October 8, 1998

MEMORANDUM TO ERSKINE BOWLES

FROM: Fred DuVal FD

CC: John Podesta
Jack Lew
Sylvia Mathews
Bruce Reed
Elena Kagan
Cynthia Rice
Mickey Ibarra
Lynn Cutler

SUBJECT: Governor Chiles

Governor Chiles will be calling you tomorrow morning on the subject of Indian Gaming and the Enzi Amendment which is in the Interior Appropriations bill. Nevada Governor Bob Miller has a similar call into John Podesta to discuss this issue. You'll recall that we expected Governor Chiles to raise this issue in his meeting with you two weeks ago. I have attached the briefing materials from that meeting. He may also raise tobacco recoupment again and these briefing materials are also provided.

Our opposition to Enzi has been consistent and I have repeatedly conveyed that to the many disappointed governors who feel very strongly about Indian gaming. We arranged a conference call recently between Jack Lew and a group of democratic governors (including Governors Chiles and Miller) so that they could express their opinions on this issue. Yet, sensing our position remains unchanged, they are trying to increase their pressure. Their opposition and our position is intense.

Mickey, Lynn and I agree that you should take the call. Additionally, we agree that our best course of action is to try and get Enzi out of the bill before it arrives here so as to avoid a more visible and difficult fight at our doorstep between the governors and the tribes.

THE WHITE HOUSE

WASHINGTON

September 21, 1998

MEETING WITH GOVERNOR LAWTON CHILES (D-FL)

DATE: September 22, 1998
TIME: 2:00p.m.
LOCATION: Chief of Staff's Office
FROM: Mickey Ibarra
Fred DuVal

I. PURPOSE

Governor Chiles has requested a meeting with you on behalf of the Democratic Governors to discuss tobacco.

II. BACKGROUND

Governor Chiles wants to meet with you to discuss tobacco and the possibility of requiring states to fund certain priorities in exchange for Medicaid recoupment protection. The Domestic Policy Council will be providing a detailed briefing of the points that Governor Chiles will raise with you.

The National Governors' Association has stated that its top three priorities for 1998 are tobacco recoupment protection, expanding Ed-Flex to all states and resolving the Indian Gaming issue. Governor Chiles will not raise Ed-Flex with you, however, he may raise the issue of Indian Gaming (see attached talking points.)

In addition to tobacco and Indian Gaming, Governor Chiles may also raise the FICA exemption decision with you. The Governors have long supported a FICA exemption that would help minimize the costs of running publicly-funded work programs for welfare recipients. They have pressed for this Treasury ruling for one and a half years and are becoming impatient with the amount of time it has taken to finalize the ruling. Governor Chiles has been the loudest voice in expressing his frustration. Please see DPC's attached background and talking points paper on this issue.

The final subject that Governor Chiles could potentially raise is that of cost allocation. Representatives from all 50 states have met with representatives from OMB, the Domestic Policy Council, and IGA to discuss the new cost allocation guidelines as required by the 1998 Agriculture Research Bill. The States identified 25 areas of concern and HHS was able to satisfy all but three. Included among the outstanding issues is whether the Administration will seek to recover Medicaid administrative dollars in the upcoming

Congressional budget battle. Please see DPC's attached bckground and talking points paper on this issue.

III. PARTICIPANTS

Governor Chiles
Charlie Salem, Director, State of Florida Washington Office
Bruce Reed
Fred DuVal

IV. PRESS PLAN

Closed Press, no stakeout

VI. ATTACHMENTS

Tobacco background paper (provided by DPC)
Indian Gaming background paper
Cost allocation background and talking points (provided by DPC)
FICA background and talking points (provided by DPC)
Attorneys General letter on tobacco
Biography of Governor Chiles

THE WHITE HOUSE

WASHINGTON

September 21, 1998

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: Bruce Reed
Elena Kagan

SUBJECT: Tobacco Update

This memo (1) advises you of recent conversations we have had with an attorney for the industry, which confirm that the industry has no interest in expanding its expected settlement with the states, in the way suggested by Dick Scruggs, to include the federal government; (2) informs you of a recent NGA/NAAG proposal that Congress pass legislation eliminating the federal government's claim for a portion of state tobacco recoveries, and outlines a compromise proposal that Governor Chiles may suggest to you on Tuesday; and (3) outlines a new idea of Bruce Lindsey's to try to use the state settlement discussions to gain clear FDA jurisdiction over tobacco products.

