Presidential Signature Requirements as a Tool for Enforcing Democratic Accountability

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As the size and scope of the executive branch has expanded in recent decades, voters are increasingly interested in ensuring that it can nonetheless be held accountable to them. Litigation regarding the scope of the President's removal power has been one important mechanism for ensuring democratic accountability. Some of these cases are discussed in other papers in this symposium. While enforcing these constitutional democratic accountability provisions is important, they merely provide the floor for democratic accountability. Congress may, and should, pass legislation that adopts additional measures to protect the value of democratic accountability.

This paper will focus on twin statutory provisions already in place primarily to protect democratic accountability—the requirements in Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972 that all rules promulgated under these statutes be signed by the President. The President later delegated this signature responsibility to the Attorney General, a delegation that I argue is unlawful. Title VI and Title IX rules not signed by the President can, and should, be challenged as improperly issued. Congress should also consider appropriate circumstances, such as when regulating in particularly controversial areas, for adding Presidential signature requirements to new statutes to protect democratic accountability.

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I. HISTORY OF THE PRESIDENTIAL SIGNATURE REQUIREMENT

Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funds from discriminating on the basis of race, color, or national origin.[1] Because Congress understood that rules interpreting this broad language could prove particularly controversial, it added a unique[2] procedural safeguard to ensure that Title VI rulemakers would be held accountable. Title VI requires that any rules any agency promulgates under Title VI must be personally signed by the President: "No such rule, regulation, or order shall become effective unless signed by the President."[3] Note the "shall," which is stronger than a statute that merely says that the President *may* promulgate such rules. It indicates the President has this responsibility exclusively.

When debating Title VI, Congress was legislating against a backdrop of significant concern about federal agencies taking civil rights enforcement measures that were then deeply unpopular at least in some quarters. In 1963, for example, the United States Commission on Civil Rights issued a report recommending that the President cut off all federal funding to the State of Mississippi because of that state's record of discrimination against Black voters.[4] The recommendation generated almost universal opposition, with even *The New York Times* editorializing against it.[5] The recommendation's critics claimed (sometimes sincerely, perhaps sometimes more disingenuously) that the people who would be most hurt would be Black schoolchildren receiving free lunch or Black farmers getting federal agricultural aid.[6] President John F. Kennedy eventually declined to act, stating: "I don't have the power to cut off the aid in a general way as was proposed by the

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1. 42 U.S.C. § 2000d *et seq*.

2. While there are a number of other areas in which Congress delegates authority directly to the President, none of which I am aware function in the same way to add an extra hurdle to notice and comment rulemaking. Also, no such requirements appear designed to further democratic accountability. Some authorize or encourage the President to exercise greater oversight over regulatory areas touching on international relations or foreign policy, where the President has traditionally exercised "very delicate, plenary and exclusive power" as "the sole organ of the federal government." *See e.g*., United States v. Curtiss-Wright, 299 U.S. 304, 320 (1936). Examples of statutes falling into this category include 19 U.S.C. § 1862 (authorizing the President to impose tariffs if the Commerce Department finds that such imports threaten national security) or 49 U.S.C. § 41304(b) (granting the Secretary of Transportation the authority "subject to the approval of the President" to suspend the permits of foreign air carriers). Others seem intended to authorize the President to act more quickly than an agency typically could in an emergency. *See, e.g*., 19 U.S.C. § 2251 (authorizing the president to impose temporary trade measures if the International Trade Commission determines a surge in imports is a substantial cause or threat of serious injury to a domestic injury). Reasonable persons can disagree on the scope of presidential power in these areas. My point here is only that presidential approval authority in these contexts serves different purposes.

3. 20 U.S.C. § 1682.

4. John F. Kennedy, Letter to the Chairman in Response to a Report on Mississippi by the Civil Rights Commission (Apr. 19, 1963), available at THE AMERICAN PRESIDENCY PROJECT, U.C. SANTA BARBARA, https://www.presidency.ucsb.edu/node/235771 [https://perma.cc/VC6P-K6M4].

5. James Reston, *How to Make Things Worse Than They Really Are*, N.Y. TIMES, April 19, 1963, at B42.

6. *Bills Relating to Extension of the Civil Rights Commission: Hearing before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 88th Cong. (1963).

Civil Rights Commission and I would think it would probably be unwise to give the President of the United States that kind of power."[7] Running through the public commentary published in *The Congressional Record* during the Civil Rights Commission re-authorization hearings about this episode is a fear that the personnel staffing federal agencies were prepared to take measures to enforce civil rights principles that would not garner majority public support if Congress had had to vote on them democratically.

Some of this editorial commentary and legislative history has not aged well. It is now widely acknowledged that Mississippi was egregiously discriminating against Black voters in violation of the Constitution. At the same time, even if broad federal power would have been used for a noble goal in that instance, some of the concerns about broad federal power being used in a less benign manner in the future are more defensible.

