

Witness List

Hearing Before the
Senate Committee on the Judiciary

on

“A Review of the Global Tobacco Settlement”

Wednesday, July 16, 10:00 a.m.
Senate Dirksen Building, Room 226

Panel I

Richard Blumenthal
Attorney General
State of Connecticut
Greenwich, CT

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Attorney General
State of Minnesota
St. Paul, MN

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Panel II

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News Release

JUDICIARY COMMITTEE

United States Senate • Senator Orrin Hatch, Chairman

July 16, 1997

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STATEMENT OF SEN. ORRIN HATCH

SENATE JUDICIARY COMMITTEE

HEARING ON A REVIEW OF THE GLOBAL TOBACCO SETTLEMENT

On June 26, this Committee held its first hearing on the recently signed Global Tobacco Settlement. With the help of Mississippi Attorney General Michael Moore, Meyer Koplow, and Matthew Meyers, we were able to better understand the implications of this ground-breaking agreement.

The breadth of the proposed settlement is unprecedented. All told, the agreement amounts to a net payout from tobacco companies of \$368 billion. It embodies the cumulative consensus of tobacco companies, 40 state attorneys general, lawyers representing plaintiffs in 26 pending private class action suits against the tobacco companies, and representatives of anti-smoking groups. Yet, in order to have any real effect, various provisions of this agreement must be analyzed and ultimately enacted by the Congress.

In addition to a variety of stipulations relating to the Food and Drug Administration's ability to regulate the tobacco industry, the settlement specifically requires enactment of a number of restrictions on the civil litigation system. It is the civil litigation components of the settlement that the Committee will focus on today. Future class-action lawsuits involving tobacco company liability would be banned under this agreement. This would settle suits brought by 40 states and Puerto Rico seeking to recover Medicaid funds spent treating smokers. The agreement also settles one state class-action against the tobacco industry and 16 others seeking certification. All current class-actions, therefore, would be settled, unless they are reduced to final judgment prior to the enactment of legislation implementing the agreement.

Claimants who opt out of existing class actions would be permitted to sue for compensatory damages individually, but the total annual award would be capped at \$5 billion. These amounts would be paid from a tobacco industry fund. In return for a payment of \$50 billion, punitive damage awards for past conduct would be banned. Nevertheless, claimants could seek punitive damages for conduct taking place after the settlement is adopted and implementing legislation is passed.

With such sweeping implications for state civil litigation efforts, the questions this settlement immediately raises are complicated. We must determine whether this is a good deal, and a deal that will withstand constitutional muster in the long run.

For instance, opponents of the settlement claim that the provision eliminating punitive damages for past industry conduct may violate constitutional safeguards. Specifically, some are concerned that this provision violates the right to jury trial guaranteed by the Seventh Amendment. On the other hand, courts have in the past been lenient with administrative remedies devised by the Congress to clear huge backloads of civil lawsuits. An example is the National Vaccine Injury Compensation program created by Congress in 1986. This particular law precluded liability suits until after victims went through a no-fault arbitration process with the Department of Health and Human Services.

We do face legal hurdles, as evidenced by the Supreme Court's recent opinion in the case *Amchem Products v. George Windsor et al.*, a \$1.3 billion settlement that would have resolved more than 100,000 future personal injury claims against a group of former asbestos makers. The justices set aside this landmark settlement of current and future claims against former asbestos manufacturers by noting that the agreement did not meet federal requirements protecting the legal interests of a diverse group of plaintiffs. The Court was concerned, in part, about the rights of people who had been exposed to asbestos but were not aware they were at risk of illness and did not know about the proposed settlement in time to opt out. How does this decision square with the proposals of the Global Tobacco settlement?

Additionally, although Congress may restrict the jurisdiction of federal courts, should Congress preempt state claims? Are there viable Tenth Amendment or federalism concerns here?

These are some of the questions I hope to have answered today.

I have stated that the subject of this hearing is the civil litigation concerns of the settlement. The witnesses we have called today have been selected to specifically address this issue. As a result, I ask other members to restrict their questioning to civil justice issues, and not spend time commenting on first amendment concerns, or whether this settlement adequately protects public health. We will address these issues in coming hearings.

I am convinced that in our hearing, we should concentrate our efforts on whether this proposed settlement is consistent with accepted legal and constitutional standards. There are undoubtedly some who will want to explore other tangential issues, but today we must focus on the civil litigation aspects of the proposed settlement.

This hearing, much less this Committee, is not convened to conduct an investigation of the tobacco industry or tobacco executives, but is instead here to learn about the global tobacco settlement, and consider whether there are ways we can improve it.

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**TESTIMONY OF
CONNECTICUT ATTORNEY GENERAL RICHARD BLUMENTHAL
BEFORE SENATE COMMITTEE ON THE JUDICIARY
WEDNESDAY, JULY 16, 1997**

Good morning. I am pleased and honored to be here to discuss with you this historic opportunity to improve and protect the health of our children and our country.

While your focus today is on the liability issues involved in the proposed tobacco settlement, I would ask you to remember this plan is a package of proposals -- a plan that must be judged in its entirety.

Though there may be objections to particular elements of this proposal -- and I share some of your concerns -- as a whole I believe this comprehensive plan is an unprecedented opportunity to seek to save a generation from the disease and death caused by tobacco.

More people are killed in this country each year because of tobacco use than are killed by alcohol, automobile accidents, suicides, AIDS and murders -- combined. More than a half billion packs of cigarettes and 26 million containers of chewing tobacco are illegally sold to our children every year.

An estimated 3.1 million American teenagers, one out of every six, are regular smokers. Tragically, each day 3,000 more children begin smoking -- which results in more than a million new underage, addicted smokers in the United States each year.

Of all the statistics concerning tobacco use in this country, the most distressing of all is that while adult use of tobacco has steadily declined over the past two decades, adolescent smoking has actually increased since the 1980s, and continues to increase today.

The country's health and welfare require that immediate action be taken to reverse these statistics. Thus, foremost in our deliberations and our negotiations

was changing the tobacco company conduct that was artificially propelling the use of tobacco products.

Our lawsuits uncovered a wide variety of industry conduct that relentlessly and ruthlessly sought to increase tobacco use. The industry:

- Deceived the public about the devastating health effects of tobacco use and its addictive nature;
- Suppressed and concealed research to hide the consequences of tobacco use;
- Targeted children to create new generations of addicted tobacco users;
- Manipulated nicotine to make its products more addictive and thereby enhance tobacco sales.

The settlement reached by the Attorneys General is designed to eradicate such conduct. The settlement addresses these and other concerns as follows:

- Youth Marketing -- The use of people, human images and cartoon characters in tobacco advertising would be banned, as would all outdoor and Internet advertising, and tobacco product placement in movies and on TV.
- Youth access -- All vending machines and self-service displays would be banned, tobacco products would be positioned out of consumers' reach and away from children's products, and a nationwide licensing system for all sellers of tobacco products would be established.
- Enforcement -- Under-age tobacco use must drop by 30 percent in five years, 50 percent in seven years and 60 percent in 10 years, or the industry would face penalties of up to \$2 billion annually. The tobacco industry would fund all enforcement efforts, with dual authority vested in both the FDA and state attorneys general.
- Regulation -- The agreement formally recognizes the FDA's regulatory authority over tobacco products, including the authority to reduce the levels of nicotine and eventually eliminate nicotine, if appropriate; requires FDA approval of all non-tobacco ingredients in tobacco products and allows FDA to set standards for reducing harmful components, including nicotine; requires ingredient testing and safety assessments with full disclosure by brand, similar to food products; requires the tobacco industry to provide the FDA with all ingredient research it conducts; and imposes harsh penalties for any violations.
- New warning labels -- There would be nine new warning labels for cigarettes and four for smokeless tobacco products. The new labels would be placed

on the front and top of packages, covering 25 percent of the package front, with white lettering against a black background.

- **Second-hand smoke** -- Tobacco use in public places (those visited by 10 or more people daily), workplaces and fast food restaurants would be prohibited, except for areas that are separately ventilated and through which non-smokers need not pass.
- **Anti-smoking efforts** -- The most massive and comprehensive public education and counter-marketing campaign in history would be waged, funded by the tobacco industry, but without any industry input into the message's content or placement. The industry also would fund state and local tobacco control programs, as well as access to tobacco cessation programs for all smokers who want to quit and cannot afford to do so.
- **Industry transformation** -- The agreement changes the way the tobacco industry does business. It dissolves cigarette trade associations such as the Council for Tobacco Research and Tobacco Institute. It also provides incentives to develop safer products and provides for ongoing federal and state regulation of any new associations.

Although we sought sweeping reforms in this industry, our leverage as state attorneys general was, and is, limited: our weapon was litigation. As with any settlement, compromise was necessary. We did not easily or eagerly compromise.

The concessions given were much narrower than the broad, blanket immunity originally sought by the industry and were made only because we judged them to be necessary to achieve our public health objectives.

But the key question is whether the final package is worth this price. I welcome the work to scrutinize and strengthen the agreement, reducing that price, if possible.

Perhaps, at the start, we should recognize what these concessions do not include. Under this settlement:

- No individual will be denied his or her day in court.
- No tobacco industry executive is granted any immunity from criminal prosecution.
- No limits are placed on punitive damages for the industry's future wrongdoing.
- No cap is placed on the compensatory damages any litigant can receive.

Any individual can bring any action against one or more of the tobacco companies for past or future actions. They may collect money for medical expenses, economic damages, loss of wages and pain and suffering.

What the Industry sought at the outset was 100 percent, complete immunity from all future lawsuits. In short, no more lawsuits from the states; no more lawsuits from individuals. As they put it, "Total peace now and forever." A "general release."

As Attorneys General, we flatly rejected that request for blanket immunity. We held firm to our position. The restrictions contained in the settlement are threefold:

- **An annual, \$5 billion limit on the payment of judgments against the industry;**
- **Elimination of punitive damages for past industry conduct;**
- **A prohibition on future class action trials.**

When examined in real and practical terms, none of these limitations unfairly disadvantages injured parties nor absolves the tobacco companies of wrongdoing.

The \$5 billion annual cap on payments will not limit individual litigants' right to compensation for damages caused by the tobacco companies. In the event the value of judgments against the Industry exceeds \$5 billion in a given year, the Industry would still be liable to pay all judgments from the following year's allotment.

And, we must remember the fact that this Industry has never paid a nickel to any person for any damage ever and has steadfastly vowed never, ever to discuss such remedies as are included in this agreement.

The agreement would prevent individuals from obtaining punitive damages for the past conduct of the tobacco companies. But we have extracted a \$60 billion payment in exchange for relief from past punitive damages. This \$60 billion -- an unprecedented penalty -- is intended to punish the industry for its past misconduct and deter future misconduct.

The purpose of punitive damages is to punish for misbehavior. This payment punishes and deters, not with the hope that juries and judges one day will punish an industry they so far have not punished, but with certainty -- a \$60 billion certainty.

And it should be noted that several states already limit or bar punitive damages in product liability cases.

In Connecticut, for example, people can only claim punitive damages to cover legal fees and costs, but in any event no more than twice the amount of compensatory damages. At least four states bar punitive damages altogether. Virtually all states impose either stringent factual predicates or higher burdens of proof before punitive damages may be awarded. Several states allow punitive damage awards but large percentages of the recovery must be paid to the state. This settlement powerfully punishes and deters -- in ways unavailable through actions brought by many individual litigants.

Most significantly, the tobacco companies are fully subject to punitive damages should they continue or return to the conduct of the past. For any future misconduct by this industry, any individual would be able to seek punitive damages, thus assuring continued deterrence or -- lacking deterrence -- appropriate punishment.

Finally, the proposal also would limit future tobacco cases from being tried as class actions. I believe this is an acceptable limitation, in the context of the settlement, when compared to the overall public health benefits of the proposal.

By and large class actions in tobacco cases have been unsuccessful. The difficulties that class action litigants have experienced in tobacco cases have been exacerbated by the disparate products, the range of tobacco-related diseases, individual circumstances of smokers and the differences in tort law from state to state. The largest of these attempted class actions, the so-called Castano litigation, was rejected due to the difficulty of meeting the criteria for class certification.

While subsequent class actions have been filed, their efficacy is less than certain. Of the 20 currently pending tobacco class actions, only three have been certified by the courts to proceed as class actions.

Moreover, the proposed limits on the aggregation of individual suits -- in my view -- only pertains to the trial phase of the litigation. The proposal continues to allow mechanisms for efficient ways of preparing cases for trial.

Both state and federal procedures designed to consolidate actions with common questions of fact for coordinated pretrial proceedings would be left undisturbed.

For example, the proposal would have no effect on the current practice through the Judicial Panel for Multidistrict Litigation which, pursuant to 28 U.S.C. 1407, routinely transfers pending cases with common factual questions to a single district court for coordinated or consolidated pretrial proceedings. Under that procedure cases are re-transferred to their original districts for individual trial at

the end of the pretrial proceedings. The cases thus receive the benefits of joint discovery and motion practice where desirable but retain their individuality for purposes of trial. Similar procedures in state courts would likewise be permissible.

Each of these limitations is clearly within the Congressional power to mandate. Congress has the power both to abolish common law rights and to limit liabilities without violating the Constitution. Duke Power Company v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978); Tull v. United States, 481 U.S. 181 (1987) (Seventh Amendment does not apply to remedy phase). That is true even with regard to pending cases. Hammond v. United States, 786 F.2d 8 (1st Cir. 1986); Arbour v. Jenkins, 903 F.2d 416 (6th Cir. 1990).

But the question is not whether Congress can impose these limitations. The question is whether it is wise and appropriate to do so.

As Attorneys General, we have generally resisted federal measures that would interfere with the states' prerogative to control conduct affecting their citizens or to enforce such controls through a state's tort system. Only in extraordinary circumstances should Congress so interfere. Even then, with all due respect, Congress should tread carefully to assure no more interference than absolutely necessary.

The proposal before you presents such a combination of extraordinary circumstance and minimal interference. The few limitations on individual lawsuits contained in the proposal are only at the margins of state tort systems. The public health benefits achievable in exchange will provide palpable benefits to the health millions of Americans, adults and children alike, and will achieve significant benefits to the economy and welfare of the nation as a whole.

We have made concessions. Every settlement with every adversary requires concessions. Appropriate compromise to achieve overriding public good is certainly not unusual.

Our job was to evaluate whether the benefits to public health outweighed the value of the concessions. The benefits are significant:

- Curtailing the relentless marketing of tobacco products to children;
- Funding enforcement of anti-tobacco laws and a nationwide campaign to persuade our children that smoking is not cool, but it kills;
- Providing cessation programs for people who want to quit;
- Allowing the Food and Drug Administration to begin regulating nicotine, without having to fight a lengthy court battle;
- Holding the industry responsible for reducing smoking among our children;

- **Placing the truth about tobacco fully before the American public;**
- **Punishing and deterring the tobacco industry's outrageous conduct.**

We should not lose sight of these tremendous benefits that even critics of this agreement say will save 100,000 lives per year. One hundred thousand of our friends and relatives.

Is it possible to reduce the concessions even more? Perhaps. I would be the first to applaud anyone who can gain a solution with either greater benefits or fewer concessions. If that is achievable, then it should be done.

Let us not lose sight of the core objectives: protecting our children and reducing death and disease as soon as possible. Evaluate the concessions against the tremendous benefits of this agreement. Recognize that Presidential and Congressional action, within the overall framework of this plan, will save lives, millions of lives now and in the future.

Every day, 3,000 children begin a habit that, for 1,000 of those children, will one day kill them. We have a historic opportunity before us that I urge you to use. Thank you.

TESTIMONY OF HUBERT H. HUMPHREY III
MINNESOTA ATTORNEY GENERAL
SENATE JUDICIARY COMMITTEE
JULY 16, 1997

Thank you, Senator Hatch and members of the Committee for convening these important hearings, and for allowing me to share my views as you begin your study of the greatest public health issue of our time. Through your deliberations, and through the historic, ongoing litigation across the country, we have a once-in-a-lifetime opportunity to re-define America's love-hate relationship with the most deadly product ever sold.

We cannot squander that opportunity. This industry has escaped justice for one hundred years by fooling Congress and the American people. History teaches us that each time America has thought it had come to grips with tobacco, we have in fact settled for false "solutions," only to learn later that we were bamboozled. And the tobacco companies have cried all the way to the bank. We cannot afford to repeat that mistake.

I regret to say that this settlement proposal could become another sad chapter in the tobacco industry's long history of deception. For all its good intentions, the proposed settlement is a Trojan camel.

Wall Street has figured out who would benefit. Tobacco stocks soared 20% during negotiations. Investment analysts say if you pass the deal, tobacco stocks will soar another 20%. On top of that, they say the CEO of Philip Morris would personally make fifty million dollars on his stock options if the deal goes through! If that's punishment, I want some!

Why would the stocks skyrocket? What would this deal give the industry that it can never achieve on its own? -- that it cannot win in a courtroom or in the Congress, without the assistance of the states? It's simple. This proposal gives the industry a future. It would build them a bridge to the twenty-second century. As Doctor Kessler has said, it "would allow the industry to live in peace." Or, as the head of R.J. Reynolds put it, it secures the tobacco industry a "place in the mainstream of legitimate U.S. commerce."

At this Committee's earlier hearing, Senator Biden eloquently suggested that, with all the revelations of the last few years, events have already started down a path in which this industry's days are probably numbered, and in which, over the next generation, we are likely to see the end of this industry in this country, at least in its current deadly and addictive form. I believe Senator Biden is right. I believe the industry knows he's right. And I believe this proposal gives them what they cannot achieve on their own: a reprieve from destiny. And from justice.

Now I know, as some of my colleagues are quick to remind me, that our lawsuits are not about putting tobacco companies out of business. That is not our place or our purpose. But neither is it our place to safeguard their ability to addict out children's children. Neither is it our place to protect them from juries of average Americans who threaten to bring them to justice. Neither is it our place to protect them from the whirlwind they will reap in the months ahead when Congress and the American people learn the whole truth about their decades of conspiracy.

Three years ago, when I filed the second of the state tobacco lawsuits -- and the first suit based on law enforcement theories, rather than common law product liability theories -- I said this industry must change its ways forever. It must obey the laws that all other businesses obey. It must tell the truth. It must pay damages commensurate with the harm it has caused. It must answer for what it has done.