1. Meyer Koplow, the outside counsel for Philip Morris, told us last week that the industry has no interest in bringing the federal government into its settlement discussions with the states. (Our initial conversations with Koplow took place the week before last, but Koplow took some time to speak with his client and get back to us.) According to Koplow, the industry does not think it makes sense to upset the state negotiations, given how close they are to success, in order to pursue a broader settlement whose prospects of completion are highly uncertain. (Koplow, of course, speaks only for Philip Morris, but if Philip Morris is not interested in talking with us, we can bet that no one else is either.)

In explaining this conclusion, Koplow first noted the legal complexities involved in crafting a comprehensive settlement -- in particular, the difficulty of insulating the liability protections and the FDA provisions from legal challenge. Although he thought there was some chance of resolving these issues to all parties' satisfaction, he said (correctly) that we would have to do much hard work before knowing whether such a resolution was possible. Koplow also noted the practical difficulties involved in the Scruggs scheme; for example, he believes that the states would <u>not</u> agree to any arrangement that would subtract punitive damages from their share of the money. Finally, Koplow stressed the "psychological" difficulties of attempting to reach an agreement. The industry, according to Koplow, simply does not trust us; it fears that we will bow to political pressure and increase our demands during negotiations.

Koplow left open the possibility that the industry would want to deal with us separately at some future time, after it had completed the state settlement. He noted that Philip Morris wants to resolve all government claims, including potential claims by the federal government. He implied that the kind of deal Philip Morris contemplates would not necessitate legislation and would include (1) money, (2) FDA jurisdiction, and (3) certain marketing restrictions excluded from the state settlement (in part so the industry has something to offer the federal government). He did not specifically raise liability protections in this context.

2. The National Association of Attorneys General (NAAG) wrote a letter to Congressional leaders last week urging them to pass legislation before Congress adjourns to "clarify that the Health Care Finance Administration should not assert any claims against state tobacco recoveries" (letter attached). We can expect the NGA to support this demand strongly; indeed, Republican Governors probably have talked already with Senator Lott and Speaker Gingrich about moving this legislation. A set of talking points prepared for Democratic Governors, for use in a recent phone call with the Administration, urges us to support the legislation, as does a letter that Senator Graham just sent you (talking points and letter attached).

Governor Chiles is meeting with you on Tuesday, primarily to discuss this issue. (As you know, Florida has a very special interest in the issue because it is one of four states to have completed a settlement with the industry.) Chiles may urge you to support a bill that simply eliminates the federal government's claim to any tobacco recovery, as described above. His staff, however, has suggested that Chiles may come in with a compromise option, predicated on the agreement we reached with the NGA in the context of the McCain legislation. Under this approach, the federal government would renounce its claim to a state recovery only when the state agreed to use half its money on a menu of seven items: child care; child welfare; the maternal and child health block grant; the substance abuse block grant; the safe and drug free schools program; Eisenhower education grants; and the state match for the children's health insurance program (subject to a six percent ceiling). This approach would give us exactly what we would have gotten from the "state side" of the McCain legislation, and we should seriously consider it -- especially given the alternative legislation that the NGA and NAAG are proposing.

We should note that any proposal restricting the federal government's ability to bring claims against the states will involve serious budget issues. The Congressional Budget Office currently projects that the federal government will recoup $1.2 billion over five years from state tobacco settlements; we can expect the Office to score even Chiles's compromise approach at approximately that amount. The Governors supposedly have agreed on a plan to reimburse the federal government for this cost, under which they would divide the cost amongst themselves based on their share of the total settlement funds. OMB is currently evaluating this proposal.

