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Tobacco-Settlement: Liability [2]



U. S. Department of Justice

Office of the Attorney General

Tobac - settlements - liability

Counselor to the Attorney General

Washington, D.C. 20530

March 10, 1998

Ms. Elena Kagan
Deputy Assistant to the President
for Domestic Policy
The White House
Second Floor, West Wing
Washington, D.C. 20502

Dear Elena:

You asked for a transcript of my testimony some time back. Enclosed is the transcript of the House Judiciary testimony. Let me know if you have any questions or comments.

Sincerely,

A handwritten signature in black ink, appearing to read "David W. Ogden".

David W. Ogden
Counselor to the Attorney General

Enclosure

PLEASE DO NOT REMOVE THIS SHEET FROM TRANSCRIPT PAGES

**U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
WASHINGTON, D.C.
TEL: (202) 225-3951**

**STENOGRAPHIC MINUTES
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February 23, 1998

**TO: David Ogden, Esq.
Councillor to the Attorney General
Department of Justice
Washington, D.C. 20530**

SUBJECT: Correction of transcript of your participation at our oversight hearing on the civil liability portions of the proposed tobacco settlement, Thursday, February 5, 1998.

Thank you for participating in the recent hearing. Attached are transcript pages, Nos: 12 - 60; 62 - 66; 70 - 82; showing your remarks given before the Committee on the Judiciary. Please correct your testimony only, using the following guidelines:

1. Print with red ink, using standard editing symbols.
2. Correct only grammatical errors or misstatements of fact. The intent of your remarks should not be changed, nor should the language be so enhanced that it becomes unrecognizable from the original text.
3. Attach documents or other requested information to the appropriate page. Supplemental material supplied for the record should be of photographic quality for reproduction.

Should the Committee have questions about your edited transcript, please indicate the name and telephone number of the person to whom inquiries should be made:

(Name)

(Telephone)

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WITHIN 14 DAYS from the above date to the address below:

**Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515
Attention: Annelie Weber**

UNLESS THE CORRECTED TRANSCRIPT IS RECEIVED BY THE COMMITTEE WITHIN THE SPECIFIED TIME, YOUR REMARKS AS RECORDED WILL APPEAR IN THE PRINTED RECORD.

NOTE: Copies of the transcript are not to be distributed for other than editing purposes and no direct quotations are to be taken from the unprinted transcript.

CERTIFICATION

I certify that the corrections made by me reflect the changes I wish to make in my oral testimony.

(Signature)

Ogden

224 STATEMENT OF DAVID OGDEN, COUNSELOR TO THE ATTORNEY GENERAL,
225 DEPARTMENT OF JUSTICE

226 Mr. OGDEN. Mr. Chairman, I am pleased to testify on
227 behalf of the Department of Justice, addressing the civil
228 liability portions of the proposed tobacco settlement.

229 On September 17 of last year, and again in his State of
230 the Union speech, the President made clear his strong desire
231 to work with this Congress in a bipartisan fashion to enact
232 national tobacco legislation. For our part, the Justice
233 Department is eager to work closely with this committee and
234 Congress to ensure that sound, comprehensive legislation is
235 enacted. Smoking and the use of smokeless tobacco have had a
236 devastating impact on our society in terms of death and human
237 suffering. This cycle of disease and death is renewed each
238 day, as 3,000 children and teenagers begin smoking regularly.

239 The President and this Congress are faced with an historic
240 opportunity and profound responsibility to address one of
241 this country's greatest single health problems. We offer the
242 following remarks in the hopes of facilitating the
243 development and passage of comprehensive national legislation
244 regarding tobacco products.

245 Working closely over the last several years, State and
246 Federal officials have dramatically altered the legal
247 landscape faced by the tobacco industry. For decades,

248 individuals harmed by the use of tobacco had little recourse.
249 Those that sued the tobacco companies always lost, and
250 regulatory agencies took no action to regulate tobacco to
251 prevent future harm. This situation began to change in 1994,
252 when the administration, prompted by an epidemic of tobacco
253 use by teenagers, supported the Food and Drug
254 Administration's initiative to conduct an extensive
255 investigation to determine whether nicotine-containing
256 tobacco products are subject to Federal regulation by the
257 FDA.

258 Based on that investigation, the FDA promulgated
259 regulations aimed at reducing youth tobacco use. During the
260 same period, the tobacco industry has been sued in many
261 jurisdictions. Since 1994, 42 states have sued the major
262 tobacco companies in an effort to recover smoking-related
263 health care costs. On June 20, 1997, the States and the
264 companies reached a tentative settlement to most of these
265 actions, contingent on the enactment of appropriate Federal
266 legislation. This agreement is embodied in the proposed
267 settlement that you have before you.

268 After reviewing the settlement, the President, on
269 September 17 of last year, called for comprehensive tobacco
270 legislation, with the goal of reducing teen smoking by 50
271 percent within the next seven years. The President stressed
272 five key elements that must be at the heart of any national

273 tobacco legislation.

274 First, a comprehensive plan to reduce teen smoking,
275 including a combination of penalties and price increases that
276 raise the price of ~~a pack~~⁶ of cigarettes by up to \$1.50 a pack
277 over the next 10 years, as necessary to meet youth smoking
278 targets.

279 Second, expressed^o reaffirmation that the FDA has full
280 authority to regulate tobacco products.

281 Third, changes in the way the tobacco industry does
282 business, especially in the ^aarea of advertising directed at
283 children.

284 Fourth, progress toward other critical public health
285 goals, such as the expansion of smoking cessation and
286 prevention programs and the reduction of second-hand smoke.

287 And fifth, protection for tobacco farmers and their
288 communities.

289 During his State of the Union Address last week, the
290 President again forcefully emphasized that the top priority
291 should be the reduction of under-age smoking. ¶ Now the civil
292 liability provisions of the settlement contemplate Federal
293 legislation that would work major changes in the current tort
294 liability regime. I'll address the specific provisions
295 individually in a moment, but first I want to identify the
296 general principles we believe should govern their
297 consideration.

298 | Our civil justice system exists to provide redress for
299 | individuals who are harmed by the conduct of others and to
300 | deter such harmful conduct in the future. These are very
301 | important goals, and their achievement is fundamental to any
302 | just society. Although the existing tort system is certainly
303 | not perfect, or the only way to achieve these goals, it has,
304 | as a general matter, served them well. For that reason, the
305 | structure of the tort system should not be modified except
306 | for important reasons. Nor should the tobacco companies
307 | become special favorites of the law. Nevertheless, proposed
308 | modifications of the tort system should be considered in the
309 | larger context of this legislation, as the chairman
310 | suggested, in service not only of the compensatory and
311 | deterrence objectives of the tort system itself, but also of
312 | the compelling public health obligations identified by the
313 | President.

314 | Although 3 states have recently achieved large
315 | settlements with the tobacco companies, the victims of
316 | tobacco-related diseases to date have received virtually
317 | nothing in the form of compensation through the tort system.
318 | Nor has that system, until now, deterred industry misconduct,
319 | such as marketing cigarettes to minors or the other problems
320 | that Representative Conyers alluded to.

321 | Certainly, recent revelations about the industry's
322 | conduct could change the situation, but litigation alone is

323 unlikely to reduce youth smoking. Only comprehensive
324 legislation, addressing price, access, marketing, and other
325 industry practices, will be enough to achieve this objective.

326 As the administration has consistently stated, if there
327 is agreement on a comprehensive bill that advances the public
328 health by fulfilling the President's five
329 principles--reducing youth smoking; expressly reaffirming the
330 authority of the FDA; changing the way the industry does
331 business; achieving other public health goals; and protecting
332 tobacco farmers--then reasonable provisions modifying the
333 civil liability of the tobacco industry would not be a
334 deal-breaker. We also believe that any such provision should
335 be crafted to make more achievable the recovery of
336 appropriate compensation for deserving injured parties than
337 historically has been the case and to reinforce the
338 legislation's other comprehensive safeguards against industry
339 misconduct.

340 In addition, any final settlement should create powerful
341 incentives for the tobacco manufacturers to fully and
342 publicly disclose all appropriate documents, as
343 Representative Conyers stated. And any changes to the civil
344 justice system must be constitutionally sound.

345 Let me turn now to the provisions of the proposed
346 settlement. The settlement leaves open many questions. No
347 definite terms establish who or what will be paid, or for how

348 long. Nonetheless, some initial observations are possible.
349 There are four broad areas in which the proposed settlement
350 would affect the civil liability system.

351 First, the settlement contemplates that much of the
352 pending litigation would be settled, including the present
353 States' attorneys general^s action^s. It appears that the
354 settlement also contemplates that future litigation of ^{that} these
355 kinds^e would be prohibited by Federal law.

356 Second, the settlement contemplates Federal legislation
357 that would impose limits on the annual aggregate and
358 individual damage payments for which the participating
359 tobacco manufacturers could be liable. An annual aggregate
360 cap for the payment of judgments and settlements would begin
361 at \$2 billion in the first year and increase to \$5 billion in
362 the ninth year and thereafter. If total judgments and
363 settlements for a given year exceeded the annual aggregate
364 cap, the excess would be rolled over for payment in future
365 years. If Congress wishes to consider annual caps, a variety
366 of approaches could be discussed. Within the context of the
367 settlement as a whole, we should explore whether liability
368 caps can be part of a creative scheme that also ^{noted} produced the
369 goals I discussed ~~above and~~ earlier.

370 One critical issue, of course, is whether annual caps or
371 other mechanisms would provide sufficient funds to meet the
372 needs of victims, or whether they should be raised. It may

373 | be valuable for Congress to ask that the tobacco
374 | manufacturers share their calculations and research
375 | concerning the likely dollar requirements of those injured by
376 | tobacco products.

377 | Third, under the settlement all punitive damages claims
378 | would be extinguished with respect to conduct taking place
379 | prior to the effective date of the bill enacting the
380 | settlement. Punitive damages could be awarded with respect
381 | to conduct taking place after that date. In considering
382 | these provisions, Congress should consider the overall
383 | legislative package and the framework it establishes for
384 | deterring future wrongdoing and serving the public interest.
385 | Congress could consider whether separate punitive damages
386 | limitations are needed if annual caps govern manufacturers'
387 | total liability. Moreover, Congress could consider
388 | alternatives, such as retaining punitive damages, with
389 | respect to claims based on facts not disclosed by the tobacco
390 | manufacturers to Congress and the public.

391 | Finally, the settlement apparently contemplates Federal
392 | legislation that would abolish class actions and other forms
393 | of multi-case tobacco ~~case~~ litigation without the defendant's
394 | consent. Litigation brought by third party plaintiffs, such
395 | as pension funds and health insurers, would be prohibited
396 | entirely unless the litigation was based on the subrogation
397 | of a single individual's personal injury claim. It has been

398 | difficult to bring class actions for tobacco-related injuries
399 | in Federal courts and many State courts have denied class
400 | certification. Still, restrictions on such joinder
401 | mechanisms could make it more difficult for some plaintiffs
402 | to pursue their claims in court.

403 | As with punitive damages, Congress should consider the
404 | need for special procedural restrictions if it enacts annual
405 | caps on industry liability. Moreover, such restrictions
406 | raise novel federalism concerns. Thus, we believe that
407 | Congress should consider carefully the practical and the
408 | legal consequences of such provisions and consider in tandem
409 | with them the adoption of rules or mechanisms that improve
410 | injured tobacco users' access to justice.

411 | In conclusion, Mr. Chairman, the Justice Department
412 | strongly supports ~~the~~ comprehensive tobacco legislation. We
413 | would be happy to join with this committee in a dialog to
414 | find the best possible solution, and I will be pleased to
415 | answer any questions that you or the other members of the
416 | committee may have.

417 | [The statement of Mr. Ogden follows:]

418 | ***** INSERT *****

419 | Chairman HYDE. Thank you, Mr. Ogden. Mr. Conyers--
420 | Mr. CONYERS. What should we do if they don't give us the
421 | documents?

422 | Mr. OGDEN. My view, and the administration's view on
423 | that, Congressman, is that while document disclosure is
424 | extremely important, and while we should work hard to find
425 | strong incentives to ensure that we get full disclosure, the
426 | fact of the matter is that every day 3,000 more of our young
427 | people are beginning to smoke regularly; and the fact is that
428 | 1,000 of those will die prematurely as a result. And it's
429 | extremely important that we get comprehensive legislation as
430 | soon as we possibly can. So what we would like to see are
431 | strong incentives for full disclosure, as much pressure as we
432 | can get for full disclosure, but we need to get this
433 | legislation accomplished.

434 | Mr. CONYERS. Well, that's their fault, not ours. I
435 | mean, for God's sake, man, I wanted the 3,000 kids that
436 | started smoking a day 50 years ago not to smoke. So now
437 | you're telling me it's my fault, if these guys jam me on the
438 | document, then it's my fault that it's taking so long and
439 | 3,000 more are starting. I don't buy it.

440 | Mr. OGDEN. Well, Congressman, I certainly agree with
441 | you. It's not your fault and it's not the fault of any of us
442 | sitting here. What I am saying is that we have a very
443 | serious and continuing problem--

444 Mr. CONYERS. So why don't they come forward with the
445 documents? This is in effect a plea bargain, isn't it?

446 Mr. OGDEN. Well, I'm not sure I would characterize it
447 that way, Congressman, because certainly criminal liability
448 will remain with respect to criminal wrongdoers. But I don't
449 quarrel at all with your basic premise: we need to get full
450 disclosure. Your question was, "what if we don't? what if
451 we're not sure we've gotten it?" And my answer to that is
452 let's create strong incentives. One possibility would be to
453 ^{condition} ~~the~~ whatever protection we craft in the way of civil
454 liability protections ~~as being conditioned~~ on being limited
455 to lawsuits based on information that has been disclosed. So
456 that if we learn something later, whatever limits we've
457 crafted might not apply. That's one possible way of looking
458 at it. It's also true that the FDA would retain authority to
459 take action, and so the basic point is let's build the
460 safeguards in, but let's move forward.

461 Mr. CONYERS. Mr. Ogden, do you think that it will be
462 more difficult for individuals to bring suits against the
463 tobacco industry with no chance of recovering punitive
464 damages as provided under this settlement proposal?

465 Mr. OGDEN. One thing that's important to remember,
466 Congressman, is that the settlement proposal does not affect
467 the availability of punitive damages with respect to future
468 conduct. It only applies with respect to conduct, as designed

469 | in the settlement, that the tobacco companies have already
470 | engaged in, and you might think about modifying that and
471 | limit it to those acts the tobacco companies actually
472 | disclose in this process. Certainly, the availability of
473 | punitive damages provides an incentive for civil litigation.
474 | On the other hand, the fact of the matter is that ~~no~~^l
475 | ~~individual~~ only one individual smoker, to my knowledge, has
476 | ever received a judgment under the tort system as it stands
477 | against a tobacco company. So you have to factor that in as
478 | well.

479 | Mr. CONYERS. So what's your answer? Yes or no?

480 | Mr. OGDEN. I think it will certainly reduce certain of
481 | the incentives. And I think that one of the things we need
482 | to look at in the context of any legislation--

483 | Mr. CONYERS. Okay--

484 | Mr. OGDEN. --is trying to make it easier for people to
485 | recover damages--

486 | Mr. CONYERS. Right. The yellow light's on--I've got two
487 | questions. Do you know how many people die of
488 | cigarette-related illnesses every year?

489 | Mr. OGDEN. It's more than 400,000, Congressman.

490 | Mr. CONYERS. Thank you. Are you aware of any statutory
491 | precedents whereby Congress has dictated State court
492 | procedural and evidentiary rules as this tobacco settlement
493 | does?

494 Mr. OGDEN. Well, I think for one thing it's somewhat
495 unclear what exactly is contemplated in terms of those
496 evidentiary rules--

497 Mr. CONYERS. From what you know what is contemplated?

498 Mr. OGDEN. I think there have been--my understanding is
499 there has been in the Price Anderson context something that
500 ~~has~~⁵ ~~bore~~⁵ some similarity, but in general this would be very
501 unusual.

502 Mr. CONYERS. It does raise a serious federalism issue,
503 doesn't it?

504 Mr. OGDEN. I agree with you.

505 Mr. CONYERS. Thank you very much. Thank you, Mr.
506 Chairman.

507 Chairman HYDE. Thank you, Mr. Conyers. Mr. McCollum of
508 Florida.

509 Mr. MCCOLLUM. Thank you, Mr. Chairman.

510 Mr. Ogden, you raised in the discussion of the punitive
511 damages in your testimony the question of constitutionality
512 of the limitation. Could you elaborate on that? What do you
513 see in this, and what should we be looking for in considering
514 whether or the not the settlement provisions with regard to
515 punitive damages might be constitutional or not?

516 Mr. OGDEN. Well, in general there is a concern that's
517 raised any time the Federal Government dictates to the
518 States, or seeks to define for the States, the rules and

519 | procedures that govern their own court systems. And it's in
520 | that context that issues are raised. We believe that it is
521 | probably the case that limitations could be fashioned within
522 | the constitutional constraints, but we need to be careful
523 | about the way we do it because these federalism concerns are
524 | very important.

525 | Mr. MCCOLLUM. You think it can be done, though?

526 | Mr. OGDEN. We believe that it can be done if it's done
527 | carefully. Yes.

528 | Mr. MCCOLLUM. You have not attempted to do that?

529 | Mr. OGDEN. Not at this point, no, sir. Our intention
530 | and our hope is to work together with the Congress in a
531 | bipartisan fashion to develop legislation.

532 | Mr. MCCOLLUM. What about the limitations with regard to
533 | class actions? Do they pose similar constitutional problems?

534 | Mr. OGDEN. They do, indeed. And, again, as applied--as
535 | they would be applied in State court proceedings, they raise
536 | federalism issues. Again, we believe that careful
537 | development of a structure could probably accomplish it
538 | within the Constitution. But due regard for the States and
539 | their prerogatives is very, very important.

540 | Mr. MCCOLLUM. You've stated in your testimony that
541 | tobacco companies should not become special favorites of the
542 | law, and I'd suggested, by the same token, they shouldn't be
543 | held to a higher standard than other industries should be

544 held. So one of the things a little troubling was your
545 comment that provisions should be crafted, in your judgment,
546 to make more achievable the recovery of appropriate
547 compensation for deserving injured parties than historically
548 has been the case. I'm curious. Are you suggesting that we
549 have a situation in which tobacco companies have not been
550 found liable under traditional court tort concepts that we
551 have strict liability or no-fault recovery for smokers to
552 compensate them? Or, what are you suggesting?

553 Mr. OGDEN. What I'm suggesting is that we should look at
554 the civil liability issue from a complete perspective, look
555 at the problems that are created by the current civil
556 liability system for the tobacco companies, but let's look as
557 well at problems that that system has created for plaintiffs
558 and see if we can craft something that improves the situation
559 of everybody concerned. So that--there have been variety of
560 mechanisms that in different circumstances have been used. I
561 think we're open to looking at any of them.