On May 2nd of this year, three weeks after I learned of the secret negotiations that had been begun by some of my colleagues, I wrote them a letter, setting out 14 searching questions I believe must be addressed in any proposed resolution -- beginning with the need for unfettered FDA jurisdiction over nicotine. Regrettably, the proposal fails to answer many of the questions I posed then and in a series of subsequent letters, which, with the Committee's permission, I would like to submit for the record, with my written testimony.

I believe the settlement proposal is inherently flawed because it answers the wrong question. In essence, the negotiators asked themselves "How much regulation will this industry accept?" Mister Chairman, with the greatest respect to my good friend, Dick Blumenthal, and to my other colleagues, that may be an appropriate question to ask when you're settling lawsuits, but it's the wrong question to ask if you're setting national health policy. The question for the Congress, I respectfully suggest, is not "What is acceptable to the tobacco industry?", but rather, "What is best for America?"

Fortunately, we now have an alternative that helps us answer that question, the right question. That alternative is the blueprint proposed by the distinguished panel convened by

Doctors Koop and Kessler, which offers a template for a comprehensive tobacco policy for this country. This Blue Ribbon Committee, which includes many of the leading health organizations in the country, has agreed upon guiding principles that parallel the concerns I have raised with my colleagues since the settlement negotiations began. And the Koop-Kessler Committee has identified, by one count, 110 specific recommendations for action.

So now the Congress has a foundation from which to build a comprehensive national policy -- a policy designed to give America what the public needs, not just what the tobacco companies want.

I suggest today that the bottom line for an effective and enduring national solution should be what I call "Koop-Kessler Plus." By "Koop-Kessler Plus" I mean you should look first to this committee's recommendations. And I would urge you to give special attention to four of their key recommendations, on each of which the proposed settlement falls short. Plus, I urge you to insist that the companies pay far more money -- enough that they feel some pain for the outrageous wrongs they have committed.

First, I agree absolutely with Doctors Koop and Kessler, and with the President, that there can be no limitation on the FDA's existing authority to regulate tobacco products as drug delivery devices, including unrestricted power over nicotine (Koop-Kessler Report, pages 3 and A-3). A month before this proposed deal was negotiated, I warned publicly that "whoever controls the nicotine, wins." I predicted then that the tobacco industry "will gladly submit to other forms of regulation, like a long list of advertising restrictions, in order to lull the public into

believing they're defeated, and to help them sneak their deal through the Congress, as long as they can control the nicotine." That's precisely what they have tried to do in the proposed settlement.

Second, I agree with the Koop-Kessler Committee that "all existing avenues of litigation, both civil and criminal, must be fully preserved," and that the victims of the tobacco industry should face "no special rules of any kind, substantive or procedural." (Koop-Kessler Report, pages 16 and E-3). The proposed settlement falls far short of meeting that test as it asks Congress to prevent victims from joining forces in class action; to prevent victims from collecting punitive damages; to ban union benefit plans, insurance companies, and other third party payors from pursuing the types of claims that are proving successful in our state lawsuits and that are being pursued successfully in our Minnesota case by our co-plaintiff, Blue Cross and Blue Shield of Minnesota, our state's largest private health insurer; and to cap the total amount the industry would pay victims in any year, no matter how many juries ruled to the contrary. In fact, I have heard that the reason the negotiators agreed to ban suits by union benefit plans is that they recognized that a single successful suit by just one of these plans could exhaust the limited recovery fund they have negotiated.

Third, I agree with the Koop-Kessler Committee that "all internal tobacco company documents that bear upon the public health must be disclosed," and that industry claims of attorney-client privilege or work-product privilege should be waived (Koop-Kessler Report, pages 16 and E-3). This is crucial. In its practical effect, the proposed settlement would allow these companies to conceal forever their smoking guns -- a million pages of top secret documents

they have hidden for decades behind claims of attorney-client privilege — documents no one has ever seen, but that we are close to prying loose, for the first time anywhere, in our Minnesota case.

Fourth, preemption of states' rights. I agree with the Koop-Kessler Committee that any legislation must include "unambiguous non-preemption provisions, expressly clarifying that higher standards of public health protection imposed by State and local governments are preserved" (Koop-Kessler Report, pages 16 and E-1). Again, the proposed settlement fails this test and, in my view, contains subtle language that will severely the existing powers of states and cities to regulate this industry.

For example, it explicitly bans for five years all state laws of the type already adopted in Massachusetts and Minnesota, requiring tobacco companies to disclose for the first time some of the harmful chemicals added to cigarettes. After the five-year ban, states would have to petition for some kind of undefined federal "exemption" before they could pass such laws.

The proposal bans the tough penalties that many cities impose today on stores that repeatedly sell cigarettes to kids. Under the settlement, cities could not revoke a violator's tobacco license until the sixth violation, whereas many cities today provide for license revocation as early as a second conviction.

States would be barred from invoking their traditional remedies for violation of their consumer fraud laws by these companies, and would be limited to seeking injunctive relief only.

The settlement perpetuates the preemptive language of the federal Cigarette Labeling Act limiting state and local power over tobacco advertising.

Finally, and most importantly, rather than confirming the existing power of states and cities to regulate any aspect of the tobacco business, the proposal flips the normal approach on its head and instead lists specific areas that states and cities could address, inviting the obvious argument that we are barred from touching any areas not specifically listed -- areas like regulation of direct marketing, telemarketing, point-of-sale advertising, celebrity endorsements, special events. Areas like cigarette content disclosure or even, conceivably, the ability to control the hazardous substances that are added to some brands of tobacco products.

Fifth, the "Plus" in my call for a "Koop-Kessler Plus" approach. This industry must feel some financial pain. In contrast to this goal, the proposed settlement would guarantee them pain-free penalties. It asks Congress to let them shift the entire burden of the settlement onto smokers, in higher prices. As if that's not bad enough, the proposal would then declare that this purported punishment would not even be considered a penalty at all, for tax purposes, so they could still deduct it and shift any remaining burden to the taxpayers!

The settlement also includes so-called "lookback" penalties, designed to "punish" the industry if it fails to reduce teen smoking rates. But even if the industry were to increase its illegal sales to kids, these penalties would amount to only about eight cents on a pack of

cigarettes, an amount they will simply absorb as a cost of doing business. One CEO has already told the press he has no expectation of meeting the targeted reductions.

I believe it's an affront to justice to cut a deal that lets the tobacco cartel pass all of the pain through to its customers and to taxpayers. To achieve justice, the companies themselves and their shareholders must pay.

Let's make them interrupt their dividends. Let's let them leverage some of the companies they bought with tobacco profits. Let's make the CEOs give back the windfall they stand to reap on their stock options.

This industry should feel some financial pain. I will be the first to acknowledge that our lawsuits are not about money. They are about protecting the public health and changing this industry's behavior forever. But, they are also about justice -- Justice for the victims and their families; Justice for the taxpayers; Justice for the public; and, yes, Justice for the tobacco companies and their executives. That means the tobacco cartel must feel the sting of penalties for forty years of lawbreaking.

Three hundred and sixty-eight billion dollars is a lot of money. Politically, it might even be called intoxicating. But, sober reflection will show that, in fact, it is far short of what is needed to serve justice and make this industry feel even a modest amount of pain.

In putting a price-tag on the proposed settlement, my colleagues had only seen the tip of the iceberg of this industry's deceit. In Minnesota, we have collected two warehouses full of secret industry documents that my colleagues did not have a chance to examine. I believe that if the Congress examines those documents, you will agree that the price must go up if we are to achieve justice.

By its express terms, the proposed settlement would let the companies pass the so-called "penalties" through to smokers, who would end up paying about 50 cents more for a pack of cigarettes. In many other countries where these same companies do business -- quite profitably, I might add -- the governments already collect far more. The Koop-Kessler Committee has called for such a two-dollar per-pack increase, citing evidence this would cut teen smoking in half (Koop-Kessler Report page B-7). A leading economic expert, Professor Jeffrey Harris of M.I.T., tells us the price could in fact be increased by \$2 per pack, generating \$800 billion over 25 years. Coupled with savings from reduced litigation and advertising expenses, this amount would be generated with minimal impact on the industry's overall profitability. The bottom line: Congress should not settle for a mere 15 billion dollars per year, when justice demands and the industry can afford to pay a great deal more.

Finally, Senator Hatch, today I would like to propose a very specific, concrete step the Congress should take before you attempt to design a national tobacco policy that may stand as the law of the land for generations.

It is absolutely vital that you have the facts. This area is too important for the Congress to buy a pig-in-a-poke. Today, I urge the Congress to subpoena the treasure trove of millions of secret industry documents that we have compiled in our Minnesota litigation.

Minnesota's lawsuit is unique. We have actually succeeded in compelling this industry to disgorge the documents it has long hidden from the public. Unlike any other case, public or private, we have forced the industry to create, under court supervision, two sealed document warehouses, one in Minnesota and one near London, England, into which we have forced them to deposit some 33 million pages of industry documents.

At the industry's insistence, the court has sealed those documents until we go to trial 180 days from today. Our team has been through them and, as our counsel likes to say, many of the things we have found aren't just smoking guns -- they're smoking howitzers! I cannot discuss the sealed documents, but I can give you an inkling by citing one document which was recently unsealed in connection with our ongoing motion practice.

This is a document from 1958. It's a secret report by scientists who were sent to America by the British American Tobacco Company to study the scientific evidence about smoking and lung cancer. Here's what they knew six years before the first Surgeon General's Report:

"Although there remains some doubt as to the proportion of the total lung cancer mortality which can fairly be attributed to smoking, scientific opinion in the

U.S.A. does not now seriously doubt that the statistical correlation is real and reflects a cause and effect relationship."

(Report on Visit to U.S.A. and Canada, H.R. Bentley, D.G.I. Felton and W.W. Reid, June 11, 1958, page 8.)

That's why they knew in 1958. Six years later, when the Surgeon General first alleged a link between smoking and cancer, the industry publicly claimed to be outraged -- outraged! -- at the very idea! Thirty-six years later, in 1994, they were still willing to come before the House of Representatives and testify, under oath, in response to questions from then-Congressman Wyden, that smoking does not cause cancer.

That's one example out of 33 million pages.

This month we're closing in on the crown jewels of the conspiracy: more than one million pages of documents that have never left their secret vaults. Mr. Scruggs hasn't seen them. General Blumenthal doesn't have them. The Department of Justice doesn't have them. Congress doesn't have them. These are the documents that have been sheltered for forty years behind false claims of attorney-client privilege.

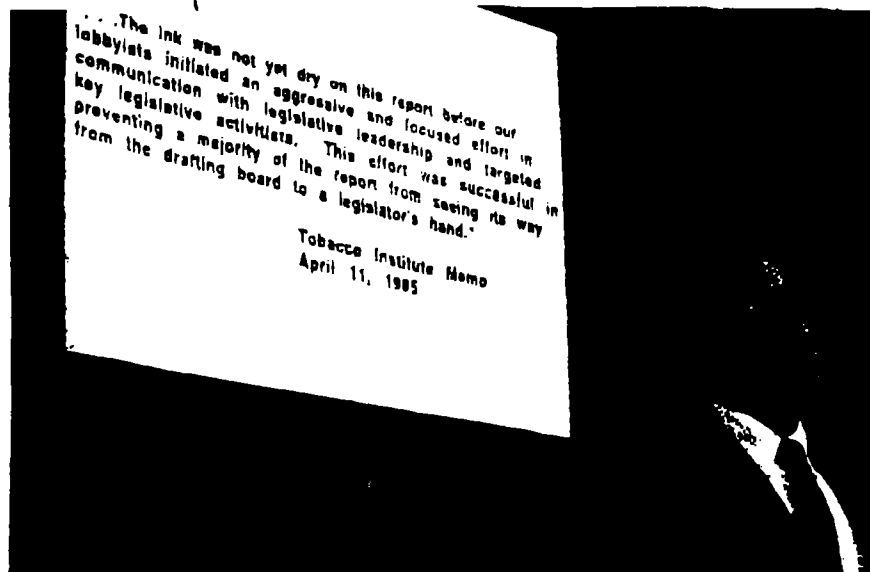
In our judgment, this is where the bodies are buried. In recent weeks we made history when we persuaded our judge that there is sufficient prima facie evidence of possible industry misconduct for the court to appoint a Special Master to review these hot documents in camera, to

decide how many of them should be made public. That process is on a fast track. The Special Master is holding a hearing even as we speak today, and hopes to complete his review by mid-autumn. But, the industry hopes desperately that you will act first, without seeing these documents. They want you to adopt the proposed settlement, which would terminate our lawsuit, squelch our efforts to get these documents, and substitute a charade the industry tried to foist on our court: a page-by-page, document-by-document mini-trial review that lets them stall disclosure for decades.

Mister Chairman, I believe you need these documents. You need to know what the industry knows about how to make cigarettes less hazardous -- and they know plenty. You need to know what the industry knows about manipulating nicotine, manipulating kids, and manipulating public policy. And they know plenty. You need to know whether they have intentionally lied to the Congress over the years. Only then will you be in a position to make good policy. Only then will you be in a position to decide what penalties are appropriate and whether they should be allowed to pass them on to their customers or deduct them on their taxes.

So, I ask the Committee to subpoena the key documents from our document depositories, and to join us in prying loose the treasure trove of documents hidden behind false claims of privilege. We will be delighted to work with you in going before Judge Fitzpatrick in St. Paul, to work within the framework of his protective orders, or to seek modifications if they are needed, to ensure that Congress can fashion effective national policy so that, this time, we find real solutions and don't become victims of a Trojan camel.

News: Analysis & Commentary



LEGAL AFFAIRS

SO MUCH FOR SMOKING OUT BIG TOBACCO'S SECRETS

The deal may let companies keep documents under wraps

When Mississippi Attorney General Mike Moore announced the proposed \$368 billion tobacco settlement on June 20, he claimed that it would force the industry to turn over a treasure trove of previously secret internal documents. "We wanted to make sure that every single person, not only in America but this entire world, knows the truth about what the tobacco industry has done.... And we are satisfied that we have done that," Moore exulted.

Critics of the deal now charge that Moore's declaration is an empty boast. In fact, they say, the pact may actually prevent the disclosure of documents that would have come to light through litigation. When the settlement was announced, tobacco foes immediately pounced on how the pact limits nicotine regulation and treats company liability. But Minnesota Attorney General Hubert H. Humphrey III has said that document disclosure is an issue of equal importance: "This fight was supposed to be about lies and cover-ups, but this deal allows the and cover-ups to live on."

The fight over disclosure

threatens to create another major hurdle for the proposed settlement. Alan Morrison, the attorney analyzing the deal for the review committee chaired by former Food & Drug Administration Chief David A. Kessler and former Surgeon General C. Everett Koop, says that as the deal stands, "the most significant documents will still be withheld...for many years, and possibly forever." And Representative Henry A. Waxman (D-Calif.) on June 12 introduced a bill that would require the companies to surrender far more paperwork than is required under the pact.

The main criticism of the deal's disclosure provisions is that they let the in-

HUMPHREY: "This deal allows the lies and cover-ups to live on"

dustry continue shielding incriminating papers behind attorney-client privilege. Last month, for example, Waxman revealed that Liggett Group Inc. had used attorney-client privilege to keep confidential a memorandum in which attorneys told the company not to market a safer cigarette because "it may incite accelerated tobacco litigation."

"WOEFULLY DEFICIENT." Tobacco's antagonists have no way of knowing exactly what information the industry may have hidden. But Stanton A. Glantz, a professor at the University of California at San Francisco and a longtime tobacco critic, believes that companies may have used privilege to avoid releasing market research, information on plans to recruit teenagers, studies of the dangers of tobacco, and memos on political strategy. He says such revelations would be highly valuable to Congress—especially as members consider how the industry should be punished and weigh how time should be regulated.

The tobacco papers can be unsealed under the proposed settlement—but in each case a panel of three federal judges must rule on whether the privilege protection should be waived. Morrison calls that "woefully deficient." Jacksonville (Fla.) plaintiffs' attorney Norwood S. Wilner, who has more than 100 private personal-injury claims against the industry, says companies could stall the panel by insisting on line-by-line review of mountains of paperwork. "It will take years to get stuff resolved," says Wilner. "I don't have the resources to deal with [that]."

Wilner, Waxman, and Morrison all want the companies to abandon any claim to attorney-client privilege, as Liggett did in its March settlement. But one tobacco lawyer says this demand is unfair and has never been imposed on an industry before—"nothing close."

Matt Myers, executive vice-president of the Campaign for Tobacco-Free Kids and a negotiator of the pact, argues that the agreement furthers disclosure. "This system moves the ball in terms of document disclosure way ahead of where we would be if we just continued to pursue the litigation," he says. But that may not be enough.

By Mike France in New York, with Gail DeGeorge in Miami and John Carey in Washington

Losing the Paper Trail

INCOMPLETE DISCLOSURE The deal does not force the companies to turn over hundreds of thousands of documents covered by attorney-client privilege.

RED TAPE Tobacco opponents can appeal industry claims of attorney-client privilege, but that requires approval by a special three-judge panel.

LAWSUIT LIMITS Because the settlement imposes barriers on future suits, critics worry that lawyers won't try to obtain attorney-client documents.

SATA: PUBLIC CITIZEN LITIGATION GROUP



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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May 2, 1997

TO: ATTORNEYS GENERAL INTERESTED IN TOBACCO SETTLEMENT
NEGOTIATIONS

Dear Colleague:

During the past week, my Office and I have participated in the states' Working Groups established to advance settlement. Contemporaneously, the press reported briefings of representative(s) of the White House and the Tobacco Industry ostensibly on behalf of twenty-four states, and apparently discussions continued with the Industry this week. Bits and pieces of settlement concepts and specific proposals have appeared in the media while the Working Groups have yet to produce comprehensive written summaries of important issues under discussion, parameters which should guide settlement discussions, or context from prior negotiations which might provide an understanding of what is under discussion and why. These media reports have also prompted calls to my Office by public health leaders and members of Congress about my position. Accordingly, I feel compelled to express my views to them and to you.