Once Title VI made it to the floor, similar fears about bureaucrats pushing through a civil rights agenda that could not have been democratically enacted frequently came up in the Congressional Record. Rep. Basil Lee Whitener (D-North Carolina) lamented the power Title VI could give to a "faceless bureaucrat in the multitude of agencies downtown" and argued that:

> If this type of legislation is written upon the statute books you give no control by the President, no control by Congress, but place unbridled discretion in the hands of an agency head or some functionary in an agency . . . . You are going to say to the people of this country that we are giving to some bureaucrat the right to say that the little children in your State and in my State may be deprived without the consent of the President or Congress of the right to get a bottle of milk or participate in the food lunch program at their schools.[8]

Representative Albert Rains (D-Alabama) made a similar argument:

> Do you honestly think that this Congress can pass a bill that will say to any city in the United States with a mayor who disagrees with the viewpoint expressed in this legislation that we can deny to the people of that city the benefits of laws and program [sic] that we pass for the benefit of all people of the country . . . . So what we are doing here is placing an intolerable burden upon the programs that Members of Congress on my right have supported these many years.[9]

Representative John Flynt (D-Georgia) agreed, stating that "Title VI would place dictatorial power into the hands of a nameless and faceless employee of the many Federal agencies."[10]

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7. *In Perspective*, LAWRENCE DAILY J.-WORLD, Apr. 23, 1963.
8. 110 CONG. REC. 2465 (1964).
9. *Id.*
10. *Id.* at 2466.

In response to such concerns, Rep. John Lindsay (R-New York) introduced an amendment to Title VI because

> the rulemaking power is so important in this area and can be so significant because of the latitude that this title by definition has to give to the executive in drafting rules and regulations that the Chief Executive should be required to put his stamp of approval on such rules and regulations.[11]

In the Senate, Sen. John Pastore (D-Rhode Island) explained the rationale for the signature requirement as follows:

> Another objection that has been lodged against Title VI is that it would give to the executive branch broader and sweeping powers that it has not heretofore known. This is totally inaccurate. Most Federal agencies now have authority to refuse or terminate assistance for failure to comply with a variety of requirements imposed by statute or administrative action. The difference is that this existing statutory activity is not surrounded by the procedural safeguards provided for in Title VI.[12]

Lindsay's amendment became part of the final statute.

The presidential approval rule was supposed to work in tandem with other safeguards to protect democratic accountability. Another amendment to Title VI provided that, before a federal agency terminated funding to any recipient for Title VI compliance, it had to file a report with Congress and wait 30 days.[13] This provision was designed to avoid situations like the Civil Rights Commission's recommendation supporting the termination of all federal funds to Mississippi. Because recipients are often dependent on federal funds and tend to fold quickly once a Title VI investigation starts, to the best of my knowledge, no federal agency has ever terminated or even recommended termination of funds, and so this provision has never been triggered.

Eight years later, Title IX of the Education Amendments of 1972 was enacted to prohibit sex discrimination by education programs or activities that receive federal funding. Its core anti-discrimination prohibition is nearly identical to that of Title VI, and the Supreme Court has held that because of the close connection between the two statutes, Title IX should be applied and interpreted as Title VI has been.[14] Congress apparently had many of the same concerns about democratic accountability. While readily quotable exchanges about the purpose of the signature requirement do not appear in Title IX's legislative record, Congress nonetheless adopted one nearly identical to the requirement in Title VI. It even added an additional safeguard to promote democratic accountability—a legislative veto—

11. *Id*. at 2499.
12. *Id*. at 7063.
13. 20 U.S.C. § 42.104(b).
14. Cannon v. Univ. of Chi., 441 U.S. 677, 694–8 (1977).

although a similar legislative veto was struck down in *INS v. Chadha*, and so it is almost certain that any effort by Congress to exercise this legislative veto would today be struck down as unconstitutional.

Although Rep. Lindsay's remarks stress that it is important for a President to personally approve any Title VI rule, and the same principle should presumably hold for Title IX, this approval authority was later delegated to the Attorney General. But such delegations are legally questionable. An Office of Legal Counsel ("OLC") opinion, for example, addresses the similar question of whether the presidential responsibility to approve summary suspensions of securities trading may be delegated to the Secretary of the Treasury.[15] According to this opinion, the President is generally authorized to delegate functions to the "head of any department or agency in the executive branch,"[16] unless another provision of law "affirmatively prohibit[s] delegation of the performance of such function" or "specifically designate[s] the officer or officers to whom it may be delegated."[17] OLC read the securities statute at issue to neither affirmatively prohibit presidential delegation nor specifically designate a subordinate officer to receive the delegation of the approval authority.

OLC found that the category of statutes that affirmatively prohibits delegation is "very narrow" and includes statutes that prohibit delegation by "their terms" or by "express statements in the legislative history."[18] Further, in "extremely limited circumstances, the function involved might be of such fundamental gravity as to render inescapable the conclusion that Congress would not have created the function but for the assumption that the President would exercise the function personally."[19] While OLC found that the power to suspend trading on a national market is a grave responsibility with profound consequences, it permitted this delegation of presidential power because (1) the statute was silent regarding delegation and (2) according to the relevant legislative history, Congress might still have created the relevant function even if it knew that the President might not exercise it personally.

Like the securities statute at issue in the OLC opinion, Titles VI and IX do not affirmatively prohibit presidential delegation of the signature authority. But

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15. Delegation of Authority to Approve Suspension of Securities Trading on a National Market, 6 Op. O.L.C. 428 (1982). OLC is sometimes criticized for being too deferential to presidential power and discretion. *See, e.g.*, Annie Owen, *A Roadmap for Reform: How the Biden Administration Can Revitalize the Office of Legal Counsel*, JUSTSECURITY (Dec. 16, 2020), https://www.justsecurity.org/73879/a-roadmap-for-reform-how-the-biden-administration-can-revitalize-the-office-of-legal-counsel/ [https://perma.cc/ZQ9A-XZ7K]. That makes the limits on presidential power and discretion articulated in this opinion all the more noteworthy.