562 Mr. MCCOLLUM. Such as?

563 Mr. OGDEN. Well, you know, there have been
564 compensation-type schemes developed under which procedures
565 have been simplified and recoveries have been capped in other
566 contexts. That would be one option. I think another way of
567 thinking about this entire problem is looking to the entire
568 package of the legislation and thinking about what kinds of

569 | benefits are being provided to folks who are smokers. For
570 | people who are smoking and who are not yet sick, the best
571 | possible form of relief they could achieve is assistance in
572 | quitting smoking, and I think that's something we have to
573 | think about--a forward-looking solution to this problem.

574 | Mr. MCCOLLUM. You're not suggested a no-fault recovery
575 | system?

576 | Mr. OGDEN. I'm not suggesting anything specific at this
577 | time, Mr. McCollum.

578 | Mr. MCCOLLUM. Thank you. Thank you, Mr. Chairman.

579 | Chairman HYDE. Thank you. The gentleman from
580 | Massachusetts, Mr. Frank.

581 | Mr. FRANK. Mr. Ogden, I certainly agree with your last
582 | statement and regret it. You are not suggesting anything
583 | specific at this time. I noticed you thanked the committee
584 | for giving you this opportunity to furnish the views of the
585 | Department regarding the legislation. I must say it is an
586 | opportunity largely unexploited by your testimony.

587 | [Laughter.]

588 | I have read it, and I don't know what you think. And I
589 | think that's a mistake. These are very important issues, and
590 | I resent the administration's unwillingness at this date to
591 | get specific. I do not think that you can be on all sides of
592 | this issue. I am glad the President wants to raise some
593 | money from the tobacco industry and use it for good purposes.

594 But we will not get there unless a lot of people are willing
595 to make some hard decisions that will justify that passing.
596 And, apparently a decision was made, not by you, somewhere up
597 that the administration would be for raising the money and
598 duck all the tough issues, and I think that's unacceptable.
599 I'm disappointed by it.

600 For example, and I was struck by the same passage my
601 legislative classmate from Florida just referenced. On page
602 5, you have a couple of sentences which seemed to me almost
603 inconsistent. You do say that 'restricting
604 liability'--modifying liability, I assume. Even there, you
605 didn't want to say 'restrict,' but I assume we're not
606 talking about expanding, so I assume--so you say, 'modifying
607 liability the civil liability would not be a deal-breaker.'
608 One, I'm disappointed by the kind of negative of that. I'd
609 like to know what the administration thinks. We should or
610 shouldn't restrict liability some. But then, you follow that
611 by saying, 'the provision should be crafted to make more
612 achievable the recovery of appropriate compensation.' If we
613 restrict liability substantially, what are we talking about?
614 I mean, are we talking about both restricting liability and
615 compensating individual smokers. How do I put those two
616 together?

617 Mr. OGDEN. First of all, Congressman, our intention, and
618 the President's intention, from the beginning in approaching

619 | the whole issue of this legislation, is to try to work
620 | together with the Congress to develop the provisions rather
621 | than to come up with our own pre-established set of
622 | provisions. What the President has tried to do is to take
623 | the principles, the objectives that we think this legislation
624 | should seek to achieve--he's provided a good deal of detail
625 | in terms of how much should be raised and what it should be
626 | put to in the budget, and I'm here attempting to explain what
627 | our position is with respect to these concepts.

628 | Fundamentally, we are not proponents of these limitations on
629 | civil--

630 | Mr. FRANK. You are not proponents, you say?

631 | Mr. OGDEN. We are not proponents--

632 | Mr. FRANK. But you are not opponents--

633 | Mr. OGDEN. What we--

634 | Mr. FRANK. You're here as ''ponents''

635 | [Laughter.]

636 | Mr. OGDEN. What we are proponents of a comprehensive
637 | solution that accomplishes the objectives that the
638 | President--

639 | Mr. FRANK. Mr. Ogden, spare me. I got that already, and
640 | I've only got five minutes. I just have to say that I don't
641 | think that works. I would also say--I also feel like, you
642 | know, it's not quite Passover, but, you know, why is this
643 | bill different from all other bills? Why, all of a sudden,

644 do you come in and you have not specific proposals to make?
645 You just want to work with us. Well, that's true of
646 everything. But having your own specific proposals does not
647 preclude working together. We always do that. But let me
648 even take you on the line--you say, well, you just want to
649 state principles. Should we in the legislation, as a
650 condition of raising significant money from the tobacco
651 industry, restrict the liability that they would face if sued
652 by individuals claiming harm from smoking? Should that be
653 part of the bill?

654 Mr. OGDEN. If it is necessary to accomplish
655 comprehensive legislation, we are prepared to accept that,
656 yes.

657 Mr. FRANK. No, I didn't ask you whether you were
658 prepared to accept it. You know, it's like Margaret Fuller
659 said, "I accept the universe." And I think it Emerson
660 said, "By God, she'd better." I mean you know--

661 [Laughter.]

662 You'll accept what you'll accept, but I want to know
663 whether you are in favor of that. Is that a good thing to
664 do?

665 Mr. OGDEN. Let me try to answer it this way: If we could
666 achieve those objectives without such provisions, the
667 administration would certainly prefer that.

668 Mr. FRANK. But if it were necessary to trade off a

669 | restriction of civil liability for the money, you would be in
670 | favor of that. Let me ask you, because you've been around a
671 | while, you've been paying attention, what's your estimate of
672 | the likelihood of raising a significant amount of money
673 | without some compensatory restriction on liability?

674 | Mr. OGDEN. It's very difficult for me, honestly, to
675 | assess what the political situation is with respect to that.
676 | I really can't do that. What I can say is that there are
677 | large advantages to having a resolution in which the tobacco
678 | companies are involved. For one thing, one of the key
679 | objectives here is changing the way they do business,
680 | changing their marketing practices, changing their whole
681 | approach. A key element in that is their involvement in the
682 | solution.

683 | A second important feature of it is that, whatever we
684 | craft in the way of reform, as the FDA regulations are
685 | potentially subject to litigation that would tie them up, if
686 | we can have a--

687 | Mr. FRANK. We know that, Mr. Ogden. I appreciate that.
688 | I didn't mean to trigger a repetition of the
689 | non-controversial statements. I was trying to get some
690 | statement of opinion on the tough ones.

691 | Absent that, Mr. Chairman, I thank you for your
692 | indulgence.

693 | Chairman HYDE. Much as I hate to say the gentleman's

694 | time has expired, it has.

695 | [Laughter.]

696 | Mr. FRANK. Mr. Chairman, I appreciate it, but in this
697 | case my time and my patience were running out about the same
698 | time, so it's just as well that you call on somebody else.

699 | [Laughter.]

700 | Chairman HYDE. The gentleman from Pennsylvania, Mr.
701 | Gekas.

702 | Mr. GEKAS. I thank the chairman.

703 | The President, is it not true, submitted a budget in
704 | which he has counted dollars out of the proposed tobacco
705 | settlement for payment of the new programs and other
706 | initiatives which are contained in that proposal, that budget
707 | proposal. Is that correct?

708 | Mr. OGDEN. What the President's done is to identify the
709 | amount of revenue that he believes the increase in tobacco
710 | prices would bring about, and he has accounted for the way in
711 | which he believes the monies raised should be spent, yes.

712 | Mr. GEKAS. So that in your assertions that you wish to
713 | work together, or the administration wishes to work together
714 | with the Congress, if we should not have a product on which
715 | would be passing back and forth between the White House and
716 | the Congress, and amended here, and changed there, and
717 | modified there, that we might end the year without a tobacco
718 | settlement. What happens to those dollars which the

719 | President wants to appropriate to X, Y, and Z out of a
720 | tobacco settlement fund? Do you have any idea? Or, do you
721 | have any general feeling about that? Or, don't you care?

722 | Mr. OGDEN. Well, of course, we care--very much. We very
723 | much want to have comprehensive tobacco legislation, because
724 | we want to get these mechanisms in place to reduce youth
725 | smoking immediately. What happens if the revenue is not
726 | raised is obviously ^{that} those dollars can't be spent.

727 | Mr. GEKAS. Then I, for one, respectfully request that
728 | you convey to the administration that it submit a bill, a
729 | proposed bill, to this committee, to the Congress for
730 | evaluation against what we already have before us; that it
731 | contain the five or what other conditions that the President
732 | has outlined and which you have reported to us today; and
733 | that it contain estimates of what may run into constitutional
734 | problems, estimates of what may not yield the monetary
735 | results that are hoped for, et cetera. It is a time-honored
736 | tradition in this Congress, and in the Congress in 1789, that
737 | the President's proposals become a focal point, and beginning
738 | point, starting point for the deliberations of Congress,
739 | especially in those issues in which the administration has
740 | gone out front in determining that it is a priority. I
741 | respectfully request that the White House, that the
742 | administration, the Justice Department, and the custodial
743 | department, whatever is necessary, present a bill to the

744 Congress containing the demands, or conditions, of the
745 President, so that we don't have to waffle back and forth
746 about what they mean and know best how to modify them. Will
747 you convey that request?

748 Mr. OGDEN. I certainly will, Congressman.

749 Mr. GEKAS. And if it winds up that only one Member of
750 Congress has requested that, what will be the result? Do you
751 have an estimate?

752 Mr. OGDEN. Well, I can commit to convey it. I cannot
753 promise what the response will be.

754 Mr. GEKAS. I thank you. It is worth it to me to
755 reestablish in the record what has been bandied about, both
756 in your testimony and in all the consultations we've had on
757 this issue. And that is the theorem that this tobacco
758 settlement does not grant immunity forever and forever to the
759 tobacco industries from civil liability. Do you agree with
760 that proposition?

761 Mr. OGDEN. Yes, I do.

762 Mr. GEKAS. Do you agree that the--even when we talk
763 about immunity and the settlement of the cases up to date,
764 that that doesn't preclude, and you've stated this, but I
765 want to reestablish it in the record, that does not preclude
766 cases from reaching the punitive damage stage and result in
767 future cases?

768 Mr. OGDEN. With respect to future conduct, that's

769 | correct.

770 | Mr. GEKAS. I thank the gentleman, and that's where I
771 | would yield back the balance of my non-time.

772 | Chairman HYDE. I thank the gentleman. The gentleman
773 | from New York, Mr. Nadler.

774 | Mr. NADLER. Thank you.

775 | First of all, let me associate myself with the comments
776 | of the gentleman from Massachusetts. I find this testimony
777 | to be very broad, very general, and to say almost nothing
778 | about whether the administration has a good or not good idea
779 | about the topic of the hearing today, civil liability--civil
780 | liability immunity.

781 | You say, for example, 'we also believe that any such
782 | provision should be crafted to make more achievable the
783 | recovery of appropriate compensation for deserving injured
784 | parties than historically has been the case.' Now one major
785 | provision of the agreement is the abolition of class action
786 | lawsuits even in state courts in the future. And if the
787 | tobacco industry is granted immunity from class action suits
788 | for prior conduct, please tell me who will be able to afford
789 | to bring individual claims against the industry. It appears
790 | that unless you're a multi-millionaire, who likes to sue for
791 | damages as a hobby, you're not going to be able to sue,
792 | because nobody has the millions of dollars unless you're in
793 | that category to be able to sue the tobacco companies and

794 | win, which is why we have class action suits. You're not
795 | going to be able to sue, and you sure as heck won't be able
796 | to win. So what you're really saying--not what you--but what
797 | the agreement really says is, no one should be able to sue
798 | the tobacco companies anymore because you're abolishing class
799 | actions suits in the future. Do you regard this provision as
800 | making more achievable the recovery of appropriate
801 | compensation for deserving injured parties than historically
802 | has been the case?

803 | Mr. OGDEN. In isolation, I certainly would not, no. But
804 | I think what we need to do is to look at the entire package,
805 | including other items which may not be in--

806 | Mr. NADLER. All right, but, sir. In isolation, you
807 | don't regard that provision as doing that. What else in the
808 | package would mitigate the conclusion, or would mitigate the
809 | impact that abolishing class action lawsuits would have on
810 | eliminating people's ability to recover in the future?

811 | Mr. OGDEN. I don't think anything in the package--

812 | Chairman HYDE. Mr. Ogden, Mr. Ogden, would you move the
813 | mike a little closer?

814 | Mr. OGDEN. Certainly, sir. I apologize--

815 | Chairman HYDE. That's all right. Some of the members
816 | aren't hearing you.

817 | Mr. OGDEN. Maybe I need to move myself.

818 | Chairman HYDE. Whatever is easier.

819 Mr. OGDEN. Certainly nothing in the package will make it
820 easier to recover in tort actions. Much in the package will
821 provide benefits to smokers outside the context of the tort
822 system. We're interested in those kinds of benefits. We're
823 also interested in looking at the specific proposals. If
824 they are too onerous, if they make it too difficult to
825 recover--

826 Mr. NADLER. All right, let me stop you there. If that
827 is the case, then what does this language mean? That
828 reasonable provisions, modifying the civil liability of
829 tobacco industry, should not be a deal-breaker? We believe
830 that any such provisions should be crafted to make more
831 achievable the recovery of appropriate compensation for
832 deserving injured parties than historically has been the
833 case. In other words, the provisions limiting civil
834 liability should not make it more difficult for people to sue
835 and recover, as I assume what this means.

836 Mr. OGDEN. That has historically been the case--I think
837 that one thing that's extremely important to bear in mind in
838 this is that in all the years that the tort system has been
839 in operation, and in all the years in which tobacco companies
840 have been selling products that injure people, there has
841 been, I believe, a grand total of one judgment for less than
842 \$1 million against the tobacco companies--

843 Mr. NADLER. And that's, that's largely--I would simply

844 | assert that that's largely because of the industry's success
845 | until very recently in keeping everything secret. Let me ask
846 | you one completely separate question, though. This deal is
847 | designed to try--and commendably so--to try to lower smoking
848 | in the United States, especially smoking among young people,
849 | and hopefully, if approved, it will have that impact. But
850 | there's nothing in this deal that will inhibit the tobacco
851 | companies, through their foreign subsidiaries, from doing
852 | what they're obviously trying to do, which is to poison the
853 | rest of the world--which is to say we're going to make up for
854 | our loss of sales in the United States by greatly increasing
855 | marketing abroad and making nations that are not now smokers,
856 | smokers.

857 | And, frankly, don't you think, or does the administration
858 | believe, that it is morally permissible to structure a deal
859 | to try to save the health of American citizens, which deal
860 | gives the tobacco companies every incentive and no prevention
861 | from stepping up their efforts to poison and kill millions of
862 | people in every other country in the world?

863 | Mr. OGDEN. No, Congressman. In fact, one of the four
864 | points that the President has insisted on in ^{the achievement of} his other public
865 | health objectives, ^{including} ~~a point is that we address the problem of~~
866 | international marketing of--

867 | Mr. NADLER. And how do you propose to do that?

868 | Chairman HYDE. The gentleman's time has expired--

869 Mr. NADLER. I'd ask for unanimous consent for one
870 additional minute.

871 Chairman HYDE. Okay, but I just would like to remind the
872 committee we have a long day ahead of us.

873 Mr. NADLER. Thank you. I just asked the witness how
874 does the administration propose to do that and where is that
875 proposal?

876 Mr. OGDEN. What the admin--there is in the--I believe
877 there is in the budget, and I'm straying a bit beyond my
878 expertise here, an indication that funds will be expended on
879 international--on programs of working on international
880 issues. And the Department of Health and Human Services has
881 addressed that issue. Secretary Shalala has testified--

882 Mr. NADLER. And do you believe that should be included
883 in legislation on this agreement?

884 Mr. OGDEN. I certainly think that would be a good idea,
885 and my understanding is that it's the administration's
886 position that that should be part of what we're achieving.

887 Mr. NADLER. Thank you.

888 Chairman HYDE. Thank you. The gentleman from North
889 Carolina, Mr. Coble.

890 Mr. COBLE. Thank you, Mr. Chairman.

891 Mr. Ogden, would the administration prefer a
892 comprehensive bill with civil liability provisions or a more
893 limited bill directed exclusively at youth access

894 restrictions?

895 Mr. OGDEN. The administration would prefer a
896 comprehensive bill that deals with the entire problem of
897 smoking, with an emphasis on youth smoking. And if it is
898 necessary, in connection with that, to have reasonable
899 provisions addressed to civil liability, then the
900 administration is prepared to proceed in that way.

901 Mr. COBLE. Now you've been close to this negotiation
902 process, Mr. Ogden. You've been exposed, I'm sure, to all
903 the details. Having said that, can you illuminate for the
904 members of this committee--strike that. Let's assume that
905 the \$368.5 billion amount is accepted, and approved, and
906 enacted, for the sake of discussion. Can you tell us where
907 the growers fit into this scheme? Because it seems to me
908 that the growers have been conspicuously absent in many of
909 these negotiations. And, as we say down home, that's a heap
910 of money. From that pot of money, there ought to be some
911 money set aside, earmarked, for the growers. What can you
912 say to us about that?

913 Mr. OGDEN. First, before I answer that question, I just
914 want to make clear I actually have not been close to the
915 details of the discussions among the State attorneys general
916 and the industry, and the public health advocates, so that I
917 don't have any personal first-hand information on that. I
918 can tell you that one of the five priorities that the

919 | President has established for this legislation is protecting
920 | tobacco farmers and their communities. And the fact of the
921 | matter is that tobacco farmers, many of them, work on small
922 | farms. Many communities in tobacco growing states are
923 | extremely dependent on this. The President doesn't believe
924 | that they are responsible, that they've done anything wrong.
925 | And if there is to be, as we hope there will be, a dramatic
926 | reduction in the amount of tobacco use, then we are committed
927 | to finding a way, within the scope of this legislation, to
928 | dealing with those problems.

929 | Mr. COBLE. Mr. Ogden, some insist, and I neither refute
930 | nor confirm this, but some insist that the goal posts in the
931 | tobacco policy discussion continue to be moved. At one point
932 | the President, the FDA, Secretary Shalala, and others said
933 | that all we needed to combat under-age smoking, and
934 | incidentally, to reduce it by 50 percent over seven years,
935 | was to codify the FDA rule which the proposed settlement
936 | adopts in its entirety. I think I'm right about that. Am I
937 | right about?

938 | Mr. OGDEN. My understanding is that one of the features
939 | of the proposed settlement would be to reaffirm FDA
940 | regulatory authority. We are very concerned about the way in
941 | which it does that, because it would actually confer
942 | significantly less authority than the FDA has now, in our
943 | view. But certainly one of the objectives here should be to

944 reaffirm the full authority of the FDA.