I have repeatedly asked for a more deliberative process with a realistic timetable and questioned the need to rush to judgment on such fundamental questions involving the nation's number one public health issue. This letter hopefully explains my views more clearly than our brief meeting on Monday, April 28, 1997 permitted. Until there is a broader understanding of and consensus on these threshold substantive and procedural issues (and others which you may raise), no one can or should suggest that settlement of Minnesota's lawsuit is a probable outcome of the negotiating process currently underway. We should also remind ourselves of how we got to this point.

Over a year ago, as tobacco litigation successes mounted and new states joined the fight against the greatest public health menace of our time, many of us began to believe that our growing strength would force the tobacco industry to seek a negotiated settlement, probably in Congress. Accordingly, last Spring a number of Attorneys General drafted a brief statement of the public policy goals and principles which we felt must underlie any settlement. Working from the general goals and principles, a more detailed global settlement outline was prepared and shared with interested Attorneys General, public health advocates and members of Congress in

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February of this year. We took these steps to avoid being surprised, while continuing to express our commitment to try our individual lawsuits.

Since the states' tobacco litigation began almost three years ago, the tide of public opinion has turned into a wave of outrage against the tobacco industry. Litigation has produced a flood of incriminating industry documents. Liggett became the first cigarette company to admit that cigarettes cause disease, and that nicotine is addictive. Massachusetts passed a historic content disclosure law, and a similar bill has been introduced in Congress. Now the FDA's drug and medical device regulatory authority has been sustained with several procedural options available to assert jurisdiction over Tobacco Industry advertising. This FDA victory caused Dr. David Kessler to reiterate caution about any settlement on Monday:

"It would be a major mistake if people rushed into a settlement without fully analyzing the very dramatic nature of the ruling upholding the agency's determination that nicotine is a drug. You could argue there is no need for a deal."

We have agreed that it is reasonable to listen to settlement proposals from the Tobacco Industry. I have not authorized anyone to make proposals on behalf of or to settle Minnesota's litigation. And any settlement must resolve the public health, law enforcement and victims' rights issues which lie at the heart of our efforts. How will we know if it does so? By asking ourselves these questions:

1. *Does a settlement preserve full Food and Drug Administration jurisdiction over tobacco products and content, including nicotine?* The FDA and the states have shown overwhelmingly that nicotine is an addictive drug, and that the tobacco companies themselves regarded cigarettes as drug delivery devices. In 1988, the Surgeon General issued a report finding nicotine a drug -- as addictive as heroin or cocaine. Last week, the U.S. District Court in North Carolina sustained the FDA's statutory authority -- a major victory affirming this fundamental conclusion. This country already has an established set of standards for such products, and they ought to be applied to the tobacco industry as they do to others. We don't need what the tobacco companies so desperately want -- a new, unprecedented health regulation standard, with immunity for the tobacco industry and preemption of state laws. The industry shouldn't be allowed to pick and choose how it is regulated.

2. *What will any settlement do for the nation's 50 million addicted tobacco users and others impacted by smoking?* We have all received pleas for help from nicotine addicts or their families -- people who turn off their oxygen tanks to smoke a cigarette. Completely separate from compensation issues, these people need help. For their sake, and for the sake of future generations, the FDA must have the ability to deal with nicotine for what it is -- a dangerous, addictive drug. Unfortunately, it's not just smokers who breathe tobacco smoke -- it's co-

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workers, bystanders and, too often, kids. Yet we have not heard a single word from the Industry about abating environmental tobacco smoke, which the Environmental Protection Agency lists as a Group A carcinogen, responsible for approximately 45,000 deaths each year among this country's nonsmokers. The proposed Smoke-Free Environment Act endorsed by 23 Attorneys General provides a solid framework for addressing these concerns.

3. *Will individual rights or state suits be preempted?* Tobacco Industry demands for immunity from future lawsuits are complete non-starters. Meanwhile, many Attorneys General have taken the position in *amicus* briefs that mandatory class action settlements unconstitutionally deprive injured citizens of their due process rights. We may not be able to prevent the tobacco companies from doing sell-out, private deals with class action lawyers, but we can surely raise our voices to stop the tobacco companies from doing such a deal in Congress. Nobody who currently smokes, or youth who have been bombarded with sophisticated cigarette marketing campaigns, should be left without the right to vindicate his or her individual interests. Any administrative compensation system proposed must not sacrifice individual rights for industry economic certainty, and state and private actions for reimbursements of medical costs cannot be preempted.

4. *Does a settlement incent the companies to develop less dangerous tobacco products?* We have alleged that for over four decades the companies have suppressed the competitive innovation and research that leads to better products in a free market economy. It's time to jump start innovation by mandatory cross-licensing of "safer," or really less dangerous, product technology, and to give everyone access to applicable research. Then let the companies compete.

5. *Given what we now know about the tobacco companies and their efforts to attract new addicts, what kind of advertising and promotion of tobacco products will a settlement still allow?* The purpose of advertising and promotion is to increase consumption. The industry didn't spend \$5 to \$6 billion for nothing. Any argument to the contrary, whether it comes from the tobacco companies or the advertising community, is an absolute falsehood! So far, I have heard no justification for permitting continued advertising and promotion except "Well, we have to give them something," or "After all, it's a legal product." The only legitimate reason for future advertising is to convey strictly neutral, accurate information about health and safety innovations which will hopefully stimulate less dangerous products. We can assist the FDA in the courts and Congress to reaffirm this authority as well as encourage the FTC to exercise its authority in its recently reopened docket on tobacco advertising. The Supreme Court's recent refusal to review the Fourth Circuit's approval of a City of Baltimore ordinance regulating tobacco advertising on billboards also reinforces our position.

6. *What will a settlement do about rising smoking rates, especially among teens?* Change the image of smoking in society. The one way advertising and promotion increase consumption is by creating positive images of the product -- because for kids in particular.

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smoking is about image. Whose kids do we want to absorb those super cool, saxophone playing, stock car racing, fun-on-the-beach, independent cowboy images? We need to be working toward changing that image, earmarking substantial sums for tobacco control activities such as counter advertising, cessation research and the like. At a minimum, a settlement should require that the Tobacco Industry contribute an amount each year to fund a counter-advertising program in an amount equivalent to its total annual expenditures for advertising and marketing. Since Attorneys General aren't experts in this area, the public health community must have a substantial role in deciding how the money is spent. And then, the funds must be allocated in such a way that tobacco lobbyists cannot divert or delay them.

7. *How much money is enough money?* The only way we can answer this question right now is to say that nobody has yet talked about a big enough number. How do we know? Because when the Wall Street analysts issued their predictions after the recent negotiations became public, the share values of Philip Morris and RJR went up about 11 percent -- a financial bonanza for the tobacco companies. Further, the nation's top-rated tobacco analyst estimated that Philip Morris and RJR stock prices would soar by 40% in value if the initial \$300 billion deal were approved. It's not enough just to say "there isn't enough money in the world" for the tobacco companies to pay all their damages. Minnesota's claims which include consumer fraud, antitrust, tort, and equitable causes of action (which other states also have asserted) for both past and future conduct lead to potential damages on a national basis much greater than \$300 billion. As many tobacco critics have said over the past week, the tobacco companies should not profit from their wrongdoing -- a settlement should hurt. Likewise, any settlement should include significant economic penalties for failure to reduce smoking and curtail illegal sales to our youth.

While the stock market is one barometer of how much the defendants can afford, expert research on the industry's unique finances and economic structure is also important. One example: Dr. Jeffrey Harris at the Massachusetts Institute of Technology estimates that cigarettes could go up almost \$2 per pack before the industry started to lose revenue. If so, the 50 cent increase now on the table looks like a bargain for the industry. For those concerned over threats of tobacco companies filing bankruptcy to evade their obligations, we must remember that bankruptcy would forfeit shareholder equity and likely cost current management their jobs. They will never choose to walk that plank.

8. *Should the public finance the tobacco industry's payment obligations?* The fraud and conspiracy alleged in our lawsuits have caused over 40 years of past harm. If Joe or Jane Citizen get a traffic ticket, they don't get to pay it off in installments; nor should the tobacco companies be let off without paying a substantial amount -- up front, at the time of settlement -- for their past wrongdoing. Likewise, the Tobacco Industry's demand for government sanctioned price-fixing is unacceptable.

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9. *What state laws would be preempted by a Congressional settlement?* The tobacco companies have survived unscathed by getting Congress to do what they want, and by preempting the states from doing more. As the chief legal officers of the states we have a unique responsibility to protect the integrity of our state legal systems. We must carefully review any settlement for express or implied preemption, particularly preemptions which detract from any citizen's right to redress grievances in our courts.

10. *Is the deal enforceable through the courts?* Congress should only be asked to act if these goals can not be achieved through settlement of lawsuits and enforceable Consent Decrees. The test of practical enforceability will be whether the tobacco companies' obligations are not only conceded to be enforceable under existing federal law, but also incorporated into consent decrees, filed and approved in courts of our choosing. Further, Consent Decrees may be our best defense against attempts by the industry to revisit Congress in an attempt to undo the deal in future years.

11. *Will the Tobacco Institute and the Council for Tobacco Research be allowed to continue their activities?* We've alleged that the tobacco industry reacted to the first studies linking smoking and lung cancer by telling the American public that they would find out and accurately report the truth about smoking and health. In fact, we now know they did find out the truth about smoking and health -- but they concealed it, reporting instead a steady stream of misinformation. For example, as long ago as 1958, according to a document from the parent company of Brown and Williamson, it was almost universally conceded even in the tobacco industry that smoking causes lung cancer. Yet the industry continues to dispute and deny, using the Tobacco Institute and the Council for Tobacco Research to give them false credibility. These two organizations are nothing more than agencies of consumer fraud and conspiracy. They should be disbanded.

12. *Will the full truth come out?* If a small-time crook wants to trade a guilty plea for some kind of immunity, a smart prosecutor makes the deal contingent on full disclosure. We can't let the tobacco companies off with less; and in their case full disclosure means turning over the documents listed on the industry's privilege logs. We believe that the courts will find that a substantial number of the documents are not privileged under the "crime /fraud" exception.

13. *Is this the right time to settle?* Frankly, it may not be. We have strong cases and if we try and win even a few, we will have brought the industry not just to the table, but to its knees. The courts have started the process of ruling on the hundreds of thousands of documents for which the industry has claimed some privilege in discovery. The tobacco companies have fought tooth and nail to keep that evidence hidden. We are confident that these privilege logs contain a treasure trove of evidence, and that much of it will be available to the plaintiffs in the near future. These documents will further strengthen our position, in litigation or negotiation.

AGs INTERESTED IN TOBACCO SETTLEMENT NEGOTIATIONS

May 2, 1997

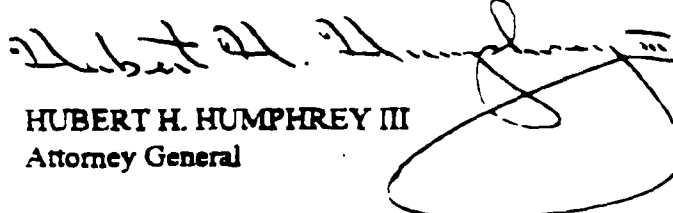
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14. *What should the process be from here on out?* It should be deliberate, inclusive and thorough. The industry will try to create false deadlines, manipulate document drafting, leak information selectively to build public pressure on the states to settle, and try to create a stampede mentality. We owe it to the American public and to future generations not to rush into a settlement of the biggest public health issue of our time. No further negotiations with the tobacco industry should be held until the attorneys general have answers to these and other key questions -- the same questions our constituents and public health allies are already asking. Further, the states must have worked out mutually agreeable negotiating positions and decided whether this is even the right time to negotiate, and we must do so with the full participation of the public health community, tobacco control experts, and other thoughtful voices.

It has been said that the current talks represent all of the suing states. If so, then all Attorneys General must have a full understanding of what is at stake, what is being discussed, and who is accountable for the results. There can be room for a negotiated settlement but not with such great haste.

Finally, anyone who wants an in-depth glimpse at how the tobacco industry has manipulated public policy makers in the past should read *Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris*, by Richard Kluger. This Pulitzer Prize winning book, especially in chapters 9 and 10, documents how the tobacco industry fooled Congress and the American public, and kept to business as usual, after the first Surgeon General's Report in 1964. We have it in our power to effect an enormous change for the public good. But unless we ask the hard questions, and take time to discuss and reflect upon the right answers, we may end up as chapters in some future history of America's losing battle with the tobacco industry.

Best regards,


HUBERT H. HUMPHREY III
Attorney General

c: Minnesota's Congressional Delegation
Public Health Representatives

AG.26542 v1



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

602 STATE CAPITOL
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May 27, 1997

TO: PARTICIPANTS IN THE TOBACCO ADVOCACY CAUCUS

Re: Letter Regarding Tobacco Civil Liability Limits and Nicotine Regulation

Dear Friends:

I very much regret that I will not be able to attend your meeting on May 28 because of a long-standing commitment to lead a mission to Israel. Several representatives of my Office will attend to share my views on a fair and just resolution of the public policy issues posed by the Tobacco Industry, its conduct and its products.

I also want to share with you a letter I am sending to my Attorney General colleagues around the country. The letter, which is attached, highlights some of the issues raised by the tobacco companies' demand for immunity from future liability in individual and class action lawsuits; and the Industry's continuing struggle to avoid full and comprehensive FDA regulation. I hope you will read the entire letter, and I hope even more that, in evaluating any proposed "global settlement" with the Tobacco Industry, you will keep in mind that:

- Congress and the American people do not yet have all the facts. To settle with the tobacco companies before we have all the facts, including the Industry's self-proclaimed "privileged" documents, is to buy the proverbial pig in a poke.
- There is no precedent in our laws -- no legal model -- for the kind of immunity the Tobacco Industry is seeking. Fairness demands that people who have suffered from the Industry's misconduct have the right to timely and adequate compensation, and that we not encourage Congress to protect the tobacco companies from the consequences of their own actions.
- When it comes to nicotine, we need to read the fine print. A global settlement may have 20 pages of specific marketing restrictions, but if it does not give the FDA the full and comprehensive jurisdiction to address the problems of tobacco and regulate nicotine as a drug, it is a set-up for business as usual.

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PARTICIPANTS IN TOBACCO ADVOCACY CAUCUS

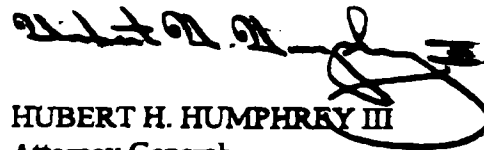
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- Because of the addictiveness of its product, the Tobacco Industry has an enormous ability to pass damages on to its customers without even losing revenue. Fixing the amount of the Industry's liability should not be a matter of raw horse trading -- it should be based on principles of just compensation, retribution for past harm, and studied consideration of economic consequences.

All of us, working together, have brought the country far down the road toward a permanent solution to our problems with the Tobacco Industry. Let's do what it takes to finish the job, and get it right.

Best regards,



HUBERT H. HUMPHREY III
Attorney General



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

May 27, 1997

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Re: Tobacco--Civil Liability Limits

Dear Colleague:

For the past month, tobacco industry representatives have been discussing the possibility of a "global settlement" with some Attorneys General. A central part of those discussions has been the industry's attempt to secure Attorney General support for new statutory limits on the industry's civil liability, both for present claims and for claims that might be brought in the future, and for restrictions on the FDA's authority to regulate nicotine.

Although several questions have been raised about this negotiation process, I believe the discussions about civil liability and nicotine regulation restrictions have helped focus the issues. Those discussions have revealed the extraordinary nature of the relief the industry is demanding. They have also prompted key members of Congress to appoint a new Advisory Committee on Tobacco Policy and Public Health, to be chaired by Dr. C. Everett Koop and Dr. David Kessler, which will help assure that the public health perspective is not lost if Congress is asked to consider a "global settlement."

Recent press reports have outlined a proposal with the following key elements: an annual global industry liability cap of \$15 billion, with \$3.5 to 4.5 billion available to pay individual claims; prohibitions on private class-action litigation, on consolidation of claims, and on punitive damages; new eligibility restrictions for private claimants (including completion of smoking cessation programs); full immunity for suppliers, distributors, resellers, and other "agents" of the tobacco industry; immunity for the industry as a whole after a future date (unless the claim involves a contaminated product, violation of FDA rules, or an illness not associated with smoking today); withdrawal of industry objections to certain marketing and advertising restrictions; and significant limits on the authority of the FDA to regulate nicotine as a drug. The press has also reported that the industry recently sweetened the pot for the states, by allocating to them a greater share of the annual contribution, and reducing the amount that would be available to other claimants.

If that proposal or any other is submitted to Congress, all Attorneys General of course can and will express our views. Because the civil liability and nicotine issues are so central, however, I believe all Attorneys General and the new Advisory Committee must ask themselves the following questions:

1. *Do we genuinely need to make concessions on civil liability to accomplish our most significant regulatory goals?* We do not have to negotiate away what we have already won--full FDA jurisdiction over the regulation of tobacco and specifically, over nicotine as a drug and cigarettes as a drug delivery device; the disclosure of enormous new evidence of industry

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culpability, including court access to hundreds of thousands of "privilege log" documents; the reopening of the FTC's tobacco advertising investigation; regulation of environmental tobacco smoke in the workplace; and continuing Department of Justice grand jury investigations of potential criminal misconduct. Before anyone agrees to compromise away the rights of others to compensation, let's look at whether the industry has really put something on the table that we cannot obtain any other way.

2. The possibility of unlimited civil liability is a powerful tool to drive true industry reform. Should we be urging Congress to take it away? Regulation is important, but regulations can change, enforcement resources can be cut back, and, particularly in today's global markets, the impact of any single nation's regulatory system is limited. We have to seriously question whether there will ever be a "safer" cigarette unless the industry continues ultimately to face the potential risk of unlimited civil liability.

3. Is it wise to cut a "global settlement" deal with the industry before we know the full truth about the industry's culpability and the scope of the harm that has been caused? Our position grows stronger every day as we uncover more secret documents and new whistle blowers come forth. Should we really cut a deal with the tobacco cartel before we get to the truth? Consider developments in just the last few weeks:

- Significant new information, obtained through the discovery process and never before available to private claimants regarding the tobacco industry's culpability, is coming out. Within the past month, the judge in Minnesota's lawsuit ruled that we had established a prima facie case of fraud, and ordered the industry to disclose, in camera, 150,000 "privilege log" documents.
- Recent reports indicate that senior tobacco company officials, including retired Philip Morris vice-president and research director Thomas Osdene, have sought criminal immunity from the Department of Justice in exchange for turning state's evidence in pending grand jury investigations.
- Just last week, a new academic study more firmly establishing the link between secondhand smoke and the incidence of heart disease was released.