16. 3 U.S.C. § 301. Both § 301 and § 302 were enacted in 1951 as part of the Presidential Subdelegation Act. This Act reflected the recommendations of a commission chaired by Herbert Hoover that was intended to make the executive branch function more efficiently.

17. 3 U.S.C. § 302.

18. Delegation of Authority to Approve Suspension of Securities Trading on a National Market, 6 Op. O.L.C. at 429.

19. *Id.*

neither do they affirmatively permit it. Some of the "express statements in the legislative history" indicate that Congress might not have created this particular authority if it had known that it might be delegated. Representative Lindsay, the proponent of the amendment, specifically stresses the importance of the "Chief Executive" personally putting a stamp of approval on rules issued under Title VI. Having even a high-level political appointee sign the rule in the President's stead would subvert Lindsay's stated goal of democratic accountability. At the very least, the current President (or any future President who values democratic accountability) should carefully examine the legality of this delegation and consider reclaiming the authority to sign future rules issued pursuant to Titles VI and IX.

If future Presidents decline to reclaim the authority to sign Title VI and IX rules, litigators should consider challenging future Title VI and IX rules, or those issued within the six-year federal civil statute of limitations for all federal civil actions,[20] on the grounds that they were not properly signed. The next Part discusses the history of significant rules issued pursuant to Titles VI and IX and identifies potential targets for litigation.

II. RULEMAKING UNDER TITLE VI AND IX

A. Title VI

President Lyndon Johnson personally signed the first Title VI rules on July 29, 1966.[21] The first broad prohibition in the set of rules generally tracks Title VI's broad ban on race, color, and national origin discrimination.[22] Because this rule essentially reiterated the statute, it appears to have been noncontroversial. Next in the set came a list of prohibitions that apply to very specific actions of discrimination against individuals.[23] The final prohibition contained in this set of rules forbids certain acts that would subject "individuals" or a "class of individuals" to discrimination.[24] Later interpreters have sometimes read this rule as creating a prohibition on disparate impact discrimination, but except for in limited

20. There is a general six-year statute of limitations for civil actions brought against the United States. 28 U.S.C. § 2401(a). All courts that have considered the question of what statute of limitations applies to APA actions agree that the six-year limitations period found in § 2401(a) is applicable. *See, e.g.*, Trafalgar Cap. Ass'ns, Inc. v. Cuomo, 159 F.3d 21, 34 (1st Cir. 1998); Polanco v. U.S. Drug Enf't Admin., 158 F.3d 647, 656 (2d Cir. 1998); Pa. Dep't of Pub. Welfare v. U.S. Dep't of Health & Human Services, 101 F.3d 939, 944–45 (3d Cir. 1996); Jersey Heights Neighborhood Assoc. v. Glendening, 174 F.3d 180, 186 (4th Cir. 1999); Dunn McCampbell Royalty Int., Inc. v. Nat'l Park Serv., 112 F.3d 1283, 1286 (5th Cir. 1997); Sierra Club v. Slater, 120 F.3d 623, 631 (6th Cir. 1997); Sierra Club v. U.S. Army Corps of Eng'rs, 446 F.3d 808, 815 (8th Cir. 2006); Turtle Island Restoration Network v. U.S. Dep't of Com., 438 F.3d 937, 942–43 (9th Cir. 2006); Daingerfield Island Protective Soc'y v. Babbitt, 40 F.3d 442, 445 (D.C. Cir. 1994).

21. 28 C.F.R. § 42.104(b) (2023).

22. Implementation of Title VI of Civil Rights Act of 1964 with Respect to Federally Assisted Programs Administered by Department of Justice, 31 Fed. Reg. 10265 (July 29, 1966).

23. 28 C.F.R. § 42.104(b)(1)(ii-vi) (2023).

24. *Id.* at 42.104(b)(2).

circumstances, I believe that interpretation to be mistaken for reasons I have explained at greater length elsewhere.[25]

When the Department of Health, Education, and Welfare split into the Departments of Health and Human Services and Education, each of the new agencies re-promulgated Title VI rules that are nearly identical to the 1966 rule.[26] These rules were amended again on November 13, 2000.[27] Mainly, the 2000 amendments changed the definition of "program or activity" in certain contexts to match the broad definition found in the Civil Rights Restoration Act.[28] The previous version of the Title VI disparate impact rule had applied only narrowly to programs or activities within institutions that received federal funds directly—that is, if a college's Agriculture Department received federal funds from the Department of Agriculture but its Physics Department did not, disparate impact race discrimination by the Agriculture Department was prohibited but disparate impact race discrimination by the Physics Department would not be. The new rule redefined "program or activity" more broadly, so that if any endeavor by a university received federal funding, all programs or activities within it were prohibited from disparate impact discrimination. To use the same example as above, even if the Physics Department did not directly receive federal money, it would still be prohibited from disparate impact race discrimination because the Agriculture Department received federal money. Although these rules would have expanded Title VI's coverage considerably, they were non-controversial at the time, receiving zero public comments despite publication of a draft in the Federal Register.[29] This Rule was signed only by Richard Riley, Secretary of Education.[30]

During the eight years of the George W. Bush Administration, relatively little new interpretive ground was broken in Title VI enforcement. But that changed when President Barack Obama's appointees came to office. These appointees generally avoided announcing their interpretations through binding rules and instead announced them through interpretive guidance. The term "guidance" does not itself appear in the Administrative Procedure Act ("APA") but is often used informally to refer to what the APA calls "interpretive rules" and "general

25. Gail Heriot & Alison Somin, *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*, 22 TEX. REV. L. & POL. 472, 546–547 (2018).

