

**NLWJC - KAGAN**

**EMAILS RECEIVED**

**ARMS - BOX 097 - FOLDER -004**

**[07/01/1997-08/06/1997]**

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Lisa M. Kountoupes ( CN=Lisa M. Kountoupes/OU=OMB/O=EOP [ OMB ] )

CREATION DATE/TIME: 1-JUL-1997 19:25:22.00

SUBJECT: URGENT REVIEW OF BUDGET LETTER NEEDED

TO: Bruce N. Reed ( CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TO: FOLEY\_M ( FOLEY\_M @ A1 @ CD @ LNGTWY [ UNKNOWN ] ) (WHO)  
READ:UNKNOWN

TO: Gene B. Sperling ( CN=Gene B. Sperling/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TO: John Podesta ( CN=John Podesta/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TO: Barbara Chow ( CN=Barbara Chow/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: John L. Hilley ( CN=John L. Hilley/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Janet L. Yellen ( CN=Janet L. Yellen/OU=CEA/O=EOP @ EOP [ CEA ] )  
READ:UNKNOWN

TO: Sylvia M. Mathews ( CN=Sylvia M. Mathews/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

CC: Melissa Green ( CN=Melissa Green/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

CC: Christopher C. Jennings ( CN=Christopher C. Jennings/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

CC: Lawrence J. Haas ( CN=Lawrence J. Haas/OU=OMB/O=EOP @ EOP [ OMB ] )  
READ:UNKNOWN

CC: Ellen S. Seidman ( CN=Ellen S. Seidman/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

CC: Charles R. Marr ( CN=Charles R. Marr/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

CC: Cynthia A. Rice ( CN=Cynthia A. Rice/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

CC: Elisa Millsap ( CN=Elisa Millsap/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

CC: Jeanne Lambrew ( CN=Jeanne Lambrew/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

CC: Mark J. Mazur ( CN=Mark J. Mazur/OU=CEA/O=EOP @ EOP [ CEA ] )

READ:UNKNOWN

CC: Emil E. Parker ( CN=Emil E. Parker/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

CC: Diana Fortuna ( CN=Diana Fortuna/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

CC: Janet Murguia ( CN=Janet Murguia/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TEXT:

FYI - you should have received in hard copy the following memo delivered to your offices with followup phone calls.

July 1, 1997

MEMORANDUM TO SYLVIA MATHEWS

JOHN PODESTA  
JANET YELLEN  
GENE SPERLING  
JOHN HILLEY  
MARTHA FOLEY  
BARBARA CHOW  
BRUCE REED  
ELANA KAGAN

FROM: Larry Haas  
Lisa Kountoupes

RE: URGENT -- Budget Conferees, Letter

Enclosed is the draft conference letter. Unfortunately, we need you to turn this around in short order. Congress has requested that we deliver it as soon as possible, and we want to do so by mid-day. Please provide us with any mark-ups of hard copy by 9 a.m. tomorrow (Wednesday) -- at the latest. Unfortunately, we won't be able to use electronic comments. Larry is in Room 253 or at fax 5-6818. Lisa is in Room 249 or at fax 5-3729.

We apologize for the short turn-around, but our staffs have been crashing all day just to get this draft done for your perusal and, for many reasons, we believe it will help our efforts to deliver our views as specifically and as quickly as possible.

Thank you for your help.

CC: Jack Lew  
Josh Gotbaum

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Ellen S. Seidman ( CN=Ellen S. Seidman/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME: 2-JUL-1997 15:55:00.00

SUBJECT: Products memo

TO: Jennifer D. Dudley ( CN=Jennifer D. Dudley/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Michael Deich ( CN=Michael Deich/OU=OMB/O=EOP @ EOP [ OMB ] )  
READ:UNKNOWN

TO: Tracey E. Thornton ( CN=Tracey E. Thornton/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Timothy J. Brennan ( CN=Timothy J. Brennan/OU=CEA/O=EOP @ EOP [ CEA ] )  
READ:UNKNOWN

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TO: William P. Marshall ( CN=William P. Marshall/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Steven D. Aitken ( CN=Steven D. Aitken/OU=OMB/O=EOP @ EOP [ OMB ] )  
READ:UNKNOWN

TO: Peter G. Jacoby ( CN=Peter G. Jacoby/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Lisa M. Brown ( CN=Lisa M. Brown/O=OVP @ OVP [ UNKNOWN ] )  
READ:UNKNOWN

TEXT:

These are the cover memo for the products memo and the memo itself. Melissa (Gene's assistant) is sending the memo directly to the addressees. PLEASE NOTE THE TIGHT TIMEFRAME. I'd really appreciate your continued help in moving this along. You've all been great so far. Thanks so much.

Ellen===== ATTACHMENT 1 =====  
ATT CREATION TIME/DATE: 0 00:00:00.00

TEXT:

Unable to convert ARMS\_EXT:[ATTACH.D47]MAIL46338528Y.116 to ASCII,  
The following is a HEX DUMP:

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July 2, 1997

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MEMORANDUM FOR

SECRETARY RUBIN  
SECRETARY DALEY  
SECRETARY SHALALA  
ADMINISTRATOR ALVAREZ  
DIRECTOR RAINES  
CHAIR YELLEN  
CHAIR BROWN  
DEPUTY SECRETARY SUMMERS  
JOHN DWYER  
JOHN HILLEY  
CHARLES RUFF  
BRUCE LINDSEY  
BRUCE REED  
ELENA KAGAN  
ERSKINE BOWLES  
JOHN PODESTA  
SYLVIA MATTHEWS  
RON KLAIN  
CHARLES BURSON

FROM: GENE SPERLING

SUBJECT: Draft product liability memo

Attached is a draft memo to the President on federal product liability law, based on our discussions last week. We ask two things: (i) your comments, edits and thoughts; and (ii) your choice among the three recommendations set out.

**Ideally, we would like your response by noon tomorrow, July 3.** Please forward comments to Ellen Seidman of my staff, who can be reached at 456-5359 or by fax at 456-1605. We apologize for the short timeframe, but we are attempting to get this memo in to the President before he leaves Washington tomorrow evening. Even noon is going to be hard; we hope the memo is sufficiently reflective of our discussions that turning it around in time is feasible. Please call me if you have any serious problems with this time frame.

Thank you all for your help, and for that of your staffs, in getting through this process.

cc:

Andrew Pincus  
Jeffrey Hunker  
Fran Allegra  
Donald Remy  
Tom McGivern  
Ed Murphy  
Ron Matzner  
Pam Gilbert

Michael Deich  
Steve Aitken  
Tim Brennan  
Tracey Thornton  
Peter Jacoby  
Bill Marshall  
Lisa Brown

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Draft: March 2, 2010 (1:16PM)

**SUBJECT: Product liability legislation**

**I. ACTION FORCING EVENT:** On May 1, on a strict party line vote, the Senate Commerce Committee reported out S.648, Senator Gorton's revision of the product liability bill you vetoed last year. Senator Rockefeller not only voted against S.648, but has made it very clear that he will not join until your concerns are satisfied, and Senator Gorton understands that without Senator Rockefeller's support, the bill cannot pass. On the other hand, Senator Lott has been pushing to bring the bill to the floor, leading Senator Rockefeller (together with Mr. Dingell) to press us to negotiate changes in the bill to meet your concern. Senator Lott may well want to move soon after the July 4 recess. Meanwhile, Senator Breaux is urging us to work with him on an alternative to the Gorton bill.

**II. BACKGROUND:** The 104th Congress passed product liability reform law -- a part of the Contract with America -- by a vote of 259 to 158 in the House and 59 to 40 in the Senate. The bill would have partially preempted state law as to both standards of liability for sellers and manufacturers of products that cause bodily harm and measures and allocation of damages. On May 2, 1996, you vetoed the bill, citing eight issues:

- Interference with state prerogatives in tort law
- One-way preemption, where pro-consumer state laws were preempted, but laws that limited consumer rights were not
- The cap on punitive damages, particularly in light of the Statement of Managers, which virtually directed judges not to use the "additur" provision included in the bill under which caps could be superseded
- Several -- not joint -- liability for non-economic damages
- A too-short (15 years), too-broad (all products) statute of repose
- Preemption of state negligent entrustment statutes, which make sellers of dangerous goods (e.g., firearms and liquor) responsible for certain actions of the buyers
- Failure to toll the statute of limitations during the period of a stay issued by a bankruptcy court
- Application of the limits on liability of biomedical materials suppliers to negligent suppliers

The House failed to override your veto by a vote of 258 to 163 to override. The House having failed to override, the Senate never took a vote.

**III. CURRENT CONGRESSIONAL ACTIVITY**

**A. S.648**

S.648 fixes the bankruptcy tolling problem, and makes an honest -- although not complete -- attempt to respond to the negligent entrustment issue. Moreover, it lengthens the statute of repose to 18 years, and establishes two-way preemption for the statute of repose, so that shorter state statutes would be lengthened (all state statutes that are set in years are shorter than 18 years). The bill does not respond to the two major problems you cited -- the cap on punitives and several liability for non-economic damages -- nor does it change the biomedical materials provision.

#### **B. Senator Rockefeller and Mr. Dingell**

Senator Rockefeller and Mr. Dingell are clearly looking for guidance on how to resolve the remaining issues (punitive damages, several liability for non-economic damages, statute of repose and biomedical materials) to meet both the concerns and fact patterns in your veto message. They have said they will engage in negotiations with us (clearly they do not expect to be able to accept our initial proposal) to develop legislation that will pass and will not be vetoed. Senator Rockefeller, in particular, has said he has no interest in another veto.

#### **C. Senator Breaux**

Senator Breaux would like to deal with this issue in an entirely different way. He has developed a bill focused far more on reducing frivolous lawsuits and less on substantive product liability standards. Senator Breaux/s bill would include a statute of repose that is more flexible than that in S.648, would establish uniform federal standards for punitives damages but no cap, and would do nothing to change state law concerning joint and several liability for non-economic damages.<sup>1</sup>

His bill would also set stricter pleading standards for federal and state court product liability actions, restrict multi-state product liability class actions, enact a very weak form of alternative dispute resolution, and require a study by the Attorney General of the product liability system. It is unclear how far Senator Breaux can get in moving support off the Gorton bill without the Administration's support for his approach.