The industry's strategic and informational litigation advantage is eroding. Almost every day, we learn more about what the industry knew and when they knew it, and we learn more about the scope of the harm that has been caused. To reach a global liability settlement now might make good sense to the industry, but, for everyone else, the time to entertain serious discussions about liability limits would be when the full truth is out.

4. Will any proposed changes in the civil justice system be fair? To the best of our knowledge, the industry wants to preserve all defenses and wants to place new and unprecedented restrictions on the eligibility of large categories of potential claimants to recover, including future smokers, present smokers who have not yet manifested disease,

victims of secondhand smoke, and smokers' family members. Apparently, the industry also wants Congress to preempt the use of class action procedures, consolidated actions, lawsuits against suppliers and distributors, and perhaps lawsuits from health insurers and employers who have been subsidizing the true cost of tobacco for decades. No other industry in America has that kind of protection. After over 40 years of fraud, conspiracy and deception, should the tobacco industry be rewarded with special liability protections available to no other industry in America?

5. Do we have satisfactory answers to the tough questions about liability caps?

Early on, the Working Group chaired by Attorney General Blumenthal properly insisted that individual claimants' access to the tort system could not be limited. There have been discussions, however, throughout about an annual liability cap that will limit the industry's overall liability.

Global liability caps raise significant questions: Whose claims get priority? First come, first served? Will awards be prorated? Who will have authority to direct fifty state and hundreds of federal court jurisdictions what they can and cannot award? If the caps are reached, how are the rights of future claimants—individuals, third-party payers—to be preserved? Does delay in payment put unreasonable pressure on claimants to settle low? How do you adjust fund contribution levels to match liability experience? Should there be a sunset date in the near future so the impact of new information and new court decisions can be reassessed? Even with industry contribution levels at the highest conceivable level, these are very difficult questions; with the limited amounts discussed so far, they may be insurmountable. That is particularly true with a dangerous product that is staying on the market, with literally millions of potential claimants, and with all of the conflicts among the interests of all the various classes of present and potential victims.

6. Is the amount of money being offered sufficient to at least begin to compensate for the harm that has been caused? The Center for Disease Control estimates the harm caused by tobacco at \$97.2 billion annually—\$50 billion in health care costs, and \$47.2 billion in lost earnings, productivity, and early death. Those figures do not include the cost of perinatal care for the low-birthweight children of smokers or the treatment of disease caused by secondhand smoke, nor do they include the additional health insurance costs employers and individuals have to pay to deal with tobacco-related damages.

7. With the risk of unlimited potential liability removed, will the industry be able to absorb its payment obligation without a significant dent in either industry profits or shareholder equity? When the idea of a \$300 billion industry payment over 25 years was first reported, Philip Morris and RJR Nabisco stock soared. Wall Street tobacco analysts have estimated that liability protection could trigger a run-up in overall industry market capitalization by as much as a third. These projections indicate that the industry would simply absorb this obligation with a 50 cents-a-pack price increase. A \$1.50 per pack increase could generate \$600 billion over 25 years. And those estimates assume that the industry cannot shift any of this liability to their insurers.

After 40 years of fraud, conspiracy and deception by the tobacco cartel, justice demands that these companies be held financially accountable. Requiring smokers alone to bail out this industry is unacceptable. Any settlement must also impose appropriate financial sacrifice on the companies.

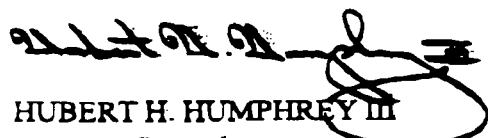
We should be ready to entertain now or in the future reasonable industry settlement offers of the state lawsuits that meet or address these concerns. We should not, however, agree to throw our support behind legislation which will compromise the rights of other parties, including both present and future claimants, unless and until we are satisfied that all of these concerns have been addressed.

Accordingly, I believe that the Attorneys General should insist on the following basic principles, if called upon to evaluate any proposed Congressional resolution:

1. Total, pervasive, and unabridged FDA control over tobacco, and specifically, over nicotine as a drug and cigarettes as a drug delivery device cannot be compromised. That regulatory process must be allowed to proceed unimpeded.
2. The industry must be willing to make an adequate up-front payment to the States for past damages, in addition to any ongoing annual payments to cover costs that are yet to be incurred. This payment must take into account the industry's full financial ability, including sale of assets, total insurance coverage, and debt or equity financing. An up-front payment means exactly that and does not mean structured over a period of time.
3. There must be full and complete disclosure of all documents relating to smoking and health, including those for which a claim of attorney-client privilege or work product has been asserted. There must be procedural mechanisms in place to insure that all of these documents are properly disclosed.
4. The availability of tort remedies should not be impaired or diminished. If the industry believes it must have greater economic predictability for a predetermined amount of time in order to reform, then an appropriate negotiating committee of private claimants may try to develop an appropriate yearly cap for all claims other than state Medicaid claims. Any such cap agreement should however contain a sunset date when the industry will again face full financial responsibility for its conduct.

I appreciate the opportunity to make my views clear.

Best regards,


HUBERT H. HUMPHREY III
Attorney General



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
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June 16, 1997

Re: Important Input from the Koop/Kessler Advisory Committee on Tobacco Policy and Public Health

Dear Colleague:

We are now at a critical juncture. We must decide whether the leverage we have created through filing lawsuits on behalf of the citizens of our states has given the public health community the tools they need to defeat this epidemic. If we don't get this right, whether through ignorance or impatience, we will condemn untold millions more to early, slow, painful, - and preventable -- deaths. We cannot afford to settle for half-measures or reforms that will not prove effective. History tells us that, when it comes to cutting deals with the tobacco industry, the fear of squandering an historic opportunity and getting bamboozled by tobacco companies is well founded - it has happened before.

Pain, suffering and death caused by tobacco have touched each of our lives. There is no disagreement among us that getting tobacco prevention and control right is the number one public health issue of our time. That's why we're in this fight.

But we are lawyers, not public health experts. Given the sensitivity of our cases and the speed of current settlement negotiations, it has been difficult for many of us to gather the depth of public health input we would like. Until the convening of the Advisory Committee on Tobacco Policy and Public Health, co-chaired by former Surgeon General Dr. C. Everett Koop, and Former Food and Drug Commissioner Dr. David Kessler, there was no one place for us to obtain the breadth and depth of public health expertise we need to judge the likely success of reforms under discussion in the settlement negotiations. Each of us was doing the best we could on our own, and reaching different conclusions.

For months now we have heard public health experts and tobacco control organizations in our own states, and across the nation, urge the Attorneys General to proceed cautiously and allow the public health community time to analyze any tradeoffs being discussed in the settlement talks. Based on what we heard at the gathering of more than 100 public health organizations in Chicago convened by the American Medical Association, and other input, we think it is fair to say that the overwhelming sentiment of this community is that the settlement process to date has made only a preliminary start at bringing in the public health expertise needed to get it right. We are also hearing loud and clear public health's deep concerns with the effectiveness of some of the reforms being touted in the settlement talks.

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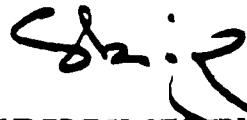
Now the public health community, as well as the White House, has coalesced around the Koop/Kessler Advisory Committee. The Committee has pooled the collective wisdom of all the major health organizations in the country, and pledged to take no more than thirty days to lay out a thirty-year blueprint for tobacco control in our nation. Organizations on the Committee, along with Health and Human Services Commissioner Donna Shalala, and Mike McCurry speaking for the President, have indicated they will not endorse or reject any settlement terms until the public health blueprint is finished. The Committee will have it's next full meeting on June eighteenth in Washington, DC.

Because millions of lives hang in the balance, I urge you to follow the lead of the Koop/Kessler Committee, and to:

- Refrain from publicly endorsing or rejecting any settlement plank under discussion until all the details are available and the Koop/Kessler Committee has completed its work.
- Continue to consult with public health, provider, and tobacco control groups in your own state to get their expert advice about which tobacco control measures are most likely to achieve the outcomes we all want, and which are likely to prove to be false solutions or to provide new defenses for the tobacco industry.
- Keep educating the public about the tobacco industry's wrongdoing, the harmfulness and addictiveness of their products, and tobacco's growing success at attracting new customers at home and around the globe, even in nations that allow no marketing whatsoever.

It has been said that those who forget the lessons of history are doomed to repeat them. So let's take a moment to remember our history. Again and again, we've been 'rolled' by this industry. We must respect the public health community enough to honor their expertise and process. When the next definitive history of the tobacco industry is written, we don't want to find ourselves as the principal players in one more tragic chapter of betrayal through false solutions accepted because we rushed to judgment. Let's take the time to listen to the people with real expertise in tobacco control policy.

Best Regards,



HUBERT H. HUMPHREY III
Attorney General

cc: Dr. C Everett Koop
Dr. David Kessler
Secretary Donna Shalala
Bruce Lindsey

STATEMENT OF HUBERT HUMPHREY III
Attorney General

Reaction to Tobacco Settlement Announcement
June 20, 1997

For the past several weeks since we left the secret settlement negotiations and took our case to the public, the tobacco industry was forced to move in our direction. We haven't budged from our original principles and we have made this a better deal.

Our message was clear and consistent: Either you accept a principled settlement at the table, or you will encounter the toughest case you've ever faced in court. Clearly, the pressure that we generated by leaving the process and working to mobilize public health leaders made this a much better deal.

But unfortunately, the deal falls far short of achieving our goals of protecting the public health and holding this industry accountable for 40 years of lies, conspiracy and deception. I regret to say so, but I fear that this deal is a tobacco bailout.

So, I have strong concerns about what the deal looks like today. And I have equally strong concerns about what the deal will look like once the tobacco-bankrolled Congress gets done with it.

Opposed to the Plan As It Exists Today

Let's talk about the plan proposed today.

- **First, Public Health.** It is unconscionable that negotiators will not wait the two or three weeks for a national public health blueprint from the Koop/Kessler Committee. This distinguished panel of public health experts should be heard from before we make any decision.
- Most importantly, we should incorporate their recommendations about how to control the killing effects of nicotine. But instead of waiting for the public health experts, they are going to allow Jesse Helms and Newt Gingrich and the tobacco lobbyists figure it out for us. That's a prescription for disaster. That's a prescription for a tobacco bailout.
- **Second, Justice.** What about these billions and billions of dollars we keep hearing about. Does it hold the industry accountable for its lawbreaking? As I have been saying for months, the monetary proposal is woefully inadequate. And Wall Street's reactions reinforce the point.
- When Wall Street got a look at the quote "punishment" in this package a few weeks ago, tobacco stocks skyrocketed. **Tobacco stocks have soared 20% since negotiations began. Yesterday, Phillip Morris reached a 52-week high.** What's wrong with this picture? After 40 years of lies, conspiracy and fraud, the tobacco industry will actually walk away with a financial windfall. Is that justice?
- Other companies prosecuted for decades of major lawbreaking end up having to sell off assets, borrow money and suspend dividend payments in order to pay their debt to society. In evaluating any

economic proposal, we must ensure that two goals are met: The industry must feel financial pain and there must be an appropriate economic recovery for victims.

- **Truth.** And finally, what about getting at the truth? Remember that? That's what we all said we were in this fight for. We had another battle over the tobacco industry's hiding the truth just this week in court. But today, the industry has taken a big step toward undoing all the work we have done gathering those 30 million tobacco documents.

This fight was supposed to be about lies and cover-ups, but this deal allows lies and cover-ups to live-on. No other business in America gets that kind of special treatment and that's outrageous.

So that's what's wrong with the deal proposed today.

Concerned About Giving the Tough Issues to Tobacco-Bankrolled Congress

And one thing concerns me more than what this deal looks like. It's how this deal will look when Congress gets done with it.

Let's face it. The tobacco industry will never find a better jury than the tobacco-bankrolled U.S. Congress.

While paying juries is illegal, paying the U.S. Congress through tobacco PACs is a time-honored tradition. And it is a corrupting tradition. U.S. history has proven that point over and over.

For months now negotiators have acted like a negotiated settlement was our only option. Settle or else. Settle before some artificial deadline. Settle now or hand it over to Congress to force us to settle.

But we have another option. We can do what we promised people we would do in the first place. Hold the tobacco industry accountable or force then to accept a tougher deal.

That is not radical. That is what I promised the people of Minnesota I would do three years ago. That is what all 40 states promised to do. That is what I want to do. That is the right thing to do.

The negotiators gave this their best shot, but, at this point in the battle, their best shot could not produce what we promised the American people -- justice, reform and accountability. Now, we should thank negotiators for their diligent efforts, but admit that the process could not deliver on our original promises. We should proceed to hold the tobacco industry accountable. We should treat the tobacco industry as we would any other business.

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FOR IMMEDIATE RELEASE
Friday, June 20, 1997

Contact: Jennifer Freeman (612) 297-1321
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HUMPHREY SAYS TOBACCO DEAL COULD BE A BAILOUT

Attorney General Hubert H. Humphrey III expressed his displeasure with the tobacco settlement today at a news conference in St. Paul.

"The deal falls short of achieving our goals of protecting the public health and holding this industry accountable for 40 years of lies, conspiracy and deception. I regret to say so, but I fear that this deal could be a tobacco bailout," said Humphrey.

Humphrey walked away from tobacco settlement talks several weeks ago arguing that attorneys general should have the resolve to bring their law enforcement cases to court rather than negotiating an agreement on the tobacco industry's terms and tight timetable. Since that time, Humphrey has been mobilizing public health advocates to oppose the settlement plan until public health objectives are met. A number of concessions have been made by the tobacco industry since that time, but the damages figures have not changed significantly.

"Today, tobacco analysts say they are bullish on a deal. What's wrong with this picture? After 40 years of lies, conspiracy and fraud, the tobacco industry could actually walk away with a financial windfall. Is that justice?" said Humphrey.

Elements of the settlement that Humphrey expressed concerns about include:

- **Public Health.** The negotiators should have waited two or three weeks for a national public health blueprint from the Koop/Kessler Committee. This distinguished panel of public health experts should be heard from before we make any decision.
- **Justice.** Current dollar figures are inadequate. Wall Street's reactions over the last few weeks reinforce the point. Tobacco stocks have soared 20% since negotiations began. With rumors swirling about today's settlement, Philip Morris reached a 52-week high yesterday.
- **Truth.** It is not clear whether the current deal makes the tobacco industry disclose their documents before the deal is done.

(more)

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Humphrey Speaks Out Against Tobacco Deal

June 20, 1997

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"For months now, too many of us have acted like a negotiated settlement was our only option," Humphrey said. "Settle or else. Settle before some artificial deadline. Settle now or hand it over to Congress to force us to settle. But we have another option. If this deal doesn't achieve our goals, we can do what we promised people we would do in the first place. Hold the tobacco industry accountable in court."

In August 1994, Minnesota became the first state in the nation to sue the tobacco industry on consumer fraud and antitrust grounds. Facing a thousand-person tobacco litigation team, the State and its co-plaintiff Blue Cross and Blue Shield of Minnesota have won a series of important issues in court and amassed over 30 million internal tobacco industry documents in depositories in Minneapolis and England. While many public documents that have been introduced in court prove Minnesota's claims, most of the documents obtained in the case are not publicly available due to a court order that the tobacco industry insisted on. The Minnesota case is set to go to trial in seven months.



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June 25, 1997

Members of the Advisory Committee on Tobacco Policy and Public Health:

After careful review, I have concluded that the proposed tobacco settlement legislation would permit the tobacco industry to once again avoid the just consequences of its past misconduct. The proposal's retreat from existing Food and Drug Administration regulatory authority, inadequate payments and performance standards, and unwarranted limitations on victims' rights to sue, all add up to another fleecing of the American public by the country's most culpable industry.

The following are by no means the only problems with the proposed settlement, but they are the most serious:

The deal seriously detracts from the FDA's authority to regulate nicotine and unjustifiably freezes even its control over advertising and marketing. Under the proposal, for at least the next twelve years -- a wholly arbitrary period of time -- the FDA could not eliminate nicotine. It could only gradually reduce nicotine, but only if it found "substantial evidence" that doing so would (a) significantly reduce health risks, (b) be technologically feasible, and (c) "not result in the creation of a significant demand for contraband or other tobacco products that do not meet the product safety standard." After twelve years if the FDA believed it should eliminate nicotine, it would have to make much the same showing, but by a higher "preponderance of the evidence" standard, with the effective date delayed two years to permit congressional override.

These limitations would make it extremely difficult for the FDA to make the required showings to regulate nicotine, both because of the need to prove a negative -- the lack of a "significant" demand for contraband products -- and because the proposal creates numerous and unwarranted procedural roadblocks to agency action. The industry has always asserted that reducing nicotine will create a black market in high-nicotine products, and it will almost certainly argue that any black market is "significant," since no standard is specified. Through vague and unrealistic substantive standards, and careful redrafting of the normally applicable administrative law procedures, the tobacco companies have stacked the legal deck against meaningful regulation. The requirement of formal, rather than notice and comment rulemaking, and the imposition of a "substantial evidence" rather than an "arbitrary and capricious" standard of judicial review are but two examples of the procedural roadblocks.

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It was these carefully crafted, pro-industry standards which caused B.A.T. Industries Chairman Martin Broughton to tell the *Wall Street Journal* that FDA regulation of nicotine is "an unlikely prospect," and for the *Journal* itself to conclude that "actually purging cigarettes of nicotine...would be virtually impossible."

The negotiators obviously intended the advertising and marketing restrictions, which go beyond the current FDA regulations, to be the lure which would distract attention from the give-back of authority over nicotine. But even here the agency's authority is frozen for an arbitrary five years. In balancing the value of enhanced advertising and marketing restrictions against the limitations on FDA authority it should not be forgotten that marketing is this industry's particular genius. If they have consented to these limitations it means they have already figured how to turn them to advantage.