3. Bruce Lindsey has proposed a more ambitious plan for using our recoupment claims as leverage to get something out of a state settlement. Under the Lindsey plan, we would drop our recoupment claims if a state agreed to (1) take 45 percent of the money unrestricted; (2) use

45 percent of the money for the seven items on our menu; and (3) give over 10 percent of the money to a "tort fund" which would pay legal judgments against the industry. If the judgments failed to exhaust the tort fund, the remaining money in the fund would return to the unrestricted state pot. Conversely, if the judgments exceeded the tort fund, the remaining liability would come out of the restricted state pot -- and if that too were exhausted, would revert to the industry. In exchange for this potentially valuable benefit the industry would agree to FDA jurisdiction -- if possible, through the settlement itself; if not, by dropping its opposition to legislation.

The great virtue of this scheme is that it could make the state settlement partly our victory: if everything works correctly, we would achieve the important goal of full FDA jurisdiction. The scheme, however, raises at least three questions. First, we may not be able to convert this deal into an effective guarantee of FDA jurisdiction. The legal difficulty of getting regulatory jurisdiction through a settlement is heightened in this scheme because we probably could not be a party to the agreement; moreover, the industry's assurance that it would not fight a legislative solution (even if it is believed) hardly guarantees the result we want in a Congress replete with FDA-haters. Second, even if we could surmount this problem, the states may well refuse to consider this plan, given that it puts more than half of their money at risk of going back to the industry for legal judgments. Third, the left in our own party may react with outrage to this agreement, arguing that we effectively have "bought" FDA jurisdiction by granting the industry relief from liability. We would have to explore these questions more thoroughly before pursuing this option.

Indian Gaming

Talking Points

- We are very aware of the concerns expressed by the Governors on this issue.

- We have expressed our opposition to the Enzi-Sessions Amendment because identities tribes a right to gaming granted by IGRA, without the benefit of Congressional hearings or to tribal consultation.

- Their are legitimate concerns on both sides about the appropriate scope of gaming. These are appropriating the subject of Department of Interior-lead negotiations which are currently taking place and which, we hope, will produce consensus between the tribes and the states on amendments to IGRA that would improve the compacting process and increase regulatory capacity.

Background

Governors, along with the nation's Attorneys General, are currently in negotiations with Tribes, the Department of the Interior, and the Department of Justice, to find feasible solutions to concerns both parties have with the Indian Gaming Regulatory Act (IGRA.)

IGRA was enacted to allow Indian tribes the opportunity to pursue gaming for economic development on Indian lands. Under IGRA, Tribes are only authorized to conduct class III gaming operations if such gaming is permitted by the state. Further, a tribe can conduct class III gaming only under two circumstances:

- pursuant to a mutually agreed-upon Tribal State compact; or

- in circumstances in which states fail to negotiate a compact in good faith. IGRA authorizes the Secretary to issue "procedures" to define the nature and scope of authorized gaming activities. IGRA only authorizes the Secretary to issue "procedures" after states have been provided with a full opportunity to negotiate compact terms.

Under IGRA, tribes were given the right to file suits directly against states to prompt states to negotiate the potential terms of gaming compacts with tribes. In Seminole v. Florida, 116 US 1114 (1996) , the U.S. Supreme Court held that a state may assert an Eleventh Amendment immunity defense to avoid a lawsuit brought by a tribe alleging that the state did not negotiate in good faith. As a result of this decision, states can avoid entering into good faith negotiations with Indian tribes without concern about being subject to suit by tribes.

Under these circumstances, the Secretary's authority to issue "procedures" may provide the only avenue for allowing Indian gaming activities to occur in states that allow or permit non-Indian gaming.

The Secretary published a proposed rule on January 22, 1998. The proposed regulations, 63 Fed. Reg. 3289 (Jan. 22, 1998), are intended to provide an administrative remedy for Indian tribes when a state fails to negotiate in good faith with an Indian tribe over the terms and conditions of a tribal-state compact as required by IGRA. Such a remedy would be available when a state not only failed to negotiate in good faith, but also successfully asserted a sovereign immunity defense to a Federal court action brought about by a tribe under IGRA. Such a defense was recognized by the Supreme Court in the Seminole decision. The Department is currently reviewing comments that have been provided on the proposed rule.