#### **D. Consumer groups and other advocates**

Consumer groups and others are strongly opposed to any legislation in this area, and have stated that they view you as "the last bastion against tort reform." The American Bar Association has written you in opposition to any federal legislation primarily on federalism grounds, but also raising concerns that overlaying partial tort law preemption on the legal systems of fifty states will cause more confusion and uncertainty, not less.

### **III. MAJOR ISSUES PRESENTED:**

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<sup>1</sup> As discussed below, many states, including California, already have several liability for non-economic damages.

Over the past eight weeks, we have jointly run an interagency process to consider whether there might be ways to alter S.648 to respond to the concerns in your veto message in a manner that could be acceptable to at least Democratic proponents of the legislation. Participants in the process included: OVP, NEC, DPC, OMB, CEA, White House Counsel, White House Legislative Affairs, Justice, Treasury, Commerce, and SBA and the Consumer Product Safety Commission as an advisor. FDA is participating in the discussion of biomedical materials. The working group surveyed the law in all the states on the critical issues of punitive damages, joint and several liability and statute of repose, and developed a number of alternatives in each area that we believe could move the bill closer (and in some cases, all the way) to your goals but may have a chance of not being rejected out of hand by proponents.<sup>2</sup> Two meetings of the NEC principals were held, on June 24 and 26.

**A. Whether there should be federal legislation in this area at all**

The arguments of the business community in favor of national legislation rest on three propositions:

- Concern about product liability litigation, and particularly concern about disproportionate awards for non-economic damages and punitive damages, is sapping American productivity by misdirecting management time and energy and capital and by putting an excessive -- and frequently non-insurable tax -- on innovation.
- In a national economy, subjecting products and manufacturers to 50 different liability regimes is not only inefficient but also -- because of the opportunities for forum shopping by plaintiffs, particularly in class actions, unfair.
- Manufacturers are the deep pocket focus of liability suits that are in fact generated by the activities of those who repair and service products; making manufacturer liability more limited and predictable -- as occurred when the 18-year statute of repose was instituted for aircraft -- will put the burden of care of those most responsible for and able to accomplish it.

Consumer groups, as well as lawyers (the ABA as well as ATLA), argue against the need for federal legislation based on:

- The lack of any explosion of product liability suits, and in particular, excessive punitive damage awards that survive judicial remittitur, suggesting there's no problem to be fixed.
- The fact that all recent proposals in this area would cut back on traditional principles of tort law that benefit plaintiffs, suggesting that what the manufacturers want is not uniformity but a tilt in their direction
- The traditional role of the states in tort law, combined with the fact that all existing proposals would only partially preempt state tort law, leading to even more

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<sup>2</sup> Based on discussions with the Center for Violence Policy, we have also crafted a more complete fix to the negligent entrustment provision. We believe there will be no problem getting the proponents to adopt this.

non-uniformity and uncertainty as this law is overlaid on, e.g., state medical malpractice law.

- Whatever limitations are initially included in federal product liability legislation will be vulnerable to cutbacks in future Congresses; the time to stop erosion is before it starts

### **B. One-way or two-way preemption**

One of the most contentious issues that runs through the legislation is whether federal standards should preempt all state laws ("two-way preemption") or whether they should function solely as a floor, with states free to establish more defendant-friendly standards ("one-way preemption"). For example, if the federal statute of repose were 18 years, two-way preemption would both lengthen shorter statutes and impose the 18-year limitation in states that have no statute of repose; one-way preemption would only lengthen shorter statutes. Similarly, if the federal government were to enact standards for awarding punitive damages, two-way preemption would both tighten the standard in states that, for example, allow punitives to be awarded for reckless behavior and require states that do not allow punitives at all to allow them according to the federal standards. One-way preemption would only tighten standards in some states, leaving others free to bar punitives entirely.

The bill you vetoed last year was almost entirely one-way preemptive. In your veto message you said, "As a rule, this bill displaces State law only when that law is more favorable to consumers; it defers to State law when that law is more helpful to manufacturers and sellers. I cannot accept, absent compelling reasons, such a one-way street of federalism. As noted above, S.648 is two-way preemptive as to the statute of repose (as well as with respect to the general standards of manufacturer and seller liability and the statute of limitations) but retains one-way preemption on punitive damages."<sup>3</sup>

While one of the arguments manufacturers and sellers make in favor of national legislation is the desire to create uniform federal standards, which would support uniform two-way preemption, on the two issues where they have made serious headway in the states -- limitations on punitive damages and imposition of several liability -- they are far more interested in a federal floor than in uniformity. We have been told, for example, that establishing the right to punitive damages in states where it does not exist, or limiting several liability for non-economic damages where state law has established it, would be totally unacceptable.

Consumer groups argue in favor of two-way preemption, ostensibly on the ground that the only good reason for federal standards is uniformity. However, many of these same groups regularly argue that federal environmental and consumer protection standards should function only as a floor, allowing states to impose more rigorous rules. It is conceivable that the consumer argument for two-way preemption is more an effort to highlight the inconsistency in the

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<sup>3</sup> In form, S.648 is two-way preemptive on several liability for non-economic damages. However, since it imposes the least plaintiff-friendly rule possible (totally several liability), it is effectively one-way preemptive.

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Draft: March 2, 2010 (1:16PM)

manufacturers' position -- and perhaps to raise an insurmountable barrier to legislation -- than a firmly held constitutional principle.

### **C. Several liability for non-economic damages**

Over the last several years, tort reform at the state level has essentially done away with the traditional rule of no comparative fault and full joint and several liability. (Only Alabama, Maryland, North Carolina and Virginia retain this combination.) Nine states<sup>4</sup> have full joint and several liability, but include comparative fault, thereby reducing the defendants' joint responsibility by the measure of the plaintiff's responsibility. Thirteen states<sup>5</sup> have pure several liability, for both economic and non-economic damages, and 24 states have various hybrid forms.

Both last year's vetoed bill and S.648 limit a defendant's responsibility for non-economic damages "in direct proportion to the percentage of responsibility of the defendant for the harm to the claimant." The trier of fact is required to assign this percentage taking into account the responsibility of all persons responsible, including those not before the court, such as settling defendants.

In vetoing last year's bill with respect to this issue, you cited the provision's general effect of preventing "many persons from receiving full compensation for injury," noting in particular the problems created by insolvent defendants. You also cited the particular impact of a several rule for non-economic damages as unfairly discriminating against "the most vulnerable members of our society." You said, "Noneconomic damages are as real and as important to victims as economic damages."

Manufacturers assert that the problem with joint liability for non-economic damages is that such damages -- unlike economic damages -- are totally unpredictable and subject to the whim of the jury, thereby making any assessment of the risk, or the purchase of insurance against the risk, virtually impossible. They are particularly concerned about the potential for a large award against the only solvent defendant in a case in which that defendant is only marginally at fault. Opponents make the argument that non-economic damages are as real and as important -- particularly to the poor, the young and the old -- as economic damages, and should not be treated differently. Some also contend that the different state standards represent the innovation and experimentation that is the role of the states, and this should not be preempted.

### **D. Punitive damages**

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<sup>4</sup> Arkansas, Delaware, Maine, Massachusetts, Michigan, Pennsylvania, Rhode Island, South Carolina and West Virginia

<sup>5</sup> Alaska, Arizona, Colorado, Illinois, Indiana, Kansas, Kentucky, North Dakota, Tennessee, Utah, Vermont and Wyoming

The process of awarding punitive damages and the amount of such damages have been the subject of some of the most intense controversy. Both last year's vetoed bill and S.648 cap punitive damages -- at the **greater** of two times compensatories (including non-economic damages) or \$250,000 for most companies and the **lesser** of these two amounts for individuals and small businesses. Upon consideration of a list of eight factors<sup>6</sup>, a judge could award damages in excess of the large business cap (but not the small business cap), up to the amount awarded by the jury, which would not be informed of the cap.<sup>7</sup> The "additur" provision explicitly constitutes one-way preemption -- it does not permit additur where state law otherwise limits punitive damages.

The bills would also: (i) establish a uniform federal standard of proof of "clear and convincing"; (ii) establish a uniform standard for award that conduct "carried out with conscious, flagrant indifference to the rights or safety of others was the proximate cause" of the harm; and (iii) authorize any party to request that punitive damages be considered in a separate proceeding (generally so that evidence of the defendant's financial condition would not be allowed into evidence during the liability and compensatory damages phase of the trial). While these rules are meant to apply in all states that have punitive damages, they would not apply in states where punitive damages are prohibited by law.<sup>8</sup>

In vetoing last year's bill, you stated that you "oppose arbitrary ceilings on punitive damages, because they endanger the safety of the public. Capping punitive damages undermines their very

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<sup>6</sup> The factors are: "(i) the extent to which the defendant acted with actual malice; (ii) the likelihood that serious harm would arise from the conduct of the defendant; (iii) the degree of the awareness of the defendant of that likelihood; (iv) the profitability of the misconduct to the defendant; (v) the duration of the misconduct and any concurrent or subsequent concealment of the conduct by the defendant; (vi) the attitude and conduct of the defendant upon the discovery of the misconduct and whether the misconduct has terminated; (vii) the financial condition of the defendant; (viii) the cumulative deterrent effect of other losses, damages, and punishment suffered by the defendant as a result of the misconduct, reducing the amount of punitive damages on the basis of the economic impact and severity of all measures to which the defendant has been or may be subjected . . ."

<sup>7</sup> The judge would be required to hold a separate proceeding on awarding an additional amount, consider each of the items, and state the court's reasons for an award above the cap in findings of fact and conclusions of law. A separate finding on each factor is not explicitly required. The conference report on last year's bill, of course, virtually directed judges not to use this authority.

