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THE WHITE HOUSE
WASHINGTON

THE PRESIDENT HAS SEEN

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February 28, 1998

MEMORANDUM FOR THE PRESIDENT

FROM: Bruce Reed
Elena Kagan

SUBJECT: DPC Weekly Report

1. Safety -- Drunk Driving Event: You are currently scheduled to do a Rose Garden event on Tuesday to highlight the need for a nationwide standard for drinking and driving. You will urge Congress to enact an amendment to ISTEA legislation to make .08 blood alcohol content (BAC) the limit for drivers across the nation. The amendment, which will be offered by Sens. Lautenberg and DeWine, gives states three years to adopt .08 BAC limits, on penalty of losing highway construction funds. To date, 15 states already have adopted .08 BAC laws. We are also preparing a directive to the Secretary of Transportation, instructing him to develop a plan to set .08 BAC as the legal limit on federal property, such as national parks and military installations.

2. Tobacco -- Legislative Developments: The Senate is making good progress on tobacco legislation, although the House remains stalled. In the Senate, Sens. Harkin and Chafee are continuing to work on a comprehensive bill and may make an announcement as early as this week. We would like to give immediate and strong support to this bipartisan effort; we will make a recommendation to you as soon as we get fuller information about the bill's contents. Sens. McCain and Hatch are also working together on comprehensive legislation (apparently with the blessing of Sen. Lott) and have started conversations with Sen. Breaux and farm-state Democrats. McCain and Hatch both complimented the Administration last week for the assistance it is providing to Congress on tobacco legislation (see entry #3, below). In the House, Rep. Fazio is getting ready to introduce a version of the Conrad bill -- once again, with only Democrats signing on -- but there is little other activity. Rep. Bliley would like to make a push for comprehensive bipartisan legislation, but the Republican leadership has not yet authorized him to do so; in any event, he and the key Democrats on his committee (Reps. Dingell and Waxman) may remain too far apart on too many issues to make such a bipartisan bill a real possibility.

3. Tobacco -- Letters to Congress: Bruce sent a letter to Sen. McCain on Friday, enclosing responses to 74 questions that the Senator had asked the Administration about tobacco legislation. Most of the questions related to restrictions on advertising designed to reduce youth smoking. In our responses, drafted with extensive input from the Department of Justice and HHS, we explain that the advertising restrictions contained in our FDA rule are consistent with the First Amendment. We go on to explain that the broader advertising restrictions included in

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the June 20th settlement, although potentially very valuable in reducing youth smoking, raise significant constitutional concerns if imposed by legislation. Some Members of Congress may use these responses to argue that only a settlement -- and not simply legislation -- can achieve the goal of reducing youth smoking. We will not make this argument ourselves, because we do not want to suggest that we need the consent of the tobacco industry to accomplish something meaningful in this area. To the contrary, we will stress the ability of comprehensive legislation to impose real pain on the industry for continuing to market to minors. But in the long run, this letter may help to create the conditions for a bipartisan agreement on tobacco by providing a rationale for giving certain legal protections to the industry (without which many Republicans and farm-state Democrats will resist legislation).

In a separate letter sent last week, responding to questions from Sen. DeWine, the Department of Justice expressed skepticism about the need to include antitrust exemptions for tobacco manufacturers in comprehensive legislation. The Department particularly criticized proposals to provide exemptions for price-fixing or for dealings with distributors and retailers. It did, however, leave open the possibility of a narrowly drawn exemption for agreements on advertising to minors.

4. Tobacco -- Fourth Circuit Decision: Judge Russell -- one of the three Fourth Circuit judges who heard argument in the lawsuit challenging the FDA's rule -- died last week (at the age of 92). Judge Russell was very hostile to the FDA's argument during oral argument. If the other two judges are split, they will have to set the case for reargument. If they are in agreement, they could still issue a decision.