945 Mr. COBLE. And I'm told--you know how rumors fly on this
946 hill. But I'm told that you all at Justice and or the
947 administration have given your blessing to the negotiators of
948 the proposed settlement. Now I'm told that there may be some
949 dissatisfaction with some of the proposals, but the details
950 as to these dissatisfactions have been vague and elusive.
951 And I'd like say, to reiterate what my friend from
952 Pennsylvania said: I think if you will, you said you would,
953 convey to the President to get his plan up here with his
954 fingerprints all over it, so we can examine it in some
955 detail. Can you? Do you tell me that you'll do that? I
956 think you told the President, or Mr. Gekas, you would.

957 Mr. OGDEN. Yes, sir.

958 Mr. COBLE. As soon as you can?

959 Mr. OGDEN. I will do it right away.

960 Mr. COBLE. We're not going to shoot the messenger if we
961 don't get it tomorrow. But it would be nice to get that plan
962 imminently.

963 Mr. OGDEN. I appreciate the former, and I certainly will
964 convey it, Congressman. I will say it is our intention to be
965 fully engaged on this, to work together with you in whatever
966 the most productive way is. And, I appreciate your comments.

967 Mr. COBLE. Thank you, Mr. Ogden, and our chairman sees
968 red when that red light comes on. And I yield back, Mr.

969 Chairman.

970 Chairman HYDE. Well, I thank the gentleman for yielding
971 back, and before I recognize Mr. Scott, the gentleman from
972 Virginia, I just want to elicit some sympathy for Mr. Ogden,
973 who, I think, is in a very awkward position. The American
974 Trial Lawyers, which are an important constituency of the
975 administration, don't want anything done. The tobacco
976 companies want it all. The President wants some achievement
977 in this field, and the middle ground involves elements of
978 tort reform, which are not high on the administration's
979 priority list. So it's like standing on two stools that are
980 separating. A terrible hernia will be the result.

981 [Laughter.]

982 So I sympathize with Mr. Ogden. I want you to know that
983 you have one person up here who's bleeding with you.

984 [Laughter.]

985 Mr. OGDEN. May I respond, Mr. Chairman?

986 Chairman HYDE. Sure.

987 Mr. OGDEN. I appreciate very much your concern, but
988 honestly, I don't feel that sense of jeopardy. Our focus
989 truly is on the public health and on attempting to get a bill
990 that reduces youth smoking and addresses these issues. We
991 all have a difficult challenge, because it's a complex
992 problem. But we're certainly dedicated to working toward it
993 in the best way we can.

994 Chairman HYDE. Well, I'm sure of that.

995 Mr. Scott, the gentleman from Virginia.

996 Mr. SCOTT. Thank you, Mr. Chairman.

997 And as one who has generally opposed tort reform, I
998 appreciate your comments, because most of the proposals on
999 tort reform just merely deny victims fair compensation and
1000 reward the wrongdoer without any balance. I support the
1001 situations like worker's compensation, where the victim gives
1002 up the right to sue, but in all cases they can recover,
1003 whether they could have won or not, if they're injured on the
1004 job; and there's a balance. So in this situation, we need to
1005 know a little bit about what the balance is to see whether or
1006 not the compensation is appropriate. And from that basis,
1007 you've kind of alluded to it, but I wanted to know what you
1008 would assess a victim's ability to win in the future. Do
1009 people bringing cases against the cigarette manufacturers
1010 have 'winnable' cases in the future or not. They haven't
1011 won so far.

1012 Mr. OGDEN. Well, you're right that they certainly
1013 haven't won so far, by and large. And I think that is a
1014 serious concern. I think one of the things we want to look
1015 closely at is whether in the context of whatever we do in
1016 this area, we are able to make compensation fairer and more
1017 efficient, and that's certainly something that we're very
1018 conscious of. If we're going to tamper in this area, if

1019 | we're going to look at this area, let's see if we can't do
1020 | that as well.

1021 | Mr. SCOTT. What chance do you think any of the States
1022 | have in winning their cases?

1023 | Mr. OGDEN. I really wouldn't comment on pending
1024 | litigation.

1025 | Chairman HYDE. I'm going to ask Mr. Scott to withhold.
1026 | We have two votes imminent on the floor, to use a favorite
1027 | word here today. And I'm going to ask the committee to stand
1028 | in recess while we go vote and to please return promptly
1029 | after the last vote so that we can proceed with the hearing.
1030 | We've only gotten to the first witness, and we have many
1031 | more. The committee stands in recess for a short time.

1032 | [Recess.]

1033 | Chairman HYDE. The committee will please come to order.
1034 | When last we were here, Mr. Scott was interrogating Mr.
1035 | Ogden, and so we return to Mr. Scott.

1036 | Mr. SCOTT. Thank you, Mr. Chairman.

1037 | Mr. Ogden, I think I was asking you what the--an
1038 | individual plaintiff would be losing if the legislation would
1039 | pass, in terms of what chances there would be in actually
1040 | winning a lawsuit and with the States? And the bells were
1041 | going off, and I'm sorry I didn't hear your answer.

1042 | Mr. OGDEN. I'm not sure I remember my answer, either,
1043 | Congressman. Well, what they lose obviously would depend on

1044 what Congress actually passes. If caps are passed that apply
1045 to individual lawsuits or they apply in an aggregate way to
1046 pay out over time, they would recover any--potentially
1047 recover any damages over a longer period of time, because the
1048 way the caps work involves rolling over the excess into
1049 future years. [^]With respect to class actions, which I think was
1050 what you were--

1051 Mr. SCOTT. Well, speaking of the rollover, is the
1052 rollover--does the rollover work both ways so if in the \$2
1053 billion, if only \$1 billion in judgments are awarded that
1054 year would the \$1 billion roll over for next year?

1055 Mr. OGDEN. My understanding ^{is that under} of the settlement ^{that} would not
1056 ~~have that happen~~ ^{that} what would happen ~~then~~ ^{is that} is that the
1057 money that was not spent in a particular year would go to a
1058 commission that would be established, and that commission
1059 would decide what public purposes to put the money to. But,
1060 of course, a different arrangement could be made if Congress
1061 saw fit.

1062 Mr. SCOTT. On the class actions, is it, from a practical
1063 point of view, impossible to bring a case against a
1064 manufacturer by an individual without a class action?

1065 Mr. OGDEN. Well, I don't think it's impossible.
1066 Certainly, one thing that we ought to be looking at in all of
1067 this, if we are going to address class actions, is whether
1068 there are other ways to reduce the transaction costs, to

1069 reduce the cost of filing suit for individuals. The critical
1070 thing, I think, why I think there's an opportunity here to do
1071 something that, in some measure, actually helps plaintiffs^{is}
1072 that under this agreement, there is \$2 billion to \$5 billion
1073 ~~over time, that it~~^{per year} actually set aside for this purpose. And
1074 it doesn't go back to the tobacco companies if it's not
1075 spent; it gets put to some other purpose.

1076 In all of history, we've had less than \$1 million worth
1077 of judgments in favor of injured smokers. Now it's possible
1078 that will change. One great advantage of what's going on is
1079 that documents are getting out there and maybe Congress can
1080 ensure that even more documents are out there and readily
1081 available to plaintiffs to use. And we may be able to do
1082 some other things. But there's more money^{available} in a single year,
1083 under this arrangement, than ever has been paid out. And I
1084 think that creates an opportunity for us to find a way to do
1085 better than we have in the past. That's all I've said.

1086 Mr. SCOTT. What effect would this have on the State
1087 settlements in the Minnesota case, which is actually going to
1088 trial?

1089 Mr. OGDEN. I think it probably would be best to address
1090 that question to one of the States' attorneys general who's
1091 going to come up here. The exact details as to how this
1092 would interact with particular lawsuits are not entirely
1093 clear to me.

1094 Mr. SCOTT. But you anticipate any judicial ratification
1095 of the settlement since you're involving so many different
1096 individual rights?

1097 Mr. OGDEN. Again, I think the details of how separate
1098 settlements would interact with legislation is something that
1099 would need to be worked out. It's an important subject, but
1100 I don't think it's clear, at the moment, exactly how that
1101 would work.

1102 Mr. SCOTT. Thank you, Mr. Chairman. I will yield back
1103 the gentleman from New York's extra minute.

1104 Chairman HYDE. Thank you. The gentleman from Tennessee,
1105 Mr. Bryant. I'm sorry. Forgive me. I overlooked Mr.
1106 Canady, down in the foggy mists at the end of the
1107 row--tobacco smoke.

1108 [Laughter.]

1109 Mr. Canady.

1110 Mr. CANADY. Thank you, Mr. Chairman.

1111 I want to join with the point that a number of my
1112 colleagues have made this morning that if the administration
1113 wants this to be a successful legislative effort, I think the
1114 administration is going to have to be specific about what it
1115 will support and to present positive proposals to us for us
1116 to consider. I think that's--otherwise, I think the
1117 prospects for this are not so great, and that's something, I
1118 think, you need to take back to the administration and

1119 | communicate to them. I think that's coming through on a
1120 | bipartisan basis from the members of the Judiciary Committee.

1121 | Mr. OGDEN. Well, Congressman, if I may respond--

1122 | Mr. CANADY. Please respond. Yes.

1123 | Mr. OGDEN. --to that? I appreciate that, and as I told
1124 | Congressman Gekas and others, I certainly will communicate
1125 | that back. I do think it's important to bear in mind that
1126 | the President has been quite specific about what he wants to
1127 | accomplish with this legislation--the objectives that he
1128 | wants to accomplish. And I don't appear, sir--

1129 | Mr. CANADY. Well, I think we're also interested in how
1130 | to accomplish the objectives, specifically. All of us can
1131 | probably hold hands and talk about broad objectives on a wide
1132 | range of proposals, but that really doesn't get the work
1133 | done. We have to have the specific mechanisms to accomplish
1134 | it. Again, I understand your, your--

1135 | Mr. OGDEN. And I don't disagree with that. All I'm--the
1136 | President has offered specifics with respect to certain
1137 | matters. With respect to the immediate matters that the
1138 | committee is considering today, the administration is not
1139 | urging the Congress to adopt such provisions and as the lead
1140 | off witness I am in that respect, I think, Mr. Chairman, in
1141 | something of an awkward position, because we don't come here
1142 | as proponents of these provisions. But what we do understand
1143 | is that in order to bring down youth smoking, we need to

1144 | increase the price of cigarettes, dramatically. That's a
1145 | critical element in it. That's going to generate a
1146 | tremendous amount of revenue that should not go to the
1147 | tobacco companies. It should go to the public--to public
1148 | purposes. And if it's necessary, in accomplishing all of
1149 | that, if it proves to be necessary to have these provisions,
1150 | we're prepared to talk about them.

1151 | Mr. CANADY. But again, I don't want to burden you more
1152 | than you've already been burdened. But to tell me that you
1153 | support an objective, but you're not a proponent of the
1154 | mechanism that's necessary to obtain the objective strikes me
1155 | as a little silly.

1156 | Mr. OGDEN. Well, I hope it's not silly, Congressman, and
1157 | I appreciate your point. I guess what I'm trying to
1158 | communicate is that we are open to discuss this issue. If
1159 | this needs to be added, we want to make it happen in the best
1160 | possible way. But we are not coming to you with specific
1161 | proposals in this area, because this is not part of the
1162 | President's personal agenda here. It's not part of what he
1163 | thinks needs to happen for its own sake.

1164 | Mr. CANADY. The Federal Government has not brought suits
1165 | that are the equivalent of the suits brought by the various
1166 | attorneys general around the country against the tobacco
1167 | industry. Why is it that the Federal Government has not sued
1168 | the tobacco industry?

1169 Mr. OGDEN. I appreciate the question and the opportunity
1170 to explain that. The Medicaid statute establishes a
1171 framework in which the states are authorized, and, indeed,
1172 obligated to pursue third party--to pursue companies or
1173 entities that have caused health care costs that should be
1174 recouped, not only on their own behalf, but on behalf of the
1175 Federal Government. That's the way the Medicaid statute is
1176 structured. And so, they are effectively representing the
1177 United States with respect ^{to} ~~with~~ the United States' portion of
1178 the Medicaid payments in these lawsuits. We've certainly
1179 looked at the question whether we can add anything in the
1180 litigation or, more broadly, whether other federal programs
1181 might be appropriate subjects for litigation; and ultimately
1182 our judgment is that the opportunity presented by this
1183 legislation is an opportunity to resolve all of these issues
1184 in a comprehensive way without the--

1185 Mr. CANADY. Well, let me ask on that, though. In this
1186 proposal, would there be a bar on litigation by the Federal
1187 Government, equivalent to the restrictions placed on the
1188 States?

1189 Mr. OGDEN. That's not something that's specified, I
1190 don't believe, in any language in the settlement.

1191 Mr. CANADY. Do you think--there should be should a bar?
1192 Is that the intention?

1193 Mr. OGDEN. I think that would depend entirely--again, I

1194 | hate to give an answer that's not directly responsive--but it
1195 | really does depend on what else is accomplished. If what the
1196 | Congress does is resolve those claims. ^(if) It looks at--decides
1197 | which types of Federal programs should be compensated and
1198 | makes a judgment about how much that should be and passes
1199 | legislation that accomplishes that kind of compensation, then
1200 | it probably would be logical to extinguish the causes of
1201 | action which would recover those same dollars.

1202 | Chairman HYDE. The gentleman's time has expired. The
1203 | gentlelady from California, Ms. Lofgren.

1204 | Ms. LOFGREN. Thank you, Mr. Chairman. I should note
1205 | before asking any questions that I come from a State that
1206 | recently banned smoking in bars, and when the tobacco tax was
1207 | put on the ballot, it got a vote of well over 80 percent of
1208 | California voters wanted to increase taxes. And polls show
1209 | that California voters would increase taxes up to \$2 a pack
1210 | or more by 80 percent margins.

1211 | So with that as a background, understanding this is a
1212 | representative democracy, I'm wondering how this settlement
1213 | gets something for people who hope to extinguish smoking for
1214 | health reasons that we couldn't get otherwise. I very much
1215 | agree that the President's motives on this are absolutely
1216 | admirable. His interest in decreasing teen smoking, getting
1217 | revenue for important purposes are just the best. But it's a
1218 | moving target, and as the litigation scene changes, the

1219 | ability of plaintiffs to recover may be very different than
1220 | when this whole thing started out.

1221 | I'm also mindful that if we had the political will, we
1222 | could raise taxes on cigarettes as much as we could get votes
1223 | for, certainly up to \$1.50 a pack. And I think there would
1224 | be popular support. So I guess the question is: putting
1225 | aside the litigation issue, what in terms of revenue to the
1226 | federal government couldn't be available to us through
1227 | taxation, regulations of use of tobacco just by will, by
1228 | votes?

1229 | Mr. OGDEN. From a public health perspective, the
1230 | critical issue is to raise the price of a pack of cigarettes.

1231 | The best estimates are that a 10 percent increase in the
1232 | price will bring about a 7 percent reduction in youth
1233 | smoking. That's what the experts tell us. So this is a very
1234 | critical element in it. The President's proposal is to do
1235 | that by requiring lump sum payments from the industry--

1236 | Ms. LOFGREN. If I may interrupt, though--I mean, we have
1237 | the ability, do we not, to raise the same amount of money
1238 | through taxation by a vote of this Congress?

1239 | Mr. OGDEN. Yes, I believe that is so, and certainly if
1240 | the Congress were inclined to proceed in that fashion, that
1241 | would probably be acceptable to the administration. I would
1242 | say this, though. One key element in what the President is
1243 | proposing is that a component of these price hikes would

1244 | actually be in the form of penalties that would be imposed on
1245 | the industry, and potentially on individual manufacturers,
1246 | based on their failure to meet certain targets. So there
1247 | actually would be incentives built into the system, and I
1248 | think we need to look at that.

1249 | Ms. LOFGREN. Let me ask about the payments into the, I
1250 | guess, the punitive damage or penalty trust fund. In reading
1251 | through, and I realize that we don't have the proposal before
1252 | us, but it looks to me that the payments would be paid for by
1253 | future revenues so that, in essence, we've got to have more
1254 | people smoking in order to come up with the revenue to pay
1255 | for the punishment. Is that an accurate analysis?

1256 | Mr. OGDEN. No.

1257 | Ms. LOFGREN. What would be accurate then?

1258 | Mr. OGDEN. What would be accurate is that the increase
1259 | in price would be a result of the payments that the industry
1260 | is required to make in the first place. So the industry's
1261 | commitment to pay comes at the front end. The price hike is
1262 | their way of paying for it. That price hike itself is a good
1263 | thing for the American people for the reasons I've stated.

1264 | Ms. LOFGREN. My time is almost out. I've got to ask
1265 | this one final question, because it's a huge California issue
1266 | and if you could respond in writing to the prior question.
1267 | California counties actually fronted the state's costs for
1268 | Medicaid. I mean, it's really scandalous what went on for

1269 multiple years. California counties have brought some
1270 lawsuits and gotten settlements. My question is and the
1271 question posed to me by California counties is: if a
1272 settlement goes through, and there is a deal made on
1273 repayment of costs, will those settlement funds flow back to
1274 the entities that actually paid them--in this case,
1275 California counties? Or, will the state rip off those funds
1276 once again, leaving local taxpayers holding the bag?

1277 Mr. OGDEN. I don't think that, at this point, there is
1278 specificity as to how the state funds specifically would be
1279 expended. The President certainly wants, with respect to
1280 some portion of the monies, them to be dedicated to states to
1281 specific purposes. But beyond that, I'm not aware of there
1282 being any specifics.

1283 Chairman HYDE. The gentlelady's time has expired. The
1284 gentleman from Tennessee, Mr. Bryant.

1285 Mr. BRYANT. Thank you, Mr. Chairman. Mr. Ogden, good
1286 morning.

1287 Mr. OGDEN. Good morning.

1288 Mr. BRYANT. My first question is, Minnesota is involved,
1289 as we speak today, with litigation trying to recover
1290 approximately \$1.7 billion in its State costs. And at the
1291 same time, we have attorneys in Florida who themselves are
1292 battling over \$2.8 billion in legal fees, almost--in Florida,
1293 they're seeking almost double in legal fees what the entire

1294 State of Minnesota is trying to recover. What is the
1295 administration's position on these outrageous, unconscionable
1296 attorneys' fees that some of the States have negotiated,
1297 which would result in lawyers becoming instant
1298 multi-millionaires, in some cases, billionaires?

1299 Mr. OGDEN. Well, as a general matter with respect to
1300 attorneys' fees, it's important, of course, that attorneys
1301 who do the work and incur the risk receive fair and
1302 reasonable ~~and~~ remuneration for that, and that's ~~it~~ necessary
1303 for the access ^{to} of justice--

1304 Mr. BRYANT. Is that fair and reasonable in your view,
1305 the administration's view?

1306 Mr. OGDEN. Certainly, the administration also believes
1307 that it is important to have mechanisms in place so that
1308 wildly unreasonable levels of compensation are not realized
1309 by attorneys[^], because the result of that is that those monies
1310 don't go to the public purposes they should go to. So we are
1311 open to mechanisms to address that issue--

1312 Mr. BRYANT. Exactly.

1313 Mr. OGDEN. There obviously also are--

1314 Mr. BRYANT. Let me interrupt you.

1315 Mr. OGDEN. Certainly.

1316 Mr. BRYANT. So you're committing, on behalf of the
1317 administration, that you will be to work with Congress and
1318 join in our efforts to effectively limit those fees to

1319 reasonable fees so that money can go elsewhere for other good
1320 causes?