<sup>8</sup> In seven states punitive damages are generally forbidden; in 16 others, they are capped in one way or another. Twenty-seven states allow unlimited punitive damages in product liability cases. Most states that allow punitive damages have adopted the "clear and convincing" evidentiary standard. While the liability standards are less uniform, only a few states allow the award of punitive damages for reckless behavior without some other aggravating factor. We have not found any state that requires that the conduct leading to the punitive damages be the "proximate cause" of the plaintiff's harm, although the words "cause" and "result" are used. Bifurcated trials -- at least on the issue of the defendant's financial condition -- are allowed or required in 15 states.

purpose, which is to punish and thereby deter egregious misconduct.” You noted that the additur provision might have mitigated this concern, but the Statement of Managers virtually directing it not be used made it ineffective in that respect.

Manufacturers assert that unpredictable and unjustifiably large punitive damage awards have driven them out of markets and impinged on innovations. Consumer advocates assert that only potentially unlimited punitive damages can deter harmful misconduct by large companies. Surveys suggest that neither the award of punitives nor the amount is skyrocketing in products cases.<sup>9</sup>

### E. Statute of repose

At its starkest, a statute of repose bars litigation after a product has been in service a specified period of time. Twenty-two states and the District of Columbia currently have statutes of repose for product liability; 17 of the states and the District restrict lawsuits after a specified number of years (ranging from 5 to 15) and the remainder use some variation of “useful life” as the bar. In 1994, you signed legislation establishing a preemptive 18-year statute of repose for general aviation.

The bill you vetoed last year included a preemptive 15-year statute of repose for all products. The statute would, however, only have preempted states without any statute of repose, or with a statute **longer** than 15 years. Shorter state statutes would have remained effective. Your veto message referenced the length of the statute, the fact that it was broadly inclusive (you cited handguns), and the fact that the preemption was only one way. The Senate bill from the 104th Congress had covered only durable goods in the workplace and had an 18-year one-way preemptive statute.

S. 648, as reported out of the Senate Commerce Committee on a voice vote, includes a fully (two-way) preemptive 18-year statute of repose, covering all products except: (i) motor vehicles, vessels, aircraft and trains used to transport passengers for hire; (ii) products that cause toxic harm; and (iii) products with express written warranties that exceed 18 years.

Manufacturers assert that a firm, and broad, statute of repose is necessary not only to provide them some certainty, but also to put the risk of injury from long-lived products on those most able to prevent it -- owners, upgraders and servicers. They argue that the 18-year statute of repose for general aviation you signed in 1994 has not only increased the willingness of manufacturers to produce the aircraft, but has made owners and servicers far more careful,

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<sup>9</sup> A recently-released Rand study has found an increase in the number and amount of punitive damage awards in financial fraud cases, such as cases involving insurance or financial products misrepresentation. This does not appear to extend to cases involving products as defined in the bill, which is limited to physical goods.

because they understand the deep pocket of the manufacturers will not be available to bail them out.

Consumers, on the other hand, argue that injuries from long-lived products -- including those that have not been altered or do not need service -- are common, and often the manufacturer should have foreseen and prevented the problem that caused the injury. They argue it is particularly important that those injured by long-lived consumer goods (such as camping equipment and cedar chests) not be barred from court completely by a strict statute of repose. Workers, they note, at least can collect worker's compensation for injuries caused by long-lived defective goods in the workplace.

#### IV. ALTERNATIVES

Working from the alternatives developed by the working group in each of the three major areas identified, your advisors concluded that the choice of alternatives really depends on another decision, whether the Administration should:

- take the position that state law developments and the lack of strong evidence of major problems in this area that are caused by lack of national standards leads us to conclude no federal legislation is appropriate at this time;
- put forward a series of proposals that are fully consistent with both your veto statement and the principle of promoting national uniformity, even if such proposals have little or no chance of leading to a bill that can be enacted; or
- put forward a series of proposals that product liability legislation proponents will regard as an acceptable place to **start** negotiations and that can, albeit with some difficulty, be squared with your veto message.

Some of your economic advisors believe the business community may be correct in asserting that the current tort liability system, and in particular the issues raised in this legislation, over-deter businesses in their development and production of innovative products. In our discussions with the business community, we have asked them to provide empirical evidence that innovation has been stymied by litigation in general or the issues that particularly concern us: punitive damages and several liability for non-economic damages. Unfortunately, empirical evidence is not available, and the anecdotes relate to pharmaceuticals or related products, and often to the issues raised by mass tort claims for **economic compensatory** damages, not non-economic damages or punitive damages..

As your advisors looked into the issue, we came to the following conclusions:

- While logically there might be some impact on manufacturing innovation and productivity from the tort system,
  - there is no empirical evidence
  - all the anecdotal evidence is from one sector -- pharmaceuticals, including vaccines -- but the legislative proposals are far broader
  - there is no explosion of either litigation or punitive damages

- the economy is booming and productivity is rising
- Over the past several years -- indeed, even since the start of the 104th Congress -- the states have made major moves toward making the tort system more defendant-friendly, ranging from the virtual abandonment of traditional principles of joint and several liability to the imposition of caps on punitive damages
- If federal legislation is not to lead to uniform national standards, there is little justification for it; there is little or no justification for one-way preemption
- Overlaying limited product liability preemption on the tort law and civil procedure of 50 states will likely increase confusion and uncertainty, not decrease it
- Recent Supreme Court decisions, including the Brady bill decision, may call into question the constitutionality of federal legislation that attempts to mandate changes in state law and judicial procedure

Thus, while there continues to be sentiment among your economic advisors for “doing something” to improve the tort system, it is mild and tempered by the recognition that current proposals may do as much harm as good. Your legal advisors do not believe the current proposals should be supported. Both groups of advisors feel strongly that if there is to be any federal legislation, it should establish uniform national standards, and should -- in the areas explicitly covered -- completely preempt the field. There is no justification for one-way preemption in this area.

This position can be manifest in two ways: taking a strong against any legislation, or developing an Administration bill that is consistent with both the veto statement and the current state of the law, even if that bill cannot be reconciled with the prime tenets of the Gorton bill.

**A. Oppose federal product liability legislation at this time**

\_\_\_\_\_ [names of advisors] recommend that you take a firm and overt stance against any federal product liability legislation at this time. Recent changes in state law as well as in federal constitutional law, combined with the lack of evidence of serious widespread problems suggest that the burden of showing why traditional state prerogatives in this area should be overruled and state law overlaid with potentially incompatible federal law has not been met. If legislation is needed in the area of pharmaceuticals (including vaccines), then it should be pursued on a targeted basis, taking advantage of -- and protecting -- the strong federal regulatory system for drugs.

**B. Develop an Administration bill we can support, consistent with both the veto statement and the current state of the law**

The hallmarks of this option are: (i) full two-way preemption, such that states with currently more defendant-friendly laws would be brought to a uniform national level as well as states whose laws are currently more pro-plaintiff; (ii) consistency with your veto message in all

respects; and (iii) inclusion of items that were not part of either the vetoed bill or S.648 that can enhance the effectiveness of the legal system for injured plaintiffs.

This option does not include any provision on joint and several liability for non-economic damages. Since part of the focus of your veto message was on the unfairness of distinguishing between economic and non-economic damages, no provision that deals only with non-economic damages can be fully consistent with the veto message. Moreover, we have reason to believe some proponents of legislation would be willing to put forward an alternative without any change in joint and several liability. However, we also know the business community regards this as an important issue but, given current trends in state law toward several liability, they will be extremely unlikely to accept two-way preemption in this area. Appendix A contains alternative formulations of joint and several liability for non-economic damages that were developed by the working group, together with pros and cons.

This option would consist of the following:

***Punitive damages - Advisory jury opinion with judicial determination and a breachable cap for small businesses, two-way preemption***

- The jury would render a solely advisory opinion on punitive damages
- The actual determination of punitive damages would be made by the judge
- The judge would be required to consider the factors in S.648, and would be required to explain why the judge's award differs (either higher or lower) from the jury's advice
- The judge could allocate a portion of punitive damages to the state rather than to the plaintiff
- Cap punitive damages at the lesser of twice compensatories or \$250,000 for firms that have 10 or fewer employees and annual revenues of \$1 million or less. The jury would not be told of the cap, and the judge could award damages in excess of the cap only upon a specific finding that damages in excess of the capped amount were not only needed "to punish or deter," but also that the financial impact of the higher award had on the defendant and its employees had been explicitly considered by the judge.
- Couple this with procedural changes to set the evidentiary standard at "clear and convincing evidence," the substantive standard at "willful and wanton" (excluding recklessness), and to require bifurcation of the damages determination if requested by any party

Pros

- Is analogous to criminal law, by keeping the jury involved but placing the decision on what is essentially a punishment in the hands of the person most experienced in deciding such issues, the judge
- Since historically, punitive damage awards that seem unjustified have stemmed from jury decisions, may increase rationality in the system
- Provides some protection for truly small businesses, responding to one of the complaints about the capriciousness of punitives

- Since businesses of the size described are rarely hit with significant punitive damages, since in most states the defendant's financial condition is already taken into consideration, there may be little practical negative effect.
- Allows the Administration to agree with some sort of cap
- By adopting the S.648 factors, may be seen as a good faith offer

#### Cons

- Agreeing to any cap at all breaks through a clear line we established last year of "no caps on punitives"; it may be very difficult to hold the line against expansion of this cap, either to larger businesses, or by limiting the judge's discretion
- Any proposal that limits punitive damages in any way may be seen as tipping our hand -- or limiting our options -- with respect to the tobacco settlement
- Takes away from the jury what has been regarded as a traditional jury function
- While judges may determine punitive damages in many states in cases where they are the trier of fact, only Connecticut and Kansas provide for initial judicial determination (in contrast to appellate review or remittitur) where a jury has sat
- Unlikely to solve concerns of either proponents or opponents of caps; consumer groups and lawyers have not favored judicial determination
- May raise difficult Seventh Amendment issues ("no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of common law")
- Making it fully two-way preemptive, thus forcing some states to allow punitive damages that do not currently do so, is likely to be regarded as both unacceptable and inflammatory by the business community