26. Nondiscrimination under Programs Receiving Federal Assistance through the Department of Education Effectuation of Title VI of the Civil Rights Act of 1964, 45 Fed. Reg. 30918 (May 9, 1980).

27. Conforming Amendments to the Regulations Governing Nondiscrimination on the Basis of Race, Color, National Origin, Disability, Sex, and Age Under the Civil Rights Restoration Act of 1987, 65 Fed. Reg. 68050, 68053 (Nov. 13, 2000).

28. 102 Stat. 28 (1988).

29. Conforming Amendments to the Regulations Governing Nondiscrimination on the Basis of Race, Color, National Origin, Disability, Sex, and Age Under the Civil Rights Restoration Act of 1987, 65 Fed. Reg. at 68052.

30. *Id.*

statements of policy."[31] Those two types of agency rules are specifically exempt from notice and comment procedures and other requirements imposed by the APA (and implicitly also from Title VI's presidential signature requirement). Whether an agency guidance qualifies as an "interpretive rule" depends on the "prior existence or non-existence of legal duties and rights."[32] That is, an interpretive rule must truly be an interpretation of an existing statute or rule and may not impose new duties on regulated entities. The term "general statements of policy"[33] is also undefined by the APA; a pair of leading administrative scholars define it as "an agency memorandum, letter, speech, press release, manual, or other official declaration by the agency of its agenda, its policy priorities, or how it plans to exercise its discretionary authority."[34]

Some Title VI guidances are genuine interpretive rules or statements of policy. Some, for example, state how the agency will apply well-established legal rules to address a novel problem. "Joint DOJ/OCR Guidance on [Racially] Segregated Proms," an interpretive rule from the George W. Bush Administration, is one example of a guidance that applies established legal rules to a phenomenon that suddenly appeared in news headlines.[35] Some guidances that reiterated school districts' Title VI obligations following the more recent outbreak of the COVID-19 pandemic are other examples.[36]

But other Title VI guidances have levied new duties on regulated entities. Many of these have applied the disparate impact approach to civil rights enforcement, under which a funding recipient is not liable merely for intentional discrimination, but for practices that have a disproportionate effect on persons of one particular race, color, or national origin and that are not justified by educational necessity. But virtually every educational practice has a disproportionate effect on some racial or national origin group, meaning that it is easy for regulators to use disparate impact to dismantle educational practices that are generally not discriminatory as that term is understood by most speakers of American English but which the regulators dislike for other reasons.

Take, for example, the practice of school suspensions for misbehavior, which some advocates criticize because it causes suspended students to miss out on valuable learning time. In response to these concerns, the Department of Education

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31. Ronald Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN L. REV. 263 (2018) (referring to the "emerging tendency among administrative lawyers to refer to interpretive rules and policy statements collectively as 'guidance'").

32. Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1110 (D.C. Cir. 1991).

33. Administrative Procedure Act, 5 U.S.C. § 553(b)(A).

34. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 677 (2010).

35. *See* OFF. OF C.R., U.S. DEP'T OF EDUC. & C.R. DIV, U.S. DEP'T OF JUSTICE, OCR-00033, DEAR COLLEAGUE LETTER: JOINT DOJ/OCR GUIDANCE ON SEGREGATED PROMS (2004).

36. *See, e.g.*, Off. of C.R., U.S. Dep't of Educ., Questions and Answers for Postsecondary Institutions Regarding the Covid-19 National Emergency (2020) (stating that institutions that had temporarily closed physical classes and moved entirely to online platforms still had to comply with Title VI, among other major civil rights laws); Off. of C.R., U.S. Dep't of Educ., Questions and Answers for K-12 Public Schools in the Current K-12 Environment (2020).

promulgated guidance in the form of a "Dear Colleague" letter that required schools to significantly limit suspending students and other disciplinary practices on the theory that these practices had a disparate impact on the basis of race and color.[37] Because this document was promulgated as a guidance, then-President Barack Obama did not sign it. This guidance went significantly beyond the Department's statutory authority under Title VI.[38] This guidance was politically controversial, with the *Wall Street Journal*'s editorial board and columnists[39] weighing in against it and *Atlantic Monthly* and *Washington Post* columnists defending it.[40]

Although President Obama was often praised for being a particularly thoughtful and nuanced commentator on racial issues, he said nothing publicly defending this guidance. If anything, his speeches about the importance of individual effort and personal responsibility that downplayed hidden racial bias in education convey the opposite message.[41] While it is hard to find polling data that directly gauges public opinion on the Education Department's particular approach, the data we do have that comes closest suggests that federally mandated racial quotas in discipline are unpopular. A poll of 4,000 recipients conducted by EducationNext found that 51% of respondents responded "Oppose" to "Do you support or oppose federal policies that prevent schools from expelling black and Hispanic students at higher rates than other students?"[42] If President Obama had had to personally sign this document and take direct political heat for it, it is entirely possible that it either would never have been issued or would have been more limited.

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37. OFF. OF C.R., U.S. DEP'T OF EDUC. & C.R. DIV, U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER: THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE (2014).

38. Heriot & Somin, *supra* note 25.

39. The Editorial Board, *The Discipline of Betsy DeVos*, WALL ST. J. (December 21, 2018), https://www.wsj.com/articles/the-discipline-of-betsy-devos-11545436300 [https://perma.cc/5PXG-UWKL]; Jason L. Riley, *An Obama Decree Continues to Make Public Schools Lawless*, WALL ST. J. (March 21, 2017), https://www.wsj.com/articles/an-obama-decree-continues-to-make-public-schools-lawless-1490138783 [https://perma.cc/AR8A-K99H].