5. Health -- Medicare Commission Meeting: You are currently scheduled to meet with the Medicare Commission on Thursday, the day before its first official session. We do not expect the Commission to take any important action at its first session: the members probably will try to set a long-term agenda and then focus on questions of process and procedure. The Commission's kick-off may nonetheless attract significant media attention, and your meeting with the members offers a good opportunity to demonstrate your commitment to solving the long-term financing challenges facing the Medicare program. We recommend that you urge the members to work in a bipartisan spirit, and that you relate their effort to the activities you are undertaking to develop consensus on needed Social Security reforms. We also are considering whether you should announce some general principles on Medicare reform to guide the Commission's work in the future.

6. Health -- Patients' Bill of Rights Legislation: The Democratic Leadership is expected to unveil its version of the patients' bill of rights in about a week. The legislation will go beyond your Quality Commission's recommendation by providing for judicial enforcement of the bill of rights and requiring health plans to cover all clinical trials, breast reconstructive surgery, and other services associated with mastectomies. (Sen. D'Amato is expected to offer an amendment on the Senate floor in the next few weeks that will impose similar new benefits requirements on health plans, including services associated with mastectomies and second

opinions for cancer patients.) Both the benefits requirements and -- perhaps even more -- the enforcement provisions are very controversial, especially with the business community. Opponents will argue that these measures will lead to increased litigation, higher premiums, and more uninsured Americans. These claims are overblown, but they will have great effect in Congress. Because the Democratic Leadership version of the Bill of Rights stands little or no chance of passing, our challenge is to indicate support for the legislation without undermining our ability to back an eventual more moderate proposal. We are meeting with the Democratic Leadership this week to construct a communications and legislative strategy.

7. Welfare Reform -- Exempting Workfare from FICA Taxes: The IRS and the Department of Treasury's Tax Policy Division have prepared a draft notice stating that workfare positions are not subject to FICA taxes. As you recall, Democratic and Republican Governors alike have long sought this result, and you have indicated support for legislation to achieve it. The IRS/Treasury draft notice specifically states that it addresses only the status of workfare programs under federal tax law, and not under any employment law (including the minimum wage). The unions nonetheless fear that a court may use the notice to support the argument that workfare is really only a welfare payment -- not employment subject to the minimum wage and other requirements. Disinterested lawyers say that a court could take this approach, but that the notice is drafted to minimize the risk as far as possible. IRS and Treasury officials are currently considering whether to publish the notice.

8. Welfare -- Fatherhood Initiatives: Rep. Shaw, joined by Chairman Archer and other Republican members of the Ways and Means Committee, introduced a new \$2 billion block grant proposal on Thursday to enhance fatherhood and parental responsibility. Shaw described the initiative as the next step in welfare reform and as a way "to help children by providing them with more than a working mother and sporadic child support." Under the initiative, states would award funds to community-based projects that encourage marriage and better parenting by fathers and help fathers to obtain employment or get better jobs. Although the bill is good politics, there is little reason to think that such an open-ended block grant will produce results. We are exploring alternative ideas in case Congress decides to take up "fatherhood" as an issue, including providing workfare slots for unemployed delinquent fathers and insisting that they work off their back child support.

9. Education -- Feinstein Ballot Initiative: You recently asked us whether you should support a California ballot initiative that Sen. Feinstein has proposed, called the "Excellence and Accountability in Education Act of 1998." The initiative contains many elements that reflect or complement your own agenda: requiring grade-by-grade education standards; ending social promotions and providing mandatory summer school for students who do not meet standards; expanding California's existing class-size reduction program; lengthening the school year; and improving teacher quality through such steps as providing incentives to recruit well-trained new teachers, raising teacher certification requirements, and rewarding outstanding teachers. But the proposed funding mechanism -- a \$1 per pack state tobacco tax -- makes it difficult for you to endorse the Feinstein initiative at this time. Your support for such a significant state tobacco tax

increase, over and above the new federal tobacco revenues contemplated in your budget, would only further complicate the effort to pass comprehensive tobacco legislation during this Congress.