#### *Statute of repose*

- Two-way preemption of state law (as in S.648)
- 18 year statute of repose (as in S.648)
- Which a plaintiff may overcome by clear and convincing evidence that the product had a longer useful safe life (not included in S.648, and responsive to the victim of the hay-baler accident cited in the veto message and to accidents involving products clearly intended to be longer-lived, such as elevators and most firearms)
- Covering only durable goods in the workplace (narrower than S.648, retaining plaintiff rights concerning consumer goods in states without any statute of repose and responding to your concern about handguns)
- With further exceptions for toxic substances, vehicles used in transportation for hire, and express warranties (as in S.648)
- And with a provision that extends the statute to allow full benefit of the two-year statute of limitations after injury or discovery of harm in, for example, year 17 (not in S.648, but not expected to be a problem)

#### Pros

- By building on S.648, demonstrates good faith to proponents of that legislation
- Two-way preemption is responsive to principles of veto message, and also lengthens statute in the 22 states that have them

- Number of years is longer than in any current state statute
- Rebuttable presumption protects workers injured by products clearly intended to be longer-lived
- Bright line number of years, combined with clear and convincing standard, means manufacturers will be free from arguments about whether something was intended to have a useful life slightly longer than 18 years
- By restricting statute to durable goods in the workplace, consumers in states without statutes of repose retain their access to court for injuries from long-lived or intermittently-used consumer goods such as cedar chests and camping and baby products
- Until late last year, all formulations of this statute had been limited to durable goods in the workplace, in part because those injured in such accident will at least have received some compensation through workers compensation
- Expands on an already-existing federal liability scheme -- workers compensation
- Exceptions protect access to court in latent defect cases

Cons

- Opponents of product liability reform will oppose any statute of repose as limiting plaintiffs' rights in states without such statutes
- Combination of two-way preemption and bright line (even with rebuttable presumption and limitation only to durable goods in the workplace), will restrict the access of some injured parties to court
- Proponents of S.648 may regard rebuttable presumption and limitation to durable goods in the workplace as unacceptable limitations, particularly given that they extended the statute from 15 to 18 years and made preemption two-way in response to the veto message

In addition to these proposals, we recommend that option 1 include items plaintiffs believe could make a real difference in their ability to recover, as well as provisions in the Breaux draft:

- Provision for alternative dispute resolution for small claims that both defendants and plaintiffs would find appealing
- Limitations on the use of protective orders where disclosure of the information is relevant to the public health or safety unless disclosure is clearly outweighed by a substantial interest in maintaining the confidentiality of the records
- Stricter pleading requirements and limitations on multi-state class actions where parties allege different types of damages
- A requirement for a study of the product liability system by the Attorney General

The first of these items might -- depending on how it is drafted -- gain the support of both plaintiffs (who cannot find lawyers to take small claims through the traditional legal system for a contingency fee) and defendants. The second (based on a bill that has been introduced by Senator Kohl) would be strongly supported by consumer groups and -- in light of the tobacco revelations probably could generate strong public support -- but would certainly be opposed by defendants and perhaps even by the plaintiff bar. The third and fourth provisions are from the Breaux draft. The class action may not be giving up much from the plaintiffs' perspective given the Supreme Court's recent decision overturning the asbestos settlement.

This option is recommended by \_\_\_\_\_ [names of advisors]

**C. Make a proposal that has a viable chance of starting negotiations with proponents**

As described in the specific pros and cons below, the items in this option cannot be completely squared with your veto statement. On the other hand, they represent real movement toward responding to your objections. However, it is critical to recognize that **once these options are on the table, negotiations may take them even farther afield, and lead to a negative dynamic in which bill supporters think they've come "most of the way" toward your position and assert that refusal to support their bill amounts to "moving the goalposts."** The danger with this option rests far less in its particular parameters than in the slippery slope it sends us down.

Again, no provision on several liability for non-economic damages is included, based on indications some proponents may be willing to move without such a provision. Appendix A contains options developed by the working group, of which only Proposal 2B is likely to be acceptable at all to the business community.

This option would consist of:

***Punitive damages - Cap with easier breakthrough, one-way preemption***

- Cap punitive damages at the greater of \$250,000 or twice compensatories (the lesser of the two for small businesses)
- Do not tell the jury of the cap
- Allow the judge to award punitive damages above the cap (for both small and large businesses) without an additional proceeding and on a simple finding that the capped amount is "insufficient to punish or deter," the standard in S.648, with no consideration of specified factors
- Insist that there be no legislative history suggesting this authority is to be used any more sparingly than implied by the statutory standard
- Couple this with procedural changes to set the evidentiary standard at "clear and convincing evidence," the substantive standard at "willful and wanton" (excluding recklessness), and to require bifurcation of the damages determination if requested by any party
- This would be two-way preemptive, except with respect to states that do not allow punitives in products cases at all

**Pros**

- Closest to both S.648 and earlier versions of bill, and thus likely to be most easily regarded as acceptable by proponents
- Particularly given that there are few punitive damage awards in excess of the cap and that judges now have remittitur authority, this would likely have little practical impact on actual awards
- The procedural changes may produce more uniformity across the country

- Making the additur provision two-way preemptive is a real improvement for plaintiffs compared to S.648

Cons

- This looks like a cap on punitive damages, which you said you opposed; “no caps on punitives” has been used as a shorthand description of the Administration’s firmest position
- It may actually be a cap with judges reluctant to award punitives
- Holding the line on the legislative history can be very difficult, particularly if the statute is acceptable in all other respects

*Statute of repose*

The proposal would be the same as under option 1, which we believe will be regarded as a good faith offer to negotiate.

The primary dangers with this strategy are the likelihood that opponents will not believe even the initial positions are consistent with the veto statement, and that it will be relatively easy for the other side to make what look like cosmetic changes that may in fact be quite significant. For example, deleting the plaintiff’s option to breach the 18-year statute of repose by a clear and convincing showing that the useful safe life was intended to be longer -- a likely demand of the manufacturing community -- would look minor, but in fact would work a major change in that it completely shut the courtroom door on plaintiffs in the many states with no statute of repose.

This option is recommended by \_\_\_\_\_ [names of advisors]

**V. DECISIONS:**

- \_\_\_\_ Let’s take the offensive against any federal product liability legislation
- \_\_\_\_ Propose option B to Senator Rockefeller, understanding he will not regard it as a serious offer.
  - \_\_\_\_ Discuss the offer with Senator Breaux before making it public, and make common cause with him if he’s interested
  - \_\_\_\_ Make the offer public to head off claims by bill proponents that we did not have anything to offer
- \_\_\_\_ Propose option C to Senator Rockefeller, making explicit that this is a best and final offer and any further movement will result in a veto
- \_\_\_\_ Propose option C to Senator Rockefeller, being prepared to negotiate
- \_\_\_\_ None of the options is good. We need to talk.

## APPENDIX A

### Options on Joint and Several Liability for Non-Economic Damages

The formulations described below reduce the negative impact of imposing several liability for non-economic damages. However, any formulation that does not guarantee the plaintiff 100% of non-economic damages (where there is any solvent and available defendant) is discriminatory against non-economic damages in those states that retain joint liability for economic damages. Assuming you do not want to put several liability for **economic** damages into play, you should be aware that all of the options described -- except pure reallocation -- have this flaw.

Informed by various state law provisions concerning joint and several liability, your advisors considered formulations for federal preemption involving the following concepts:

- Several liability with reallocation among remaining defendants (and plaintiff if the plaintiff is at fault) in the event the amount allocated to any defendant is uncollectible (thus guaranteeing plaintiffs 100% recovery for the portion of the damage not their fault, but sparing low-fault, deep-pocket defendants the need to sue for contribution)
- Setting a level of fault below which only several liability will apply (thus responding to the concerns of low-fault deep-pocket defendants)
- Setting a threshold of fault below which several liability will apply, but with a multiplier (thereby guaranteeing the plaintiff some recovery where only the low-fault defendants are solvent)
- Guaranteeing the plaintiff a specified percentage of recovery of non-economic damages
- The extent to which plaintiff fault will be taken into account to reduce recovery for non-economic damages
- Special rules for small businesses, particularly as to responsibility for more than their share of damages
- Two-way preemption, which would be meaningful if federal law were less pro-plaintiff than some state laws

Working on the assumption that you wished us to develop proposals that include several liability for non-economic damages -- so as to be able to convince those favoring product liability of our good faith, but that are least restrictive of the rights of plaintiffs, your advisors developed the following alternative formulations relating only to non-economic damages:

#### **Proposal 1 - Reallocation<sup>10</sup>**

- Joint and several if the plaintiff is fault-free

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<sup>10</sup> This is based on the statute currently in effect in Missouri.

- If the plaintiff is at all at fault, liability is several, but if the plaintiff cannot collect from one or more defendant after a specified period of time<sup>11</sup>, the plaintiff can petition the court for reallocation of damages not attributable to the plaintiff among the remaining defendants, but no defendant less at fault than the plaintiff may be charged with more than twice his proportionate share of damages
- This would be two-way preemptive

#### Pros

- Preserves balance between faultless plaintiff and defendant with any fault in favor of the plaintiff
- Is generally consistent -- or at least not less pro-plaintiff -- with the laws of most states<sup>12</sup>
- Where plaintiff is at fault, less culpable defendants -- even if they are deep pockets -- will have their damages limited
- Of all the potential limitations, is most likely to retain 100% recovery for non-economic damages
- By retaining joint and several liability in many situations, should encourage settlement

#### Cons

- May be viewed as excessively pro-plaintiff, and thus not a good-faith offer, particularly if it is two-way, thus increasing defendants' responsibility in states, such as California, with several liability for non-economic damages
- May limit plaintiff's recovery where plaintiff is at fault and there are multiple defendants
- Requires fact-finders in (the 13) states that currently do not have comparative fault or several liability to assign degrees of responsibility
- Shifts from defendants to plaintiffs the responsibility for collecting from each defendant, potentially adding to delay in recovering and increased expense
- As among defendants, it is unclear why the extent of the plaintiff's responsibility should have an impact on defendants' responsibility to pay the judgment

#### **Proposal 2A - Guaranteed recovery, two-way preemption**

- Joint and several liability of any defendant is than 30% at fault (taking into account the fault of the plaintiff and settling defendants)
- If any defendant is less than 30% at fault, that defendant's responsibility would be limited to a maximum of twice the defendant's proportionate share of non-economic damages except where a greater multiplier was needed to ensure the plaintiff recovery of at least 50% of the assessed non-economic damages.

