parents of citizen children recipients who have identified themselves as undocumented, or whose immigration status is unclear to the county, threatening to turn over the parents' names to the INS unless they immediately remove the children

²The form omits several legal statuses from the options it presents to parents. Some *legal* immigrant parents may check "undocumented" because their status does not match any of those listed. In addition, it does not provide an opportunity for undocumented victims of domestic violence who are protected under the Violence Against Women Act to indicate that status. Although these women and children are not eligible for food stamps, they do qualify for TANF.

from TANF and food stamps or prove to the county's satisfaction that they have legal status; and

- Actually submitting these non-recipient parents' names to INS.

This paper analyzes separately each of the three steps San Diego is taking or proposing to take. Its primary focus is on the implications of these actions for families of food stamp recipients, although most of the civil rights issues raised here also would apply to TANF.³ This paper concludes that:

- Although San Diego needs some information on non-applicant parents to determine their children's eligibility for food stamps, it does not need to require non-applicant parents to identify themselves as undocumented. The 1996 welfare law gives USDA specific authority to require California to make changes in the application form and procedures in order to ensure the fairness of the application process.
- The threatening letters San Diego proposes to send raise serious legal concerns. The section of the welfare law allowing state and local governments to make certain reports to INS does not cover these letters sent to recipients. The 1996 welfare law and longstanding provisions of the Food Stamp Act allow USDA to prohibit the sending of such letters.
- Although the welfare law allows some information to be shared with the INS, the Administration still may intervene to ensure that the manner in which the information is shared does not violate the civil rights of U.S. citizen children. Although San Diego may be permitted to share information regarding immigrants of whom it becomes aware through the immigrants' efforts to obtain benefits for *themselves*, the county's policy singles out and explicitly targets immigrant parents who live with and care for their citizen children. In so doing, it discriminates on the basis of the exercise of the fundamental right to family association and privacy.⁴

This paper concludes with some illustrative examples of actions the Administration could take to protect the rights of citizen children in San Diego.

³The TANF statute specifically requires states to observe civil right protections. Social Security Act § 408(c); 42 U.S.C. § 608(c).

⁴The National Immigration Law Center (NILC) is preparing a separate analysis on section 434 of the 1996 welfare law, which deals with the sharing of information on an immigrants' status with the INS. Pub. L. 104-193, § 434; 8 U.S.C. § 1644. Accordingly, this paper does not analyze that provision.

II. Application Forms

San Diego uses a California application form that requires parents who are applying only for their children to specify the parents' immigration status. Parents are given several alternative boxes to check, one of which is labeled "undocumented."

The Food Stamp Act, as amended by the 1996 welfare law, requires states to "establish procedures governing the operation of food stamp offices that...provide timely, accurate, and fair service to applicants for, and participants in, the food stamp program [and] develop an application containing the information necessary to comply with this Act..."⁵ Where a state or county practice denies applicant or recipient households "fair service," the Administration has the authority to require corrective action. This action could include both prospective cessation of problematic practices and steps to ameliorate the harm caused by practices that have already taken place. USDA certainly could determine that it is unfair to require parents to give irrelevant and potentially self-incriminating information as a condition of their citizen children's ability to receive the food stamps to which they are entitled as low-income U.S. citizens.

Two arguments have been raised in defense of this form. First, it has been noted that the circumstances of parents living with these citizen children are relevant to determining the children's eligibility and benefit levels even if the parents are not seeking food stamps for themselves. Second, it is argued that the questions at issue, even if not needed for food stamps, are within the state's discretion under TANF and can be included in the food stamp application on that basis where the state is using the same application form for food stamps and TANF. Upon closer examination, neither of these arguments support the specific approach San Diego has taken.

Parents of minor children that live with those children generally must be included in the same food stamp household with the children.⁶ With some exceptions, most ineligible household members' income and resources are considered at least in part in determining the remaining household members' eligibility and benefit levels.⁷ States have options to count different amounts of the ineligible immigrants' income depending on whether the immigrant is in a category that was disqualified under pre-1996 food stamp rules or one that was made ineligible by the welfare law. But California has chosen to treat the income of all ineligible immigrants in the same manner, regardless of the immigration category in which they fall. California treats the income of ineligible immigrants the same as it treats the income of individuals who do not supply

⁵Food Stamp Act §§ 11(e)(2)(A) and (B)(i) and (ii); 7 U.S.C. §§ 2020(e)(2)(A) and (B)(i) and (ii).

⁶Food Stamp Act § 3(i); 7 U.S.C. § 2012(i); 7 C.F.R. 273.1(a)(2)(i)(B).