1321 Mr. OGDEN. We support that concept, yes.

1322 Mr. BRYANT. Thank you.

1323 Mr. OGDEN. There are constitutional issues that
1324 obviously would need to be addressed.

1325 Mr. BRYANT. I understand that. Now, I understand that
1326 you've testified, consistent with the President, that there
1327 are basically five objectives that would have to be
1328 considered in any settlement. Do you see this particular
1329 agreement that we're talking about today, the comprehensive
1330 settlement as embodying those five principles? And in
1331 particular the one that, I believe, very effectively deals
1332 with youth smoking and, in fact, offers a money-back
1333 guarantee that if it doesn't work, then people are going to
1334 pay. But do you believe that agreement embodies those five
1335 principles that the President is seeking?

1336 Mr. OGDEN. We want to build on that agreement. We think
1337 that wonderful things have been done to get to that point,
1338 but the President believes ^{that} ~~there~~ ^{are} things that need to be
1339 improved. For one thing, he wants a much larger increase in
1340 the price of cigarettes than is called for in the current
1341 agreement. For another thing, he wants no restrictions on
1342 the FDA's regulatory authority with respect to cigarettes and
1343 other tobacco products. ^{And} ~~there~~ are other ways, I think, in

1344 | which it can be improved. But that's not to denigrate the
1345 | achievement that it represents, because it is a great deal of
1346 | progress.

1347 | Mr. BRYANT. I want to commend your position in regards
1348 | to I often ask, ''why would tobacco want to make all these
1349 | concessions that they make in any kind of agreement like
1350 | this?'' You know, both parties have to agree and make
1351 | concessions. Why would they do that if they didn't get some
1352 | kind of limitation on liability? Not complete immunity but
1353 | some limitation. And apparently, this idea of simply taxing
1354 | tobacco here is being suggested as an alternative. But as
1355 | you point out, I think very effectively, when you go that
1356 | route you lose so many things that you get in this
1357 | agreement--that is voluntary cooperation with tobacco in
1358 | terms of their advertising, their marketing, which, if you
1359 | didn't do that you would spend years in litigation over, as
1360 | well as these penalties and incentives for people to work
1361 | together and, indeed and truly, for the first time cut youth
1362 | smoking. I think you lose so much when you do that. That's
1363 | why, I think, I am please to see the administration
1364 | supporting that position and some sort of omnibus overall
1365 | settlement of this case. Thank you. Do you have a quick
1366 | answer?

1367 | Mr. OGDEN. Well, simply to say that we think
1368 | everybody--Congress and the administration--needs to keep its

1369 eye on the ball of reducing youth smoking. That's the
1370 central thing, and the other points that the President is
1371 seeking to achieve. And while we are not proponents of these
1372 provisions with respect to civil liability reform, civil
1373 liability changes, we are prepared to look at them in the
1374 service of those.

1375 Mr. BRYANT. But isn't this the most realistic approach
1376 to really, really getting the objectives we want and keeping
1377 our eye on the ball?

1378 Mr. OGDEN. Well, whether it is or isn't, I think,
1379 remains to be seen. We certainly are willing to work very
1380 hard with you to try to develop the best solution.

1381 Mr. BRYANT. Thank you, Mr. Chairman.

1382 Chairman HYDE. The gentlelady from Texas, Ms. Jackson
1383 Lee.

1384 Ms. JACKSON LEE. Thank you very much, Mr. Chairman. I'd
1385 ask unanimous consent to submit an opening statement that I
1386 had in the record.

1387 Chairman HYDE. Without objection.

1388 [The statement of Ms. Jackson Lee follows:]

1389 ***** COMMITTEE INSERT *****

1390 Ms. JACKSON LEE. Let me first acknowledge a lot of the
1391 hard work that has gone into the point where we are today and
1392 certainly appreciate the work of various attorney generals,
1393 in particular, of course, I happen to come from a State that
1394 has engaged in a settlement that has been approved. I also
1395 sit on a task force that is working on this issue from the
1396 congressional perspective.

1397 Tell me what the structure is in the Justice Department.
1398 Is there an existing task force that deals with this
1399 particular matter, tobacco settlement?

1400 Mr. OGDEN. Yes, the Civil Division of the Department has
1401 been looking very hard at this issue from a number of
1402 perspectives, with involvement from our Office of Legal
1403 Counsel and other components. And we are working together
1404 and have been for some time.

1405 Ms. JACKSON LEE. Are you the principal--and I say you,
1406 meaning that task force or that structure--the principal
1407 structure upon which the White House relies for its advice
1408 and input on this settlement?

1409 Mr. OGDEN. Certainly from the Justice Department we are.
1410 Obviously, there are other departments in the executive
1411 branch that provide very important input, including Health
1412 and Human Services.

1413 Ms. JACKSON LEE. Is there a person in the White House
1414 that you deal with that is the principal negotiator, or

1415 principal point person on this issue other than the
1416 President?

1417 Mr. OGDEN. We deal principally with the Domestic Policy
1418 Council--Mr. Reed.

1419 Ms. JACKSON LEE. And is this task force the one that's
1420 in the Justice Department? Is Attorney General Reno or Eric
1421 Holder an active participant?

1422 Mr. OGDEN. Both of them are actively involved.

1423 Ms. JACKSON LEE. Was there a reason that they were not
1424 here, and I'm not sure whether the chairman invited them, but
1425 is there a reason that they're not here today?

1426 Mr. OGDEN. The Chair issued a very gracious invitation
1427 to the Attorney General. Mr. Holder had been hoping to be
1428 able to testify. Unfortunately, he took ill over the
1429 weekend. He's better now, but he did not have the time to
1430 prepare adequately and so you're stuck with me, I'm afraid.

1431 Ms. JACKSON LEE. Well, I wanted that to be for the
1432 record. I think that this is one of the most challenging
1433 decisions that we as a Congress and this Nation will have to
1434 deal with, because it has far-reaching impact on the health
1435 of a nation, not necessarily an isolated group, isolated
1436 states, but the health of a nation.

1437 So let me proceed with some of the concerns that I have
1438 and to add to inquiry and, I imagine, instructions that you
1439 have heard from several of my colleagues with respect to a

HJU036.000

PAGE

61

1440 proposal by the administration. Mine would be slightly
1441 different. I do believe that the administration has a
1442 responsibility of making, or getting, the best deal, the best
1443 proposal, the best settlement. And I would take issue with
1444 the wait-and-see posture or we-will-work-with-you posture
1445 only because I realize that one can argue that you're not a
1446 litigant per se, and that this has been basically a private
1447 matter or a matter that has been amongst litigants. But when
1448 it impacts the national health policy, or impacts the
1449 financial bottom line of a nation--how much Medicaid, how
1450 much Medicare, how much funding prospectively we'll have to
1451 utilize to stymie the results, if you will, of the
1452 utilization of cigarettes--the damages that have been
1453 done--then it becomes a national issue.

1454 So I would argue vigorously that the government, the
1455 National Government, had that kind of responsibility. We are
1456 on different sides of this issue, and I remain open, albeit
1457 that I have been working on a task force. Points made about
1458 trial lawyer fees and whether or not trial lawyers are moving
1459 this train, let me say that trial lawyers that I have spoken
1460 to have said to me, "get the best deal that you possibly can
1461 get," bar none, on the settlement or anything else.

1462 Attorneys fees have been judged according to Federal
1463 judges who have reviewed them. But my question to you is,
1464 what happens with this cap on punitive damages? Even though

1465 | we have the \$60 billion, how does that help the injured
1466 | smoker in the year 2010 and why are we not weighing in on
1467 | that issue? What happens with this settlement with result to
1468 | the class action part of it? And how do you see the FDA
1469 | being a vital part of the regulation of nicotine? Do they
1470 | put big block letters on the cigarettes? People already know
1471 | that. How would you see this being implemented, and don't
1472 | you see a role for the government to make this a better
1473 | settlement? If you'd answer--I gave you three questions, and
1474 | if you'd answer those, I'd appreciate it.

1475 | Mr. OGDEN. I'll do my best, Congresswoman. First of all,
1476 | I certainly agree with you that this is an issue of the most
1477 | pressing national importance, pressing importance to the
1478 | government, to the Administration. And we want to be as
1479 | proactive a participant in crafting a solution as we possibly
1480 | can.

1481 | Second, I think the second question related to punitive
1482 | damages. Certainly, I don't come here as a proponent of
1483 | limitations on punitive damages. However, restricting
1484 | punitive damages in a scheme that maintains deterrence
1485 | against wrongdoing by the companies is something that, if
1486 | necessary, we would be prepared to look at.

1487 | Finally, I guess I lost your third question. Do you
1488 | remember what it was?

1489 | Ms. JACKSON LEE. Yes, it had to do with how this lawsuit

1490 | and how the FDA regulation is going to be implemented, and
1491 | how this settlement would impact that injured smoker in the
1492 | year 2010.

1493 | Mr. OGDEN. Critically important is the FDA's continued
1494 | role; they'll be able to respond to any new information that
1495 | comes out, issue new regulations with respect to tobacco.
1496 | There should be no restriction on them with respect to
1497 | needing to make some finding about black markets or
1498 | contraband, as has been proposed in the settlement. They'll
1499 | be able to provide significant protection, including
1500 | addressing marketing issues ~~which, I think~~ and access
1501 | issues--that I think ^{are} ~~is~~ extremely important to this problem.

1502 | Chairman HYDE. The gentlelady's time has expired.

1503 | Ms. JACKSON LEE. Thank you, Mr. Chairman.

1504 | Chairman HYDE. The gentleman from Ohio, Mr. Chabot.

1505 | Mr. CHABOT. I thank the chairman.

1506 | Mr. Ogden, if--I know you have been listening to the
1507 | various questions that have been put to you today, and
1508 | there's been kind of a common theme from both sides of the
1509 | aisles. I think Barney Frank, early on, from the Democratic
1510 | side pressed you on the fact that the administration has not
1511 | really put forward a plan yet had criticism. Mr. Gekas, on
1512 | our side--and there's been a lot of questioning and comments
1513 | about that--and I agree with the tenor of those comments. I

1514 think there's been a woeful lack of leadership from the White
1515 House on this issue thus far. I think it's time--time's long
1516 overdue that you put forward proposed legislation that we can
1517 consider in Congress.

1518 I mean, the other night when the President gave the State
1519 of the Union address, he talked about all kinds of ways to
1520 spend the money from this proposed settlement, things which
1521 sounded good, you know, things like shoring up Social
1522 Security and finding some money for child care and education
1523 and other things--things a lot of us agree with. But those
1524 things aren't going to happen unless this settlement happens,
1525 and this settlement isn't going to happen unless we have
1526 leadership from the White House. So I would strongly
1527 encourage you to send that message back, loud and clear: that
1528 we want the President's plan, we want the details, and we
1529 want it very soon.

1530 Mr. OGDEN. I've committed to do that, Congressman. But I
1531 also would, I guess, repeat what I've said before, which is
1532 that the President has laid out what he believes ~~what~~ the
1533 objectives ^{should be} and he has laid out quite a bit of what he thinks
1534 the mechanism should be--this critical increase in the price
1535 of tobacco through lump sum payments and penalties that will
1536 reduce youth smoking so dramatically.

1537 Mr. CHABOT. Give us a timeframe, if you could. How soon
1538 do you expect us to actually to have the President's detailed

1539 | plan before Congress.

1540 | Mr. OGDEN. I can't give you an estimate about that
1541 | because--as I--my understanding of what the administration
1542 | hopes to do is to work together with the Congress, with the
1543 | leaders of the Congress, to craft bipartisan legislation to
1544 | accomplish these objectives.

1545 | Mr. CHABOT. So you don't know how long it's going to
1546 | take then? You don't know when we'll get the President's
1547 | plan?

1548 | Mr. OGDEN. I hope that we can have bipartisan
1549 | legislation drafted very, very soon, but I don't have any
1550 | timetable.

1551 | Mr. CHABOT. But you don't know what very soon is at this
1552 | point--as far as if we're talking weeks or a couple of months
1553 | or how long we're talking?

1554 | Mr. OGDEN. I don't have a timetable. It depends on how
1555 | quickly we can all agree on the appropriate way to go. All
1556 | right, well, let me move on to something else. We also
1557 | discussed the potential of increasing a tax on cigarettes in
1558 | order to come up with the funding, and let's talk about that
1559 | for a minute. I know some years ago the administration had a
1560 | proposal, and actually carried it forward, about a luxury tax
1561 | on yachts and expensive cars and that sort of thing. The
1562 | idea was a lot of revenues would come in, they could things
1563 | with these revenues. And ultimately what happened, as we all

MR.
CHABOT'S
QUESTION

MR. CHABOT.

1564 know, is that people didn't buy yachts, and they stopped
1565 buying cars and we actually crippled an industry; and not
1566 many revenues came in. And I'm just wondering: is there a
1567 point of diminishing returns on the cigarette tax? And what
1568 do you see happening out there? How high can that go
1569 before--and I know we ultimately want to reduce smoking. So
1570 you're ultimately trying to reduce smoking, particularly to
1571 young people. And I'd just like you to discuss, perhaps in a
1572 little more detail, how you see that playing out?

1573 Mr. OGDEN. Well, as you say, the objective--I don't know
1574 what the objective was with yachts and cars, but certainly
1575 the objective with tobacco is to reduce dramatically the
1576 number of people who are smoking in the future. And,
1577 therefore, exactly the point of this--indeed, the whole point
1578 of the lump-sum payments and the penalties that the President
1579 thinks should be imposed--is to reduce dramatically the
1580 amount of smoking that is going on, particularly by young
1581 people, but also in general. Obviously, there's a
1582 relationship between price and demand, and we hope to use
1583 that, particularly with starting smokers to do that.

1584 What the President has proposed is lump-sum payments and
1585 penalties that would potentially raise the price of a pack of
1586 cigarettes by up to a \$1.50 over the course of the next 10
1587 years with attention to how well we are doing in our targets.
1588 How much is youth smoking coming down?

HJU036.000

PAGE

67

1589 Mr. CHABOT. Well, again, just to reiterate as strongly
1590 as I can, I think we ought to have the President's proposal
1591 and have it here as quickly as possible.

1592 Thank you, and I yield back the balance of my time.

1593 Chairman HYDE. I thank the gentleman.

1594 The gentleman from Massachusetts, Mr. Meehan.

1595 Mr. MEEHAN. Mr. Chairman, I would like to first of all
1596 take this opportunity to thank you for holding today's
1597 hearing. Enacting comprehensive legislation to reduce
1598 tobacco uses should be one of the top priorities for this
1599 Congress, and I hope that today's hearing helped move that
1600 process forward.

1601 However, let me be very clear, absolute immunity from
1602 civil liability for the tobacco industry is and should be
1603 dead.

1604 With regard to the President, while I would like to see a
1605 specific proposal, let me just point out that Bill Clinton is
1606 the first American President in history to stand up to big
1607 tobacco on behalf of America's children, and I am very
1608 appreciative of the President's efforts on tobacco.

1609 We in the Congress have a unique and historic opportunity
1610 this year to change the course of this country's public
1611 health. Tobacco uses have indicated it's a leading,
1612 preventable cause of death in the United States.

1613 For decades the tobacco companies have marketing this

1614 addictive and deadly product to America's children. They
1615 have targeted young people with advertising and just over the
1616 last few weeks a new set of internal documents have been
1617 released that conclusively proved the existence of this
1618 deliberate strategy to market to children.

1619 And it's interesting, because here in Congress even
1620 longtime allies of the industry have expressed dismay and
1621 disgust over these documents detailing blatant and cynical
1622 ploys to entice kids into lifelong and life-ending addiction.

1623 Now, Mr. Ogden, in your written testimony you touch upon
1624 many of the provisions which I think ought to be included in
1625 a comprehensive tobacco bill, a combination of penalties and
1626 price increases that raise the price of cigarettes by a
1627 \$1.50, full authority to the FDA, changes in the way the
1628 tobacco industry does business, particularly with regard to
1629 advertising, and a number of other critical public-health
1630 goals.

1631 And I agree with these principles, and I think we can
1632 include many others, including a comprehensive proposal to
1633 reduce tobacco use. Now, however, de facto immunity, full
1634 immunity from civil liability for the adoption of these
1635 measures to protect health; however, I think it's dead. I
1636 don't think that we need to negotiate as equals with this
1637 industry.

1638 Mr. Ogden, in December of 1994, I submitted to Attorney

HJU036.000

PAGE

69

1639 General Reno a 114-page prosecution page memorandum detailing
1640 a number of potential criminal violations by tobacco
1641 companies and their executives, and since that time The New
1642 York Times and The Wall Street Journal and many other media
1643 outlets have suggested that the Justice Department has been
1644 conducting a number of grand jury investigations focused on
1645 the tobacco industry and its attorneys.

1646 From media accounts, at least, it appears that this is
1647 one of the major criminal investigations that the Justice
1648 Department has conducted with charges or allegations of
1649 perjury and misleading the Federal Government, wire fraud,
1650 mail fraud, criminal conspiracies, securities violations, and
1651 abuse of attorney-client privileges.

1652 And just two weeks ago the Justice Department announced
1653 that a small, biotech firm in California had plead guilty to
1654 the illegal export and import of genetically-enhanced tobacco
1655 seeds in conjunction with the company's work for Brown and
1656 Williamson.

1657 Now, in light of the Justice Department's ongoing
1658 investigation into potential criminal violations, do you
1659 believe now is an appropriate time for the Congress to grant
1660 de facto immunity to this industry from civil liability that
1661 at least in part is designed to punish the industry for
1662 decades-long duplicity, of duplicity on their part?

1663 We don't have all the results of that criminal

1664 investigation. I wonder if you could respond.

1665 Mr. OGDEN. Well, I can't, of course I can't comment
1666 either to confirm or deny the existence of any--

1667 Mr. MEEHAN. You don't have to do that. We read the
1668 Journal and the Times and there are leaks, so--

1669 Mr. OGDEN. But apart from that, yes, I think it is
1670 extremely important that the Congress move forward
1671 expeditiously with this legislation. Part of it--

1672 Mr. MEEHAN. And de facto immunity?

1673 Mr. OGDEN. De facto, well, certainly anything that
1674 constitutes immunity for the industry for future acts would
1675 be unacceptable, and that's not on the table. With respect
1676 to other matters, we are willing to consider limited
1677 measures, reasonable measures, that would change the way in
1678 which the liability system works, with respect to tobacco, if
1679 that's necessary in order to achieve these larger purposes.