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<sup>11</sup> In Missouri it is 30 days, which may be too short to actually encourage the plaintiff to try to collect; in Connecticut it is one year, which may be too long.

<sup>12</sup> Only plaintiffs with some degree of fault in the four states that retain traditional no comparative fault/joint and several liability would be significantly disadvantaged; plaintiffs in the nine states with comparative fault and joint and several liability could be somewhat disadvantaged. Plaintiffs in states with any further restrictions would likely benefit.

**Proposal 2B - Guaranteed recovery, one-way preemption**

- Joint and several liability of any defendant is than 10% at fault (taking into account the fault of the plaintiff and settling defendants)
- If any defendant is less than 10% at fault, that defendant's responsibility would be limited to a maximum of twice the defendant's proportionate share of non-economic damages except where a greater multiplier was needed to ensure the plaintiff recovery of at least 60% of the assessed non-economic damages.

Pros

- Should be seen by proponents of limitation as a good-faith offer, with real limits
- Preserves joint and several liability for defendants with significant degree of fault
- Ensures that no low-fault defendant will have to pay more than 50% (or 60%, if one-way) of total non-economic damages, and that in most cases they will be limited to their proportionate share
- Although it limits responsibility of low-fault defendants, it guarantees that plaintiff will collect substantial portion of assessed non-economic damages (if there are any solvent and available defendants)
- The two-way preemption version would increase plaintiff's guaranteed level of recovery in states with several liability for non-economic damages (such as California and Illinois), and thus might be considered an acceptable tradeoff for limitation on guaranteed recovery in other states

Cons

- Setting the guaranteed recovery level at 50% or 60% (or, in fact, any level lower than 100%) may be viewed as non-responsive to both the objections in the veto statement -- not full recovery, and discrimination against non-economic damages
- Will require fact-finders in the 13 states that don't have both comparative negligence and several liability to make additional determinations
- Defendants who view themselves as likely to be low-fault deep pockets will object that their potential for payment of non-economic damages is so high that they cannot take limitations into account in either settlement discussions or purchase of insurance
- Small degrees of differentiation of fault -- e.g., between 9% and 11% -- could have major repercussions on responsibility to pay damages

Your advisors recommend that proposal 1 be the first one we explore with proponents of product liability. It is by far the most consistent with the veto statement. If, however, it is rejected out of hand by product liability proponents, and you believe it is essential that we continue to negotiate, we would recommend Proposal 2A, which includes two-way preemption. We should make it very clear that if forced to one-way preemption, we would only accept a proposal with a significantly higher level of guaranteed recovery for the plaintiff (e.g., 60%), and a significantly lower threshold of for imposition of several liability (e.g., 10%).

Areas where we believe some negotiation could be possible include:

- Some decrease in the minimum level of recovery for two-way preemption (we would put an absolute floor at 50% for one-way preemption and 40% for two-way preemption)
- Some increase in the threshold for imposition of joint and several liability (we would put an absolute ceiling of 35% for two-way preemption and 15% for one-way preemption)

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Sanders D. Korenman ( CN=Sanders D. Korenman/OU=CEA/O=EOP [ CEA ] )

CREATION DATE/TIME: 8-JUL-1997 15:19:39.00

SUBJECT: race initiative meeting

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

Elena,

I have written the table of contents/outline for the background report we discussed at the meeting with Chris Edley. Peter, Alicia and Ed Montgomery provided input. How would you like to proceed?

Sandy



Part I: Demography

1. Racial composition of the US population: 1990s and historical trends
2. Geographic distribution
3. Components of change: birth, death and immigration
4. Projections

Part II: Disparities in the 1990s and trends in disparities

1. Economic status

a. Income and Poverty

b. Labor markets

employment, unemployment, non-employment

hours

wages and non-wage compensation

occupation/industry

non-wage characteristics of jobs (e.g., working conditions, health risks)

disability

c. Wealth/credit

financial

business ownership

home ownership

retirement wealth

credit and credit institutions

2. Educational status

a. Enrollment

Drop out rates; college enrollment and completion rates

b. Quality of schooling

c. Achievement

d. Training

3. Health status and health care

a. Health status

Pregnancy and infancy

Child hood and young adulthood

Adulthood

Older ages

{Specific diseases or conditions}

b. Health care

Insurance

Availability of health services

Health behaviors

4. Political status
  - a. Voting
  - b. Holding public office
  - c. Other political participation
  
5. Criminal justice
  - a. Offenders and victims
  - b. Criminal justice process (sentencing etc.)
  
6. Family organization
  - a. Family structure
  - b. Other family patterns (fostering, adoption, extension etc.)
  - c. Living arrangements and family support of the older population
  
7. Impact of immigration
  - a. Labor markets
  - b. Education
  - c. Other

Part III: Race relations

1. Racial attitudes and behaviors  
(ACD is very good on history of black white attitudes/opinions. Needs to be expanded to other groups and updated.)
2. Racial segregation
  - Residences
  - Schools
  - Workplaces
  - Other
3. Bias crimes, etc.
4. Developments in the 1990s
  - Rodney King beating trials and riots
  - OJ Simpson trials
  - The Bell Curve controversy
  - Challenge to Affirmative Action in California

Part IV: Discrimination

1. Measurement/methods: econometric vs. audit studies
2. Links between discrimination and outcomes.  
(Issue: Audit studies prove discrimination exists, but how much of the disparities documented in Part II can be attributed, directly or indirectly, to discrimination?)
3. Causes of discriminatory behavior
4. Consequences of discrimination for society  
Has the nature of discrimination changed?

**Automated Records Management System  
Hex-Dump Conversion**

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Jerold R. Mande ( CN=Jerold R. Mande/OU=OSTP/O=EOP [ OSTP ] )

CREATION DATE/TIME:10-JUL-1997 12:45:00.00

SUBJECT: Copies of the Final Koop-Kessler Report

TO: Elizabeth Drye ( CN=Elizabeth Drye/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TO: Paul J. Weinstein Jr. ( CN=Paul J. Weinstein Jr./OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TO: Bruce N. Reed ( CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

CC: Thomas L. Freedman ( CN=Thomas L. Freedman/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

CC: Toby Donenfeld ( CN=Toby Donenfeld/O=OVP @ OVP [ UNKNOWN ] )  
READ:UNKNOWN

CC: Daniel K. Tarullo ( CN=Daniel K. Tarullo/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

CC: Richard J. Turman ( CN=Richard J. Turman/OU=OMB/O=EOP @ EOP [ OMB ] )  
READ:UNKNOWN

CC: Mark J. Mazur ( CN=Mark J. Mazur/OU=CEA/O=EOP @ EOP [ CEA ] )  
READ:UNKNOWN

CC: Ellen S. Seidman ( CN=Ellen S. Seidman/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

CC: Charles F. Stone ( CN=Charles F. Stone/OU=CEA/O=EOP @ EOP [ CEA ] )  
READ:UNKNOWN

TEXT:

I can get additional copies of the report if they are needed. It is also available at: [www.science-policy.com/tobacco/report.htm](http://www.science-policy.com/tobacco/report.htm)

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Phillip Caplan ( CN=Phillip Caplan/OU=WHO/O=EOP [ WHO ] )

CREATION DATE/TIME:11-JUL-1997 14:00:23.00

SUBJECT: Pittsburgh/Chicago travel

TO: Cecily C. Williams ( CN=Cecily C. Williams/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Daniel Wexler ( CN=Daniel Wexler/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Dorian V. Weaver ( CN=Dorian V. Weaver/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Christopher Wayne ( CN=Christopher Wayne/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Kathleen M. Wallman ( CN=Kathleen M. Wallman/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Beth A. Viola ( CN=Beth A. Viola/OU=CEQ/O=EOP @ EOP [ CEQ ] )  
READ:UNKNOWN

TO: June G. Turner ( CN=June G. Turner/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Michael V. Terrell ( CN=Michael V. Terrell/OU=CEQ/O=EOP @ EOP [ CEQ ] )  
READ:UNKNOWN

TO: Jordan Tamagni ( CN=Jordan Tamagni/OU=WHO/O=EOP @ EOP [ UNKNOWN ] )  
READ:UNKNOWN

TO: Aviva Steinberg ( CN=Aviva Steinberg/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Todd Stern ( CN=Todd Stern/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Stephen B. Silverman ( CN=Stephen B. Silverman/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Jake Siewert ( CN=Jake Siewert/OU=OPD/O=EOP @ EOP [ OPD ] )  
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TO: Stuart M. Schear ( CN=Stuart M. Schear/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Dan K. Rosenthal ( CN=Dan K. Rosenthal/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Sarah J. Reber ( CN=Sarah J. Reber/OU=CEA/O=EOP @ EOP [ CEA ] )  
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TO: Simeona F. Pasquil ( CN=Simeona F. Pasquil/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Peter R. Orszag ( CN=Peter R. Orszag/OU=OPD/O=EOP @ EOP [ OPD ] )

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TO: Mary Morrison ( CN=Mary Morrison/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Minyon Moore ( CN=Minyon Moore/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Megan C. Moloney ( CN=Megan C. Moloney/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Anne E. McGuire ( CN=Anne E. McGuire/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Sylvia M. Mathews ( CN=Sylvia M. Mathews/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Bruce R. Lindsey ( CN=Bruce R. Lindsey/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Christopher J. Lavery ( CN=Christopher J. Lavery/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Karin Kullman ( CN=Karin Kullman/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Kirk T. Hanlin ( CN=Kirk T. Hanlin/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TO: Brian J. Johnson ( CN=Brian J. Johnson/OU=CEQ/O=EOP @ EOP [ CEQ ] )  
READ:UNKNOWN

TO: Phu D. Huynh ( CN=Phu D. Huynh/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Russell W. Horwitz ( CN=Russell W. Horwitz/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TO: Julia R. Green ( CN=Julia R. Green/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Laura A. Graham ( CN=Laura A. Graham/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Jeremy M. Gaines ( CN=Jeremy M. Gaines/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Karen E. Finney ( CN=Karen E. Finney/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Paul K. Engskov ( CN=Paul K. Engskov/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Maria Echaveste ( CN=Maria Echaveste/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Jennifer D. Dudley ( CN=Jennifer D. Dudley/OU=WHO/O=EOP @ EOP [ WHO ] )

READ:UNKNOWN

TO: Suzanne Dale ( CN=Suzanne Dale/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Catherine A. Cornelius ( CN=Catherine A. Cornelius/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Carolyn E. Cleveland ( CN=Carolyn E. Cleveland/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Jose Cerda III ( CN=Jose Cerda III/OU=OPD/O=EOP @ EOP [ OPD ] )  
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TO: Emily Bromberg ( CN=Emily Bromberg/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Kris M Balderston ( CN=Kris M Balderston/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Lori L. Anderson ( CN=Lori L. Anderson/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

Sean P. Maloney ( CN=Sean P. Maloney/OU=WHO/O=EOP [ WHO ] )  
READ:UNKNOWN

TEXT:

The President will travel to Pittsburgh (NAACP Convention) and Chicago (Natl Assn of Black Journalists) on Thursday, July 17.