Clearly, these loopholes could perpetuate the manufacture and sale of addictive cigarettes for the next several generations. In this war, whoever controls the nicotine wins. Under this settlement, the FDA does not control nicotine. I urge the commission to recommend instead complete and unqualified FDA jurisdiction over nicotine and over tobacco advertising and marketing.

Youth tobacco use reduction targets are too long delayed, too lax, and fail to create effective incentives to force tobacco companies to comply. The so-called "look-back" provisions set performance targets for the reduction of youth tobacco use. Unfortunately, the first measurement of continued use, or "look back," does not occur for five years, when the goal for underage cigarette smoking reduction is 30%. The total reduction goal, achieved in the 10th and succeeding years, is a 60% reduction in youth smoking. Expectations for diminished use of smokeless tobacco by children are even more modest, with a 25% five-year look-back target increasing to a mere 45% after 10 years.

Perhaps even worse than the modesty of these goals is the fact that the industry would still be able to profit from sales to minors. While the FDA could, under the proposed settlement, impose a surcharge if the targets are not met, the surcharge is flawed: The surcharge would equal \$80 million for each percentage point above the target, but with a cap of \$2 billion per year, or about 8 cents per pack — far less than the industry's average 31 cents per pack operating profit. Moreover, the surcharge would not be levied against specific manufacturers, but rather against the industry as a whole. This spreading of the payment diffuses accountability and will inevitably detract from incentives to comply.

Finally, and even more incredibly, the industry could reclaim much of this minimal surcharge if it could show good faith efforts at compliance.

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There is no reason to wait five years before beginning to measure, and implement counter-incentives to, youth tobacco use; nor is there any justification for a surcharge which does not decisively deter sales to youth. Why should the nation be so patient and generous with an industry that has worked so hard, for so long, to addict our children?

Instead, I strongly urge the Commission to support H.R. 1772, the "No Tobacco For Kids Act," which begins to look back after two years, and imposes a \$1 per pack fee on noncomplying manufacturers. In this area, any doubts should be resolved in favor of the nation's children not the tobacco companies.

The agreement contains unprecedented immunity for the tobacco companies. Under the settlement, only individuals could bring actions in the future. This would rule out class actions, multi-plaintiff actions, and lawsuits such as those brought by the states, except with the defendants' consent (leaving them free to whitewash their liability through collusive class actions). Few individuals have the legal or financial resources to fight this cash- and lawyer-rich industry. In addition:

- State lawsuits would be preempted, or, in the euphemism of the draft "legislatively settled," a move which I believe to be an unconstitutional infringement on state sovereignty. Such lawsuits -- the very tool that forced the industry to the negotiating table -- would be barred forever.
- The industry would pay no punitive damages for its past lawbreaking.
- Total industry liability payments in individual actions would be capped at 33% of the industry's annual base payments. That means future individual plaintiffs would be able to collect, in the aggregate, no more than \$2 billion the first year, rising to \$5 billion in year 6 and thereafter.
- No individual plaintiff (which for this purpose would include third-party payors such as Blue Cross Blue Shield of Minnesota and the plaintiff labor unions) could collect more than \$1 million per year unless there is money left over within the aggregate yearly cap.
- All "addiction/dependence" claims (the Castano claims) would be legislatively settled.

Our civil justice system has evolved to compensate victims at the expense of wrongdoers. As a natural consequence, when the system works it provides powerful incentives to change harmful behavior. To the extent we shelter wrongdoers from the natural consequences of their actions, we discourage positive, changed behavior and deny victims their due.

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In summary, the deal imposes an unprecedented set of limitations on individual liability, carefully calibrated to effectively deny individuals their day in court. Taken together, the limitations permanently tilt the litigation playing field toward an industry which has bullied its victims and abused the court system for three decades. The industry immunity is unjust and fails to provide the incentives for change.

The money is far less than the tobacco industry can afford; it provides neither adequate compensation nor any punitive effect. The industry would pay up to \$368.5 billion over the next 25 years. However, the payments are subject to a number of adjustments (mostly downward), they are tax deductible, and by law would be passed through to smokers.

The tobacco industry's undertaking to pay \$368.5 billions sounds impressive -- until one remembers that the total direct, health care harm from tobacco products exceeds \$50 billion a year and that the current combined health care and economic loss is on the order of \$110 billion per year. In other words, as impressive as the dollars sound, they don't come close to repaying the harm caused by tobacco use.

Just as important in calculating the adequacy of the tobacco companies' payments is the nature of their conduct. Whether characterized legally as crimes, intentional torts, consumer fraud or antitrust violations, the States have alleged that this is an industry which richly deserves punishment. All indicators are that this settlement would help the companies, not hurt them. By way of illustration:

- With the advertising and promotion restrictions, the companies could well save \$4 billion of the \$6 billion they spend yearly on these items. Add \$600 million to a billion in reduced legal fees each year and the approximately \$5 billion in savings is over half of the first-year total payment. Add the tax benefits, which Public Citizen estimates at about an annual average of \$4.8 billion, and the total approximate savings of \$9.8 billion per year means that the tobacco industry virtually pays for its sins out of savings.
- Dr. Jeffrey Harris of M.I.T. says the companies could raise prices \$2 per pack (to around \$4) without losing revenue. That would yield \$32 billion per year, or more than \$800 billion over 25 years. Dr. Kenneth Warner of the University of Michigan and Prof. Richard Daynard of Northeastern University agree. An expert retained by a group of states says that the \$2 figure is very low -- that the companies could in fact raise prices much more.

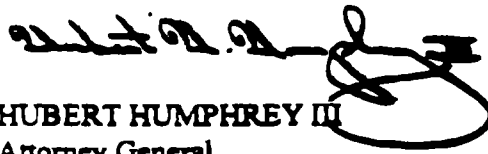
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- The designation of some of the payments as "punitive damages" is a joke. It's not punitive unless it hurts -- and this settlement wouldn't hurt the companies at all. In fact, Bloomberg News reported on Saturday that the tobacco company CEOs "hold stock and options that could rise as much as \$65 million by the end of next year, based on analyst estimates that take the settlement into account."
- Tobacco stocks have been up 20% since the talks began in April. With the terms now out, leading Wall Street tobacco stock analyst Gary Black predicts that this week the stocks will soar. The long run performance of tobacco stocks will tell us if there's enough money in this deal.

A principled settlement with the tobacco industry would recover much more of the damages caused by tobacco products. It would not allow the tobacco companies to meet their obligations out of savings, or reap huge profits while absorbing the payments as a cost of doing business. It would not, by legislative fiat, require the companies to pass increased costs on to its victims. It would hurt the wrongdoers, not reward them.

I believe this deal must be vastly improved, or not done at all. I hope the Commission will not sanction a retreat from the FDA's current authority over nicotine, but rather will recommend strong incentives to diminish youth smoking, real justice for injured smokers, and stiff payments by America's outlaw industry.

Best regards,



HUBERT HUMPHREY III
Attorney General

**Introductory Statement of Richard F. Scruggs
before the
Senate Judiciary Committee
July 16, 1997**

Introduction

Good morning Mr. Chairman and Distinguished Members of the Committee.

I am Richard Scruggs, the Senior Partner in the law firm Scruggs, Millette, Lawson, Bozeman & Dent, P.A., located in Pascagoula, Mississippi. I represent the State of Mississippi and a number of other States in litigation against the tobacco industry.

As you may know, Mississippi was the first State to take on big tobacco, and I am proud to have been part of the legal team that planned and executed the first successful suit. I also was privileged to have been involved in the months-long negotiations between the tobacco industry and the Attorneys General of the states involved in litigation against the industry. Thank you for having invited me to appear before the Committee as it considers crucial issues surrounding how tobacco products are manufactured, marketed and distributed in the United States, and crucial issues surrounding the tobacco industry's accountability for the harm that it has done to the nation in human and economic terms.

The issues before the Committee are crucial indeed, as certain of the now well-known facts surrounding cigarette consumption in this country clearly demonstrate. For example:

- Approximately 50 million Americans currently smoke cigarettes;
- Approximately 6 million Americans currently use smokeless tobacco products;
- These products kill more than 400,000 Americans each year due to cancer, respiratory illnesses, heart disease, and other health problems;
- Cigarettes kill more Americans each year than AIDS, alcohol, car accidents, murders, suicides, illegal drugs, and fires combined;
- 3,000 children start to smoke every day in this country and 1,000 of those will die prematurely of a smoking-related disease; and
- Cigarette smoking continues to rise among American secondary school students.

These facts were essentially well-known by the spring of 1994. But at that time, despite numerous attempts by private litigants during the previous four decades, the existing tort system had been unavailing to everyone seeking compensation for injuries caused by consumption of tobacco products. Tobacco control had proven equally illusory in the legislative and regulatory arenas.

Against this factual backdrop, Attorney General Mike Moore of Mississippi filed the first lawsuit by a State government against the major cigarette manufacturers in the United States on May 23, 1994. In that action, General Moore sought injunctive relief to protect Mississippi's children from the marketing practices of the tobacco industry, and sought restitution for hundreds of millions of dollars spent by Mississippi taxpayers occasioned by the provision of health care to

Mississippi's indigent citizens and to those other citizens who qualified for medical assistance under various State-sponsored programs, such as charity hospitals and State-funded health insurance programs. Ultimately, 39 other States, certain cities and counties, and the Commonwealth of Puerto Rico brought similar civil actions against the tobacco industry. Additionally, various private putative class action lawsuits and a host of individual suits have been brought against the tobacco industry and various of their agents and consultants during recent years.

Each and every one of these civil actions proved to be complex, expensive, cumbersome and hard-fought. While I can report to the Committee that the Mississippi lawsuit recently was settled, each and every one of the other State lawsuits remains hotly contested and hard-fought as we sit here today. It was the crucible of such hotly contested lawsuits that brought the Attorneys General, public health representatives, certain of the private litigants and the tobacco industry together for historic and unprecedented settlement talks in April of this year. As the Committee knows, those talks gave rise to a comprehensive settlement plan which was announced on June 20, 1997. In my view, it is clear that the only prospect that the remaining litigants have for swift, fair, inexpensive and consistent resolution of their respective positions is through national legislation based upon that Proposed

Resolution, coupled with certain obligations being placed upon the tobacco companies through a binding, enforceable protocol and through enforceable consent decrees entered in the various State lawsuits.

As the Committee continues to consider the details of the Proposed Resolution, and the comments of its proponents and its critics, it must be remembered that the Proposed Resolution was concluded in settlement negotiations while the parties were engaged in the heat of battle in courtrooms all over the country, and that, despite the agreements contained in the Proposed Resolution, those lawsuits continue unabated. Regrettably, the devastating effects of tobacco consumption by Americans also continue unabated. In fact, since the litigants concluded the Proposed Resolution, approximately 78,000 of our children have started smoking, and nearly 26,000 of them will die prematurely from a smoking-related illness.

Nature of the Legal Claims Against the Industry and Relief Sought

In their respective lawsuits against the tobacco industry, the various Attorneys General around the country brought a wide variety of equitable and legal claims, including: Restitution/Quasi-Contract -- Unjust Enrichment, Indemnity, Negligence, Strict Liability for Defective and Unreasonably Dangerous Products,

Breach of Express and/or Implied Warranties, Negligent Performance of Voluntary Undertakings, Fraud/Intentional Misrepresentation, Conspiracy and Concert of Action, Liability for Aiding and Abetting Others, Injunctive Relief, Common Law Public Nuisance, Violations of Consumer Protection/Deceptive Trade Practices Acts, Consumer Fraud, Violations of State Antitrust Acts, Violations of Federal and State Racketeer Influenced and Corrupt Organization Acts, False Advertising, and Wrongful Interference with Legal Obligations.

While the particular relief sought in these actions varied depending upon the specific law of the jurisdiction involved, included, among others, were requests for injunctions, claims for payment of money damages, payment of restitutionary damages, disgorgement of profits, claims for treble damages, pre-judgment interest, costs, attorneys' fees, declaratory relief, disclosure of previously withheld research documents, demands for funding of corrective public education campaigns, demands for funding of smoking cessation programs, and demands for the disbanding of trade organizations.

Comprehensive Nature of the Proposed Resolution

The wide array of claims brought against the tobacco industry and the attendant complex legal issues thus presented, coupled with the clear and present

damage being visited upon the public health by the consumption of tobacco products, all greatly complicated the negotiating process, but made it crystal clear to the negotiating team that a comprehensive resolution would be required -- a resolution the terms of which would be integrated and complementary if the litigation goals of the Attorneys General and the private litigants were to be realized. Thus, while individual provisions of the Proposed Resolution rightly have come under particular scrutiny, the Proposed Resolution must be viewed as a *systemic* resolution to a complex array of social, public health, legal and economic issues.

The Proposed Resolution will provide state and federal governments with the mechanisms they need to address the complex problems presented by the use of tobacco products in America -- including issues related to FDA regulation of tobacco products, marketing, advertising, and like issues related to underage usage of tobacco products, significant and verifiable changes in the corporate culture of the tobacco industry, licensing of cigarette vendors and enforcement of laws pertaining to underage sales, public education, medical and scientific research into less hazardous products, counter-marketing to reduce the allure of smoking to young people and to encourage current smokers to quit, the funding of smoking cessation programs, requiring the disclosure of the tobacco industry's non-public past and

future internal laboratory research, the provision of industry-funded health care, and individual access to the courts, to civil trial by jury and to full compensation to those harmed by the tobacco industry.

Issues Related to Punitive Damages

As the Committee doubtless knows, punitive damages have been a part of the tort system in this country since antiquity, although not all states permit punitive damages. Even where punitive damages are allowed, some states provide caps on the maximum amount which may be awarded and at least one jurisdiction provides that a portion of any punitive damages awarded in an individual case be remitted directly to the state. Punitive damages in civil actions are not generally regarded as compensatory in character, rather they are awarded to punish particularly egregious misconduct and to deter others from engaging in such wrongful conduct in the future. This Committee is well aware of the debate that rages in legal circles concerning the efficacy of punitive damages in American jurisprudence, I am sure.

As is now commonly known, the Attorneys General, the public health representatives, their counsel and counsel for the private litigants were of one voice during the negotiations that it was essential for the tobacco industry to be subject to punitive damages for their prior misconduct. The tobacco industry was equally

adamant that they be protected from such awards in individual cases because such awards are inherently unpredictable and could unfairly advantage some plaintiffs over others. In return for significantly punitive concessions, the Proposed Resolution would resolve on a societal and uniform basis all punitive damages claims for past misconduct only as part of the overall settlement package. A close examination of the Proposed Resolution will demonstrate that an incredibly high price was exacted from the tobacco industry in settlement of the claims, including the punitive damages claims, of the State and private litigants: the tobacco industry will be required to pay \$10 billion on the day legislation substantially similar to the Proposed Resolution is signed; will pay \$25 billion into a Public Health Trust during the first 8 years under the legislation; will pay \$335.5 billion during the first 25 years of the legislation, with \$15 billion to be paid annually in perpetuity, subject to certain adjustments if the volume of sales of tobacco products to adults rises or falls; and will become one of the most heavily regulated industries in America.

It bears emphasis that the Proposed Resolution does not impact at all any prospective litigant's entitlement, if any, to compensatory damages, or to punitive damages for future misconduct by the tobacco industry.

Issues Related to Class Actions

The Proposed Resolution would provide for individual trials only and would not permit class actions to be brought against the industry in the future. The Committee is undoubtedly aware of the contentious nature of class action litigation in general, the abuse of class action "settlements" to the detriment of future victims who have yet to manifest an injury, and of tobacco-related class action litigation in particular, given that each individual's smoking patterns and history are different, as are the health effects of smoking upon each individual. The Broin class action brought by airline flight attendants is currently underway in Miami state court, and the Court's rulings thus far indicate that despite the class action status of the litigation, the trial of thousands of individual damages issues may be required. The Castano class action filed in the United States District Court in New Orleans was decertified by the Fifth Circuit Court of Appeals in May of 1996, and while one Castano-like state class action has been certified in the Louisiana State courts, a similar class action in Pennsylvania recently was dismissed by the trial court.

Most significantly, three weeks ago, on June 25th, the United States Supreme Court rendered its decision in a case styled Amchem Products, Inc. v. Windsor in which it upheld the Third Circuit Court of Appeals decision to decertify a settlement

class action involving the global settlement of current and future asbestos-related health claims. Among the problems that the Third Circuit had noted with the class action were the different smoking histories of the class members. Thus, it is not clear that the class action is a viable method to litigate smoking-related health claims in any event.

When viewed in the context of the entirety of the Proposed Resolution and the current state of the law, I believe the Proposed Resolution protects the interests of the individual litigant seeking compensation from the tobacco industry, while achieving historic financial and regulatory concessions from the tobacco industry. This is especially true given the requirements for the industry to disclose its past and future internal research documents and the creation of an industry-funded national document depository. Documents produced into the depository are to be deemed produced for any litigation in the United States and will greatly reduce the costs normally associated with document discovery in civil actions against the tobacco industry. Thus, every citizen who alleges that he or she has been harmed by the tobacco industry will be guaranteed access to the courts in order to seek compensation for his or her injuries, and to the trial by jury which is guaranteed by the Seventh Amendment. Such litigation will become significantly less expensive

for individual litigants once the mechanism for disclosure of industry documents becomes operative.

Conclusion

The Proposed Resolution achieved in settlement of the lawsuits brought by the Attorneys General and certain private litigants provides an historic opportunity to resolve the most pressing public health problem in American history. It is an opportunity that was fought for and won at great expense and against a formidable foe in the tobacco industry. We are poised now to achieve the total reformation and restructuring of the tobacco industry in the United States, and most importantly, we are on the verge of achieving the means to protect a generation of America's children from the ravages of early tobacco-related death. I am confident that with your leadership, we will achieve these most important goals. Thank you, again, for the opportunity to participate in the proceedings before the Committee.

STATEMENT BY STANLEY M. CHESLEY

The proposed tobacco settlement announced on June 20 is an agreement among tobacco companies, 40 state attorneys general, lawyers representing plaintiffs in 26 pending class actions, and representatives of anti-smoking groups such as Kids Against Tobacco. I was proud to be one of those who negotiated and signed the agreement. I want to explain why I support it wholeheartedly.