1680 De facto immunity certainly is not anything that's on the
1681 table.

1682 Chairman HYDE. The gentleman's time has expired. The
1683 gentleman from Georgia, Mr. Barr.

1684 Mr. BARR. Thank you, Mr. Chairman.

1685 Mr. Ogden, I think it was in response a question by my
1686 colleague from Tennessee, Mr. Bryant. You said that there
1687 were constitutional issues that need to be addressed with
1688 regard to attorney's fees. What constitutional issues are

1689 | those?

1690 | Mr. OGDEN. Well, my understanding, Congressman, is that
1691 | when you have a completed contractual arrangement and
1692 | legislation seeks to modify the benefits of a completed
1693 | contractual arrangement that may exist--for all I know I
1694 | assume does exist--between the States and certain of their
1695 | attorneys, questions arise with respect to the degree to
1696 | which settled expectations about levels of compensation can
1697 | be modified after the fact. It's an issue that, you know, I
1698 | am not prepared to comment on in terms of how it can be
1699 | resolved. We are certainly interested in working in ^{the} ~~a~~ manner
1700 | that I indicated to Mr. Bryant on the question.

1701 | Mr. BARR. So the constitutional issue in your view is
1702 | simply a contractual one?

1703 | Mr. OGDEN. It is--

1704 | Mr. BARR. The sanctity of whatever contract there might
1705 | be?

1706 | Mr. OGDEN. Contractual expectations can give rise to
1707 | certain property interests that the Government's bound to
1708 | respect in certain ways, and we just need to be careful in
1709 | looking at this issue that we're consistent with what the
1710 | Constitution requires.

1711 | Mr. BARR. Let's focus for a minute on the Constitution.
1712 | I notice that in your written remarks the word
1713 | 'Constitution' doesn't appear nor does the word

1714 ' 'constitutional' ' appear anywhere. Correct me if I am
1715 mistaken.

1716 Mr. OGDEN. I hope you are mistaken.

1717 Mr. BARR. I read through it again after your reference
1718 to constitutional issues needing to be addressed with regard
1719 to attorneys' fees. There are people, including myself, that
1720 think that there are some fairly fundamental constitutional
1721 issues with regard to this so called global settlement.

1722 There have been, over the course of recent national
1723 history, a couple of matters in which the Federal Government
1724 played a lead role in addressing legal matters that affect
1725 huge segments of our population, the Bell breakup back in the
1726 1970's and 1980's, an antitrust-based matter, asbestos
1727 litigation.

1728 Neither of those I think really provides the
1729 constitutional framework for what we are contemplating here.
1730 If you feel otherwise, I'd be interested to hear that. I
1731 think we're basically going into uncharted territory.

1732 We have essentially the three branches of government just
1733 sort of setting down, like at a table, and carving up an
1734 industry, a product that is not illegal. Smoking is not
1735 illegal. The product is not an illegal product. It doesn't
1736 carry criminal penalties for its possession, as with
1737 controlled substances.

1738 And I am also concerned not only with the separation of

1739 powers--potential separation of powers problems here--but
1740 also blurring of other lines as well, for example between the
1741 way our country historically in its constitutional framework
1742 has handled civil problems as opposed to criminal. I don't
1743 think that the Congress could pass a law criminalizing
1744 possession of tobacco or use of tobacco. To my knowledge no
1745 State has.

1746 Yet it seems to me what's happening is the Federal
1747 Government and many of States' attorneys general are trying
1748 to do just that, sort of coming in through the back door.

1749 Do you have any concerns--does the administration have
1750 any concerns at all for constitutional limitations in the
1751 area of separation of powers and what we are getting into
1752 here, or in terms of blurring the lines between civil and
1753 criminal judicial proceedings in our country?

1754 Mr. OGDEN. The constitutional concerns that I've
1755 addressed in my testimony, and they are mentioned in a couple
1756 of places, pages five and eight for example, relate
1757 principally to questions about federalism, that is the extent
1758 to which--

1759 Mr. BARR. I did see those. I do know that you
1760 referenced federalism.

1761 Mr. OGDEN. And we do say that any changes must be
1762 constitutionally sound, and that is extremely important, and
1763 the issues are issues about what can the Federal Government

1764 do with respect to State institutions in terms of modifying
1765 them and under what circumstances can they do that.

1766 I confess it has not occurred to me that there are any
1767 separation of powers questions with respect to the branches
1768 of government that are posed by--by the proposal. Certainly
1769 if there are specific concerns that you have, we would look
1770 at them, as we take any of these things very seriously, and
1771 as far as the questions of civil--

1772 Mr. BARR. Closing off access to the courts would be one
1773 that would perhaps come to mind.

1774 Mr. OGDEN. Of course, Congress does have certain powers
1775 with respect to establishing what business the courts are
1776 open to conduct, and there are limits on that, but certainly
1777 any specific concerns that you have we'd be--

1778 Mr. BARR. None have come to the administration's mind
1779 thus far?

1780 Mr. OGDEN. Not with the separation of powers that I am
1781 aware of, sir.

1782 Chairman HYDE. With regret, the gentleman's time has
1783 expired.

1784 The gentleman from--we have nine more witnesses, folks.
1785 We've been two hours with this excellent witness, and I just
1786 merely give that as a little fascinating datum.

1787 [Laughter.]

1788 And it is not a misdemeanor to curtail questioning, and

1789 | one might even get immunity if they would, but in any event,
1790 | Mr. Jenkins--and I am only picking on you and Mr. Hutchinson
1791 | because you are both Republicans, and I am more comfortable
1792 | jumping on you than Democrats.

1793 | Mr. JENKINS. Well, thank you, Mr. Chairman, and you
1794 | speak of this excellent witness, and I agree, and the lawyer
1795 | in me almost wants to go out and be on his side. He's badly
1796 | outnumbered. He's fielded questions from all around the
1797 | field here. I think he's a brave man.

1798 | My questions are a little more practical, and of course
1799 | they'll be fewer after the chairman's admonition, but on page
1800 | five of your testimony, Mr. Ogden, the second paragraph from
1801 | the bottom, you say that "the legislation should make
1802 | compensation of victims more fair than historically has been
1803 | the case."

1804 | There's an implication that the trials that we've had
1805 | have not been fair relating to this subject. Is that true?

1806 | Mr. OGDEN. No, I didn't mean to imply that any
1807 | particular trials had been unfair, but there is a concern
1808 | that access to justice simply by the mechanics of what exists
1809 | within the system has been complicated over history.

1810 | Very few recoveries have been made in this area, and what
1811 | I intended there was what I was addressing with Mr. ~~Watt~~^{Scott}
1812 | earlier which is the fact that under the arrangement, under
1813 | the settlement, funds would be set aside for compensation,

1814 far in excess of what has previously been paid out, and it
1815 would be incumbent upon us to find out appropriate ways that
1816 injured parties who were deserving of it could receive some
1817 of those funds.

1818 Mr. JENKINS. When we talk about setting aside
1819 compensation, let me ask you--we talk about fair trials. Has
1820 anybody thought of this aspect of this? We're going to have
1821 a fund out there. Nobody can keep from the minds of
1822 perspective jurors that this is case.

1823 Now aren't we, in effect, nationally pointing jurors in a
1824 direction about verdicts in any future cases? Is there any
1825 situation that's analogous to this in our law? Of course, I
1826 mean you could say insurance is similar, but I guess in every
1827 State the instructions of the trial judge are that there will
1828 be no mention of that, and it's not brought into the law
1829 suit.

1830 I don't know that that's the law in every State, but is
1831 there anything that you can think of as analogous, and how
1832 are we going to keep from the juror ultimately out there, in
1833 the end result, from saying "'Gosh, we've got the money for
1834 this. Let's award a verdict.'"

1835 Mr. OGDEN. What these are--

1836 Mr. JENKINS. Excuse me. I am sorry.

1837 Mr. OGDEN. What these are of course, in essence, are
1838 limitations on the amount of money that can be paid out in

1839 any given year. And that's really how they function, at
1840 least as I understand it.

1841 Now it is true that under this arrangement, if they are
1842 not allocated in any given year, as I mentioned earlier, to
1843 compensation, they would be put to other public purposes, but
1844 these are, in essence, limitations on payment in a particular
1845 year, and I think as such may impose somewhat less of a
1846 concern than might appear if we really thought about this as
1847 a fund per se.

1848 Mr. JENKINS. All right.

1849 Thank you, Mr. Chairman.

1850 Chairman HYDE. I thank the gentleman very much. The
1851 gentleman from Arkansas, Mr. Hutchinson.

1852 Mr. HUTCHINSON. Thank you, Mr. Chairman.

1853 The administration's position, so far as you have
1854 indicated today, for comprehensive tobacco legislation I
1855 think is a significant step. I wish that step had come
1856 sooner in giving Congress the administration's position, but
1857 I think it is significant what you've said today, reflecting
1858 the administration's view on this.

1859 I do agree with Mr. Gekas and others that the
1860 administration needs to submit a piece of legislation. So,
1861 add my voice among those other members that are requesting
1862 specific guidance from the administration on this important
1863 subject.

1864 Mr. OGDEN. I am taking notes.

1865 Mr. HUTCHINSON. Keep writing.

1866 Another subject--Mr. Conyers and others have raised the
1867 issue that there are documents still out there that have not
1868 been disclosed, and he indicated he wants all the facts on
1869 the table. And my question to you is, are you satisfied that
1870 all relevant documents and information have been provided by
1871 the tobacco companies?

1872 Mr. OGDEN. If I may, first--this is not the first moment
1873 that someone from the administration has indicated support
1874 for comprehensive tobacco legislation or these five points.
1875 The President outlined them in September, and this has been a
1876 position that's been indeed clear for some time, but--

1877 Mr. HUTCHINSON. Could you get to my question, please?

1878 Mr. OGDEN. Yes, I just wanted to be sure that the record
1879 was straight on that one point, but the--remind me what your
1880 question was. I am sorry.

1881 Mr. HUTCHISON. The question is, are you satisfied that
1882 all relevant documents and information of the tobacco
1883 companies have been provided? If not, what do you believe is
1884 out there? Where are we in relation to the disclosure of the
1885 information and documents?

1886 Mr. OGDEN. I think that ensuring ourselves that we do
1887 have full disclosure is extremely important.

1888 Mr. HUTCHINSON. I understand, but where are we right

1889 | now?

1890 | Mr. OGDEN. I really can't say. Certainly more
1891 | revelations are coming out. More documents are being
1892 | released all the time. I think what's important is that
1893 | there be strong incentives and requirements that
1894 | non-privileged documents be produced as part of this
1895 | resolution.

1896 | Mr. HUTCHINSON. Well, do you know--does the
1897 | administration know of any documents that the tobacco
1898 | companies have that have not been disclosed?

1899 | Mr. OGDEN. Well, certainly privileged documents, or
1900 | documents as to which there are claims of privilege, have not
1901 | been disclosed. We believe that there is an appropriate
1902 | place for a valid assertion of the attorney-client privilege.

1903 | Beyond that, I certainly don't have any specific
1904 | information, but I think it is incumbent on us to make sure
1905 | that all of it is produced.

1906 | Mr. HUTCHINSON. And I agree. I think that there should
1907 | be full disclosure, but I don't like just throwing out that
1908 | unless there's specific items that Congress should address to
1909 | require full disclosure. If we're just throwing out words
1910 | then I think that's demagoging an issue.

1911 | The other--

1912 | Mr. OGDEN. My impression is that there are at this point
1913 | a fair number of documents that remain under seal in

1914 litigation, and so there is a role for making things public,
1915 making them more broadly available and all that.

1916 Mr. HUTCHISON. If the administration believes those
1917 should be disclosed, I would like to have a list of those
1918 documents, and I think that we ought to put pressure that
1919 they can be done.

1920 Another area of questions real quickly--there is historic
1921 precedent, is there not, for limitations on tort liability?

1922 Mr. OGDEN. Certainly many States have various rules with
1923 respect to that.

1924 Mr. HUTCHINSON. And including limitations that Congress
1925 has enacted on freedom from liability from vaccine
1926 manufacturers or limitations of liability in that area.

1927 Mr. OGDEN. I believe that's right.

1928 Mr. HUTCHISON. If the settlement is enacted, an
1929 individual would still be able to file suit individually
1930 to--under the settlement what would be the theories of
1931 liability that an individual could file suit on and what
1932 theories would be barred under the settlement?

1933 Mr. OGDEN. That's a question that might be best
1934 addressed to the States' attorneys general. My understanding
1935 is that with respect to future claims the law really wouldn't
1936 be changed under the terms of the settlement, with respect to
1937 what kinds of claims could be asserted.

1938 Mr. HUTCHINSON. So an individual could file suit?

1939 Mr. OGDEN. On any legal theory, I believe, except to the
1940 extent that that case is already in existence or settled.
1941 That's my understanding, but many of the details are somewhat
1942 sketchy, or at least in my mind are, and I think it'd be best
1943 to get the answer from the folks who are more familiar with
1944 it.

1945 Mr. HUTCHINSON. The administration's budget included \$65
1946 billion from the tobacco settlement. Is that over and above
1947 what would be used to fund, for example, assistance to the
1948 tobacco farmers?

1949 Mr. OGDEN. My understanding is that the ~~notion is that~~
1950 ~~the monies are the result of the increased~~ that are
1951 generated through these lump-sum payments and penalties, that
1952 are designed to raise the price of tobacco, would be
1953 dedicated to accomplish the purposes, including assistance to
1954 tobacco farmers.

1955 Mr. HUTCHINSON. I am out of time, and I thank the Chair.

1956 Chairman HYDE. I thank the gentleman, and Mr. Delahunt,
1957 who just came in, do you have any--you don't have any
1958 questions, do you?

1959 [Laughter.]

1960 Thank you. Thanks very much.

1961 Well, I want to thank you, Mr. Ogden. You've been a very
1962 forthcoming witness, given the limitations of the situation,
1963 and we thank you, and if we have more information, as I am

1964 | sure we will, we'll be in touch with you.

1965 | Mr. OGDEN. Thank you very much, Mr. Chairman.

1966 | Chairman HYDE. Thank you.

1967 | Now the next panel, panel two, the first witness will be
1968 | Mr. Meyer Koplow of the firm of Wachtell, Lipton, Rosen &
1969 | Katz. Mr. Koplow represents Phillip Morris and participated
1970 | on their behalf in discussions which resulted in the proposed
1971 | tobacco settlement we are examining today. He will be
1972 | representing the views of the tobacco industry.

1973 | We are pleased to have Colorado Attorney General Gale
1974 | Norton as our second witness. General Norton is a graduate
1975 | of the University of Denver and its law school. Her prior
1976 | experience includes service as Associate Solicitor at the
1977 | U.S. Department of Interior, Director of the legal staff of
1978 | the National Park Service and the U.S. Fish and Wildlife
1979 | Service, and an appointment by President Bush to the Western
1980 | Water Policy Review Commission. She has also been recognized
1981 | by the American Institute of Architects as the Colorado
1982 | Public Official of the Year.

1983 | The panel's final witness will be former president of the
1984 | American Lung Association, Dr. Alfred Munzer. Dr. Munzer is
1985 | a graduate of Brooklyn College and the State University of
1986 | New York Downstate Medical Center. In addition to being
1987 | president, he has served at the American Lung Association in
1988 | the capacity of chairman of its Program and Budget Committee

8-25

Tobacco mkt - DOT

What does current liab syst do?

- a) compensates
- b) assesses fault
- c) takes responsibility for misconduct

Purpose of settlement

- reduce & curb smoking
- DOT action
- reduce adult smoking
- provide stable env for farmers / ind
- raise funds
- provide for safer products
- provide comp syst for those injured - including docs - to several fault or just prev
- reduce tx costs relating to tobacco litigation

Liab liab

- a) liab caps
- b) pure dam
- c) allocative mech - includes class actions etc.

Liab caps

How much to put down on full liability? (that's what Ron W)

- no limits
- limits on \$ paid in given yr.
- part but not future
- cap indiv suit - e.g. only out-of-pocket / med expenses or limit kinds of damages (whos comp)

TRM LINE - give to cos.

Whole new syst -

punishes
empowers people / eligibility req
damages
kinds of illnesses -

Ask industry re when comp -
actuarial analysis

Cumulative liab. syst - not by
9002

Turning - only make less
effective.

Punitive - deter + punish / give incentive to take care / investigate
doctors

- same anal as caps.

Pay as part of deal - T & - serves same purpose

make pay
more up front

Punitive to reinforce document production - linkage to ID scope of
past misconduct

Punitive to ensure investigation + suit.

- Allow w/ ID burden of proof

- use judge to make award

- cap punishes

flat caps

flexible cap -

use multiplier of caps.

← limits multiple punitive damage awards for same conduct (Habeas)

None at all

corpus delicti
do you feel
state courts
could in #

advising you + why you pay
for past misconduct
if news dies? - are lots are
out - or continuing payment
scheme

new comp system every forward

new model of comp -

who's comp -

p. could access fairly cheaply

certain elig reqs.

funded by tobacco cos.

insurance pool.

Class actions - reduce litig costs / access to lawyers /

electronics, but use new joinder + discovery devices

allow other kind of joinder devices

perhaps even augment them

multidistrict litigation models.

make sure sb actually
gets IPART - then joinder
rules - it not work

public disclosure
public pun
use other
punitive
to serve
same purpose

Vaccine injury
Radiation

> same lecture - concept is there.

Tobacco-settlement-liability

3-2 Liability Limits

Criteria:

As ~~soon~~ ^{and} day, any chance for p. to recover?
Painder/CA key to 2 of recovery
anything

Criteria to give up:

1. Fed claims for Medicare + Medicaid - give them up -
harriet brought the good news

2. N + local claims (as in settlement)

3. Punitive damages for past conduct

* tie pun damages in sum to disclosure -

if facts + docs w/ held - then can recover

4. Annual liability cap -

most imp. to ind

2-56 may not be enough - w/ this, you have
anything below real costs to have (\$) to preserve
equity

5. Annual limits on individual actions (e.g. 1M per year)

(even if you don't have overall cap, you may
have this - wouldn't do cos. much good)

6. Abolishing class actions + joinder devices

(any diff between these two?)

(class actions so let - only then other other goods)

less of a concern if they're ^{cos.} annual cap

7. Addiction + dependence claims

Any lasting effect on ~~the~~ ^{the} identifiable actions

PACKAGE DEALS

1. Package of settlement

Flexibility priorities 2. Both AG suits + ^{any} fed suits -

block class, joinder, 3rd party payer actions for future
block all things that make it easier to bring suits -
but no caps, + punitive

ORDER HERE?
PROP. NO CONSENSUS HERE

(Poss to allow whatever you allow
of punishments to be outside cap.)
↓
(i.e., part on non-disclosure)

3. Rely on cap - annual int cap + indiv - roll over
leave mech of CA + prinder note part addition suits
preclude past ~~and~~ punishments (save little part on -)

4. Report for past combined opti-

No caps -

indiv + CA go forward - even
from past

Punishments for past
precluded.