Deadlines for the tripbook are as follows:

Background Material - both Western PA and Illinois - DUE TUESDAY, JULY 15  
at 6:00 PM

Political memo (2)

Economic background (2)

Cabinet issues (2)

CEQ issues (2)

Event memos - DUE WEDNESDAY, JULY 16 at 6:00 PM

NAACP - Ben Johnson

Black Journalists - Ann Walker

Please call me or Sean Maloney with any questions. Sean has just joined our office as the second Deputy Staff Secretary and will be working on trips as well.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Sanders D. Korenman ( CN=Sanders D. Korenman/OU=CEA/O=EOP [ CEA ] )

CREATION DATE/TIME:14-JUL-1997 08:58:19.00

SUBJECT: Re:

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

Elena,

I am in all day. My phone is 395-4597.

Sandy

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Elizabeth Drye ( CN=Elizabeth Drye/OU=OPD/O=EOP [ OPD ] )

CREATION DATE/TIME:15-JUL-1997 17:35:29.00

SUBJECT: URGENT: USDA draft letter supporting Tobacco crop insurance

TO: Mark J. Mazur ( CN=Mark J. Mazur/OU=CEA/O=EOP @ EOP [ CEA ] )

READ:UNKNOWN

TO: Jerold R. Mande ( CN=Jerold R. Mande/OU=OSTP/O=EOP @ EOP [ OSTP ] )

READ:UNKNOWN

TO: Bruce N. Reed ( CN=Bruce N. Reed/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TO: Paul J. Weinstein Jr. ( CN=Paul J. Weinstein Jr./OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TO: Mary L. Smith ( CN=Mary L. Smith/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TO: Thomas L. Freedman ( CN=Thomas L. Freedman/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

USDA wants immediate clearance of a letter opposing a Lowey amendment that would deny crop insurance and crop disaster relief for tobacco crops.

USDA's position is outlined below. Their position makes sense to me, but we should word it carefully. I'll get the letter. What do you think?

----- Forwarded by Elizabeth Drye/OPD/EOP on 07/15/97  
05:30 PM -----

Alecia Ward

07/15/97 05:23:02 PM

Record Type: Record

To: Elizabeth Drye/OPD/EOP

cc:

Subject: URGENT: USDA draft letter supporting Tobacco crop insurance

Elizabeth,

Just wanted to make sure that you are aware of this. TJ is fine supporting the USDA position, but wants to weigh in with others in the EOP to see if there are problems of which he is not aware.

Thanks.

Al

----- Forwarded by Alecia Ward/OMB/EOP on 07/15/97 05:22  
PM -----

Mark A. Weatherly  
07/15/97 04:44:58 PM  
Record Type: Record

To: See the distribution list at the bottom of this message  
cc: Ronald M. Cogswell/OMB/EOP, Alecia Ward/OMB/EOP, Jim R.  
Esquea/OMB/EOP, Stephen M. Frerichs/OMB/EOP  
Subject: URGENT: USDA draft letter supporting Tobacco crop insurance

House Ag Appropriations Subcommittee Chairman Skeen has asked Sec. Glickman to send a letter to counter an expected floor amendment tomorrow, and the Secretary would like to send the letter today. The amendment, to be offered by Cong. Lowey (D-NY), would prohibit USDA from offering crop insurance or crop disaster assistance for tobacco - starting with next year's crop and forevermore thereafter.

The draft USDA position is that "USDA is strongly opposed to this amendment". The letter states that crop insurance is the principal remaining safety net for farmers who suffer crop losses; that most tobacco farmers operate small farms and form an important part of the economy of many rural areas; and that the Administration supports a "safety net" (as the President cited when he signed the 1996 Farm Bill). It also recalls the hurricanes of last year that hit tobacco growers hard in North and South Carolina and Virginia, for which crop insurance provided significant indemnity payments.

The Administration has not quite broached the fate of tobacco farmers in the current tobacco company settlement talks. However, there has been some talk of ensuring any adverse affects on their livelihood are offset (USDA currently does not forecast adverse affects: while domestic demand may decrease from the deal, export demand is growing). In addition, in a March 1994 ACB News Special that featured the President answering questions from young people at the White House, the President stated, "There are a lot of good people in America who still raise tobacco. And we should have funds set aside for them (in the cigarette tax) to help them convert away from raising tobacco to doing other kinds of farming so they can actually make a living." (This is about all we've got on the President's potential views on this issue.)

In our view, some version of the safety net argument for preserving crop insurance for tobacco, and opposing the Lowey amendment, would appear a consistent Administration position. But this issue is clearly above our heads, and so request any guidance you can offer as soon as possible.  
Thanks.

Message Sent

To: \_\_\_\_\_  
T J. Glauthier/OMB/EOP  
Charles E. Kieffer/OMB/EOP  
Lisa M. Kountoupes/OMB/EOP  
Barbara Chow/WHO/EOP  
Lucia A. Wyman/WHO/EOP  
Joseph J. Minarik/OMB/EOP

----- Forwarded by Alecia Ward/OMB/EOP on 07/15/97 05:22  
PM -----

Joseph J. Minarik

07/15/97 04:50:45 PM

Record Type: Record

To: Mark A. Weatherly/OMB/EOP

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

Subject: Re: URGENT: USDA draft letter supporting Tobacco crop insurance

For what it's worth, I think the President's statement speaks for itself; and we have certainly made crop conversion a part of our economic response. Therefore, I see no way that we can back cutting off crop insurance -- certainly not now, and probably even after we get a substantial part of the land base to convert.

Message Copied

To:

---

T J. Glauthier/OMB/EOP

Charles E. Kieffer/OMB/EOP

Lisa M. Kountoupes/OMB/EOP

Barbara Chow/WHO/EOP

Lucia A. Wyman/WHO/EOP

Ronald M. Cogswell/OMB/EOP

Alecia Ward/OMB/EOP

Jim R. Esquea/OMB/EOP

Stephen M. Frerichs/OMB/EOP

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Andrew J. Mayock ( CN=Andrew J. Mayock/OU=WHO/O=EOP [ WHO ] )

CREATION DATE/TIME:21-JUL-1997 15:51:47.00

SUBJECT: McCurry's Daily Briefing

TO: Alicia H. Munnell ( CN=Alicia H. Munnell/OU=CEA/O=EOP @ EOP [ CEA ] )  
READ:UNKNOWN

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TO: Sylvia M. Mathews ( CN=Sylvia M. Mathews/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TEXT:

Below find today's Q&As on the race initiative from McCurry's briefing (I included Alicia and Elena on this e-mail to alert them to the new study referenced in first question):

Q On another issue, there's a new study out today that says there's been a change in the racial culture in the deep South. What's the President's feelings on that, especially with this race initiative and Thursday with his two stops at the NABJ and the NAACP?

MR. MCCURRY: A change in the culture?

Q The racial culture in the last 30 years since --

MR. MCCURRY: That's a report that's been issued? I'm just not familiar with it.

Q Yes, the University of Illinois --

MR. MCCURRY: I'm not familiar enough with the report to comment on it, but I'm sure, depending on how it's been generated or who generated it, if it's got some serious thinking in it, it will be of interest to the President's advisory board.

Q And also, do you think that the word "tolerance" is not race-relations-friendly in using the race initiative --

MR. MCCURRY: I've heard -- no one has suggested that the President's call for tolerance is anything but encouragement to all Americans to be respectful of the views of others, even though you might not necessarily share those views, as the word implies.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Phillip Caplan ( CN=Phillip Caplan/OU=WHO/O=EOP [ WHO ] )

CREATION DATE/TIME:21-JUL-1997 16:04:02.00

SUBJECT: The President's trip to Nevada, California and Nevada

TO: Cecily C. Williams ( CN=Cecily C. Williams/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Daniel Wexler ( CN=Daniel Wexler/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Dorian V. Weaver ( CN=Dorian V. Weaver/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Christopher Wayne ( CN=Christopher Wayne/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Kathleen M. Wallman ( CN=Kathleen M. Wallman/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Beth A. Viola ( CN=Beth A. Viola/OU=CEQ/O=EOP @ EOP [ CEQ ] )  
READ:UNKNOWN

TO: June G. Turner ( CN=June G. Turner/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Michael V. Terrell ( CN=Michael V. Terrell/OU=CEQ/O=EOP @ EOP [ CEQ ] )  
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TO: Jordan Tamagni ( CN=Jordan Tamagni/OU=WHO/O=EOP @ EOP [ UNKNOWN ] )  
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TO: Aviva Steinberg ( CN=Aviva Steinberg/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Todd Stern ( CN=Todd Stern/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Stephen B. Silverman ( CN=Stephen B. Silverman/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Jake Siewert ( CN=Jake Siewert/OU=OPD/O=EOP @ EOP [ OPD ] )  
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TO: Stuart M. Schear ( CN=Stuart M. Schear/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Dan K. Rosenthal ( CN=Dan K. Rosenthal/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Sarah J. Reber ( CN=Sarah J. Reber/OU=CEA/O=EOP @ EOP [ CEA ] )  
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TO: Simeona F. Pasquill ( CN=Simeona F. Pasquill/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Peter R. Orszag ( CN=Peter R. Orszag/OU=OPD/O=EOP @ EOP [ OPD ] )