⁷7 C.F.R. § 273.11(c) and (d).

their Social Security numbers.⁸ Because California follows this approach, San Diego will have all of the information it needs to determine citizen children's eligibility and benefit levels if it either knows that the parents are immigrants not applying for food stamps or that the parents have not supplied their Social Security numbers. Whether the parents are undocumented or fall within some legal category is not relevant. In short, San Diego's requirement that the parents of eligible citizen children identify their specific legal or illegal status is not necessary for the food stamp program.⁹

Nor can these questions be justified as part of a TANF/food stamp common application form. Prior to the 1996 welfare law, states were required to use common applications and combined interview and verification procedures for AFDC and food stamps.¹⁰ States were required to submit application forms to USDA for approval.¹¹ Since states were required to combine their AFDC and food stamp application procedures, USDA could not reject an application form for requesting information unnecessary to food stamp eligibility determinations if the state needed that information for AFDC purposes.

In the course of replacing the AFDC program with the TANF block grant, the 1996 welfare law repealed all requirements concerning common application forms and joint processing procedures for food stamps and cash assistance.¹² Recognizing that many states' TANF-funded programs might operate on principles so different from the food stamp program that joint application procedures might be inappropriate, Congress eliminated the joint application and joint processing requirements. Congress also eliminated the requirement for USDA to approve food stamp application forms in advance. In their place, as noted above, the welfare law directed states to develop appli-

⁸See 7 C.F.R. § 273.11(c)(2).

⁹It may be noted that HHS is working actively with states to help them design Medicaid and CHIP applications that collect the information needed to provide benefits to eligible citizen children without requiring undocumented non-applicant parents to incriminate themselves.

¹⁰The statute required that, "[n]otwithstanding any other provision of law, the Secretary [of Agriculture] and the Secretary of Health and Human Services shall develop a system by which (1) a single interview shall be conducted to determine eligibility for the food stamp program and the aid to families with dependent children program ... (3) households in which all members are included in a federally aided public assistance ... grant ... shall have their application for participation in the food stamp program contained in the public assistance ... application form ... and (4) new applicants, as well as households which have recently lost or been denied eligibility for public assistance ..., shall be certified for participation in the food stamp program based on information in the public assistance ... case file to the extent that reasonably verified information is available in such case file." Food Stamp Act § 11(i) (1996); 7 U.S.C. § 2020(i) (1996).

¹¹Food Stamp Act § 11(e)(2) (1996); 7 U.S.C. § 2020(e)(2) (1996).

¹²Pub. L. 104-193, §§ 835(1)(A) and (2).

cation forms with information "necessary" for food stamp eligibility determinations and authorized USDA to intervene where a state or political subdivision¹³ is following procedures that deny an applicant or recipient "timely, accurate [or] fair service."¹⁴

Therefore, the 1996 law replaced a system under which USDA had an absolute right of prior approval over everything in the food stamp application form, but as a practical matter had to approve any questions needed for AFDC purposes, with one in which states write their own forms without federal oversight but USDA has authority to intervene where it finds that specific aspects of the form would deny applicants "timely, accurate, and fair service." Presumably, this authority will be exercised only in unusual and very serious cases. In so doing, USDA is not required to accept a practice that is unfair to food stamp households merely because the state wishes to apply that practice to its cash assistance program; as noted, states are no longer required to operate common application systems for food stamps and cash assistance. The statute authorizes states to prepare forms asking questions "necessary" for food stamp purposes, and in general USDA should not object to the inclusion of additional material relevant to other programs that the state finds useful to include. But the Administration does have the authority to step in to prevent manifest injustices.

Moreover, although USDA approved California's joint AFDC-food stamp application under pre-1996 law, that approval ceased to be pertinent once the 1996 legislation repealed the approval requirement and limited the federal role to preventing egregious unfair practices. (In addition, when USDA originally approved the California form, it could not know that San Diego would subsequently issue guidance to its staff urging them to press non-applicant immigrant parents to incriminate themselves unnecessarily.¹⁵) To be sure, USDA should not now impose burdensome requirements on the state concerning an application form to which the Department has not previously objected. But since states are no longer required to submit application forms or procedures to USDA for advance approval,¹⁶ USDA's actions to implement and enforce the

¹³In states such as California, where counties administer the food stamp program, both they and the state are considered a "State agency." See Food Stamp Act § 3(n)(1); 7 U.S.C. § 2012(n)(1). Although USDA customarily works with state officials when seeking compliance from a particular county, it does have the legal authority to intervene directly with county officials.

¹⁴Food Stamp Act § 11(e)(2)(B); 7 U.S.C. § 2020(e)(2)(B).