The Enzi-Sessions Amendment to the FY 1999 Interior Appropriations bill passed the Senate under unanimous consent on Tuesday, September 15. The Amendment would continue the current moratorium on the Secretary's approval of tribal-state compacts not first approved by the state, and would prohibit the Secretary from promulgating the proposed rules which provide a procedure for class III Indian gaming in the absence of a compact.

BOB GRAHAM
FLORIDA

COMMITTEES:
FINANCE
ENVIRONMENT AND PUBLIC WORKS
VETERANS AFFAIRS
SELECT COMMITTEE ON INTELLIGENCE
ENERGY AND NATURAL RESOURCES

United States Senate

WASHINGTON, DC 20510-0903

September 15, 1998

B Reed
J. Lew
B. Nash
G. Sperling

Please get answers ASAP & prepare response

The Honorable Erskine B. Bowles
Chief of Staff to the President
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. Bowles:

I sincerely appreciated the opportunity to meet with you on September 15, 1998, to discuss numerous mutual areas of interest. In order to track these issues more efficiently, I thought that it would be helpful to give you a brief outline of my concerns as they relate to each of these subjects. Where appropriate, I have enclosed more detailed information on particular issues.

First, as you know, in August 1997, the State of Florida settled a lawsuit with the tobacco industry for over eleven billion dollars. Governor Chiles has begun to use these funds to implement anti-tobacco programs and to fund the largest children's health insurance expansion in the State's history. Unfortunately, by laying claim to settlement funds as federal Medicaid dollars, the Health Care Financing Administration threatens to scuttle Governor Chiles' initiatives and leave hundreds of thousands of Florida's children uninsured. It is my hope that with the Administration's support, we can clarify legislatively that settlement funds belong to the settling state, not to the federal government. In fact, the National Governors Association ranks this issue as its top priority for the remainder of the session. I would very much appreciate the opportunity to work together with you to solve this critical problem.

Bruce Reed

Second, during debate over the Agriculture Appropriations Bill, I sponsored an amendment to add emergency funds to several accounts within the Department of Agriculture to address the needs of Florida agriculture resulting from the extensive fires and extreme drought that occurred in the state over the course of this year. This amendment was accepted by the Senate pending a review by the Administration of the total dollar value of agriculture disasters nationwide. I understand through my communications with the Office of Management and Budget that the review referenced in this amendment has become a part of a larger effort by the Administration to identify supplemental funding needs. My staff has informed me that the Office of Management and Budget provided a firm date of Thursday, September 10, 1998 for the review of supplemental funding needs to be completed. To my knowledge, this information has not been released due to several pending, but unidentified, policy issues.

OMB
Jack
Lew

I would like to be updated on the following information: (1) When will the Administration's review of disaster needs be released? As you know, the retention of the Florida funds for disaster mitigation in the 1999 Agriculture Appropriations Bill is subject to your release of this document; and (2) what are the policy issues being reviewed as part of this process?

OMB

Third, since early this summer, the Nuclear Regulatory Commission (NRC) has been operating with only three out of the five statutorily required commissioners. The NRC is in desperate need of a full commission staff to address the rising tide of relicensing applications from the nation's nuclear power plants, and to streamline the licensing review and approval process. The two (2) current candidates are: (1) Greta Dicus (D), a reappointment; and (2) Jeff Merrifield (R), a new appointment. I would ask that the Administration expedite the nomination process for these (2) two individuals in order to ensure their approval by the full Senate prior to its adjournment.

N ASAP

Finally, as a follow up to our September 9, 1998, phone conversation, I would like to re-iterate my strong interest in the appointment of a White House Commission to examine the issues surrounding seaport safety and security in the United States. In order to continue this effort, it is necessary for the Administration to issue an Executive Order that would establish the White House Commission on Marine Transportation. It is my sincere hope that an Executive Order could be issued in the upcoming weeks, and that the commission will be fully functional at the National Marine Transportation Safety Conference, which will convene on November 17-19, 1998, in Warrenton, Virginia.

Gene

I thank you again for taking the time to meet with me, and assisting me in moving these issues forward. If there is anything else that I can do to be of assistance in this matter, please do not hesitate to let me know.