40. Adam Harris, *Trump's School-Safety Commission's Strange Focus on Discipline*, ATLANTIC (December 18, 2018), https://www.theatlantic.com/education/archive/2018/12/trumps-school-safety-commissions-strange-focus-on-discipline/578455/ [https://perma.cc/8G76-FV2H]; Joe Davidson, *Opponents ready to fight Trump's plan to repeal Obama's 'rethink' of school discipline*, WASHINGTON POST (April 10, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/04/10/opponents-ready-to-fight-trumps-plan-to-repeal-obamas-rethink-of-school-discipline/ [https://perma.cc/V52H-G83W].

41. *See, e.g.*, *Full Text: President Obama's speech to BTW students*, ACTION NEWS 5 (May 16, 2011), https://www.actionnews5.com/story/14653453/full-text-president-obamas-speech-to-btw-students/ [https://perma.cc/2ZNS-PS8J]; Off. of the Press Sec'y, The White House, Remarks of President Barack Obama—As Prepared for Delivery—Back to School Speech (Sept. 14, 2010), https://obamawhitehouse.archives.gov/the-press-office/2010/09/13/remarks-president-barack-obama-prepared-delivery-back-school-speech [https://perma.cc/JKQ7-V256].

42. *Results from the 2015 Education Next Poll,* EDUCATIONNEXT, (Aug. 10, 2015), https://www.educationnext.org/2015-ednext-poll-interactive/ [https://perma.cc/25YC-UQBX]. Twenty-nine percent of the general public answered, "neither support or oppose." Forty-two percent of Democrats also answered "Oppose." I find the question unclear because it does not distinguish between scenarios in which the discipline disparity is due to intentional discrimination versus those where it is not.

Although the Trump Administration rescinded the school discipline guidance in 2018,[43] the Biden Administration issued a Notice of Proposed Rulemaking in June 2021 indicating that it plans to issue a similar rule.[44] Like President Obama before him, President Biden has also personally stayed away from speaking on this issue. Promulgating a new discipline rule through notice and comment rulemaking would fix some of the APA problems with the Dear Colleague letter that critics have identified. Assuming the new rule takes a disparate impact approach to student discipline, it is likely that it would go beyond the scope of Title VI, which is not a disparate impact statute and authorizes disparate impact rules only in limited situations.[45] There are also serious questions about the constitutionality of disparate impact rules more generally.[46] Therefore, at least one school or parent group will almost certainly challenge the new rule on statutory and/or constitutional grounds. Assuming President Biden does not sign the new rule himself, the lawyers bringing any such challenge should consider including a claim that this law was not presidentially signed.

I express no opinion about whether problems with exclusionary student discipline call for a federal remedy. But, if they do, this is a decision that ultimately needs to be made by Congress. Challenging a lack of signature would help to reestablish democratic accountability for decisions about race and discipline.

B. Title IX

The first Title IX rules were published in 1975 by the then-Department of Health, Education, and Welfare ("HEW").[47] Gerald Ford personally signed these rules.[48] Following the HEW split, the Departments of Health and Human Services and Education each adopted near-identical copies of the old regulations.[49] At about the same time, the Departments of Agriculture and Energy also published their own very similar Title IX rules. On October 29, 1999, the Department of Justice and 23 other federal agencies published a Notice of Rulemaking to implement Title IX.[50] This "Title IX common rule" is textually very similar to its 1970s ancestor but contained updates to reflect recent Supreme Court decisions. The Department of Justice and 20 other agencies published the

43. *See* OFF. OF C.R., U.S. DEP'T OF EDUC. & C.R. DIV, U.S. DEP'T OF JUSTICE, OCR-000113, DEAR COLLEAGUE LETTER: UPDATES TO DEPARTMENT OF EDUCATION AND DEPARTMENT OF JUSTICE GUIDANCE ON TITLE VI (2018).

44. Request for Information Regarding the Nondiscriminatory Administration of School Discipline, 86 Fed. Reg. 30449 (June 8, 2021).

45. Heriot & Somin, *supra* note 25, at 525–63. *See* Alexander v. Sandoval, 532 U.S. 275 (2001).

46. Ricci v. DeStefano, 129 S. Ct. 2658, 2682–83 (2009) (Scalia, J., concurring).

47. Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 40 Fed. Reg. 24128 (June 4, 1975).

48. Nondiscrimination on the Basis of Sex under Federally Assisted Education Programs and Activities, 40 Fed. Reg. 24137 (June 4, 1975).

49. *See* 45 C.F.R. § 86 (2023).

50. *See* Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance, 64 Fed. Reg. 58568 (Oct. 29, 1999).

final Title IX common rule on August 30, 2000.[51] This rule was signed by then-Attorney General Janet Reno.[52] The Department of Justice received only 22 comments, five of which came from other federal agencies.[53]

As with Title VI, many of the most important rules defining how Title IX gets federally enforced have been guidances, Dear Colleague letters, or other informal rules not issued pursuant to formal notice and comment rulemaking procedures. At least until recently, the most famous of these was the Policy Interpretation from 1979, which set forth the famous three-part test regarding sex discrimination in college athletics.[54] Though HEW followed what was essentially a stripped-down version of notice and comment rulemaking in promulgating the rule, it was signed only by the HEW Secretary and was not signed by the President or Attorney General.[55] OCR later reaffirmed its commitment to the three-part test through a 1996 Clarification, which was signed only by then-Department of Education Assistant Secretary for Civil Rights Norma Cantu.