¹⁵A memo the county distributed on June 25 repeatedly advises eligibility workers to press immigrant parents to identify their specific immigration status: "ETs are reminded of the requirement to correctly identify each immigrant applicant's or household member's immigration status. ... During the month of July 1998, Intake supervisors must verify the accurate C/A [Citizenship/Alienage] coding of all cases in the CalWORKS, Food Stamp and General Relief programs. ... The case record must be updated through additions and deletions to accurately reflect undocumented immigrant household members..."

¹⁶See also Food Stamp Act § 11(d); 7 U.S.C. § 2020(d).

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requirement of “timely, accurate, and fair service” will necessarily take place in most cases after an objectionable practice has begun. That does not deny the Administration the capacity to require a state or county to take steps to minimize the impact of any unfair procedures that have been implemented.

Finally, sections 5(b) and 11(e)(5) of the Food Stamp Act¹⁷ prohibit states from imposing additional conditions of eligibility for food stamps not authorized by federal law. A requirement that non-applicant parents provide more information about their immigration status than is required to determine their children’s eligibility and benefit levels (especially potentially self-incriminatory information) is such a condition. Yet not only has San Diego failed to notify these parents that their children may receive food stamps without this information being supplied, the county has directed its eligibility staff to press immigrant parents to specify their immigration status.¹⁸

By using the food stamp application process to collect unnecessary information about non-applicant parents to use in pursuit of its immigration policy agenda, San Diego County is exceeding the scope of its authority under the Food Stamp Act.¹⁹ Whatever it may choose to do when operating independently as a county government, when administering the food stamp program it is not free to pursue ends, or to impose barriers on applicant and recipient households, that are not authorized by federal law.

III. Letters to Non-recipient Parents

Because INS apparently lacks the administrative resources to act on the information San Diego wishes to provide, in many ways the most harmful part of the county’s plan is the letter it intends to send to immigrant parents threatening to report them to INS unless they remove their citizen children from the TANF and food stamp programs. Once this letter has been sent, a severe chilling effect will set in whether or not the county actually reports particular immigrants. *Preventing this letter from going out is crucial to preserving citizen children’s access to food stamps and other public benefits.*

The requirement that states and their political subdivisions assure “fair service” to households extends to recipients as well as applicants. This letter, by creating a broad chilling effect, is manifestly unfair. It specifically encourages immigrant parents to terminate their children from food stamp benefits for which the children are eligible. (It does not inform parents that their children remain eligible for food stamps, much less explain how they may retain food stamps for their children without fear of reprisal

¹⁷U.S.C. §§ 2014(b) and 2020(e)(5).

¹⁸See footnote 15 above.

¹⁹See generally Food Stamp Act §§ 2, 3(n), 4(a) and (c), 5(a) and (b), 11(a), (c), (d) and (e), and 16(a); 7 U.S.C. §§ 2011, 2012(n), 2013(a) and (c), 2014(a) and (b), 2020(a), (c), (d), and (e), and 2025(a).

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from the INS.) It serves no constructive purpose in the food stamp program: as described above, the precise immigration status of ineligible immigrant parents is irrelevant to the calculation of their citizen children's benefits. Its purpose is to force the removal of eligible citizen children from the food stamp program. Federal regulations permit states to request verification only of information necessary for food stamp determinations.²⁰ The regulations specifically prohibit food stamp offices from discouraging eligible people from participating.²¹ The sole practical function of these letters is to chill legitimate program participation by citizen children.

It also should be noted that although section 434 of the welfare law permits state and local agencies to communicate certain information to INS, it does not authorize letters to immigrant households.²² The county has no legal need to send such letters. If the Administration determines that such letters are unfair to citizen children, it may direct the county not to transmit them.²³

IV. Reporting Names to INS

Whatever the precise interpretation adopted of section 434 of the welfare law,²⁴ states and counties clearly may share some kinds of information on immigrants with the INS. Equally clear, however, is that section 434 does not immunize otherwise un-

²⁰7 C.F.R. § 273.2(f)(1)-(3).

²¹7 C.F.R. § 273.2(c)(2)(i).

²²San Diego also might argue that these letters help immigrant families by allowing the county to weed out those immigrant parents that have legal status in this country before it contacts the INS. This benefit would be dubious at best. The INS will be far better able than county eligibility workers to determine who is and is not lawfully present in the United States. Some parents may have checked "undocumented" because they have lost their immigration papers; the INS's computer records could show that these immigrants have lawful status. Some may be undocumented victims of domestic violence who qualify for TANF (though not food stamps) pursuant to the Violence Against Women Act (VAWA).