Sincerely,

Bob Graham

United States Senator

Enclosures

STATE OF DELAWARE
OFFICE OF THE GOVERNOR

THOMAS R. CARPER
GOVERNOR

MEMORANDUM

TO: DEMOCRATIC GOVERNORS

FROM: GOVERNOR TOM CARPER, NGA CHAIR
GOVERNOR PEDRO ROSSELLO, DGA CHAIR

DATE: September 17, 1998

SUBJECT: DGA CONFERENCE CALL 5 PM TODAY

It is unlikely that either of us will be able to participate in today's conference call with Erskine Bowles and Jack Lew. However, it is imperative that we take this opportunity to raise a number of issues of importance to governors. We have attached talking points on three top priorities: Ed-Flex, tobacco recoupment, and Indian Gaming, and are asking that you raise these issues during today's call.

It is likely that the Administration will play a key role in meetings with Congressional leaders to hammer out an overall deal to fund the government for the next year. White House support for these top priorities is critical.

ED-FLEX

- **Expansion of the current Ed-Flex Demonstration program this year is a top priority for Democratic governors and NGA. The President proposed in February at the NGA meeting to extend Ed-Flex to all states that meet certain criteria. NOW is the time to extend Ed-Flex to all states.**

- **NGA worked with Senators Wyden and Frist and with Representatives Castle and Roemer and with the Adminstration in drafting a bipartisan bill to ensure that the new flexibility includes strong accountability requirements.**

- **Many states are doing tremendous things in the area of school reform -- the majority of states passed accountability and class size reduction initiatives in this legislative session. This flexibility will enhance the reforms that are taking place in the states.**

TATNALL BUILDING
DOVER, DELAWARE 19901
(302) 739 - 4101
FAX (302) 739 - 2775

CARVEL STATE OFFICE BLDG.
WILMINGTON, DELAWARE 19801
(302) 577 - 8210
FAX (302) 577 - 3118

- Some Democrats have expressed some concern that Ed-Flex would eventually lead to an education block grant (similar to what the Dollars to the Classroom bill tried to accomplish). Governors oppose that bill; however, there is strong bipartisan support for Ed-Flex. Ed-Flex does not allow states to combine federal, state, and local funds.
- Furthermore, Ed-Flex could actually circumvent the push for education block grants while ensuring that the new flexibility comes only with requisite accountability because: 1) states must have established plans for school improvement and must be accountable for results; 2) states must be willing to grant local school districts waivers of state rules; and 3) it will bring greater coordination to the administration of federal education programs.
- The Ed-Flex bill is budget neutral.

TOBACCO RECOUPMENT PROTECTION

- HCFA sent letters to all states last year asserting the federal government's rights over state tobacco settlement dollars using an obscure provision in federal Medicaid law. Without repeal of that provision all states with settlements and states that settle in the future could be required by HCFA to give more than half of their settlement dollars to the federal government.
- HCFA's logic is that since the lawsuits were brought on behalf of the state/federal program Medicaid that the federal government deserves its share.
- However, most states have little or no Medicaid claims involved in their lawsuits. Most states assert a variety of claims including consumer protection, fraud, racketeering, antitrust violations and health care costs
- States brought these suits with no assistance from the federal government and the federal government retains the ability to sue for their own costs in federal programs such as Medicare and Veterans.
- **Without repeal of the HCFA recoupment provision state settlement funds will be tied up for years in negotiation and/or litigation with the federal government. The funds will be unavailable for state efforts to curb teen smoking, improve children's health or expand child care and education programs.**
- **There is Republican leadership support for providing all states with protection from HCFA recoupment. They are ready to attach this protection to the continuing resolution to fund the government.**
- **Governors have agreed on a mechanism to pay for this provision with each state with a settlement paying a proportionate share to offset the $1.2 billion cost over 5 years to the federal government.**

INDIAN GAMING

- The Enzi-Sessions amendment to the FY1999 Interior appropriations bill passed the Senate under unanimous consent on Tuesday, Sept. 15th.

- The Amendment would continue the current moratorium preventing the secretary of the U.S. Interior from using federal funds to approve tribal-state compacts that have not first been approved by the state, as required by law.