Among its provisions, the agreement requires tobacco companies to pay \$368.5 billion over 25 years. Thereafter, it must pay \$15 billion per year, forever. Thus, over the first 50 years, the industry will pay almost \$750 billion. This money will never revert to the industry.

Strange as it may sound, however, this money is secondary. More important is the cultural shift this settlement represents. It ends the old culture in which cigarette companies operated and subjects the industry to a new culture, the aims of which are to eliminate under-age smoking and to break the grip that smoking addiction has on so many Americans. The agreement also builds in mechanisms and penalties designed to guarantee the success of these objectives.

Bear in mind, *three thousand American children start smoking every day*. During the 120 days we negotiated this agreement, 360,000 kids started smoking. This settlement permanently cuts off avenues tobacco companies have traditionally, and often subtly, used to market their products, especially to children. It outlaws outdoor cigarette advertising, cigarette vending machines, cigarette promotions in sporting activities such as the NASCAR circuit, and cigarette ads using human images or cartoon characters, such as Joe Camel and the Marlboro Man. Before the Joe Camel ads were introduced, two percent of Camel's sales were to minors; after Joe Camel, that rose to thirteen percent. The agreement sets a timetable for eliminating under-age smoking. If the timetable is not met, heavy surcharges will be imposed on tobacco companies.

Furthermore, the settlement solidifies the regulatory authority of the Food and Drug Administration (FDA), which has led the fight against nicotine addiction. The agreement empowers the FDA to reduce nicotine levels in cigarettes, or even eliminate nicotine altogether beginning in 2009.

The agreement also establishes, with funding from tobacco companies, a truly comprehensive, nationwide program to help all smokers end their addiction and improve their overall health, which is clearly in the public's interest. While the specifics still have to be worked out and the end result is not guaranteed, the components of this program will likely target smoking cessation for any smoker; smoking education for pregnant women, teenagers, and

new parents; medical monitoring for present and former smokers; possible prescription and insurance co-payments for seniors and youths who smoke or have smoked; and funding for research on lung cancer and other illnesses caused by smoking.

Under the settlement, there will be blunt new warning labels occupying 25 percent of front panel packaging of cigarettes. Tobacco companies will have to disclose the internal reports and documents they have concealed for decades. Individuals will still have the right to sue tobacco companies and seek full compensation for injuries or deaths caused by smoking. About \$4 billion will be set aside each year to pay damages awarded to plaintiffs in such suits.

Could the new culture created by this settlement have been achieved through litigation? From the beginning, I strongly felt it could be achieved through a nationwide settlement, but not through even the most successful litigation strategy. A court could never order the cultural changes we were able to negotiate. For example, a favorable ruling in a tobacco lawsuit, like the class action we filed in Ohio, would not stop a single child from starting to smoke, nor stop the tobacco industry from making children the targets of their marketing.

The American Cancer Society estimates that, if the goals of this agreement are achieved, one million children alive today would be saved from tobacco-related death. It would be tragic if, in our zeal to punish tobacco companies, we were to pass up the opportunity to save these lives.

Stanley M. Chesley

TESTIMONY OF LAURENCE H. TRIBE^{*}
on the
GLOBAL TOBACCO SETTLEMENT
before the
SENATE JUDICIARY COMMITTEE

July 16, 1997

It is an honor and a pleasure to appear at the Committee's invitation today. I am here to address the constitutional issues raised by the global tobacco settlement reached by some 40 state attorneys general and the tobacco companies in June. This settlement, which some have called perhaps the most important public health measure in this country's history, is currently only a memorandum of understanding between the states and the companies. To be effective, it must be implemented by congressional legislation.

My conclusion, in brief, is that the bulk of the settlement fits squarely within Congress' powers under existing Supreme Court precedent. It does not raise serious issues under the Commerce Clause of Art. I, under the Fifth Amendment's Due Process or Takings Clauses, under the Seventh Amendment's Jury Trial Clause, or under the Tenth Amendment and related principles of federalism.

However, the proposed restrictions on tobacco advertising would raise very serious First Amendment questions if they were to be enacted into law by Congress. My understanding is that proponents of the settlement, recognizing this problem, are prepared to rely on consent decrees and private agreements with the tobacco industry to enforce the restrictions on advertising. This approach is a novel one that raises a number of practical questions, which I will detail in the body of my statement, but there is no constitutional principle prohibiting it.

Next, constitutional issues are raised by aspects of the indoor smoking rules and by limitations on the Supreme Court's jurisdiction over disputes arising from the settlement's state enforcement incentives. However, these are relatively minor points that can be easily remedied and do not in any way go to the heart of the agreement.

^{*} Tyler Professor of Constitutional Law, Harvard Law School. The views expressed here are my own. I am not, of course, testifying on behalf of Harvard Law School, and my testimony does not necessarily reflect the positions of any of the parties to the settlement, although I have represented and continue to represent the States of Florida, Mississippi, and Texas, as well as the Commonwealth of Massachusetts, in state and federal tobacco-related litigation.

Other constitutional questions arise from the provisions regarding the disclosure of industry documents, whereby disputes over privilege are vested in a special Article III court composed of three federal judges appointed by the Judicial Conference. In that provision among others, there are a number of ambiguities in the settlement as now drafted that I think need to be resolved before legislation is adopted.

I.

Although I am here to address constitutional issues rather than matters of policy, let me say a word about the balance between state and federal power and the concern raised by some that the settlement would create another unnecessary federal bureaucracy. I think those concerns are misplaced. At the outset, I should note the proposal was negotiated and approved by a team that included some of the leading state attorneys general in the country. It would be difficult to find a group more keenly interested in federalism, states' rights, and the Tenth Amendment. So the proposal should not be greeted on arrival with suspicion that it's just another big Washington program.

Further, any such suspicion dissipates upon an examination of the proposal itself. The settlement's emphasis is on decentralization, not on Washington-based solutions. Under the settlement, tobacco companies will agree through a binding contractual protocol to pay some \$368.5 billion over a 25-year period, and a particular priority for the proceeds is to fund a variety of state and local anti-smoking campaigns, as well as similar efforts by private non-profit groups. Funds can be used to discourage minors from beginning to use tobacco products and to assist current users in quitting. These are the equivalent of block grants for research, public education programs, smoking cessation programs, and impact grants to communities and individuals.

The agreement further provides strong financial incentives for both states and tobacco companies to reduce smoking among children: if states fail to meet the targeted goals set out in the agreement, they will lose part of their federal health-care funding, and if the industry fails to achieve the steep reductions in underage tobacco use mandated in the agreement, it will suffer "look-back" economic surcharges. Whether the surcharges should be set differently in order to strip the industry of any incentive to induce children to smoke (I am inclined to think they should be set significantly more steeply), the federal government does not dictate how the goals are to be met; rather, the agreement sets a performance standard and leaves it to the states and industry to decide how best to meet it. This is a market-based incentive system, not command-and-control regulation.

Similarly, compensation for injured smokers and other users of tobacco products is achieved not through creation of a new federal benefits bureaucracy but through preservation

of the right to sue in the tort system. Hence, it is those who would have Congress use its taxing and spending powers to establish a federal trust fund to treat ill smokers— through an increased tax on tobacco, for example — who are the ones advocating the creation of a new federal program.

For these reasons, I am surprised to hear criticism of the agreement by supporters of states' rights. And I am surprised to hear libertarians and those who believe in the free enterprise system criticize the settlement as unfair to the tobacco industry. The tobacco companies have voluntarily agreed in the settlement to make monetary payments and to accept restrictions on their business and marketing practices — obligations which are embodied in consensual court decrees and contractual undertakings.¹ It's no small irony that those who usually preach the rationality of private market actors would assume that tobacco companies — which do not suffer from a dearth of expert legal advice — would agree to a settlement against their own best interest if the legal claims against them were frivolous.

Finally, inasmuch as you have sought my views as a constitutional scholar rather than my opinions as to matters of policy, let me stress that I'm not here to evaluate the merits of the objections some have raised regarding how the agreement would affect the FDA's jurisdiction over nicotine or how it would treat public access to industry documents alleged to be privileged and confidential. Concerns with at least some degree of facial validity have been raised regarding these provisions, and I don't mean to dismiss them as lacking in merit — or to argue that no better agreement could be negotiated through the give and take of compromise, or imposed legislatively without the industry's agreement. In assessing the merits of particular policy objections, one must always keep in mind that, as the President and others have said in other contexts, the best should not be made the enemy of the good. But that is not the subject of my testimony: I've been invited to testify on constitutional issues, and that is my sole focus today.

II.

My substantive analysis of the proposal begins with the restrictions on private civil litigation. Title VIII of the proposal would:

¹ There can thus be no argument that the sums in question are being confiscated under compulsion, and no First Amendment claim that the companies are being forced to fund anti-smoking messages against their will. See Glickman v. Wileman Bros. & Elliott, Inc., No. 95-1184, Slip op. at 14 (U.S. S. Ct. June 25, 1997) (mandatory assessment to fund speech would raise First Amendment issue if company had "political or ideological disagreement with the content of the message").

- legislatively settle current Attorney General actions, parens patriae suits, and class actions;

- eliminate punitive damage claims based on conduct occurring before the enactment of the proposed legislation;

- prohibit class actions, joinder, consolidation, and other procedural techniques for aggregating claims, and provide that if any state court attempted such measures, the case would be removable to federal court; and

- impose an annual aggregate cap for judgments and settlements of 33% of the annual industry base payment (which ranges from \$6 billion in the first year of the agreement to \$15 billion in the ninth year and thereafter). If judgments and settlements exceed the cap, the excess does not have to be paid currently but rolls over into the next year. If an individual should recover a judgment of more than \$1 million, the amount over \$1 million would not be paid that year unless all other judgments and settlements could be satisfied within the annual aggregate cap. The excess rolls forward without interest and is paid at the rate of \$1 million per year, until the first year that the annual aggregate cap is not exceeded, at which time the remainder of the judgment is paid in full. Paid judgments and settlements would give rise to an 80-cents-on-the-dollar credit against the industry's annual payment and would accordingly reduce that payment by such an amount.

Further, Title III of the agreement requires that non-participating companies — who will not have made consensual payments to settle actions for health care costs or class actions by individual smokers — put substantial sums in escrow to ensure that potential future liabilities can be satisfied.

A number of objections have been raised against these provisions.

1. The restrictions on the recovery of compensatory damages in private or state-initiated civil actions have been attacked as violations of due process, as takings of private property for public use without just compensation, as violations of the right to jury trial, and on similar grounds. The restrictions have been defended on the ground that, without congressional intervention, a proliferation of claims could lead to a chaotic process whereby early-to-sue plaintiffs receive full compensation, while smokers whose injuries develop further in the future might recover only a fraction of their claims (or even nothing at all) if litigation interfered with the ability of tobacco companies to satisfy judgments against them in timely fashion.

Under existing Supreme Court precedent, I believe that the proposed restrictions on

private civil actions fall well within Congress' powers. The Supreme Court has explained that "our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' The 'Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object,' despite the fact that 'otherwise settled expectations' may be upset thereby." Duke Power Co. v. Carolina Envt'l Study Group, Inc., 438 U.S. 59, 88 n.32 (1978) (citations omitted). In Duke Power, the Court upheld the Price Anderson Act's \$560 million cap on total compensatory damages recoverable under state-law causes of action from any single nuclear power plant accident, observing that "statutes limiting liability are relatively commonplace and have consistently been enforced by the courts." *Id.* For example, a legislature may, consistent with due process, create new substantive immunities and defenses that retroactively restrict tort liability. Logan v. Zimmerman Brush Co., 455 U.S. 422, 432 (1982); Martinez v. California, 444 U.S. 277, 281-83 (1980). The legislature may bar an automobile passenger from suing the driver for negligently caused injuries. Silver v. Silver, 280 U.S. 117, 122 (1929). Indeed, when federal statutes and regulations preempt state law, they frequently displace state common-law causes of action. *See, e.g., CSX Transportation, Inc. v. Easterwood*, 507 U.S. 568 (1993) (speed limits imposed by federal regulation on freight and passenger trains preempt common-law negligence claims). In short, "a legislature is free to make statutory changes in the common law rules of liability without running afoul of the Fifth or Fourteenth Amendment protections of property. The reason, the Supreme Court has explained, is that no one is considered to have a property interest in a rule of law." Branch v. United States, 69 F.3d 1571, 1577-78 (Fed. Cir. 1995), *cert. denied*, 117 S. Ct. 55 (1996).

I do not mean to suggest that Congress' power to restrict state-law tort actions is unlimited. In the Duke Power case, for example, the Supreme Court recognized that statutory limits on tort damages implicate central common-law rights and are subject to constraints under the Due Process Clause. 438 U.S. at 86-87, 91-93. Although the Court did not need in that case to define the outer boundaries of Congress' power, Justice Marshall later remarked, "[O]ur cases demonstrate that there are limits on governmental authority to abolish 'core' common-law rights." PruneYard Shopping Center v. Robins, 447 U.S. 74, 94 (1980) (Marshall, J., concurring). In New York Central R.R. Co. v. White, 243 U.S. 188 (1917), the Court suggested that due process might preclude a state from abolishing common-law rights of action "without providing a reasonably just substitute." *Id.* at 201.

Whatever the limits of Congress' power to regulate state-law tort claims may be, I do not believe that the global tobacco settlement approaches those limits. Notably, the proposed legislation does not abolish private state-law claims against tobacco companies. It does not even cap such claims, although — depending on the volume and size of judgments — it may have the effect of postponing the ultimate payment of some of those claims and discounting

their magnitude by not providing for payment of interest.² It will have that effect, however, only if the volume and size of judgments and settlements approach levels that Congress could reasonably conclude would begin to threaten the ability of tobacco companies to pay all such claims in an orderly fashion. The global settlement thus ensures that all those injured by tobacco will have the opportunity to have their day in court to seek appropriate compensation. There is nothing in existing Supreme Court precedent suggesting that such a rationalization of the litigation process, in order to guarantee that future plaintiffs will have access to justice, is beyond Congress' powers.

2. The provisions have been attacked as violating federalism principles, or separation of powers, or both — on the ground that they legislatively settle pending litigation, much of it brought by the states. But Congress may change applicable law in a way that terminates or settles pending civil actions, whether brought by or on behalf of individuals or by Attorneys General on behalf of their states. See, e.g., Robertson v. Seattle Audubon Society, 503 U.S. 429, 441 (1992). Not until a lawsuit proceeds to final judgment does a vested right attach that cannot be upset through congressional action. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995); Pennsylvania v. Wheeling & Belmont Bridge Co., 18 How. 421, 431

² Existing Supreme Court precedent does not provide clear support for the proposition that a tort claimant has a constitutional right to interest on the portion of a judgment which is rolled over into subsequent years. In Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980), the Supreme Court unanimously held that, under the Fifth and Fourteenth Amendments, a county could not confiscate the interest accruing on an interpleader fund deposited in the registry of the county court. "The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property." Id. at 164. However, Webb's Fabulous Pharmacies did not hold that, where interest is not in fact accumulated in a government fund, a tort plaintiff has a federal constitutional right to receive such interest from a defendant. Indeed, the Supreme Court has held that Congress was free to provide in 28 U.S.C. § 1961 that post-judgment interest in ordinary civil cases should be computed from the date when a court enters final judgment rather than the (potentially much earlier) date on which a jury returns a verdict for the prevailing party, on the ground that "[e]ven though denial of interest from verdict to judgment may result in the plaintiff bearing the burden of the loss of the use of the money from verdict to judgment, the allocation of the costs accruing from litigation is a matter for the legislature, not the courts." Kaiser Aluminum & Chemical Co. v. Bonjorno, 494 U.S. 827, 835 (1990). The Supreme Court may shed additional light on these issues in Phillips v. Washington Legal Foundation, No. 96-1578 (cert. granted June 27, 1997), which presents the question whether a state may take and use for charitable purposes interest on the money a lawyer holds for a client in a trust account.

(1856).

3. The proposed legislation has been attacked as a violation of the Seventh Amendment's guarantee of trial by jury. I do not believe this criticism is well taken. The Seventh Amendment governs proceedings in federal court, but not in state court,³ where many tobacco suits are brought. Even in federal court, the measure would not prevent juries from making liability determinations or assessing compensatory damages in cases involving tobacco-related illnesses. It would not abrogate a jury's verdict by capping damages at a preset, one-size-fits-all amount. Rather, the proposal would merely regulate the manner in which judgments are satisfied and would potentially affect the rate at which some of them are paid. The Supreme Court has explained that the Seventh Amendment secures only "the 'substance of the common-law right of trial by jury.'" Tull v. United States, 481 U.S. 412, 426 (1987) (quoting Colgrove v. Battin, 413 U.S. 149, 156 (1973)). "Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature." Id. at 426 (citations omitted). Under this standard, I do not believe that the proposed legislation interferes with the Seventh Amendment right to jury trial.

4. Some have suggested that the proposed legislation offends norms of equality protected by the Fifth Amendment's Due Process Clause because it is industry-specific rather than universally applicable. But it is entirely permissible for Congress to tailor its legislative response to a particular industry which raises special liability issues — as the tobacco industry plainly does.⁴ "A legislature may hit at an abuse which it has found, even though it has failed to strike at another." United States v. Carolene Products Co., 304 U.S. 144, 151 (1938). "Evils in the same field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955) (citations omitted); see also Cleland v. National College of Business, 435 U.S. 213, 221 (1978) (*per curiam*) ("If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'") (citation omitted).

³ See, e.g., Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2222 & n.14 (1996); Walker v. Sauvinet, 92 U.S. 90, 92 (1876).

⁴ This legislation is not comparable to a statute singling out several companies by name for special punitive restrictions — a practice that would raise grave separation of powers and Bill of Attainder Clause problems.