Moreover, the INS will understand that there is nothing illegitimate about immigrant parents applying for food stamps on behalf of their citizen children. As noted above, many legal immigrant parents in this position may incorrectly believe getting food stamps for their children could endanger the parents' immigration status and withdraw their children from the program accordingly.

²³The questions of whether the application form violates the Food Stamp Act's "fair service" requirement and whether the proposed letter to immigrant households violates this requirement are separate questions. The Administration could find that either, both, or neither are unlawful under the statute.

²⁴Section 434 provides "Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigration status, lawful or unlawful, of an alien in the United States." Pub. L. 104-193, § 434; 8 U.S.C. § 1644.

lawful activity merely because that activity is carried out with the purpose of sharing information with the INS.

Limits apply to many legal activities. Indeed, even our most cherished constitutional rights have limits. Free speech and association activity protected by the first amendment can be subjected to reasonable restrictions as to the time, place and manner it takes place.²⁵ Nor does the first amendment provide an absolute shield where an action violates civil rights laws. Activity sanctioned under section 434 is no less subject to reasonable limits.

In many areas of law, communication that is protected or even required in general may be prohibited if done in an improper manner. Police officers generally are required to report evidence of crimes but may be prohibited from testifying to information they seized in an illegal search or obtained through an unlawfully coercive interrogation. Doctors, lawyers, and priests may be compelled to report crimes they witness walking to or from work while at the same time being prohibited from reporting information that came into their possession in a confidential communication. In cases where disclosure is permitted, or even required, as a general matter, disclosing information obtained in an improper way may be prohibited.

In addition, even if information came into one's possession legitimately, an unlawful manner of reporting may be proscribed. Police officers who report only those crimes committed by members of a particular racial or ethnic group can be prosecuted for civil rights violations even if all of the information they report is accurate and lawfully obtained. By the same token, a policy of prosecuting only offenders that have exercised lawful first amendment rights in a particular manner (and not prosecuting other offenders) would raise serious civil rights issues even if there is no doubt that the alleged crimes had been committed.

In another example, although section 434 may allow an official to communicate with the INS about an immigrant, extortion and public integrity laws still prohibit such officials from threatening to undertake such communication unless payments are made. Similarly, an official who becomes aware of classified information that the CIA has brought a foreign national into the country may not reveal that information to an INS agent and cite section 434 as a defense to a prosecution for revealing classified material.²⁶

²⁵*Cox v. New Hampshire*, 312 U.S. 569, 574 (1941) (upholding prohibition on demonstrations without parade permits); see also, e.g., *Grayned v. Rockford*, 408 U.S. 104 (1972) (upholding ban on loud demonstrations near schools while classes are in session); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (upholding limits on use of sound trucks on public streets).

²⁶Section 434 covers communications concerning legal aliens as well as those unlawfully in the country.

Thus, even if the Administration concludes that the type of communication San Diego proposes to make is within the ambit of section 434, the question remains whether the particular manner in which the county plans to act violates other laws.²⁷ If it does, the Administration may indicate that it finds communication acceptable under section 434 but insists it be done in a manner consistent with law.

It appears that the manner in which San Diego proposes to communicate is inappropriate for three reasons. First, as discussed above, it obtained this information by imposing requirements and asking questions the Administration may determine violate the Food Stamp Act's "fair service" requirement.

Second, the method by which San Diego obtained this information discriminates against nuclear family members who are living together, violating the constitutional privacy and freedom of association rights of the citizen children in these families. The Supreme Court has repeatedly held that forming a family is a "fundamental right" and that courts must subject rules or practices that restrict or punish persons exercising basic family rights to "strict scrutiny."²⁸ The Court has extended the right of families to live together even to extended families, striking down a municipal zoning ordinance that prevented a woman from living with her two grandchildren.²⁹ If the citizen children affected by San Diego's policy lived with more distant relatives or strangers — apparently undocumented relatives or strangers — they would not face the loss of their caregivers as a result of applying for food stamps.³⁰ Similarly, if San Diego only proposed to report immigrants who seek food stamps for themselves, it would have no differential effect based on living arrangement. But San Diego's policy explicitly tar-

²⁷A cardinal canon of statutory construction is that a court should seek to give effect to all applicable statutes, favoring a construction that avoids conflicts between them. Repeal by implication is not favored and will not be presumed unless no other reasonable construction is available.

²⁸E.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (unconstitutional to restrict remarriage by persons in arrears on child support); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (failure to waive filing fee for low-income persons seeking divorce has the unconstitutional effect of denying them the right to form a new family); see also *Loving v. Virginia*, 388 U.S. 1 (1967) (unconstitutional to restrict formation of inter-racial families).