Tobacco - settlement -
liability

ELIANT - THIS IS THE INFO WE THINK
WE NEED FOR THE CIVIL LIABILITY
REFORM WORK.

DAVID

INFORMATION NEEDED

In order to prepare a compensation delivery model, we need information from HCFA, CDC, tobacco manufacturers, insurance companies, the State AGs, and others.

- I. What is the universe of present and future persons injured by tobacco-related disease?
 - A. Deaths due primarily to tobacco use/exposure
 1. Number of individuals estimated dying from lung cancer, emphysema, other tobacco-related diseases over the last three years
 2. Number of individuals estimated to die annually in 2000, 2005, 2010, etc. from those same diseases.
 - B. Diseases primarily caused by tobacco use/exposure
 1. Number of individuals currently estimated to be afflicted by particular tobacco-related diseases:
 - a. Lung Cancer
 - b. Emphysema
 - c. Pharynx, larynx, diseases
 2. Number of individuals estimated to be afflicted by diseases where tobacco viewed as a contributing factor:
 - a. Demographic information about individuals afflicted by diseases:
 - b. Average age
 - c. Sex
- II. Damages/Costs Caused by Tobacco Use/exposure
 - A. Aggregate figures
 1. Health care costs per year --- is it \$50 billion?
 2. Health care costs by disease
 3. Productivity lost --- is it \$50 billion?
 - B. Category figures
 1. Average individual health care claim
 2. Percentage of health care cost:
 - a. Uninsured
 - b. Covered by Medicare

- c. Covered by Medicaid
- d. Covered by workmen's compensation
- e. Multi-employer insurance

III. Cost of Processing Claims*

A. Workmen's Compensation Model

1. Number of current claims processed by the states
2. Estimate cost of the system

B. Judicial system (DoJ attempting to develop)

1. Number of tort/product liability cases filed
2. Estimate of judicial time expended on tort/product liability cases
3. Estimate of judicial budget resources expended on tort/product liability cases.
4. Estimated cost of handling tobacco-related cases

* These statistics do not directly relate to tobacco, but would be used in estimating the cost of processing tobacco compensation claims under various scenarios.

what we need

7/10/20

1) smallness + secrecy

2) importance - "need 51 votes" for limits

3) What we need

~~step 1 - establish a committee~~

a. - ~~range~~ ^{spectrum} of proposals - e.g. class actions

b. - convergence - work but don't be unrealistic

c. - link up to other goals - e.g., on youth smoking,

disclosure

understand there's some disagreement
this week about whether we
should even talk about this
that's been settled.

key now is to develop a set of proposals
to weigh pros + cons, independently
+ then later, at a different level, in
context of whole deal

d. - how deal w/ pending lawsuits

Mike McCurry statement

Our position on liability limits for tobacco companies is what it has always been. We have said this many times -- I know I have said it many times from this podium -- and we are saying it once again in testimony to Congress this morning. We would prefer a comprehensive tobacco bill without any liability limits. We believe that tobacco companies should not have special protections, and that the June 20th settlement struck the wrong balance. But again, as we've said many times before, if we get everything else that we want in a tobacco bill -- if we get a comprehensive bill that satisfies each of the President's five principles -- then reasonable limits on liability would not be a dealbreaker. Our priority is to protect public health and particularly, to reduce youth smoking. We will consider legislation as a whole to determine whether it fully achieves that objective, and we will sign legislation that succeeds in doing so.

DAVID OGDEN

Sen. Ted Cruz - next week
FDA Regs - Court?
Add request - civil liab provisions

tobacco -
settlement -
liability

10-12-15

Barney Frank - meanest
- unhelpful - no views whatsoever

pinch of - both sides - more from Repubs through
Admin hasn't proposed
Tell The Admin - we need a bill
We need language
Leadership

No one disagreeing about much of anything
~~At~~

was something or
interplay with
Something that's
not a deal breaker
it's not to achieve
goals

Friendly staff from TN & VA Repubs -
looked like they were appreciative -
saying thank you.
Have to do, right?

Box - willing to consider -
but penalties by imp.

- Willing to do it have to do.
Have not reached conclusion that
ind. is necessary.

Documents - shouldn't we find out everything first?

Atty fees - (Bryant) - ~~proposed~~ appropriate to wk/with -

Mike McCurry Statement

Our position on liability limits for tobacco companies is what it has always been. We have said this many times -- I know I have said it many times from this podium -- and we are saying it once again in testimony to Congress this morning. We would prefer a comprehensive tobacco bill without any liability limits and look forward to the legislative proposal from Senator Conrad and the Senate Democratic Taskforce. We believe that tobacco companies should not have special protections, and that the June 20th settlement struck the wrong balance. But again, as we've said many times before, if we get everything else that we want in a tobacco bill -- if we get a comprehensive bill that satisfies each of the President's five principles -- then reasonable limits on liability would not be a deal breaker. Our priority is to protect public health and particularly, to reduce youth smoking. We will consider legislation as a whole to determine whether it fully achieves that objective, and we will sign legislation that succeeds in doing so.

tobacco - settlement -
liability



White House Press Release

PRESS BRIEFING BY SECRETARY OF HEALTH AND HUMAN SERVICES DONNA SHALALA , AND DIRECTOR OF DOMESTIC POLICY COUNCIL BRUCE REED

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

September 17, 1997

PRESS BRIEFING BY
SECRETARY OF HEALTH AND HUMAN SERVICES DONNA SHALALA
AND DIRECTOR OF DOMESTIC POLICY COUNCIL BRUCE REED

The Briefing Room

2:17 P.M. EDT

MR. REED: I think we can go straight to questions. We're delighted with the broad bipartisan support we had here this morning, and broad support from throughout the public health community. We're also pleased that the House has agreed by voice vote to repeal the \$50 billion tax credit in the balanced budget agreement. Now both Houses have agreed with the President.

Donna, do you have anything else to add?

SECRETARY SHALALA: No. We're happy to take your questions. Yes?

Q Are you talking about trying to change the current deal that takes effect, or are you talking about starting from scratch with legislation, no matter what the tobacco companies say? And if you are on the second, how are you going to handle the tobacco advertising portion of it?

MR. REED: As we said -- as the President said this morning, we want to build on the settlement, we want to build on the hard work of the attorneys general. He laid out his plan today, his priorities, and we're going to work with Congress to achieve those. One of our goals has long been to restrict advertising and marketing aimed at kids. We have an FDA rule that's in court on that score. And we'd also like to see at the end of the day further voluntary

penalties. I think the point that we have made is that you need a comprehensive strategy. That's the first point that the President made. You need a comprehensive strategy so that while each committee will take up a different part of the President's proposals, it's necessary that we watch all the parts at the same time if we really want to bring down youth smoking. After all, that's what this is about.

Q I don't think the President said anything this morning about **liability** protections for the industry, and so, where do you stand on that? And if you don't intend to support that, do you think you could get a comprehensive bill through Congress without --

SECRETARY SHALALA: Actually, he was asked about that today.

MR. REED: Yes. I think what he said was that we were willing to look at caps on **liability**, but we want to make sure that Congress enacts legislation that fulfills the five principles that we laid out in the plan this morning.

SECRETARY SHALALA: The point the President was making was he put on the table what he wants from legislation, and other parties including the **tobacco** industry will be putting on the table and presenting to Congress what they want. But the five points that he laid out are the core of what he believes we need to reduce teenage smoking.

Q Secretary Shalala, after all the notoriety and pressure on this issue of advertising targeted at teenagers, to what extent is the industry still doing it and can you give some examples?

SECRETARY SHALALA: Obviously, the most obvious targeting and the clearest one that was identified was Joe Camel. We have believed for a long time that glamorizing **tobacco**, particularly as it impacts on young girls, is something -- making **tobacco** hip and cool is something that affects teenage behavior. And that's why the advertising rules that we laid out in the FDA reg were focused on those places where young people would see the advertising. And as long as there are -- I think something like a third of all the seniors in high school in this country are smokers, smoke at least for some part of a month, according to our measurements -- we're concerned about any advertising that makes smoking look glamorous, look cool and look like what hip people do. So it's not just the cartoon characters, but the broad effort that has an effect on teenager's behavior.

Q Bruce, the **tobacco** industry statement so far today has been negative on what the President said, but somewhat noncommittal, saying they want to work it out. At the end of the day are you prepared to impose legislation over the wishes of **tobacco**, or must this comprehensive settlement, by nature, be consensual?

MR. REED: We want to work at comprehensive **tobacco** legislation with the Congress. We'll do it in a bipartisan way. We've laid out our priorities. I can't tell you whether at the end of the day the **tobacco** industry will be there or not. They came to the table in the first place. There are clear incentives for them to get comprehensive national legislation. But we clearly have some differences.

Q But that didn't really answer the question, I think, of

Q And then you've doubled it.

SECRETARY SHALALA: But, again, our emphasis isn't on the money. Our emphasis is on the results. And that is, we have never been about let's raise some money so we can pay for public health. We want to put everything in place that we can to reduce youth smoking.

Q So if you monitor consumption by brand, could you conceivably have \$1.50 penalty put on Marlboro and then nothing put on Lucky Strike or Winston?

MR. REED: I think we'd like to see a combination of industry-wide penalties and some company by company. The brand-by-brand surveys are just beginning this year, so we need to see what kind of data we get on that. But it would be a combination.

Q Concerning the **liability** protections, the deal provided for banning future class actions and state attorney general suits, caps on annual **liability**, punitive damage, eliminating that. Which of those, or all of those are you willing to go along with if all the guidelines that the President set down this morning are met?

MR. REED: Well, I think, as I said earlier, we would condition accepting any limits on **liability** on getting the rest of what we're after. We had some concerns about certain aspects of the **liability** scheme in the settlement. For example, it put a cap on future punitive damages, damages for future misconduct -- which we think is a mistake. But we'd have to look at the whole package.

Q Bruce, why shouldn't the penalties be called taxes?

MR. REED: I think that, for one thing, the responsibility for paying these penalties comes first and foremost on the industry. All of the -- whether you're talking about a tax, an annual payment or a penalty, it ultimately has the potential to be passed on to the consumer. And in this case, that may well serve the overall goal of reducing cigarette consumption.

THE PRESS: Thank you.

END

2:38 P.M. EDT



To comment on this service: feedback@www.whitehouse.gov



toLacco - settlement - liability

White House Press Release

REMARKS BY THE PRESIDENT ON TOBACCO SETTLEMENT REVIEW

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

September 17, 1997

REMARKS BY THE PRESIDENT
ON TOBACCO SETTLEMENT REVIEW

The Oval Office

10:55 A.M. EDT

THE PRESIDENT: Thank you very much. Mr. Vice President, Secretary Shalala, Secretary Glickman, thank you for your work. Thank you, Bruce Reed. I'd like to say a special word of thanks to David Kessler for the work he did -- historic work he did at the FDA when he was here. Thank you, Dr. Koop, and members of the public community who are here. To members of Congress, the Attorneys General, the representatives of plaintiffs in the private litigation -- and we have one of the injured parties here representing all of the them. We thank all of them for coming today.

This is a time of prosperity and hope and optimism for America, with our economy improving, making progress on our social problems, our efforts to lead the world to a more prosperous and peaceful future making headway. But I think we all know that this country still has some significant challenges, especially in the health field. And if we think about what we want America to be like in the 21st century, the health of our people and especially the health of our children must be paramount in our thinking, in our vision, and in our efforts.

That's why, a year ago, I worked with the FDA and we launched this nationwide effort to protect our children from the dangers of **tobacco** by reducing youth access to **tobacco** products, by preventing companies from advertising to our children.

The purpose of the FDA rule was to reduce youth smoking

would be willing to work with us. But we cannot have the FDA crippled here, and we have to have real and meaningful penalties if the targets for youth smoking are not met. And so I feel very good about that.

I think the Congress -- I think it's highly likely that they will take action. When they take action depends, I think, upon when they can work through the issues for themselves and how they decide how to divide up the work among the committees. But it's not too soon to start. We could have hearings on this fairly soon, and I would hope to work with the Congress to develop a bill that would embody these principles.

Q Mr. President, you haven't said what you're willing to agree to for the **tobacco** industry. Are you will to agree to immunity from future **liability**?

THE PRESIDENT: Well, I don't think they've asked for future **liability**, I think they've asked for immunity from **liability** for past suits. And the question there would be, what are they willing to agree to. They need to come and meet with us. We need to discuss it, and we need to see whether we can embody these five principles. These are the things I'm interested in.

To me, I'll say again, this is not primarily about money. This is about changing the behavior of the United States, both the behavior of the **tobacco** companies, the behavior of the American people, the future behavior of our children. I'm trying to create an environment here with these five principles that I believe would achieve that. And if they want to be our partners in it, I think we can get there. And I hope they will be.

Q Are you willing to put your prestige on the line to ensure that this becomes law?

THE PRESIDENT: Well, I think my personal prestige on this has been on the line for more than a year now. (Laughter.) There for a while, I thought more than my prestige was on the line. (Laughter.) You know, for a person involved in public life in Washington today, personal prestige may be an oxymoron. (Laughter.) But at least you still have your neck most days.

Q What do you say to the people -

Q -- protect the well-being of **tobacco** farmers - sounds like you're going to take away their livelihood.

THE PRESIDENT: Well, there are a number of things which can be done, and I don't want to get into the details. Secretary Glickman can talk about it. But we have had farmers in various sectors in our agriculture society facing constricted incomes before, and we have done things which helped them. There was a -- for example, I remember a few years ago something that affected dairy farmers in my state. There was a massive buy-out program for dairy farmers, and in a lot of states like Arkansas, there were any number of small farmers that were having a very difficult time who had a chance to start their life on a different basis.

I don't want to minimize this. **Tobacco** has a very high return per acre. So it's not a simple thing. You can't just say to a **tobacco** farmer to go plant soybeans, even if the soil will hold them. This is, from an agricultural point of view, economically complex. But, nonetheless, we have a responsibility to these people. They haven't done anything wrong. They haven't done anything illegal. They're good, hard-working, tax-paying citizens, and they

THE WHITE HOUSE
WASHINGTON

February 5, 1998

MEMORANDUM FOR THE PRESIDENT

FROM: BRUCE REED
SUBJECT: SECRETARY SHALALA'S REPORT ON WELFARE REFORM

The attached memo from Secretary Shalala provides a good update on welfare reform.

Among the most interesting findings:

- The stunning caseload drop continues -- 2.4 million in the first 13 months of the new law. Twenty one states have dropped by 25 percent or more in that time.
- There has been no "race to the bottom" -- states are spending more per recipient than in 1994. All states are meeting the maintenance of effort requirement we fought for in the welfare law, and 20 states are exceeding it.
- Many more recipients are now working. State evaluations show a substantial increase in the share of people who leave welfare for work (from 45-50 percent under AFDC to up to 60 percent now), even as record numbers leave the rolls.
- There is little evidence of hardship among those who are sanctioned for not meeting program rules. Only nine states have adopted lifetime limits of less than five years.
- Forty states have enacted policies to make work pay, generally by increasing earnings disregards so families can keep their welfare subsidy while earning more.
- About a half dozen states (CA, NY, MD, OH, FL, CO, NC) are devolving key decisions to the counties.

Something not mentioned in the memo, but discovered from the new state financial data, is that seventeen states have created state-only welfare programs to which TANF work requirements and time limits don't apply.

tobacco-settlement -
② Liability

**TESTIMONY ON THE TRIBAL GOVERNMENT PROVISIONS
OF PROPOSED TOBACCO LEGISLATION
Before the Senate Indian Affairs Committee**
February 12, 1998

(and)

tobacco-settlement -
advertising

Chairman Nighthorse Campbell, Vice Chairman Inouye, and Members of the Committee, good morning and thank you for inviting the Department of Justice to testify today. I am Thomas LeClaire, Director of the Office of Tribal Justice, Department of Justice.

At the outset, I should emphasize that I am here today to briefly discuss our preliminary views on Federal Indian law and policy as it relates to various legislative proposals concerning the marketing, sale, and regulation of tobacco. The views that I express today are limited to Federal Indian law and policy issues, and are not intended to set forth a general Administration policy position on the proposed tobacco legislation.

THE FEDERAL TRUST RESPONSIBILITY AND GOVERNMENT-TO-GOVERNMENT RELATIONS WITH INDIAN NATIONS

When working with Indian nations it is important to bear in mind the fundamental principles that guide the Federal Government's relations with Indian tribes and nations.

The United States has a unique legal relationship with Indian tribes as set forth in the Constitution, treaties, statutes, court decisions, executive orders, and administrative action. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. E.g., Treaty with the Delaware Nation, 1778, 7 Stat. 13; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). In

hundreds of treaties and agreements, our Nation guaranteed the right of Indian tribes to the "highest and best" form of government -- self-government. Ex Parte Crow Dog, 109 U.S. 556, 568-69 (1883).

Congress has acknowledged that "the United States has a trust responsibility to [Indian tribes] that includes the protection of the sovereignty of each tribal government." See P.L.G., 25 U.S.C. § 3601(2); see also 25 U.S.C. §§ 450, 1451, 1601, 2501-2502, 3701, and 4101. Under our Federal trust responsibility to protect Indian nations, the United States should exercise the highest standard of care concerning tribal government authority.

The Administration and the Attorney General respect and honor the commitments of the United States to Indian nations. Thus, both Congress and the Executive Branch have recognized the importance of working with Indian nations on issues concerning tribal government, trust resources, and Indian treaty rights within the framework of government-to-government relations. We respectfully submit that any legislation in this area relating to tribal governments should be consistent with Federal government-to-government relations with Indian nations and the status of Indian tribes as domestic nations under the protection of the United States.

DEFINITIONS

In any legislative proposals, we believe that the term "Indian tribe" should be defined either by reference to the

definition set forth in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b, or the Federally Recognized Indian Tribe List Act, 25 U.S.C. § 479a. Reporting on the Federally Recognized Indian Tribe List Act, the House Committee on Resources emphasized the importance of federal recognition to Indian tribes:

[Federal recognition is a] formal political act[;] it permanently establishes a government-to-government relationship between the United States and the recognized tribe as a "domestic dependent nation," and imposes on the government a fiduciary trust relationship to the tribe, and its members.

H.R. Rep. 103-781, 103rd Cong., 2nd Sess. (1994) at 2; 1994 U.S.C.C.A.N. 3768, 3769.

If the terms "American Indian" and "Alaska Native" are used, we recommend that those terms be defined by reference to the term "Indian" under 25 U.S.C. § 450(d), which is based on tribal membership in a federally recognized Indian tribe. Morton v. Mancari, 417 U.S. 535 (1974) (tribal membership is a "political status" related to the status of Indian tribes as governments).