In fact, Congress has frequently targeted statutes at particular liability issues in specific industries, rather than adopting universally applicable laws. Prime examples are:

- the Price Anderson Act (which caps damages in any single nuclear accident to \$560 million);

- 42 U.S.C. § 2210(s) (which limits the punitive damages liability of nuclear facilities licensees and contractors);

- the Federal Credit Union Act, 12 U.S.C. § 1787(c)(3)(A)-(B) (which limits damages for lost profits, lost opportunity, or for pain and suffering stemming from the liquidation of federal credit unions);

- the Black Lung benefits program, 30 U.S.C. § 901, et seq. (which displaces state workers' compensation laws if they are found inadequate by the Secretary of Labor and provides more generous federal benefits), upheld in Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) ;

- the National Swine Flu Immunization Program, Pub. L. No. 94-380, § 2, 90 Stat. 1113 (1976) (which precludes private liability for adverse reactions to the Swine Flu vaccine that are not the result of manufacturer negligence or breach of contract and instead substitutes a special remedy against the federal government);

- the National Vaccine Program, 42 U.S.C. §§ 300aa-1 to -33 (which provides direct compensation to individuals who suffer injuries as the result of mandatory childhood vaccination and requires a waiver of claims against vaccine manufacturers);

- the Federal Employers Liability Act (FELA), 45 U.S.C. §§ 51-60 (which provides a negligence-based, federal cause of action for interstate railroad employees injured in the course of employment and preempts state common-law causes of action); and

- the Jones Act, 46 U.S.C.App. § 688 (which displaces state law and gives merchant seamen essentially the same benefits and limitations as FELA provides for interstate railway employees).

Thus, I do not think there is any constitutional issue raised by limiting the proposed legislation to the tobacco industry.

5. Some have pointed to the Supreme Court's recent decision in Amchem Products, Inc. v. Windsor, No. 96-270 (U.S. S. Ct. June 25, 1997), as a sign that there are constitutional

difficulties with the proposed legislation. Amchem — which I should disclose I argued in the court of appeals and Supreme Court on behalf of the objectors to the settlement, who ultimately prevailed — held that a particular rule of federal civil procedure (Federal Rule of Civil Procedure 23(b)(3)) does not permit the certification of a class action to achieve the global settlement of current and future asbestos-related claims against a group of asbestos manufacturers. That decision supports the propriety of what Congress is being asked to do here. Amchem rested in large part on the fundamental distinction between courts and legislatures. The Court acknowledged that “[t]he argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution.” Slip op. at 35 (emphasis added). The Court therefore ruled that an unelected Art. III federal district judge, bound by the Federal Rules of Civil Procedure, could not compel a putative “class” of millions of people exposed to asbestos, and not capable of being meaningfully represented by the few parties who brought the case to court, to proceed through an administrative compensation scheme negotiated by those parties and the defendants and approved by the court. The Supreme Court’s opinion is peppered with observations that this was a legislative, not a judicial, solution. See Slip op. at 2 (noting that the Judicial Conference Ad Hoc Committee on Asbestos Litigation recommended “federal legislation creating a national asbestos dispute-resolution scheme”); id. at 3 (“the Judicial Conference of the United States urged Congress to act” because “the federal courts . . . lack[] authority to replace state tort systems with a national toxic tort compensation scheme”).

In the national legislature, all citizens are represented by virtue of our democratic system, and the interests of even future Americans are affected every day by decisions Congress makes regarding the national debt, federal borrowing, and myriad fiscal priorities. Conflicts of interest among different groups in the legislative process do not provide a basis for attacking statutes. “General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.” Bi-Metallic Investment Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915).

In contrast, it has long been axiomatic that, in court, “parties who choose to resolve litigation through settlement may not dispose of the claims of a third party.” Firefighters v. Cleveland, 478 U.S. 501, 529 (1986). The class action device is a limited exception to this principle — but only where class “representatives” adequately represent the interests of all absent class members, and where all the other requirements of the Federal Rules of Civil Procedure are satisfied. In Amchem, the Court found that “[t]he settling parties . . . achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected.” Slip op. at 33. In short, the Amchem Court

recognized that, while Congress has adopted a Black Lung program, the courts may not on their own initiative decree an analogous "White Lung" program for asbestos victims and their families. Properly understood, then, the decision in Amchem supports rather than undermines the proposal before you today.

6. Nor is the elimination of punitive damages for past conduct constitutionally problematic. Private plaintiffs have no constitutionally cognizable entitlement to punitive damages. Punitive damages "are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). Congress may reasonably decide to extract a lump-sum payment for past conduct in lieu of punitive damages recoverable in individual actions.

Indeed, in several areas of the law punitive damages are not available at all. The Supreme Court has held that punitive damages are not recoverable against municipalities, City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981), or against unions that breach their duty of fair representation. International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979). Congress has eliminated punitive damages in several categories of cases involving nuclear power plants. 42 U.S.C. § 2210(s). Members of the Court have repeatedly urged deference to legislative measures that might be adopted either by Congress or by the states to regulate punitive damages. E.g., BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1603 (1996); id. at 1614 (Justice Ginsburg, joined by Chief Justice Rehnquist, dissenting); Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 39 (1991) (Justice Scalia, concurring in the judgment); id. at 57 (Justice O'Connor, dissenting).

7. The prohibitions on class actions and consolidation of actions are not constitutionally problematic as applied to federal courts. Ever since the Judiciary Act of 1789, Congress has regulated the procedures used by the lower federal courts.

However, "[t]he general rule 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes state courts as it finds them.'" Howlett v. Rose, 496 U.S. 356, 372 (1990) (quoting Henry Hart, "The Relations Between State and Federal Law," 54 Colum. L. Rev. 489, 508 (1954)). The states "thus have great latitude to establish the structure and jurisdiction of their own courts." Id. For Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims — to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits — would raise serious questions under the Tenth Amendment and principles of federalism.

Perhaps because its proponents have recognized the constitutional difficulties raised

by direct congressional regulation of state courts, the proposal does not purport to prohibit state courts from consolidating cigarette cases or trying them in class form. Instead, the proposal makes any case removable to federal court if a state court attempts such a procedural move. Although Congress may as a general proposition regulate the jurisdiction of the federal courts, it may not by statute enlarge their Art. III jurisdiction. That, of course, was the holding of the landmark case of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Accordingly, I do not think that the proposed statute could be applied to permit the removal of an action where federal jurisdiction were otherwise lacking.

8. I also want to address the provision in Title III for non-participating companies. Because those companies will not have made consensual payments to settle pending actions against them and thus will not receive the benefits of the legislated limits on future liability, the agreement provides that "it is vital that the claimants be ensured that funds will be available to satisfy any judgments that may be obtained." The proposed legislation would accordingly require non-participating companies to escrow substantial sums, which would be earmarked for potential liability payments, and the residual of which would not be returned to the companies until 35 years later, although interest would be paid.

These provisions are entirely unobjectionable from a constitutional perspective. Congress is entitled to ensure that non-participating companies will not become judgment-proof in light of the significant liabilities they face. The proposed legislation would leave the adjudication of those liabilities to the tort system and — after the liabilities are satisfied — would return any residual to the companies with interest. To be sure, the 35-year period is a long one, but it is reasonable in light of the latency period for tobacco-related diseases.

III.

Let me turn next to the rather sweeping restrictions on advertising contained in the proposal, which I believe raise very serious First Amendment problems. As in the FDA rule, the statute would:

- prohibit the use of non-tobacco brand names for tobacco products, except those in existence as of Jan. 1, 1995;
- restrict tobacco advertising to FDA-specified media;
- restrict tobacco advertising (except for that in adult facilities and adult publications) to black text on a white background;
- ban all non-tobacco merchandise carrying names and logos;

- ban sponsorships of concerts and sporting events.

The legislation would also:

- ban the use of human images and cartoon characters in all tobacco advertising;
- ban all outdoor tobacco product advertising;
- prohibit tobacco advertising on the Internet unless designed to be inaccessible to or from the United States;
- ban payments for tobacco product placements in movies, TV shows, and video games; and
- severely restrict point-of-sale advertising.

These restrictions are extremely problematic under the First Amendment. A regulation of commercial speech is invalid unless the government can show that it “directly advances” a “substantial interest” and “is no more extensive than necessary.” 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1509 (1996) (plurality opinion). In recent years, the Supreme Court has repeatedly struck down restrictions on commercial speech under this standard. See Liquormart, 116 S. Ct. at 1509-10; *id.* at 1521 (O’Connor, J., concurring); Rubin v. Coors Brewing Co., 115 S. Ct. 1585, 1592-93 (1995); Ibanez v. Florida Dept. of Business & Professional Reg., 512 U.S. 136 (1994); Edenfield v. Fane, 507 U.S. 761, 767-68 (1993).

Given the extensive regulation of tobacco manufacturing (for example, the creation of manufacturing standards, the regulation of cigarette ingredients, and so on) elsewhere in the proposed legislation, and the mandates for new and improved warnings, it would be difficult to defend the sweeping restrictions on advertising as being narrowly tailored to an important governmental interest. The paternalistic view that tobacco advertising must be restricted because adult consumers might find it persuasive is antithetical to the assumptions on which the First Amendment is based.

Protecting children is plainly an important and legitimate governmental purpose. But in the recent Communications Decency Act case, the Supreme Court reaffirmed the basic principle that speech to adults may not be reduced to that appropriate for children. Reno v. ACLU, No. 96-511, slip op. at 29 (June 26, 1997) (“It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults. . . . [T]he Government may not ‘reduc[e] the adult population . . . to . . . only what is fit for

children.'") (citation omitted); see also Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 128 (1989) (ban on "dial-a-porn" messages unconstitutional); Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 73 (1983) (ban on mailing of unsolicited advertisement for contraceptives unconstitutional); Butler v. Michigan, 352 U.S. 380, 383 (1957) (ban on sale to adults of books deemed harmful to children unconstitutional).

The First Amendment objection here is even stronger than it was in the Internet indecency case and the other decisions I have cited. For what is harmful about tobacco is obviously not the advertising itself (the speech) but the tobacco's use. In contrast, in the Internet case, the government's interest was in preventing children from being exposed to indecent expression on the computer; the speech itself was alleged to cause harm. If tobacco sales to minors, and advertising aimed specifically at minors, may be directly regulated — as they obviously may be — a court is not likely to uphold draconian limits on what adults may hear and see.

I understand that the proponents of the settlement appreciate these First Amendment difficulties and are prepared to rely on consent decrees and binding contractual protocols with the tobacco industry (mentioned in Title III of the settlement) to enforce the restrictions on advertising. By way of analogy, Judge Harold Greene relied on the voluntary nature of a consent decree to hold that the Bell Companies had waived their rights to challenge restrictions on their speech imposed by the AT&T divestiture decree. See United States v. Western Electric Co., 673 F. Supp. 525, 586 n.273 (D.D.C. 1987).

Of course, the First Amendment also protects an audience's right to receive information. For example, in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976), a consumer group was permitted to challenge state-imposed restrictions on the speech of pharmacists. And a consent decree may not adjudicate the rights of nonparty listeners who might wish to receive commercial speech from tobacco companies. Nonetheless, it appears to me — and I believe that reviewing courts would agree — that third parties no longer enjoy such rights to receive information when the would-be speaker voluntarily agrees to silence itself. Cases like Snepp v. United States, 444 U.S. 507 (1980), which upheld a secrecy agreement under which a former CIA employee was prohibited from publishing any information about the agency without specific government approval, make sense only if the right to receive information presumes the existence of a willing speaker.

Assuming that the First Amendment issue can thus be surmounted, the only problems confronting the consent decree solution are largely practical ones. Title III of the agreement, recognizing that not all fifty states have brought suit against the tobacco companies, and so are not in a position to enter into consent decrees with the companies, provides that the

industry will also enter into a binding national tobacco contractual protocol. Under the Tenth Amendment, however, Congress cannot directly require states to enter into consent decrees or other forms of agreements. Printz v. United States, No. 95-1478 (June 27, 1997) (striking down provision of Brady Act requiring local sheriffs to conduct background checks); New York v. United States, 505 U.S. 144 (1992) (invalidating statutory provision requiring states to take title of nuclear waste). Moreover, new tobacco companies might conceivably come into existence which would not be party to contractual protocols or consent decrees. New companies would presumably be treated as “non-participating” companies under Title III and would not be subject to the advertising restrictions in the first instance, although Title III provides powerful incentives to companies to enter into consent decrees and contractual undertakings.

The waters are therefore uncharted, but it appears possible to defend the severe advertising restrictions by reference to the consent decrees and contractual protocols. It seems that most if not all of the hurdles can be overcome so long as the states and the industry are both willing to see to it that the advertising restrictions are implemented.

IV.

Finally, a number of other provisions of the settlement raise constitutional issues, most of which should be fairly easy to remedy but all of which merit at least some attention.

Title II requires states to undertake significant enforcement steps designed to reduce youth smoking and access to cigarettes by children. If a state does not maintain the specified level of enforcement effort, the FDA may withhold a significant portion (up to 20%) of the federal health care program funds otherwise payable to the state. In the event of a dispute between the state and the FDA, the state may challenge the decision in the D.C. Circuit, with no review permitted by the U.S. Supreme Court.

The funding provision itself probably does not raise constitutional difficulties. Although state obligations to institute youth anti-smoking programs are phrased as mandatory — in apparent violation of Printz v. United States and New York v. United States, 505 U.S. 144 (1992) — the overall structure of Title II reveals that the “obligations” are really only conditions on federal funding. Given the maxim that statutes should be interpreted to avoid constitutional difficulties, it seems likely that the legislation would be construed in this way. Under South Dakota v. Doje, 483 U.S. 203 (1987) (highway funds may be conditioned on drinking age laws), the condition imposed appears to be a reasonable one because of the link between smoking and health care costs.

The prohibition on Supreme Court review is more problematic in light of Art. III, §2,

cl. 2, which provides that the Supreme Court shall have original jurisdiction in all cases in which a state is a party. Congress' power to regulate the Supreme Court's appellate jurisdiction is expressly made inapplicable to this aspect of the Court's original jurisdiction. Ever since the Judiciary Act of 1789, Congress has assumed that the constitutional grant of original jurisdiction to the Supreme Court could be made concurrent with the jurisdiction of the lower federal courts. Thus, today 28 U.S.C. § 1251(a) prescribes exclusive Supreme Court jurisdiction only over controversies between states; all other jurisdiction (including controversies between the United States and a state) is made concurrent by § 1251(b). See, e.g., Börs v. Preston, 111 U.S. 252 (1884) (upholding concurrent jurisdiction conferred by statute); Ames v. Kansas, 111 U.S. 449 (1884) (same).

Nonetheless, the proposed legislation is remarkable in that it appears both to eliminate the Supreme Court's original jurisdiction in this area and to prevent the Supreme Court from exercising review over the D.C. Circuit's decision. In California v. Arizona, 440 U.S. 59 (1979), the Court concluded that it was "extremely doubtful" that Congress could limit the jurisdictional grant in this manner. Id. at 65-66. I recommend making the D.C. Circuit's jurisdiction concurrent, not exclusive, and including a provision for Supreme Court review.

In addition, Title IV restricts indoor smoking in "public facilities," which are defined to mean any buildings regularly entered by 10 or more individuals at least one day per week. Many private homes would meet this standard, as would churches, schools, libraries, and buildings of every conceivable variety.

The expansive definition of "public facilities" raises grave difficulties under Congress' Commerce Clause power and under the Tenth Amendment, in light of the Supreme Court's decision in United States v. Lopez, 514 U.S. 549 (1995), which held that Congress lacked the power to criminalize the possession of guns in school zones. Title IV is probably not invalid on its face, for it has many permissible applications. But it would likely be held unconstitutional in most of its applications unless the definition of "public facilities" were considerably narrowed.

The final portion of the agreement I'd like to mention is the disclosure provision in Appendix VIII for tobacco industry documents and health research. Whatever view one might take on the merits of how the agreement strikes the substantive balance between the public's need for such information and the industry's interest in withholding it, the procedural mechanism for resolving disputes involving privileges and protections — including attorney-client and attorney work-product privileges and trade secret protections — requires further attention.

As I read Appendix VIII, the proposed legislation would establish a panel of three

federal Article III judges, appointed by the Judicial Conference, to hear and decide all future disputes over claims of privilege or trade secrets. The judges would have exclusive jurisdiction over all such disputes, whether disclosure is sought by states or the federal government, public and private litigants, health officials, or members of the public. The judges would decide the disputes not by reference to existing state or federal law but according to the ABA/ALI Model Rules, the Uniform Trade Secrets Act, and what are described as “principles of federal law with respect to privilege.” The panel’s decisions are said to be “binding upon all federal and state courts in all litigation in the United States.”

This novel procedure raises a number of constitutional questions that warrant clarification or revision of the proposed legislation:

- Under Article III, principles of judicial independence, and such decisions as United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1872) (Congress may not “prescribe rules of decision to the Judicial Department of the government in cases pending before it”), and Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) (Congress may not require federal courts to reopen final judgments), Congress cannot compel federal courts to apply a rule of decision in adjudicating cases that is not law, in the sense of being a publicly promulgated binding norm. The ABA/ALI Model Rules and the Uniform Trade Secrets Act are not themselves “law.” They are proposals drawn up by scholars and experts. Unless Congress means to adopt them as federal law via the enactment of the proposal legislation, Congress cannot simply order the federal courts to follow them in some class of disputes.

- Under Art. III, the federal courts can decide only actual cases or controversies. They cannot render advisory opinions or decrees to govern future disputes. Yet Appendix VIII seems to envision the special court as a sort of administrative forum to which states, the federal government, public health officials, and interested citizens could apply in order to obtain an authoritative legal opinion on whether specified industry documents are subject to disclosure. Art. III requires that such determinations occur in the context of concrete cases and controversies.

- Appendix VIII does not require that private citizens applying to the special court be able to identify any concrete “injury in fact” they have suffered. But such injury is a constitutional prerequisite for invoking the federal judicial process under Art. III. In Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), the Supreme Court indicated that the “injury in fact” requirement limits congressional power to confer standing by statute where none would otherwise exist.

- Some have interpreted the provision in Appendix VIII that the determinations of the panel be “binding upon all federal and state courts in all litigation in the United States” as

meaning that, once the federal court determines the privileged or non-privileged status of a specific document in a particular case, that determination will automatically bind all litigants in any court. I think that such a construction is in error. The "general consensus 'in Anglo-American jurisprudence'" is that a person "is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." Richards v. Jefferson County, 116 S. Ct. 1761, 1765-66 (1996) (citations omitted). Every person would be entitled to his or her day in court to litigate the status of a particular document, although the court would be free to accord stare decisis effect to its prior judgments. Nonetheless, it may be wise to make this clear in the legislation itself.