²⁹*Moore v. City of East Cleveland*, 431 U.S. 494 (1977); see also *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) (unconstitutional to deny food stamps to group of unrelated persons living together). In *Lyng v. Castillo*, 477 U.S. 635 (1986), the Court upheld food stamp rules requiring parents and children who lived together to apply for food stamps as a single unit in many circumstances, finding it improbable that this rule would burden families' choices about living arrangements. The modest reduction in food stamps to reflect economies of scale that *Castillo* upheld contrasts sharply with the threat of deportation that San Diego would impose as a penalty on citizen children living with their immigrant parents.

³⁰San Diego's June 25 memo states that "[t]he following exceptions will not be reported to INS ... Unaided roommates [and] Undocumented non-needy caretaker relatives of children receiving CalWORKs." Its draft letter to immigrant households defines "caretaker relatives" as "non-parents."

gets immigrant parents living with and caring for their citizen children. In so doing, it discriminates on the basis of the exercise of the fundamental right to family association and privacy. States may not deny public benefits to persons on the basis of their exercising protected constitutional rights.³¹

Finally, San Diego relies on information obtained through coerced self-incrimination by immigrant parents. The Supreme Court has held in numerous contexts that the fifth and fourteenth amendments prohibit the state from requiring self-incrimination on pain of being denied an important privilege, such as employment,³² permission to bid on public contracts,³³ professional licensure,³⁴ eligibility to hold public office,³⁵ or the right to defend a civil proceeding.³⁶ San Diego requires immigrant parents to incriminate themselves on pain of their citizen children being denied their federal entitlement to food stamps. Here again, if San Diego limited its communication to persons who voluntarily disclosed their unlawful status in the course of seeking food stamps for themselves, the situation would be very different.

In closing, it should be noted that even if San Diego could argue that it might have provided food stamps to the children even if their parents had declined to answer the self-incriminating questions on their children's applications, the children's parents could not reasonably have known that. Indeed, the county distributed a memo to its eligibility workers last month giving precisely the opposite message: that its staff is expected to determine non-recipient parents' precise immigration status.³⁷ A basic requirement of due process is that the government communicate in a manner reasonably

³¹E.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (state may not deny welfare to persons exercising right to interstate travel); *Speiser v. Randall*, 357 U.S. 398 (1958) (state may not deny tax exemption to person refusing to make loyalty oath).

³²*Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Association v. Commissioner of Sanitation of New York*, 392 U.S. 280 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

³³*Lefkowitz v. Turley*, 414 U.S. 70 (1973).

³⁴*Spevack v. Klein*, 385 U.S. 511 (1967).

³⁵*Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).

³⁶*Boyd v. United States*, 116 U.S. 616 (1886).

³⁷See footnote 15 above. San Diego's memo of June 25 is in marked contrast to California's new Medicaid application form, which takes pains to advise undocumented parents of the proper procedures to follow in seeking coverage for their citizen children. Clearly California can devise a form to address these problems appropriately.

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calculated to apprise affected persons of their rights.³⁸ San Diego clearly did not endeavor to help immigrant parents understand that they were not required to specify their status to obtain food stamps for their children.

V. Options for the Administration

The legal situation described above gives the Administration several options to intervene on behalf of the citizen children threatened by San Diego's actions:

- The Administration could advise San Diego that it is opening a civil rights investigation into the county's plans in light of the apparent discrimination against U.S. citizen children living with their undocumented parents and the compulsory self-incrimination that results from the application form and the county's directive that its eligibility technicians press non-applicant parents to clarify their immigration status. Such an investigation could be opened at the Department of Justice, at USDA's Office of Civil Rights, or both.
- The Administration could inform San Diego that its actions and plans raise serious civil rights questions and direct the county not to proceed until these legal issues can be resolved. The Administration could ask the county to provide copies of training manuals, operations memoranda to its eligibility staff, and other documents that would help determine the legality of the county's actions.
- The Administration could direct San Diego to submit a detailed plan for how it intends to proceed and to defer implementation of further steps until the Administration can determine that this plan meets the standards established in the Food Stamp Act and civil rights laws.
- The Administration could prohibit San Diego from sending threatening letters to immigrant households as a violation of the Food Stamp Act's requirement of "fair service" to applicants and recipients.

³⁸*Greene v. Lindsay*, 456 U.S. 444 (1982); *Mullane v. Central Hanover Bank & Trust* 339 U.S. 306 (1950); *Lopez v. Espy*, 83 F. 3d 1095 (9th Cir. 1996).