TRIBAL REGULATORY AUTHORITY

As domestic dependent nations, Indian tribes are distinct, self-governing political communities that possess governmental authority over their members and their territory. Merrion v. Uicarilla Apache Tribe, 450 U.S. 130, 141 (1982). Indian tribes have plenary authority over Indians, see 25 U.S.C. § 1302 (Indian tribes possess criminal jurisdiction over all Indians within tribal territory), and possess civil authority over the conduct of non-Indians, who enter tribal lands or engage in commercial

relations with the tribe or its members. Kerr McGee v. Navajo Nation, 471 U.S. 195 (1985); Montana v. United States, 450 U.S. 544 (1981).¹

Accordingly, if tobacco legislation is enacted to establish minimum federal law requirements for the manufacture, marketing, distribution, and sale of cigarettes, Indian tribes should have the opportunity to establish tribal law requirements for Indian country consistent with the federal minimum standards. 18 U.S.C. § 1151 (Indian country defined). Tribal legislative authority should not be limited by state law requirements, and state law requirements should not be incorporated by reference in Indian country because Indian peoples have "the right to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217 (1959).

Consistent with the Federal Indian Self-Determination Policy, legislation should provide tribal government institutions with the opportunity to enforce federal and tribal law requirements relating to tobacco within Indian country. Some of the smaller tribes may not have the regulatory infrastructure in place to enforce tobacco regulatory laws at this time, so tobacco legislation might include some type of federal certification process by the Secretary of the Interior (or Agriculture) to determine whether an Indian tribe has the governmental

¹ An Indian tribe may also retain civil authority over the activities of non-Indians on non-Indian lands within its reservation, if the activities threaten the tribe's political integrity, economic security, or health and welfare. Montana v. United States, *supra*.

infrastructure necessary to enforce the laws.² If the Secretary makes the requisite certification, then the Indian tribe should be recognized as the frontline authority for tobacco regulation in Indian country.

If the Secretary does not make the necessary certification, the Food and Drug Administration (or other federal agency) should be authorized to enforce federal tobacco laws in the applicant tribe's Indian country. An Indian tribe should have an opportunity to reapply for the necessary federal certification, so that it may perform tobacco regulatory functions when its tribal government institutions become capable of doing so.

Finally, even where Indian tribes are certified as capable of enforcing federal and tribal tobacco regulatory laws, the Federal Government should retain concurrent authority to enforce federal law. (States should not be delegated federal regulatory authority in Indian country in the absence of tribal consent because that would infringe on tribal self-government. Cf. 25 U.S.C. § 1326 (Indian people must, by referendum, approve any extension of state authority in Indian country under Public Law 280); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) (tribal governments are not

² This certification process should focus on tribal governmental infrastructure, and not a comparison to state and local governments, because Indian tribes have distinct tribal government institutions based on their own unique histories.

dependent on, or subordinate to, the States).³⁾

RESERVATION GENERATED VALUE

Based on the United States' recognition of tribal rights to self-government, Indian tribes and reservation Indians generally are exempt from state regulation and taxation in Indian country. See e.g., California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (regulation); Mos v. Salish & Kootenai, 425 U.S. 463 (1974) (taxation). In addition, when Indian tribes and Indians generate value on their reservations, federal law may also preempt state taxation of non-Indians engaged in Indian commerce. See White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) (non-Indian engaged in reservation timber production with Indian tribe was exempt from state motor fuel taxation).

In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983), for example, the Supreme Court held that non-Indian hunters using a tribal hunting enterprise on reservation lands were exempt from state hunting regulations. The Court explained the basis for its decision as follows:

The Tribe has engaged in a concerted and sustained undertaking to develop and manage the reservation's wildlife and land resources specifically for the benefit of its members. The project generates funds for essential tribal services and provides employment for members who reside on the reservation. . . . The Tribal enterprise in this case clearly involves "value generated on the reservations by activities involving the Tribe."

³ Indeed, the States have often been hostile to tribal self-governance. United States v. Kagama, 118 U.S. 375 (1886); see also Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

Id. at 340. Accordingly, the State had no authority to impose license requirements and fees on non-Indians utilizing the valuable hunting resources generated by the Tribe on its reservation.⁴

It is possible that some Indian tribes may raise tobacco, or engage in manufacture of Native American tobacco products. If so, tribal sales may be considered to be based on reservation value, and reservation sales of products based on such value to non-Indians would then be exempt from state taxation. Any legislation in this area should, consistent with the regulatory objectives of the statute, preserve that avenue of development for Indian tribes under the Indian self-determination policy.

PROTECTION OF AMERICAN INDIAN RELIGIOUS USES OF TOBACCO

For centuries, tobacco has been considered essential to the practice of American Indian religions as well as to the preservation of Native American culture and tribal identity. In order to protect this religious exercise from government interference, religious use of tobacco by members of federally recognized tribes should be exempted from any comprehensive tobacco legislation.

The Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that

⁴ In contrast, where Indian tribes market prepackaged goods, without adding reservation value, non-Indian consumers may be required to pay non-discriminatory state sales taxes. Washington v. Colville, 447 U.S. 134 (1980) (prepackaged cigarettes).

it may do so without violating the Establishment Clause."⁵ The accommodation doctrine permits the government to single out religion for special treatment under certain circumstances in order to lift a generally applicable regulation, such as tobacco regulation, that might burden the exercise of religion.

Further, the special government-to-government relationship between the federal government and federally recognized tribes permits Congress to enact legislation that recognizes and protects the unique aspects of Indian tribes.⁶ Traditional tribal religious practices provide one such unique aspect of tribes. In light of this, the federal government may ensure that its actions serve to preserve rather than to destroy Indian religion and culture.

The special relationship between the United States and Indian tribes provides the underpinning of elements of a number of federal statutes, such as the American Indian Religious Freedom Act Amendments, 42 U.S.C. 1996a, National Historic

⁵ Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987) (quoting Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 144-45 (1987)).

⁶ Morton v. Mancari, 417 U.S. 535 (1974) (preferences for federally recognized Indian tribes are subject to less exacting scrutiny under the Equal Protection Clause than racial or ethnic preferences because of the historical and political relationship between tribes and the federal government). Two Courts of Appeals have extended Morton's logic to the Establishment Clause context. In Rupert v. Director, U.S. Fish and Wildlife Service, 957 F.2d 32 (1st Cir. 1992) (per curiam), the First Circuit upheld an exemption for federally recognized Indian tribes from the federal criminal prohibition on the possession of eagle feathers. The Fifth Circuit, in Peayote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991), similarly upheld exemptions for the Native American Church from federal and state laws prohibiting peyote possession.

Preservation Act, 16 U.S.C. 470, and the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001. These statutes, and others, recognize the singular characteristics of Native American culture and, therefore, contain provisions tailored to protect Native American cultural artifacts. A legislative exemption for the religious use of tobacco similarly recognizes some of the differentiating characteristics of Indian religion. The Department believes therefore that -- in addition to the accommodation doctrine -- the special relationship empowers Congress to protect the religious use of tobacco by members of federally recognized tribes.

Finally, the history of attempts by the United States to curtail Indian religious exercise provide an important justification for protecting Indian religious exercise from further incursion. The mandate to protect religious liberty is deeply rooted in this Nation's constitutional heritage. American Indian religions, regrettably, have not always benefitted from the First Amendment's protection of the exercise of religion. For example, from 1894 through the 1930's, the federal government banned "[t]he 'sun-dance' . . . and all other so-called feasts assimilating thereto," as well as "[t]he usual practices of so-called 'medicine men.'" Regulations of the Indian Office 106 (1894). Against this background, it is important to incorporate protections for American Indian religious uses of tobacco in order to prevent unintended infringement on American Indian freedom of religion.

Mr. Chairman, that concludes our preliminary views on the Indian provisions of the proposed tobacco settlement. At this time, I would be happy to respond to any questions that you may have.

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**PREPARED STATEMENT OF DAVID W. OGDEN, COUNSELOR TO THE
ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE**

Mr. Chairman, I am pleased to testify today on behalf of the Department of Justice regarding two subjects. As initially requested, I will be testifying concerning First Amendment issues related to the FDA's advertising regulations and the litigation concerning those restrictions. In addition, the Committee has requested that I address the civil liability provisions of the proposed tobacco settlement.

I. Advertising Restrictions

A. Background

The Department of Justice is currently involved in litigation in which the FDA's restrictions have been challenged on statutory and constitutional grounds. In such circumstances, it is the longstanding practice of the Department not to elaborate on the legal positions we have taken in litigation; our briefs speak for themselves. Accordingly, I have provided to the Committee copies of our district court brief in the abovementioned case. Nevertheless, because Congress is considering the enactment of comprehensive tobacco legislation that would reaffirm the FDA's authority and impose advertising restrictions similar to those that are being challenged, the Department has determined that it is appropriate for me to appear today to summarize the arguments that we have made in court in defense of the constitutionality of the FDA advertising restrictions. I cannot, however, provide elaboration of our arguments beyond the confines of our briefs.

That limitation does not, however, prevent me from explaining how critically important it is for the health of our children that the FDA have the authority to regulate

the marketing and advertising of tobacco. As the FDA found after one of the most extensive rulemakings in history (including submission of more than 47,000 pages of comments from the tobacco industry), the FDA concluded that death and disease from tobacco products can best be eliminated by reducing the number of children and adolescents who begin to use cigarettes and smokeless tobacco. Every day, 3,000 more young people begin smoking regularly, and at the present rate, 1,000 will die prematurely as a result. As the FDA found, tobacco use is a "pediatric disease" because most adult smokers become addicted during childhood. Over 80% of adult smokers started when they were children or adolescents. 61 Fed. Reg. 44421.

Restrictions on access -- it is illegal to sell cigarettes to minors in all 50 states -- are not enough, however, to stop children and adolescents from beginning to smoke. Young people have access to cigarettes and smokeless tobacco from many sources and, as the FDA concluded, advertising targeted at children and adolescents plays a significant role in young people's decision to use tobacco. Children and adolescents are highly vulnerable to the sophisticated marketing techniques employed by the tobacco industry and do not fully understand the serious health risk. Seventy-five percent of youth smokers are addicted, and it is extraordinarily difficult for them to stop using tobacco products as adults.

The susceptibility of young people to tobacco advertising has not been lost on the tobacco industry. Internal company documents demonstrated the industry's intention to target young smokers and so-called pre-smokers. For example, one document from R.J. Reynolds stated that "if our Company is to survive and prosper, over the long-term we

must get our share of the youth market." Another document recited that "[e]vidence now available . . . indicate[s] that the 14 to 18 year old group is an increasing segment of the smoking population. RJR must soon establish a successful new brand in this market if our position in the industry is to be maintained."

The evidence before the FDA of the impact of tobacco advertising on youth smoking was substantial. Numerous studies and surveys showed that "children are exposed to substantial and unavoidable advertising, that exposure to tobacco advertising leads to favorable beliefs about tobacco use, that advertising plays a role in leading young people to overestimate the prevalence of tobacco use, and that these factors are related to young people's tobacco initiation and use." 61 Fed. Reg. 44488. Two recent and comprehensive analyses by the National Academy of Science's Institute of Medicine and the Surgeon General found that tobacco advertising plays a significant role in the decisions of young people to use tobacco products. Moreover, the American Psychological Association concluded that "color and imagery in advertisements" greatly affected young people because "they generally have less information-processing ability than adults," and that tobacco advertising directly exploits this deficit. 61 Fed. Reg. 44468, 44488.

Indeed, advertising campaigns employing appealing imagery have been particularly effective with young people. The "Joe Camel" campaign, featuring a fanciful cartoon figure, had a dramatic effect on Camel's share of the youth market, increasing it from less than 3% in 1988 to more than 13% by 1992. During the same period, the campaign had no effect on Camel's share of the adult market. Moreover, 30% of three-years olds and

more than 90% of six-year-olds were able to identify "Joe Camel" as a symbol for smoking. 61 Fed. Reg. 44476-78; 60 Fed. Reg. 41333.

Faced with this disheartening evidence, the FDA concluded that "cigarette and smokeless tobacco advertising has a powerful appeal to children and adolescents," 61 Fed. Reg. 44471, and that "the pervasiveness and imagery used in industry advertising and promotional programs often obscure adolescents' perceptions of the significance of the associated health risks and the strength of the addictive power of tobacco products." 61 Fed. Reg. 44571. Thus, in addition to regulations designed to sharply curtail the access of young people to tobacco products, the agency concluded that advertising restrictions are necessary to "ensur[e] that the restrictions on access are not undermined by the product appeal that advertising for these products creates for young people." 61 Fed. Reg. 44465. Further, the FDA determined that "[t]o be effective, these restrictions must be comprehensive." 61 Fed. Reg. 44489-90. Indeed, empirical studies in other countries that have restrictions on tobacco advertising have shown that such restrictions, "when given appropriate scope and when fully implemented, will reduce cigarette and smokeless tobacco use among children and adolescents." 61 Fed. Reg. 44493.

For these reasons, pursuant to its authority to regulate "restricted devices," 21 U.S.C. § 360j(e), the FDA promulgated regulations that require a black-and-white, text-only advertising format, except in adult publications and adult-only facilities; ban outdoor advertising of cigarettes and smokeless tobacco within 1,000 feet of schools and public playgrounds; prohibit tobacco companies and distributors from selling or distributing non-tobacco products, such as hats and t-shirts, bearing a tobacco product brand name or logo;

and prohibit the sponsorship of athletic, cultural or other events in a tobacco brand name. See 61 Fed. Reg. 44617-18. These rules would combine with the longstanding statutory prohibition on radio and television advertising of cigarettes and little cigars, 15 U.S.C. § 1335, to dramatically reduce the impact of tobacco advertising on America's young people.

The tobacco manufacturers and others immediately challenged these regulations on statutory and constitutional grounds in the United States District Court for the Middle District of North Carolina. The district court found that the FDA does have the general authority to regulate the manufacture, sale and distribution of tobacco products, but nonetheless ruled that the agency lacks the authority under § 360j(e) to impose advertising restrictions on the sale, distribution, or use of tobacco products. Coyne Beam, Inc. v. FDA, 966 F. Supp. 1374, 1397-1400 (M.D.N.C. 1997). In light of this statutory decision, the court had no occasion to reach the First Amendment issues. Id. at 1400 n.33. The parties in the Coyne Beam case filed cross-appeals to the United States Court of Appeals for the Fourth Circuit. The Court has yet to issue any ruling.

B. First Amendment Analysis

Prior to 1976 the Supreme Court did not view the First Amendment as protecting commercial speech. See Valentine v. Christensen, 316 U.S. 52 (1942). Accordingly, the Court did not even mention the First Amendment when, in 1932, it upheld a statute that prohibited the advertisement of cigarettes on billboards and street-car placements. Packer Colp. v. Utah, 285 U.S. 105 (1932). In 1965, Congress banned outright the advertising of

cigarettes on television and radio. See 15 U.S.C. § 1335. In 1972, the Court summarily affirmed the constitutionality of that statutory ban. Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972), summarily affirming Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582. (D.D.C. 1971). In 1976, however, the Supreme Court changed course and held that commercial is deserving of some measure of protection under the First Amendment. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Counsel, Inc., 425 U.S. 748 (1976).

In our brief in the Coyne Beam case, we explain why the FDA restrictions are constitutional under the currently controlling framework for First Amendment review of restrictions on advertising, set out by the Supreme Court in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). The Central Hudson analysis asks as a threshold question whether the regulated speech is "related to unlawful activity" or is misleading. Id. at 564. If so, the speech can be freely regulated by the Government; if not, the next issues to be considered are: "whether the asserted governmental interest is substantial"; "whether the regulation directly advances the governmental interest asserted"; and "whether [the regulation] is not more extensive than is necessary to serve that interest." Id. at 566. Our brief in the Coyne Beam case explains that the FDA regulations satisfy each of the four parts of the Central Hudson test. What follows is a summary of the arguments that we made.

The Prohibited Advertising Is Related to Unlawful Activity

The Supreme Court has repeatedly said that commercial speech "related to" unlawful activity is not entitled to First Amendment protection. See, e.g., 44 Liquormart,

Inc. v. Rhode Island, 116 S.Ct. 1495, 1505 n.7 (1996); Florida Bar, 515 S.Ct. at _ ("Under Central Hudson, the government may freely regulate commercial speech that concerns unlawful activity, or is misleading."); Central Hudson, 447 U.S. at 563-64. The FDA regulations are directed at, and tailored to, restricting the flow of commercial speech to minors, a group of persons who may not legally purchase the product being advertised. Recent evidence indicates, however, that tobacco manufacturers have targeted advertisements at an underage audience; and in any event, these advertisements are perceived by minors as offers or inducements to buy and use tobacco products. Thus, such advertising "relates to" and encourages illegal transactions.

We have not argued that this point, by itself, permits the FDA to ban tobacco advertising altogether, because we recognize that such advertising also relates to lawful activity: the purchase of tobacco products by adults. The incidental effect of the restrictions on advertising to adults does require Central Hudson analysis. It is critical to that analysis, however, that the FDA has tailored its regulations in a manner directly related to the "unlawful" aspect of tobacco advertising, and whom the advertisers have no right to reach. The FDA's restrictions are aimed at the Government's wholly legitimate and compelling interest in curbing minors' use of tobacco products, rather than at restricting adults' rights to receive information about their consumer choices.

The Interest in Discouraging Youths from Using Tobacco Products Is Substantial.

There can be no doubt that the Government has a sufficiently substantial interest in discouraging the use of tobacco products by minors. As the Supreme Court has

instructed:

[i]t is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens. Accordingly, we have sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights.

New York v. Ferber, 458 U.S. 747, 756-57 (1982).

The Interest Is Directly and Materially Advanced by the Regulations.

The FDA has shown that the challenged regulations advance the Government's interest "in a direct and material way." Edenfield v. Fane, 507 U.S. 761, 767 (1993). Millions of minors are using tobacco products. Minors not only start using cigarettes and smokeless tobacco as children and adolescents, they become addicted as children and adolescents. This usage has severe and long-term adverse health consequences for these minors when they become adults. And, the FDA has found, based on numerous studies, that tobacco advertising is a significant cause of use by minors. Even if there were not such an extensive record on this point, the Supreme Court has recognized that, as a matter of "common sense" and "reason," promotional advertising and subsequent consumption are linked, and that reducing the former will reduce the latter. See 44 Liquormart, 116 S. Ct. at 1506 ("the Court [in Central Hudson] recognized ... that there was an immediate connection between advertising and demand") (quoting Central Hudson, 447 U.S. at 569, 100 S. Ct. at 2353). Accord Rubin v. Coors Brewing Co., 515 U.S. _ (1995) ("It is assuredly a matter of 'common sense' that a restriction on the advertising of a product characteristic will decrease the extent to which consumers select a product on the basis of

that trait. ").

In short, the FDA reasonably concluded that tobacco companies' huge investment advertising of tobacco products helps persuade minors to use these products and that restrictions on advertising will help to reduce demand in that group, and thereby benefit public health.