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TO: Mary Morrison ( CN=Mary Morrison/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Phu D. Huynh ( CN=Phu D. Huynh/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Russell W. Horwitz ( CN=Russell W. Horwitz/OU=OPD/O=EOP @ EOP [ OPD ] )  
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TO: Julia R. Green ( CN=Julia R. Green/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Laura K. Capps ( CN=Laura K. Capps/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Debra D. Bird ( CN=Debra D. Bird/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Barbara A. Barclay ( CN=Barbara A. Barclay/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Kris M Balderston ( CN=Kris M Balderston/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Lori L. Anderson ( CN=Lori L. Anderson/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

CC: Mickey Ibarra ( CN=Mickey Ibarra/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

CC: Angelique Pirozzi ( CN=Angelique Pirozzi/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

CC: Fred Duval ( CN=Fred Duval/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

CC: Karen E. Skelton ( CN=Karen E. Skelton/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TEXT:

The President will travel to Lake Tahoe (Lake Tahoe forum), Los Angeles (DCCC fundraiser), and to Las Vegas (NGA Convention) on July 26-28.

The President will leave very early on the morning of the 26th -- approximately 6:00 AM. We have been asked to get him his briefing book early on Friday evening -- 7:00 PM at the latest.

Therefore, deadlines for the President briefing book are as follows:

Background memos: DUE THURSDAY, July 24 at 6:00 PM.

- (sep. memos for each state)
- Political background (NV and so. CA)
- CEQ issues (NV and so. CA)
- Cabinet affairs issues (NV and so. CA)
- Economic 1-pagers (NV and CA)

Event memos: DUE FRIDAY, July 25 at 3:00 PM (3 hours earlier than normal)

- Lake Tahoe events:
  - boat ride - CEQ
  - speech and roundtable - CEQ/Political
- DCCC fundraiser - Political
- NGA Convention - IGA
  - Event memo - IGA
  - Governor-by-Governor issues/concerns - IGA
  - NGA policy concerns/major issues - IGA
  - Gubernatorial races update -Political

There is ample time to begin working on this material now and no reason not to have it in to my office by the above deadlines so that we can get the President his briefing book early.

Please call me or Sean Maloney if you have any questions. Thanks.



**The Tobacco Settlement and Incentives to Develop Reduced-Risk Tobacco Products**  
July 29, 1997

**I. Background**

In the past, the tobacco industry has not developed many innovative, reduced risk products -- in large measure because to develop and promote safer products would have been to acknowledge the harm done by existing products. But some innovations, like filters and reduced-tar cigarettes, do appear to have followed the release of adverse health news about smoking. In the current environment, in which companies are admitting that their products are harmful and consumer awareness of smoking's risks is heightened, individual companies may be more likely to view the development of reduced risk products as a profitable endeavor.

The Settlement includes provisions intended to speed the introduction of reduced risk products. According to the Settlement, the goal of these provisions "is to guarantee that a mechanism exists to ensure that products which appear to hold out the hope of reducing risk are actually tested and made available in the marketplace and not held back." The types of innovations expected to be introduced include the removal of toxic constituents from cigarettes, a reduction in the nicotine content in cigarettes, and alternative delivery devices for nicotine that remain attractive to consumers.

**II. Provisions of the Settlement**

Provisions relating to reduced risk products are in Title I, Section E, Part 4 of the Settlement. Manufacturers will be required to:

- Notify FDA of any technology that they develop or acquire and that reduces the risk from tobacco products, and
- For a "commercially reasonable" fee, cross license all such technology to those companies also covered by the same obligations. Procedural protections will be built in to resolve license fee disputes.

Other provisions include:

- If the technology is in early development stages, manufacturers will be provided confidentiality during the development process.
- The FDA will have the authority to mandate the introduction of less hazardous products that are technologically feasible by requiring the manufacturer who owns the technology to introduce the product or to license the technology to another producer. If no manufacturer or licensee brings such products to market in a reasonable time frame set by FDA, the U.S. Public Health Service may produce the product, either itself or through a

licensing arrangement.

### III. The economic tradeoff between dissemination and incentives for R&D

One concern with these provisions is that they effectively eliminate the patent system for tobacco products. Economists have long struggled with the optimal design of a patent system. If new innovation occurred spontaneously -- without the need to invest in R&D -- society's interest would be best served by requiring immediate, full disclosure and licensing of new products and technologies without fee. But innovation generally does require investment -- and full disclosure coupled with free adoption by other firms provides little or no incentive for such investment to be undertaken. The patent system therefore grants a property right to the inventor "to exclude others from making, using or selling the invention."<sup>1</sup> The fundamental tradeoff in the patent system -- inherent in designing the length and comprehensiveness of the patent protection -- is to balance the need to encourage R&D with the desire to disseminate new discoveries as quickly as possible.

### IV. The Settlement and incentives

The Settlement's provisions, especially the cross-licensing requirement, are near one extreme of possible patent systems. They ensure rapid dissemination of new discoveries, but provide little incentive for firms to invest further in the processes that could lead to such discoveries. **A crucial question to answer is how much of the total possible R&D has been undertaken, and how much remains to be done. In the area of removing toxins from cigarettes, much -- though not all -- is apparently already technologically feasible. Some analysts believe that current knowledge would also allow a reduction of the nicotine content in commercially viable cigarettes within a relatively short period (e.g., 6 months); others believe that such products are a decade away. A critical technical question for FDA and others to answer is to give a best guess as to how much research remains to be undertaken, and in what specific areas.**

To the extent that most of the relevant R&D has already been undertaken, the incentive problems are not significant. *Enforcing full and even free cross-licensing of extant R&D may not pose the same incentive problems as enforcing cross-licensing of future R&D.* Two potential dangers with cross-licensing existing R&D are (1) it may damage the government's credibility that such a requirement will not be repeated in the future, thus reducing incentives for future R&D; and (2) **it may be difficult to define an "existing" innovation (how would a prototype be classified, where the bulk of the costs are bringing it to market?).** Despite these potential problems, it may be useful to draw a distinction between cross-licensing of existing R&D and future R&D.

Another important incentive question is to what extent the firms will be allowed to

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<sup>1</sup> Patents are granted for a term of 17 years (14 years for design patents), which may be extended only by a special act of Congress (except for certain pharmaceutical patents). After expiration of the term, the patentee loses rights to the invention.

market their innovations. The FDA and others raise legitimate concerns about allowing marketing of reduced risk tobacco products: by providing a government imprimatur of reduced health risks, allowing such advertising may induce more smoking (either by non-smokers or by those who had intended to reduce their smoking levels). So even if each cigarette is "safer," the public health risk may be expanded because of the increase in total smoking relative to the baseline. *To the extent that advertising of reduced risk products is not allowed, however, firms will have little interest in developing such products.*

One possibility -- which may not be technically feasible -- would be to allow firms to publish "health hazard ratings." For example, cigarette packages could carry health hazard ratings of 90, 95, or 100 depending on the risks profile of the product.<sup>2</sup> It seems unlikely that a product carrying a health hazard rating of "90" would be much more attractive to a non-smoker than one carrying a rating of "100." Such a system could provide firms with some incentives to develop safer products -- because extant smokers would pay attention to the health hazard rating -- while minimizing the potential for perverse results. The system would also facilitate a CAFE-like regulation that cigarette sales by each individual producer could have a mean health hazard rating of no more than some level.

## V. Options

The above discussion suggests several possible options:

1. *Maintain current provisions.* The current provisions provide limited incentives for innovation, but strong incentives for diffusion. This solution is acceptable if we believe that most of the knowledge about developing safer products already exists -- and there is therefore more to be gained from disseminating what is known than from trying to develop new knowledge and new products and technology.
2. *Require full (and perhaps free) cross-licensing of existing knowledge but not future discoveries.* As noted above, this option would efficiently diffuse the existing stock of knowledge without affecting firms' incentives for future investments in R&D. Future R&D efforts could be governed by the regular patent system, or one of the options below. One important detail in such a system would be the delineation of existing R&D from future R&D.
3. *Grant patents for a limited period.* The Settlement effectively eliminates the patent period. An intermediate position, which would provide more balance between incentives and dissemination, would shorten the patent period from 17 years to perhaps a few years. At the end of the patent period, other firms would have free access to the knowledge.
4. *Grant patents for a limited period and then have the tobacco fund buy out the patent holder (could be combined with #2).* One solution to the tradeoff between dissemination and incentives

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<sup>2</sup> Given the difficulty of distinguishing real health benefits, the scale should only include a few discrete levels -- perhaps 90, 95, and 100 -- instead of being continuous.

is to have the government buy out the patent holder and then license the knowledge to other producers (perhaps for a nominal fee). For example, we could grant a 2-year patent for tobacco products. At the end of the 2-year period, the tobacco fund would compensate the patent holder for some multiple (e.g., 3) of profits from the patent over that period -- a proxy for the present value of the profits from the patent itself. The patent will then expire, and the knowledge could be distributed to other firms for free or for a nominal fee, ensuring relatively rapid dissemination. This structure would maintain incentives for future R&D, encourage patent holders to market their innovations aggressively during the patent period, and ensure dissemination after the end of the patent period.

5. *Eliminate cross-licensing requirements.* Eliminating the cross-licensing provisions would allow companies to profit from innovation as they would in any other industry, thus encouraging future R&D. Concerns about strategic withholding of innovations and the related lack of diffusion could be alleviated by the settlement's provision allowing the FDA to set performance standards. In that way, a minimum level of safety could be set for the entire industry and adjusted as major innovations occurred.