Although there is almost nothing in Title IX's legislative history about athletics, for a long time enforcement of Title IX was so centered on athletics that much of the general public misunderstood it as a statute solely about college sports.[56] In brief, Title IX's application to athletics has been controversial largely because the 1979 Guidance had the practical effect of many colleges and universities cutting men's teams to ensure "substantial proportionality" in athletic opportunities for men and women.[57] Once again, if President Jimmy Carter had had to sign it personally, one wonders if this particular policy interpretation would have been issued in the same form.

More recently, Title IX has also come into the headlines for rules that President Obama's appointees first issued, first regarding sexual assault and harassment and again regarding sexual orientation and gender identity. The Supreme Court has interpreted Title IX's prohibition on sex discrimination to encompass sexual harassment when such harassment is severe, pervasive, and objectively offensive.[58] On the day that President Obama announced his re-election bid in 2011, then-Vice President Joe Biden and then-Secretary of Education Arne Duncan unveiled a 19-page Dear Colleague letter on sexual assault at the

51. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52857 (Aug. 30, 2000).

52. *Id.* at 52881.

53. *Id.*

54. Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413 (Dec. 11, 1979).

55. *Id.*

56. My favorite factoid in this vein: there is a women's athletic apparel company named Title Nine, which I understand is the only fashion business ever named after a section of the U.S. Code.

57. For longer discussions of the legal and policy problems with the three-part test, please see Alison Somin, *The Obama Administration: Changing the Rules of the Title IX Game*, 11 ENGAGE 26 (Dec. 2010), or JESSICA GAVORA, TILTING THE PLAYING FIELD: SPORTS, SEX, AND TITLE IX (1992).

58. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 329 (1999).

University of New Hampshire.[59] In 2014, the Department of Education's Office for Civil Rights ("OCR") issued a forty-six page document, "Questions and Answers on Title IX and Sexual Assault," that explained in detail what all educational institutions ought to do to eliminate sexual harassment. OCR did not follow notice and comment rulemaking procedures before promulgating this document, and it was signed only by Catherine Lhamon, the Assistant Secretary for Civil Rights.[60] It defined sexual harassment more broadly than had the Supreme Court, finding that Title IX prohibited harassment that was severe *or* pervasive. Among other questionable provisions of this Guidance was a requirement that schools had to use a preponderance of evidence standard in determining whether a student has committed sexual harassment. Neither Title IX itself nor the Supreme Court had ever identified such a requirement, and if a school uses a clear and convincing standard in similar discipline proceedings, it would seem more appropriate to use that standard here. While some Democratic senators and women's rights advocacy groups praised the guidance for taking a hard line against sexual assault, it was also harshly criticized, including from some unlikely sources like the Harvard and University of Pennsylvania law faculties. "Harvard has adopted procedures for deciding cases of alleged sexual misconduct which lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX," 28 Harvard Law professors wrote in a piece published in *The Boston Globe*.[61]

Here, President Obama and the White House did take a more personal role in advocating for the new policy, signing a Presidential Memorandum that created a White House Task Force to Protect Students from Sexual Assault.[62] Still, the presidential memorandum Obama signed is more vague than the detailed guidance issued by OCR. It is hard to find anyone who disagrees with the basic moral principle that sexual assault is wrong. The tougher questions are what, if any, the federal role should be in preventing it, and how to deal with the trade-offs when preventative efforts infringe on individual rights or basic due process protections. Signing a vague presidential memorandum, but not the detailed OCR rule, essentially allowed President Obama to get credit for what was popular about the new sexual assault rules while ducking accountability for its flaws.

Because of these problems, among others, the Trump Administration withdrew some of the more controversial sexual harassment guidances and promulgated

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59. OFF. OF C.R., U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: STUDENT-ON-STUDENT SEXUAL HARASSMENT AND SEXUAL VIOLENCE (2011).

60. Off. of C.R., U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (2014).

61. Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE (Oct. 14, 2014), https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html [https://perma.cc/TT4G-HG6E].

62. Off. of the Press Sec'y, The White House, Memorandum—Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a [https://perma.cc/S2S8-GXSS].

formal notice and comment rules concerning sexual misconduct in 2020.[63] These rules were signed only by Secretary of Education Betsy DeVos. While several lawsuits were brought challenging substantive provisions of the rule, none challenged it as being improperly signed. Soon after taking office, President Biden asked the Department of Education to review the Title IX rule.

In June 2022, the Department of Education issued a proposed draft rule that would largely revive the Obama Administration's approach to sexual harassment and assault.[64] Comments were due in August 2022, and the Department is still considering them before issuing a final rule. Some knowledgeable observers expect that this process will take a year or longer. If the final Title IX rules look much the same as the proposed rules, it is likely that there will be lawsuits challenging them. Assuming President Biden does not personally sign them, the individuals challenging them should consider adding a claim that they were not properly signed.

A final area in which Title IX has proven controversial is whether it should be interpreted to prohibit sexual orientation and gender identity discrimination. The first regulatory foray into this general area came in 2016, when the Departments of Education and Justice issued a joint letter on the rights of transgender students.[65] This letter interpreted Title IX to require funding recipients to grant access to bathrooms, locker rooms, showers, and overnight accommodations based on the student's gender identity rather than their biological sex. This letter was one component of an administration-wide effort to interpret civil rights laws, including Title VII (the statute that prohibits sex and other forms of discrimination in employment) to cover discrimination against gay and transgender persons. This interpretation was controversial, with 25 Republican senators writing to the respective Departments to take issue with it.