The Regulations Are Not More Extensive than Necessary.

The final question under Central Hudson is whether the regulation is more extensive than is necessary to serve that interest." 447 U.S. at 566. This inquiry does not amount to a "least restrictive means" test. Instead, the Court's decisions require

a "'fit' between the [government's] ends and the means chosen to accomplish those ends," a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served"; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Board of Trustees of the State Univ. of New York v. Fox, 492 U.S. 469, 480 (1989).

Accordingly, a commercial speech restriction will fail the narrow-tailoring requirement only if it "burden[s] substantially more speech than necessary." Edge Broadcasting, 509 U.S. at 430. On the other hand, a restriction is more likely to be narrowly tailored if it leaves open alternative channels for the communication to appropriate recipients of the valuable information contained in the commercial speech. See Florida Bar, 515 U.S. at -.

The FDA restrictions satisfy this narrow tailoring test. "The First Amendment's concern for commercial speech is based on the informational function of advertising."

Central Hudson, 447 U.S. at 563. At its core, advertising serves to "disseminat[e] . . . information as to who is producing and selling what product, for what reason, and at what price." 44 Liquormart, 116 S. Ct. at 1505 (principal opinion) (quoting Virginia State Board of Pharmacy, 425 U.S. at 765). It is this informational function -- with respect to adult recipients -- that the First Amendment's protection of commercial speech is "designed to safeguard." Edenfield, 507 U.S. at 766. The FDA regulations have been carefully tailored to preserve, rather than impair, this informational function of tobacco advertising. The regulations are not aimed at restricting tobacco manufacturers, distributors, or retailers from conveying information about their products to lawful purchasers. To the contrary, advertisers remain free to provide relevant commercial information to adults -- such as the price of tobacco products, where such products can be obtained, what such products contain, and any other fact consumers would want to know about tobacco products, such as any asserted brand-specific superiority.

In crafting its regulations, the FDA identified aspects of tobacco advertising that may be particularly influential on children, but do not play a significant role in the most critical informational functions of advertising. To the greatest extent practicable, the regulations are directed to these youth-influencing aspects without intruding on the ability of the tobacco industry to provide adults with relevant factual information about their products. For example, the FDA's regulations restrict the use of images and color in tobacco advertising. But there is no limit on what kinds of information may be provided in this fashion. Moreover, this restriction does not apply to publications whose readership is at least 85% adult and includes less than 2 million children. 21 C.F.R.

§ 897.32(a)(2)(i)-(ii).

Because the FDA's regulations are not intended to impede the free flow of commercial information to lawful purchasers, but instead are designed to preserve that flow, they differ fundamentally from the sorts of advertising restrictions that have typically been condemned by the Court. In 44 Liquormart, for example, Rhode Island's statutes were specifically designed to prevent liquor advertisers from conveying information about the price of their products. See 116 S. Ct. at 1501. Likewise, in Coors, the Alcohol Administration Act sought to minimize lawful purchasers' knowledge of a basic characteristic of beer--its alcohol content--by excluding content information from beer labels. See 515 U.S. at . And in Central Hudson itself, the regulatory orders at issue prohibited all promotional advertising by electrical utilities. See 447 U.S. at 558-60. In each of these cases, the challenged regulation undertook to keep truthful commercial information out of the hands of legal purchasers. That is not the case with the FDA regulations.

The plaintiffs in the Coyne Beam case have argued that the FDA must exhaust all alternative, non-speech related means to reduce underage smoking before regulating cigarette advertising. This view is based on a misreading of the First Amendment and the Supreme Court's decision in 44 Liquormart. Unlike the liquor price advertising restrictions invalidated in 44 Liquormart, the FDA's speech-related restrictions are targeted at preventing advertising to a group of people who cannot legally purchase the product in question. That case does not require that we run the risk that more and more children will fall prey to this advertising while we experiment with other measures. Moreover, the

regulations are being employed as a complement to non-speech restrictions. The government bans the sale of tobacco products to minors and is moving to improve the effectiveness of the ban. Minors can obtain tobacco products through a variety of means, and point-of-sale restrictions by themselves certainly will not reduce demand. There is every reason to expect that unfettered tobacco advertising will continue to persuade a significant percentage of young people to use tobacco products, thus undermining the effectiveness of the agency's non-speech (access) restrictions. Unlike non-speech restrictions, the advertising restrictions directly discourage demand. For that reason, they will result in less underage smoking now and fewer tobacco-related deaths in the future.

For all of the reasons articulated in our Coyne Beam briefs, we believe that the FDA's advertising restrictions are constitutional and that they will be upheld when they are finally considered by the courts.

C. A Few Words on the Proposed Settlement

The proposed tobacco settlement parallels the FDA's regulations in many respects, but also contemplates additional restrictions, most significantly: (i) a ban on all use of human images and cartoon characters (ii) a ban on all tobacco advertising outdoors; and (iii) a ban on all tobacco advertising on the Internet. If enacted, these more extensive prohibitions would raise more serious constitutional questions. The Department of Justice is continuing to analyze these additional restrictions.

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II. The Civil Liability Provisions of the Tobacco Settlement

A. Background

On September 17th of last year, and again in his State of the Union speech, the President made clear his strong desire to work with this Congress in a bipartisan fashion to enact national tobacco legislation. For our part, the Justice Department is eager to work closely with this Committee and the Congress to ensure that sound, comprehensive legislation is enacted. Smoking and the use of smokeless tobacco have had a devastating impact on our society in terms of death and human suffering. This cycle of disease and death is renewed each day, as 3,000 children and teenagers begin smoking regularly. The President and this Congress are faced with an historic opportunity -- and profound responsibility -- to address one of this country's greatest single health problems. We praise the hard work and leadership of the President, the states' attorneys general and other public health advocates, whose unwavering efforts have been instrumental in creating this opportunity. We offer the following remarks in the hope of facilitating the development and passage of comprehensive national legislation regarding tobacco products.

B. Events Leading up to the Present Consideration of the Proposed Tobacco Settlement

Working closely over the last several years, State and Federal officials have dramatically altered the legal landscape faced by the tobacco industry. For decades, individuals harmed by the use of tobacco had little recourse -- those that sued the tobacco companies always lost and regulatory agencies took no action to regulate tobacco to prevent future harm. This situation began to change in 1994, when the Administration, prompted by an epidemic of tobacco use by teenagers, supported the Food and Drug Administration's

(FDA) initiative to conduct an extensive investigation to determine whether nicotine-containing tobacco products are subject to FDA regulation. Based on that investigation, the FDA promulgated regulations aimed at reducing youth tobacco use. In April 1997, a federal district court in North Carolina affirmed the FDA's authority to regulate tobacco products, but denied FDA's statutory authority to regulate tobacco advertising. (This decision is currently on appeal.)

During the same period, the tobacco industry has been sued in many fora. Since 1994, forty-two states have sued the major tobacco companies in an effort to recover smoking-related health care costs. In addition, many private lawsuits have been filed by those who claim to have been injured by smoking. On June 20, 1997, the states and the companies reached a tentative settlement to most of these actions, contingent upon enactment of appropriate federal legislation. This agreement is embodied in the proposed settlement. The industry has already settled lawsuits in three states where trial was imminent (Mississippi, Florida, and Texas). Trial in the Minnesota case brought by Attorney General Hubert Humphrey, III, began on January 20, 1998, in St. Paul.

After reviewing the settlement, the President on September 17, 1997 called for comprehensive tobacco legislation with a goal of reducing teen smoking by 50 percent within seven years. The President stressed five key elements that must be at the heart of any national tobacco legislation:

1. a comprehensive plan to reduce teen smoking, including a combination of penalties and price increases that raise cigarette prices by up to \$1.50 per pack over the next 10 years as

- necessary to meet youth smoking targets;
2. express reaffirmation that the FDA has full authority to regulate tobacco products;
 3. changes in the way the tobacco industry does business, especially in the area of advertising directed at children;
 4. progress toward other critical public health goals, such as the expansion of smoking cessation and prevention programs and the reduction of secondhand smoke; and
 5. protection for tobacco farmers and their communities.

During his State of the Union address last week, the President again forcefully emphasized that his top priority is the reduction of underage smoking. Of the three thousand young people who begin smoking each day in America, one thousand will die prematurely from tobacco-related diseases. Reducing teen smoking is the most important step that Congress and the Administration can take now towards protecting the Nation's health in the next century and minimizing future health care costs.

C. The Civil Liability Provisions

1. A Summary of the Provisions

The civil liability provisions of the settlement contemplate federal legislation that would work major changes in the current tort liability regime. Broadly speaking, such federal legislation would provide an annual cap on the industry's potential liability in civil actions, eliminate punitive damages for past industry misconduct, and impose various procedural restrictions on parties who would sue tobacco companies for smoking-related

injuries. I will address the specific provisions individually in a moment, but first I want to identify general principles we believe should govern their consideration.

2. Guiding Principles When Analyzing the Civil Liability Provisions

Our civil justice system exists to provide means of redress for individuals who are harmed by the conduct of others and to deter such harmful conduct in the future. These are very important goals, and their achievement is fundamental to any just society. Although the existing tort system is certainly not perfect or the only way to achieve these goals, it has as a general matter served them well. For that reason, the structure of the tort system should not be modified except for important reasons. Nor should tobacco companies become special favorites of the law.

Nonetheless, the tort system has not been an effective means of compensating injured smokers to date. Although some states have recently achieved large settlements with the tobacco companies, the victims of tobacco-related diseases, to date, have received virtually nothing in the form of compensation through the tort system. Nor has that system until now deterred industry misconduct, such as marketing cigarettes to minors. Certainly, recent revelations about the industry's conduct could change the situation. Litigation alone, however, is unlikely to reduce youth smoking; only comprehensive legislation addressing price, access, marketing, and other industry practices will be enough to achieve this objective.

For this reason, the Administration believes that comprehensive legislation that advances the President's five goals is essential to the public health and the future of our children. With respect to changes in the civil liability system in such comprehensive

detracting from the achievement of the five critical objectives of this legislation, we should think creatively about how to make it possible for such injured parties to recover compensation, without incurring enormous legal fees or engaging in years of litigation.

~~5) The settlement agreement as currently formulated is unacceptable in several respects. For example, the industry payments that it contemplates will not raise the price of cigarettes enough to reach the targeted reductions in youth smoking, and the settlement does not confirm the FDA's full regulatory authority over tobacco products. The Administration will not agree to any legislation that does not correct these deficiencies.~~

6) Any final settlement should create powerful incentives for tobacco manufacturers to fully and publicly disclose all appropriate documents. For example, Congress should consider limiting any changes to the civil liability system to information that was fully disclosed by the tobacco industry to the Congress and the public.

7) Any changes to the civil justice system must be constitutionally sound.

With these principles in mind, let me now turn to the provisions of the proposed settlement.

3. A Description of the Civil Liability Provisions and Some Questions Raised

The proposed settlement leaves open many questions. No definite terms establish who or what will be paid or for how long. The settlement is more of a template for

constructing a legislative solution than a traditional out-of-court settlement of the state lawsuits and the numerous individual and class action lawsuits. Nonetheless, some initial observations are possible.

There are four broad areas in which the proposed settlement would affect the civil liability system.

a. Resolution of Pending Litigation

The settlement contemplates that much of the pending litigation would be settled, including the present states attorneys general actions. It appears that the settlement also contemplates that future litigation of those kinds would be prohibited by federal law. Pending addiction/dependence claims by injured smokers also apparently would be settled.

b. Limits on Annual Liability

The settlement contemplates federal legislation that would impose limits on the annual aggregate and individual damage payments for which the participating tobacco manufacturers could be liable. An "annual aggregate cap" for the payment of judgments and settlements would begin at \$2 billion in the first year and increase to \$5 billion in the ninth year and thereafter. If total judgments and settlements for a given year exceeded the annual aggregate cap, the excess would be rolled over for payment in future years. Payments would be limited to \$1 million per judgment per year unless every other judgment and settlement could first be satisfied in that year without exceeding the annual cap. Unpaid individual judgments in excess of the individual cap would be rolled forward, without interest, for payment in future years.

If Congress wishes to consider annual caps, a variety of approaches could be

discussed. Limits could be established on the amount paid to each claimant or could be imposed only on future claims, or only on past ones. Within the context of the settlement as a whole, we should explore whether liability caps can be part of a creative scheme that also furthers the goals discussed earlier.

One critical issue, of course, is whether annual caps or other mechanisms would afford sufficient funds to meet the needs of victims or whether they should be raised. It may be valuable for Congress to ask that the tobacco manufacturers share their calculations and research concerning the likely dollar requirements of those injured by tobacco products.

c. Limits on Punitive Damages

Under the settlement, all punitive damages claims would be extinguished with respect to conduct taking place prior to the effective date of the bill enacting the settlement. Punitive damages could be awarded with respect to conduct taking place after passage of the legislation.

The purpose of punitive damages is to deter and punish. Congress is being asked to remove this tool with respect to the tobacco manufacturers' past conduct. At the same time, however, Congress is considering legislative provisions that will serve similar purposes. In considering punitive damages provisions, Congress should consider the overall legislative package and the framework it establishes for deterring future wrongdoing and serving the public interest. Congress could consider whether separate punitive damages limitations are needed if annual caps govern manufacturers' total liability. Moreover, *if Congress wishes to consider provisions on punitive damages, it* Congress could consider alternatives such as capping punitive damages or -- perhaps most interestingly -- retaining punitive damages with respect to claims based on facts not

disclosed by the tobacco manufacturers to Congress and the public. Finally, with respect to any of these proposals, Congress will have to look carefully at the constitutionality of the proposed legislation.

d. Procedural Restrictions

The settlement apparently contemplates federal legislation that would abolish class actions and other forms of multi-case tobacco litigation without the defendants' consent. Litigation brought by third party plaintiffs, such as pension funds and health insurers, would be prohibited entirely unless the litigation was based on the subrogation of a single individual's personal injury claim. Third-party payor claims that were pending on June 9, 1997, would be allowed under a grandfather clause.

It has been difficult to bring class actions for tobacco-related injuries in federal courts, and many state courts have denied class certification. Some state courts have granted class certification to claimants against the tobacco manufacturers, however, and other joinder mechanisms that would be affected by the proposal can significantly reduce individual litigants' costs of suit. Restrictions on such joinder mechanisms could make it more difficult for some plaintiffs to pursue their claims in court. As with punitive damages, Congress should consider ~~the need~~ for special procedural restrictions if it enacts annual caps on industry liability. Moreover, such restrictions raise novel federalism issues. Thus, we believe that Congress should consider carefully the legal and practical consequences of such provisions, ~~and consider in tandem with them the adoption of rules or mechanisms that improve~~ injured tobacco users' access to justice.

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D. Conclusion

The Department of Justice strongly supports comprehensive tobacco legislation.

Crafting legislation that significantly reduces teenage tobacco use and meets the other goals the President has announced is an enormous, yet vitally important, challenge. We would be happy to join with this Committee in a dialogue to find the best possible solution.

Thank you for giving me this opportunity to furnish the views of the Department of Justice regarding this legislation. I will be pleased to answer any questions you may have.

**STATEMENTS BY THE PRESIDENT AND ADMINISTRATION
INDICATING LEGISLATIVE PROTECTION FROM LIABILITY IS NOT A
TOBACCO DEAL-BREAKER**

1. Press Briefing by Press Secretary Mike McCurry, June 20, 1997

Mike McCurry: Well, the limitation on punitive damages for past misconduct is not necessarily a deal-breaker for us. We understand that the attorneys general extracted substantial concessions from the tobacco companies for this limitation and we'll evaluate whether the agreement as a whole advances the nation's public health interests. But on that specific limit, that's not necessarily a deal-breaker.

2. President's Remarks on Settlement Review, September 17, 1997

Q. ...Are you willing to agree to immunity from future liability?

The President: Well, I don't think they've asked for future liability. **I think they've asked for immunity from liability for past suits. And the question there would be, what are they willing to agree to.** They need to come and meet with us. We need to discuss it, and we need to see whether we can embody these five principles. These are the things I'm interested in. To me, I'll say again, this is not primarily about money....

3. Press Briefing by Secretary Shalala and Bruce Reed, September 17, 1997

Q. I don't think the President said anything this morning about liability protections for the industry, and so, where do you stand on that? And if you don't intend to support that, do you think you could get a comprehensive bill through Congress without --....

Reed: Yes. **I think what he said was that we were willing to look at caps on liability, but we want to make sure that Congress enacts legislation that fulfills the five principles that we laid out in the plan this morning.**

Q. Concerning the liability protections, the deal provided for banning future class actions and state attorney general suits, caps on annual liability, punitive damage, eliminating that. Which of those, or all of those are you willing to go along with if all the guidelines that the President set down this morning are met?

Reed: Well, I think, as I said earlier, we would condition accepting any limits on liability on getting the rest of what we're after. We had some concerns about certain aspects of the liability scheme in the settlement. For example, it put a cap on future punitive damages, damages for future misconduct -- which we think is a mistake. But we'd have to look at the whole package.

4. *The New York Times*, "Aide to Clinton Sees Flexibility on Tobacco", page A16,

September 22, 1997

“Mr. Reed said on Fox News today that the Administration would not try to change the liability protections in the national tobacco settlement reached on June 20 as long as there were real moves to reduce the number of underage smokers.

‘We’ve always said that some form of caps on liability is not a deal-killer for us, but we would condition that on getting the kind of comprehensive plan to reduce smoking that we’re asking for,’ Mr. Reed said.”

5. Testimony by Secretary Shalala before Senator Jeffords (R-VT), September 25, 1997 (from FDCH political transcripts)

Jeffords: One of the areas that the June tobacco settlement that was not discussed in the President’s announcement was the civil liability provisions. Should we view the President’s silence on this issue [sic] endorsing these provisions?

Shalala: **Actually, Mr. Chairman, when the President was asked that question he said that if the core principles that he has laid out are taken care [of] as part of the legislation, then he would be willing to discuss the civil liability issue but not until he sees legislation that really is comprehensive, that deals with the farmers, that deals with the FDA jurisdiction. We want to make sure that the core of the legislation is focused on reducing smoking by young people.**

6. National Journal’s CongressDaily, January 16, 1998

Mike McCurry: **“The caps on liability, as we have said in the past, are not necessarily a deal breaker.”**

7. Los Angeles Times, “Proposed Tobacco Settlement Isn’t Setting Congress on Fire,” p.A5, January 29, 1998

Elena Kagan: **“Limits on liability are not necessarily a deal-breaker for us.”**

8. U.S. Newswire, Press Briefing by Mike McCurry, January 30, 1998

Mike McCurry: **“Now, the issue is one of caps on liability. We have never said that caps on liability were absolutely central to any legislation; in fact, as you recall, the President did not even address that in the principles that he outlined last August about the legislation that would be required to implement the settlement. We’ve said it’s not a deal-breaker by any means, but it certainly is not one of the fundamental elements that the President believes has to be in there.”**