## **VI. Summary of key points and questions**

- Innovation generally requires investment -- and full disclosure coupled with free adoption by other firms provides little or no incentive for such investment to be undertaken.
- Enforcing full and even free cross-licensing of extant R&D may not pose the same incentive problems as enforcing cross-licensing of future R&D. But the government's credibility may suffer, and it may be difficult to define "existing" R&D.
- To the extent that the FDA does not allow advertising of reduced risk products, firms will have little interest in developing such products. To counter the potential risk to public health from allowing advertising of "safer" cigarettes, one possibility -- which may not be technically feasible -- would be to allow firms to publish "health hazard ratings."
- The cross-licensing requirements embodied in the Settlement are near one extreme of possible patent systems. Modifications could include limiting cross-licensing to existing R&D, allowing a shorter-than-usual but non-zero patent period, or simply eliminating the cross-licensing requirements and relying on FDA regulations to encourage dissemination.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Sanders D. Korenman ( CN=Sanders D. Korenman/OU=CEA/O=EOP [ CEA ] )

CREATION DATE/TIME: 6-AUG-1997 12:18:27.00

SUBJECT:

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

I am following up on our conversation regarding the race initiative. Did you get a chance to talk to Judy Winston?

Sandy

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Sanders D. Korenman ( CN=Sanders D. Korenman/OU=CEA/O=EOP [ CEA ] )

CREATION DATE/TIME: 6-AUG-1997 14:58:46.00

SUBJECT: Re:

TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )

READ:UNKNOWN

TEXT:

Am I missing a meeting?

Elena Kagan

08/06/97 02:57:23 PM

Record Type: Record

To: Sanders D. Korenman/CEA/EOP

cc:

Subject: Re:

3:00 meeting.

RECORD TYPE: PRESIDENTIAL (NOTES MAIL)

CREATOR: Sean P. Maloney ( CN=Sean P. Maloney/OU=WHO/O=EOP [ WHO ] )

CREATION DATE/TIME: 6-AUG-1997 15:23:10.00

SUBJECT: St. Louis Trip

TO: Robin J. Bachman ( CN=Robin J. Bachman/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Cecily C. Williams ( CN=Cecily C. Williams/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Daniel Wexler ( CN=Daniel Wexler/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Dorian V. Weaver ( CN=Dorian V. Weaver/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Christopher Wayne ( CN=Christopher Wayne/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Kathleen M. Wallman ( CN=Kathleen M. Wallman/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Beth A. Viola ( CN=Beth A. Viola/OU=CEQ/O=EOP @ EOP [ CEQ ] )  
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TO: June G. Turner ( CN=June G. Turner/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Michael V. Terrell ( CN=Michael V. Terrell/OU=CEQ/O=EOP @ EOP [ CEQ ] )  
READ:UNKNOWN

TO: Jordan Tamagni ( CN=Jordan Tamagni/OU=WHO/O=EOP @ EOP [ UNKNOWN ] )  
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TO: Aviva Steinberg ( CN=Aviva Steinberg/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Todd Stern ( CN=Todd Stern/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Stephen B. Silverman ( CN=Stephen B. Silverman/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Jake Siewert ( CN=Jake Siewert/OU=OPD/O=EOP @ EOP [ OPD ] )  
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TO: Stuart M. Schear ( CN=Stuart M. Schear/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Dan K. Rosenthal ( CN=Dan K. Rosenthal/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Sarah J. Reber ( CN=Sarah J. Reber/OU=CEA/O=EOP @ EOP [ CEA ] )  
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TO: Peter R. Orszag ( CN=Peter R. Orszag/OU=OPD/O=EOP @ EOP [ OPD ] )  
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TO: Mary Morrison ( CN=Mary Morrison/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Megan C. Moloney ( CN=Megan C. Moloney/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Anne E. McGuire ( CN=Anne E. McGuire/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Sylvia M. Mathews ( CN=Sylvia M. Mathews/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Bruce R. Lindsey ( CN=Bruce R. Lindsey/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Christopher J. Lavery ( CN=Christopher J. Lavery/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Karin Kullman ( CN=Karin Kullman/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Kirk T. Hanlin ( CN=Kirk T. Hanlin/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Elena Kagan ( CN=Elena Kagan/OU=OPD/O=EOP @ EOP [ OPD ] )  
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TO: Brian J. Johnson ( CN=Brian J. Johnson/OU=CEQ/O=EOP @ EOP [ CEQ ] )  
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TO: Phu D. Huynh ( CN=Phu D. Huynh/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Russell W. Horwitz ( CN=Russell W. Horwitz/OU=OPD/O=EOP @ EOP [ OPD ] )  
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TO: Julia R. Green ( CN=Julia R. Green/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Laura A. Graham ( CN=Laura A. Graham/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Jeremy M. Gaines ( CN=Jeremy M. Gaines/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Karen E. Finney ( CN=Karen E. Finney/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Paul K. Engskov ( CN=Paul K. Engskov/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Maria Echaveste ( CN=Maria Echaveste/OU=WHO/O=EOP @ EOP [ WHO ] )

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TO: Jennifer D. Dudley ( CN=Jennifer D. Dudley/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Suzanne Dale ( CN=Suzanne Dale/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Catherine A. Cornelius ( CN=Catherine A. Cornelius/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Carolyn E. Cleveland ( CN=Carolyn E. Cleveland/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Jose Cerda III ( CN=Jose Cerda III/OU=OPD/O=EOP @ EOP [ OPD ] )  
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TO: Emily Bromberg ( CN=Emily Bromberg/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: David S. Beaubaire ( CN=David S. Beaubaire/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Nicholas R. Baldick ( CN=Nicholas R. Baldick/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Brenda M. Anders ( CN=Brenda M. Anders/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Thomas D. Janenda ( CN=Thomas D. Janenda/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Lorraine L. Wytkind ( CN=Lorraine L. Wytkind/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Anna C. White ( CN=Anna C. White/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Paul J. Weinstein Jr. ( CN=Paul J. Weinstein Jr./OU=OPD/O=EOP @ EOP [ OPD ] )  
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TO: Christopher F. Walker ( CN=Christopher F. Walker/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Ann F. Walker ( CN=Ann F. Walker/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Michael Waldman ( CN=Michael Waldman/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Peter G. Umhofer ( CN=Peter G. Umhofer/OU=CEQ/O=EOP @ EOP [ CEQ ] )  
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TO: Barry J. Toiv ( CN=Barry J. Toiv/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Marjorie Tarmey ( CN=Marjorie Tarmey/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Stephanie S. Streett ( CN=Stephanie S. Streett/OU=WHO/O=EOP @ EOP [ WHO ] )

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TO: Darby E. Stott ( CN=Darby E. Stott/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Craig T. Smith ( CN=Craig T. Smith/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Joshua Silverman ( CN=Joshua Silverman/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Laura D. Schwartz ( CN=Laura D. Schwartz/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Stefanie Sanford ( CN=Stefanie Sanford/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Christa Robinson ( CN=Christa Robinson/OU=OPD/O=EOP @ EOP [ OPD ] )  
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TO: Jennifer M. Palmieri ( CN=Jennifer M. Palmieri/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Elizabeth R. Newman ( CN=Elizabeth R. Newman/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Kevin S. Moran ( CN=Kevin S. Moran/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Linda L. Moore ( CN=Linda L. Moore/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: April K. Mellody ( CN=April K. Mellody/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Andrew J. Mayock ( CN=Andrew J. Mayock/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Joseph P. Lockhart ( CN=Joseph P. Lockhart/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Ann F. Lewis ( CN=Ann F. Lewis/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Sara M. Latham ( CN=Sara M. Latham/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Joshua A. King ( CN=Joshua A. King/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Angus S. King ( CN=Angus S. King/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Cynthia M. Jasso-Rotunno ( CN=Cynthia M. Jasso-Rotunno/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Katherine Hubbard ( CN=Katherine Hubbard/OU=WHO/O=EOP @ EOP [ WHO ] )

READ:UNKNOWN

TO: Nancy V. Hernreich ( CN=Nancy V. Hernreich/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Jason S. Goldberg ( CN=Jason S. Goldberg/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: D. Stephen Goodin ( CN=D. Stephen Goodin/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Andrew Friendly ( CN=Andrew Friendly/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Shelley N. Fidler ( CN=Shelley N. Fidler/OU=CEQ/O=EOP @ EOP [ CEQ ] )  
READ:UNKNOWN

TO: Anne M. Edwards ( CN=Anne M. Edwards/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Elizabeth Drye ( CN=Elizabeth Drye/OU=OPD/O=EOP @ EOP [ OPD ] )  
READ:UNKNOWN

TO: Marilyn DiGiacobbe ( CN=Marilyn DiGiacobbe/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Brenda B. Costello ( CN=Brenda B. Costello/OU=WHO/O=EOP @ EOP [ WHO ] )  
READ:UNKNOWN

TO: Michael Cohen ( CN=Michael Cohen/OU=OPD/O=EOP @ EOP [ OPD ] )  
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TO: Daniel K. Chang ( CN=Daniel K. Chang/OU=CEA/O=EOP @ EOP [ CEA ] )  
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TO: Kris M Balderston ( CN=Kris M Balderston/OU=WHO/O=EOP @ EOP [ WHO ] )  
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TO: Lori L. Anderson ( CN=Lori L. Anderson/OU=WHO/O=EOP @ EOP [ WHO ] )  
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Phillip Caplan ( CN=Phillip Caplan/OU=WHO/O=EOP [ WHO ] )  
READ:UNKNOWN

TEXT:

The President will travel to St. Louis on Tuesday, August 12, 1997, to attend a Welfare-to-Work Partnership event and a DNC luncheon.

Deadlines for the President's Trip Book are as follows:

Background memos: DUE, MONDAY, AUGUST 11 at 6:00 PM

- Political memo
- Economic 1-pager
- CEQ Hot Issues
- Cabinet Affairs Hot Issues
- Accomplishments

Event memos: DUE, MONDAY, AUGUST 11 at 6:00 PM

- Welfare-to-work event (Christa Robinson)
- DNC Event (Craig Smith)

Please call or e-mail me if you have any questions. Thanks.