Before 2010, the federal government had not interpreted Title IX or its statutory cousin Title VII's prohibitions on sex discrimination to reach gender identity. The federal appellate courts heard a few cases before 2000 in which plaintiffs claimed that Title VII covered employment discrimination based on gender identity, but all courts rejected this interpretation until 2000. Several times in the 2000s, Congress considered and rejected the Employment Non-Discrimination Act and Student Non-Discrimination Act, which would have explicitly amended Title VII and Title IX respectively to prohibit sexual orientation and gender identity discrimination. For some time, LGBT rights groups had urged President Obama to use the administrative tools available to him to strike stronger blows against what they view as anti-LGBT discrimination. The President has broad discretionary power to make rules regarding the federal

63. 34 C.F.R. § 106.1 (2023).

64. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed Jul. 12, 2022). The draft rule also contains provisions regarding sexual orientation and gender identity, which I discuss *infra* at pp. 477–78.

65. OFF. OF C.R., U.S. DEP'T OF EDUC. & C.R. DIV, U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER: TRANSGENDER STUDENTS (2016).

government's relationship with federal contractors, and so these groups encouraged him to issue an executive order that would prohibit sexual orientation and gender identity discrimination in this context. A 2012 *New York Times* article states that President Obama "disappointed and vexed gay supporters" by initially refusing to issue such an executive order.[66] Obama wanted to enact such a change legislatively—at least until it became clear that there were insufficient votes in Congress for such a bill. At that point, President Obama amended his We Can't Wait agenda to reflect the priorities of what he perceived to be a key constituency within his party's coalition.[67]

Some defenders of the Obama Administration's transgender policies have forthrightly acknowledged these same policies probably could not have been democratically enacted. Vanita Gupta, then-Assistant Attorney General for Civil Rights and co-author of the Dear Colleague letter, observed: "The project of civil rights demands creativity. It requires being bold. Often that means going against the grain of current-day popular thinking."[68] In an opinion interpreting Title VII to cover gender identity discrimination, Seventh Circuit Judge Richard Posner wrote, "I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of "sex discrimination" that the Congress that enacted it would not have accepted."[69] Judge Posner nonetheless defended the Seventh Circuit's approach on the grounds that courts "fairly frequently" update statutes to avoid "obsolescence" and "placing the entire burden of updating old statutes on the legislative branch."[70] Still, his observation that "We should not leave the impression that we are merely the obedient servants of the 88th Congress . . . . We are not."[71] may be troubling to those who believe civil rights policies should be democratically enacted, including the members of the 88th Congress who took pains to make sure that the actors who enforced Title VI remained democratically accountable.

A month after President Trump's inauguration, the Departments of Education and Justice withdrew the 2016 Dear Colleague letter.[72] The Education Department later determined that it did not interpret Title IX to reach sexual orientation or gender identity discrimination. In 2021, when President Biden came into office, Title IX LGBT policy changed once again. A Notice of Interpretation announced that the Department interpreted "Title IX's prohibition on discrimination 'on the basis of sex' to encompass discrimination on the basis of sexual orientation and gender

66. Jackie Calmes, *Obama Won't Order Ban on Gay Bias by Employers*, N.Y. TIMES (Apr. 11, 2012), https://www.nytimes.com/2012/04/12/us/politics/obama-wont-order-ban-on-gay-bias-by-employers.html [https://perma.cc/XQK9-6BM6].

67. *See* R. SHEP MELNICK, THE TRANSFORMATION OF TITLE IX 229 (2018).

68. *Id*. at 241.

69. Hively v. Ivy Tech, 853 F. 3d 339, 357 (7th Cir. 2017).

70. *Id*.

71. *Id*.

72. OFF. OF C.R., U.S. DEP'T OF EDUC. & C.R. DIV, U.S. DEP'T OF JUSTICE, OCR-00108, DEAR COLLEAGUE LETTER: WITHDRAWING TITLE IX GUIDANCE ON TRANSGENDER STUDENTS (2017).

identity."[73] The Department's reasoning purported to rely on *Bostock v. Clayton County*, a 2020 Supreme Court opinion that interpreted Title VII's prohibition on sex-based employment discrimination to encompass sexual orientation and gender identity discrimination in the hiring and firing context.[74] The Trump Administration had also reviewed *Bostock* in developing their Title IX guidance, but had concluded that the differences between Title IX and Title VII outweighed the similarities and therefore interpreted the former statute as solely about sex discrimination.[75]

Acknowledging the criticisms of earlier anti-LGBT discrimination rules that were promulgated as Dear Colleague letters or guidance rather than by notice and comment rulemaking, in July 2022 the Department of Education issued a draft rule interpreting Title IX to cover sexual orientation and gender identity discrimination.[76] This draft rule requires funding recipients to classify transgender persons in line with their gender identity when assigning shared facilities like dormitory rooms, locker rooms, or bathrooms. It also interprets Title IX to reach harassment based on sexual orientation and gender identity. Because the Proposed Rule defines harassment broadly to reach conduct that is severe or pervasive, critics have voiced concerns that it will infringe on First Amendment protected speech.

The Notice of Proposed Rulemaking stated that a later rule would address athletic participation by transgender students. The draft rule received a lot of attention from the public, garnering more than 349,000 comments.[77] Many knowledgeable observers expect that when the final rule is announced, it will be challenged in court, likely on both statutory authority and First Amendment grounds.[78]

President Biden has personally taken a high-profile stance on transgender issues. A White House Presidential Proclamation for the first time declared March 31 an official Transgender Day of Visibility,[79] on which date the White House released a video message where President Biden said, "To transgender Americans of all ages, I want you to know that you are so brave. You belong. I

73. Enforcement of Title IX With Respect to Discrimination in Light of Bostock v. Clayton County, 86 Fed. Reg. 32637 (June 22, 2021).

74. Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

75. Off. of Gen. Counsel, U.S. Dep't of Educ., Memorandum for Kimberly M. Richey Re: Bostock v. Clayton Cty. (Jan. 8, 2021).

76. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed Jul. 12, 2022).

77. Bianca Quilantan, *Cardona's Title IX rule draws more than 349,000 comments*, POLITICO (Sep. 6, 2022), https://www.politico.com/newsletters/weekly-education/2022/09/06/cardonas-title-ix-rule-draws-more-than-349k-comments-00054840 [https://perma.cc/CX4L-A7E8].

78. Pacific Legal Foundation filed a comment on the proposed rule discussing the statutory authority and First Amendment arguments. Pacific Legal Found., Comment Letter in Opposition to Proposed Title IX Regulation (Sept. 12, 2022), https://pacificlegal.org/wp-content/uploads/2022/09/2022-09-12-plf-title-ix-comment-letter.pdf [https://perma.cc/8FNG-LR7X]

79. Proclamation No. 10164, 86 Fed. Reg. 17495 (Mar. 31, 2021).

have your back."[80] Biden has also personally sat for an interview with Dylan Mulvaney, a transgender creator of popular TikTok videos.[81] It is thus plausible that Biden would be willing to sign a final Rule that looks substantially similar to the Department of Education's Draft Rule. At the same time, Biden has avoided publicly engaging with some of the harder tradeoffs that federal regulation in this area would entail, such as tensions between these rules and the values of freedom of speech or religious liberty. The position that Biden has taken publicly—that transgender people should receive some general protection from discrimination—is broadly popular, garnering 64% of the public agreeing with it in a recent Pew Research survey.[82]

But on other transgender issues, the picture painted by the polling data is more complicated. A plurality of Americans—40% of Pew's respondents—say that change is happening too fast on transgender issues.[83] Whether transgender women should be permitted to play on women's sports teams is also more contentious than basic nondiscrimination rules; about two thirds of Americans oppose allowing transgender women or girls to compete in women's sports.[84] One *Politico* reporter has written that she understood the Education Department avoided issuing a transgender athletic participation Title IX rule because it "would put campaigning Democrats on the defensive."[85] In sum, Biden could probably sign rules that guarantee basic nondiscrimination against transgender persons and face minimal political risk. But personally approving an athletics rule would put him at much greater risk and is an example of how presidential approval rules could serve to constrain the administrative state.

III. CONCLUSION

Looking back at the recent history of major Title VI and Title IX rules, the members of Congress who were concerned about bureaucrats issuing rules that were out of step with public opinion were largely proven right. When the presidential signature requirement was actually followed in the 1960s and 1970s, the rules which agencies issued did not go far beyond the scope of the statutes they were implementing and tended to be noncontroversial. After the President delegated this authority to the Attorney General in the 1970s, various federal agencies, including the Departments of Education and Justice, increasingly promulgated

80. @POTUS, TWITTER (Mar. 31, 2022, 10:04 AM), https://twitter.com/POTUS/status/1509532210495254528 [https://perma.cc/8SHS-HL47].

81. NowThis News, *Joe Biden and TikTok Star Dylan Mulvaney Discuss Trans Rights*, YOUTUBE (Oct. 26, 2022), https://www.youtube.com/watch?v=B9258AnO_Bk [https://perma.cc/NMF9-KQN9].

82. Kim Parker et al., *Americans' Complex Views on Gender Identity and Transgender Issues*, PEW RSCH. CTR. (June 28, 2022), https://www.pewresearch.org/social-trends/2022/06/28/americans-complex-views-on-gender-identity-and-transgender-issues/ [https://perma.cc/VX8M-C8FV].

83. *Id.*

84. *Id.*

85. Bianca Quilantan, *Democrats aren't eager to talk about transgender athletes. The GOP can't get enough.*, POLITICO (Oct. 10, 2022), https://www.politico.com/news/2022/10/10/democrats-arent-eager-to-talk-about-transgender-athletes-the-gop-cant-get-enough-00060931 [https://perma.cc/VX8M-C8FV].

rules that are more questionable and controversial exercises of their statutory authority under Titles VI and IX. The delegation of presidential signature authority should not be exclusively blamed for these developments, but it has worked in tandem with other doctrines giving broad authority to the civil rights state to contribute to government overreach.

Counterfactual history is always hard. Nonetheless, looking at the politics and public opinion surrounding some of the most prominent Title VI and IX rules of the last few decades, it is at least plausible that some either would never have been promulgated at all or would have looked different if the then-President had had to sign them. The members of the 88th Congress who anticipated that a presidential signature requirement would prevent agency bureaucrats from overreaching were probably right. Enforcing the presidential signature requirement would likely help to ensure that significant and controversial decisions about civil rights regulation get made by politically accountable actors—the President or Congress.

When enacting new regulatory statutes where bureaucratic overreach is a concern, Congress should consider including presidential signature requirements. Congress could also consider amending existing regulatory schemes to require presidential approval of rules. Enforcement of the structural constitutional provisions that serve democratic accountability is of course important. But those constitutional provisions serve as a floor, not a ceiling, for democratic accountability. Congress can and should do more to ensure that important decisions continue to be made democratically.