- The amendment would also prohibit the secretary from promulgating a regulation or implementing a procedure that could result in tribal Class III gaming in the absence of a tribal-state compact or from going forward with any proposed rule on this matter in FY1999.

- Under the Secretary of Interiors' proposed rule, tribes can by-pass states when they feel states are not negotiating in good faith and when states assert sovereign immunity in court proceedings.

- The Secretary's proposed rule would preempt states' authority under existing laws and would give tribes incentive to avoid negotiating gambling compacts with states.

- Governors feel that since the Secretary's inherent authority includes the responsibility to protect the interests of the tribes, there would be a serious conflict of interest where the Secretary asserts judgment over disputes between states and tribes.

- **The Enzi - Sessions amendment does not affect current Tribal-State gambling compacts that are already in effect. This amendment would also continue to give the Secretary the ability to approve compacts mutually agreed to by Tribes and States.**

- **Governors, along with the nation's Attorneys General are currently in negotiations with Tribes, the Department of Interior, and the Department of Justice, to find feasible solutions to concerns both parties have with the Indian Gaming Regulatory Act.**

- **Governors urge the President to include the Enzi - Sessions amendment in a CR, giving all interested parties time to come to an agreement.**

NEW INDIAN TRUST LAND

NGA POSITION

The Governors want a concurrent role in federal decisions regarding new trust land and the recognition of new tribes. In addition, NGA believes Congress should require a state and tribe to reach binding agreement on the application of state and local taxes before new trust land is acquired by tribes.

CLINTON ADMINISTRATION POSITION

Under the Clinton Administration, there is now a notice and comment period before land can be taken into trust for tribes. The notice period allows states and localities an opportunity to raise their concerns about the transfer of land into trust. In addition, as of February 1994, the federal regulations require the Governor and state Attorney General to be notified as interested parties when a group is asking for federal tribal recognition.

However, the Administration strongly opposes requiring tribes to enter into binding agreements on state and local taxes before they can take land into trust. This would undermine tribal sovereignty and the ongoing government-to-government cooperation currently underway between a number of tribes and states that are voluntarily negotiating joint taxation agreements.

BACKGROUND ON INDIAN GAMING

The Indian Gaming Regulatory Act of 1988 (IGRA) set out a broad framework for states and tribes to negotiate individual gaming agreements, or "compacts," that describe the types of gaming tribes are permitted to run on their lands. The key issue of negotiation between states and tribes typically centers around the scope of gaming that will be allowed. Permission of Class III gaming (e.g., slot machines) has been a major point of contention between states and tribes.

Last year, in Seminole Tribe of Florida v. Florida, the Supreme Court ruled unconstitutional a provision in IGRA which would have permitted a tribe to sue a state in Federal court for negotiating in bad faith or refusing to negotiate at all under IGRA. The decision raises questions as to what remedies exist for tribes when states refuse to negotiate with them.

The Interior Department announced an Advanced Notice of Proposed Rulemaking (ANPR) on May 1, 1996 to give all parties-- states, tribes, and others-- an opportunity to submit their views on what types of procedures, if any, exist for the Secretary to facilitate gaming where a state has failed to negotiate with a tribe in view of the Seminole decision. The ANPR closed in July 1996. Secretary Babbitt had previously indicated that the Interior Solicitor would make a recommendation by the end of 1996. No recommendation has been released to date.

NGA POLICY

The NGA opposes any move by the Secretary of the Interior to develop procedures allowing gaming where no tribal-state compact exists. They view this as a move by the Secretary to use unilateral authority to permit tribal operation of Class III gaming. The NGA also supports amendments to IGRA to ensure that Governors are not required to negotiate with tribes on gambling devices otherwise prohibited under state law.

CLINTON ADMINISTRATION POLICY

The Administration continues to support Indian gaming as a viable means of economic development for many tribal nations. Seminole does not prohibit the voluntary negotiation of compacts between tribes and states. Indeed, more than 100 tribes have compacts with 24 states.

Comments received by the Interior Department from the ANPR remain under review. The Interior Solicitor is expected to make a recommendation soon on whether the Secretary has the power to invoke administrative procedures to allow for certain forms of gaming, or whether the matter should be handled legislatively.