* * *

I want to thank the Committee again for inviting me to appear. I also want to express my appreciation to Larry Block, Paul Joklik, and the other members of the staff for their assistance, and to my colleague Jonathan Massey, adjunct professor at Georgetown University Law Center, for his help in preparing this testimony.

I hope my comments have been helpful, and I stand ready to answer any questions that the Committee might have.

STATEMENT

of

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Cato Institute
Washington, D.C.

before the

Committee on the Judiciary
United States Senate

July 16, 1997

Global Tobacco Settlement

Mr. Chairman, distinguished members of the Committee:

My name is Robert A. Levy. I am a senior fellow in constitutional studies at the Cato Institute.¹ I would like to thank the committee for inviting me to testify on selected aspects of the global tobacco settlement that has been much in the national news of late. Pursuant to a discussion with your staff, Mr. Chairman, I am submitting with this statement a more extended Cato Policy Analysis entitled "Tobacco Medicaid Litigation: Snuffing Out the Rule of Law," which I request be inserted into the record.

The "Proposed Resolution" negotiated by state attorneys general, plaintiffs' lawyers, public health advocates, and the tobacco industry is a shameful document, extorted by public officials who have perverted the rule of law to tap the deep pockets of a feckless and friendless industry. While the agreement may serve the political interests of 39 attorneys general and pad the wallets of private contingency fee lawyers, it is destructive of the health of a free nation.

First, because of a bargain to which they were not even a party, future claimants may not litigate as a class, sue for punitive damages covering past acts, or collect compensatory damages in excess of an agreed upon cap -- they lose common law rights they have long enjoyed under the Seventh Amendment. State attorneys general have no authority under our system of government to extinguish the rights of third parties through agreements with second parties. Second, the U.S. Congress, if it enacts legislation codifying the settlement, will be interceding in product liability cases that have long been the prerogative of state and local jurisdictions, thus exercising power beyond that enumerated in the Constitution and flouting our federal system of dual sovereignty. And third, states that have manipulated the law in a scheme to fund their Medicaid programs without raising taxes will be rewarded for their misbehavior.

¹ A biographical sketch is attached.

that the tobacco companies have broken the law. To hold a single industry financially liable because some families are unable or unwilling to insure their offspring is an unconstitutional bill of attainder -- an imposition of punishment without notice, without a trial, and without evidence. It is no more than a bald transfer of wealth from a disfavored to a favored group.

There is neither legal nor moral justification for any payment whatsoever to reimburse state Medicaid programs. First, in order to fatten their own coffers, the states have simply expunged the requirement that they prove causation. Instead of having to show that a Medicaid recipient smoked and his smoking was the cause of his illness, the states need only produce generalized statistics indicating that certain diseases are more prevalent among smokers than nonsmokers.³ Second, authoritative studies have concluded that excise taxes collected on cigarette sales already exceed the social costs attributable to smoking.⁴

The Medicaid lawsuits that precipitated this settlement were created out of whole cloth by states filling the dual and conflicting roles of lawmaker and plaintiff. Florida set the pattern by enacting a new statute, allegedly resting on principles of equity, that strips tobacco companies of their traditional rights and puts in their place a shockingly simple rule of law: The state needs money; the industry has money; so the industry shall give and the state shall take. Under the new regimen, the state can sue tobacco companies directly, without stepping into the injured party's shoes. By that sleight-of-hand, Florida can collect from the industry even when the illness is the smoker's own fault; the statute abrogates all of the industry's affirmative defenses, including assumption of risk. If a smoker happens to be a Medicaid recipient, individual responsibility is out the window. The same tobacco company selling the same product to the same person resulting in the same injury is, magically, liable not to the smoker but to the state. Liability thus hinges on a smoker's Medicaid status, a happenstance totally unrelated to any misdeeds by the industry.

A handful of private attorneys -- later to be hired at contingency fees ranging from 10 to 30 percent of the recovered damages -- were responsible for the novel legal theorizing that became the Florida statute and the model for the other states.⁵ Those members of the plaintiffs' bar are now hopelessly conflicted, serving as government sub-contractors with financial incentives geared to the magnitude of their conquest. They are driven by the contemplation of a huge payoff while, at the same time, they fill a quasi-prosecutorial role in which their overriding objective is supposedly to seek justice.

³ Fla. Stat. Ann. § 409.910(9)-(9)(a) (1995) ("In any action brought under this subsection, the evidence code shall be liberally construed regarding the issue[] of causation [which] may be proven by use of statistical analysis").

⁴ See, e.g., William G. Manning, et al., "The Taxes of Sin: Do Smokers and Drinkers Pay their Way?" Journal of the American Medical Association, March 17, 1989; Jane G. Gravelle and Dennis Zimmerman, Cigarette Taxes to Fund Health Care Reform: An Economic Analysis (Washington, D.C.: Congressional Research Service, 1994); Viscusi, *supra*.

⁵ See Michael Orey, "Fanning the Flames," American Lawyer, April 1996.

Health.

Under the "Proposed Resolution," the FDA is authorized to regulate nicotine as a drug and, after the year 2009, the agency can ban nicotine altogether. Conspicuous warnings on each pack will advise smokers that cigarettes are addictive, cause cancer, and can kill. Tobacco companies will have to disclose harmful ingredients and research to the FDA, and smoking will be prohibited in most public places and in the workplace.

Those provisions could be just the tip of the iceberg, of course, with tobacco merely the first and easiest victim. Right around the corner could be similar restrictions on alcohol, coffee, chocolate, diet drinks, dairy products, red meat, fast food, sugar, sporting equipment, cars -- you name it. Proposals from supposedly intelligent people in positions of responsibility include grading foods for their fat content, taxing them proportionately, and using the tax revenues for public bike paths and exercise trails.¹³ When decisions about the products we choose to consume are entrusted to an unelected and unaccountable bureaucracy, the loss of personal freedom is inescapable. To those who care about such things, that situation is intolerable.

Indeed, allowing Congress to make product selections on our behalf is not much better than assigning those matters to an administrative agency. Arguably, we might ask the government to serve as a gatherer of, and repository for, the data that are necessary to facilitate voluntary and informed consumer transactions (although there is no apparent reason why the private sector couldn't better perform that function). But once we relegate such choices to the state, we should not be surprised by pernicious side effects, including a flourishing black market, rampant and organized crime, and a backlash among rebellious teens. A war on tobacco will produce no better results than our endless war on drugs, or Prohibition before that. Instead of forays into South American countries to destroy their coca fields, we could find ourselves combing the back roads of North Carolina hunting down tobacco farmers.

Improved health for our children is an objective that no reasonable person could disapprove. But make no mistake, dollars and cents -- not health issues -- are the driving force behind the tobacco settlement. When their own money is on the line, both federal and state governments opt for financial health over smokers' health. Facing illness claims by military personnel to whom the U.S. government had dispensed cigarettes free of charge, Veterans Affairs secretary Jesse Brown told the former soldiers to pay their own freight for having chosen to smoke.¹⁴ When sued by a prisoner who was denied a nicotine patch for the habit he developed in a Florida jail, the state pleaded that it was no more responsible for his purchase of cigarettes than for his "buying a candy bar at the canteen."¹⁵ If that principle renders the government immune from liability, it renders private companies immune as well.

¹³ E. Katherine Battle and Kelly D. Brownell, Confronting a Rising Tide of Eating Disorders and Obesity: Treatment vs. Prevention and Policy, 21 Addictive Behaviors 755-65 (1996). Mr. Brownell is director of the Yale Center for Eating and Weight Disorders.

¹⁴ Bill McAllister, "Smoking by GIs Raises Liability Issue at the VA," Washington Post, April 24, 1997, p. A1.

¹⁵ Waugh v. Singletary, Case No. 95-CVC-J-20 (D. Fla., July 11, 1995).

Reynolds are held accountable. Given the types of expressive communication that receive undiluted First Amendment aegis despite their minimal social utility, the restrictions on tobacco advertising in general and Joe Camel in particular are quite simply unfathomable.

To be sure, critics of the industry point to the impact of tobacco ads on credulous, uninformed, and innocent teenagers. But the debate is not whether teens smoke; they do. It's not whether smoking is bad for them; it is. The real question is whether there is a link between tobacco advertising and the decision by children to begin smoking or to increase their consumption. There is no evidence to establish that link. The primary purpose of cigarette advertising is to persuade smokers of one brand to switch to another.²⁰ Six European countries that have banned all tobacco ads have since seen overall consumption *increase* -- probably because health risks are no longer documented in the banned ads.²¹ In the United States, every relaxation of the restrictions on promoting health-related product improvements has generated a blizzard of ads, "healthy" competition for market share, and significant declines in tar and nicotine content.²² Not surprisingly, whenever health claims are outlawed, the industry promotes imagery and endorsements, the very ads that anti-smoking zealots decry. We need more health-based ads, not fewer.

Even if we accept the argument that the tobacco companies have targeted underage prospects, they surely have not accomplished their objective. Over the 1985-95 decade, during the heyday of Joe Camel, the percentage of kids aged 12-17 who smoke dropped from 29 percent to 20 percent.²³ Taking a longer term view, the average age of first-time regular cigarette users has neither advanced nor declined from 1962 through the latest 1994 data.²⁴ And inner-city teens report that they are cynical about, even resentful of, cigarette ads; the percentage of minority youngsters who regularly smoke has plummeted over the past 10 years.²⁵ Although some ads may have succeeded in gaining brand share, they have been singularly unsuccessful in expanding the overall market, especially among children.

²⁰ See, e.g., John E. Calfee, "The Ghost of Cigarette Advertising Past," Regulation, November/December 1986, pp. 35-45.

²¹ Michael J. Stewart, "The Effect of Advertising Bans on Tobacco Consumption in OECD Countries," International Journal of Advertising 12 (1993): 155-80.

²² Calfee, supra.

²³ Substance Abuse and Mental Health Services Administration, Preliminary Estimates from the 1995 National Household Survey on Drug Abuse (Washington, D.C.: U.S. Department of Health and Human Services, 1996), p. 68.

²⁴ Ibid. at 99.

²⁵ See Amy Goldstein, "Experts Uncertain Why Black Youths Shunning Cigarettes," The Detroit News, August 21, 1995.

actions will be of no consequence. In Metro-North,²⁸ the Court held that a plaintiff who had been exposed to asbestos, but had contracted no disease, could not collect for "negligent infliction of emotional distress" or "medical monitoring" under the Federal Employers' Liability Act. Many tobacco class actions have demanded medical monitoring expenses even though plaintiffs had no physical illness and no symptoms; their only alleged injury was an addiction to tobacco.

In a second asbestos case, known as Georgine,²⁹ the Court concluded that a common interest in settling claims is not enough to certify a class if the named plaintiffs could not fairly represent other class members at trial. While courts can consider a settlement as one factor in deciding whether to certify, the requirements of Rule 23³⁰ must be satisfied. It would appear, therefore, that the prospects for a court-approved class tobacco settlement are now less likely. Any such settlement would have the same certification problems that the Court criticized in Georgine, but on a far broader scale. The asbestos settlement involved 250,000 plaintiffs nationwide; a statewide tobacco class would probably include millions of claimants with diverse illnesses, smoking habits, and awareness of the risks -- not to mention a greater variation in employment, weight, age, diet, other lifestyle choices, family history, education, wealth, and exposure to other causal agents. In short, plaintiffs' lawyers will likely have a much tougher time obtaining class certification to litigate diverse claims that should probably be litigated separately.

Of course, it is one thing to require attorneys to be more careful in structuring a class of plaintiffs; it is quite another to prohibit class actions altogether. The cumulative effect of foreclosing class actions, rejecting punitive damages, and capping compensatory damages could so exhaust an attorney's incentive to litigate that claimants with legitimate grievances are denied their day in court. That is sufficient reason to oppose partially immunizing the industry from litigation. The proper resolution of the tobacco problem is for the industry, smokers, and their insurance companies to fight it out through the tort system. State attorneys general may join the fray, provided that state Medicaid programs, like any other insurer, bear the same burden of proof that the injured party would have borne, and be subject to the same defenses that the tobacco companies could have asserted against a smoker.³¹

²⁸ Metro North Commuter Railroad Co. v. Buckley, No. 96-320, June 23, 1997.

²⁹ Amchem Products, Inc. v. Windsor, No. 96-270, June 25, 1997.

³⁰ Fed. R. Civ. P. 23, which establishes the criteria for class certification.

³¹ Just to be clear about my views on this matter, I want to emphasize that the industry's partial immunity from litigation is an injustice to claimants, but one that pales by comparison with the enormous injustice that the proposed settlement visits upon the industry itself. Legislation that eliminates the industry's immunity while approving or indeed tightening the remaining settlement terms would, therefore, be the least equitable of all solutions.

notorious Court-packing scheme -- has facilitated federal overreaching by condoning legislation that has no basis whatever in the Constitution. If Congress thinks it necessary to add to its enumerated powers, the Framers crafted an amendment process for that purpose. Rather than avail itself of that process, however, Congress has simply ignored the limits set by the Constitution and eviscerated our most basic defense against tyranny: the doctrine of enumerated powers.

Today, we are in dire need of a re-limitation of federal power, which has ballooned in large measure through amplification of the Commerce Clause. Instead of serving as a shield against interference by the states, the commerce power has become a sword wielded by the federal government in pursuit of a boundless array of social and economic programs. In a recent article in the Harvard Law Review, Northwestern University law professor Gary Lawson got it exactly right: "The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution."³⁵

The fundamental principle, then, is simply this: No matter how worthwhile an end may be, if there is no constitutional authority to pursue it, then the federal government must step aside and leave the matter to the states or to private parties. Congress can proceed only from constitutional authority, not from good intentions alone. That was the principle the Court restated in Lopez when it said, for the first time in nearly 60 years, that the power of Congress to regulate commerce among the states is not a power to regulate anything and everything. In applying that principle, however, the Court went only a little way toward rolling back Congress's expansions, saying that Congress must show that the activity regulated "substantially" affects interstate commerce. As Justice Thomas said in his concurrence, that is not a proper reading of the Commerce Clause, which was meant to enable Congress to assure the free flow of goods and services among the states.

Applied to the case at hand, for Congress to have authority to legislate in this area, it is not enough to proclaim that tobacco products are transported across state lines and sold in large volume to customers in many states. To legitimately invoke the commerce power, Congress must show that the proposed settlement is necessary (i.e., essential) and proper (i.e., not violative of other rights) to assure the free flow of interstate commerce. There has been no such showing by Congress or by any of the parties to this settlement. Nor could there be. Health risks attributable to tobacco, and marketing tactics by tobacco companies, have little to do with the unhampered movement of trade. They are, incontrovertibly, subjects of a police power that belongs, under our system, to the states.

Should the states adopt inconsistent or conflicting regulations that interfere with the free flow of commerce, then Congress can surely supersede such regulations and remove any such interstate barriers. But the states, to my knowledge, have either refrained from legislating in respect of tobacco marketing or health risks, or have legislated in a manner that creates no serious obstacles to trade. And differences among the states with regard to class certification, punitive damages, and caps on compensatory damages -- to the extent there are such differences -- have not been demonstrated to prevent, delay, or diminish interstate transactions.

³⁵ The Rise and Rise of the Administrative State, 107 Harv. L. Rev. 1231, 1234 (1994).

The Court distinguished national (i.e., general) from local (i.e., particular) benefits, retaining for itself the prerogative to decide what Congress was about. But less than a year later, in Helvering v. Davis, the Court abandoned its oversight function, holding that the discretion to distinguish national from local “belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power.”³⁹ That left things for all practical purposes in the hands of Congress. As Roger Pilon has put it:

[A]lthough Congress’s now independent power to spend for the general welfare was still limited by the word “general,” the Court would not itself police that limitation but would instead defer to Congress as to whether any expenditure was general or particular -- the very Congress that was already raiding the Treasury and redistributing its contents with ever greater particularity.⁴⁰

Not surprisingly, no federal statute has ever been invalidated because it did not serve the general welfare. So much for enumerated powers -- the centerpiece of the Constitution.

The third interpretation -- which in truth was the original understanding -- comes from James Madison and Thomas Jefferson, who argued that the General Welfare Clause conferred no additional power whatever: it was a summary or convenient means of referring to the enumerated powers in the aggregate; and it was a further shield against the power to tax and spend for enumerated ends, by limiting that power to serving the *general* welfare. Thus, like the Commerce Clause properly construed, the General Welfare Clause was meant to be a shield against the abuse of power, not a sword of power, as it is today.

Plainly, Madison and Jefferson were correct. If Congress could first define the general welfare, then appropriate money for its furtherance, any limits on federal power where money is involved evaporates. Even if Congress had no power at all to enact legislation, it could simply appropriate funds and claim that it was exercising an independent power to provide for the general welfare. Unhappily, that is precisely what has transpired in the wake of the New Deal Court.

Today, the redistributive powers of Congress are everywhere -- except in the Constitution. The result is the feeding frenzy that is modern Washington, the Hobbesian war of all against all as each tries to get his share and more of the common pot the tax system fills. That must be ended. It is unseemly and wrong. More than that, it is unconstitutional, whatever the slim and cowed majority on the New Deal Court may have said. The Framers did not empower government to take from some and give to others. They did not establish a welfare state.⁴¹

³⁹ 301 U.S. 619, 640 (1937).

⁴⁰ A Court Without a Compass, 40 N.Y.L. Sch. L. Rev. 1004, 1005 (1996).

⁴¹ Roger Pilon, supra, note 32 at 23.

CATO

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Constitutional law
Administrative law
Tort law
Capital markets

Bob Levy joined Cato in December 1996 after 25 years in business. He is an Adjunct Professor at the Georgetown University Law Center, a director of the Institute for Justice, and a trustee of the George Mason University Foundation. Bob received his Ph.D. in business from the American University in 1966. That year he founded CDA Investment Technologies, Inc., a major provider of financial information and software. Bob was chief executive officer of CDA until 1991. He then returned to college and earned his J.D. in 1994 from the George Mason University, where he was chief articles editor of the law review. The next two years he clerked for Judge Royce C. Lamberth on the U.S. District Court in Washington, D.C., and for Judge Douglas H. Ginsburg on the U.S. Court of Appeals for the District of Columbia Circuit. Among Bob's publications are a book, dozens of articles in various academic and professional journals on investment-related subjects and, more recently, several scholarly papers in the legal field.

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