

June 13, 2005

Honorable Gladys Kessler
United States District Court
for the District of Columbia
333 Constitution Avenue, NW
Washington, DC 20001

Re: *United States v. Philip Morris et al*,
99-CV-2496

Dear Judge Kessler:

I am chairman of the Citizens' Commission to Protect the Truth, which filed an amicus brief in the above entitled matter on February 24, 2005.

I write out of concern about reported recent actions of parties in this case that may be undermining the integrity with which you have conducted this trial.

During closing arguments last week, attorneys for the Justice Department abandoned the expert testimony that they had presented to support forward-looking relief to fund national public education, smoking-prevention and smoking-cessation efforts. That testimony had indicated that \$130 billion over 25 years would be required to mount effective efforts; at the last minute, Justice Department lawyers reduced the amount requested to \$10 billion over 5 years and abandoned their earlier demand that the tobacco companies fund programs to help 45 million current smokers quit. News stories in the Los Angeles Times, Washington Post and New York Times, and on the Associated Press wire, reported that other witnesses, including Matthew Meyers, president of the Campaign for Tobacco-Free Kids, and Michael Eriksen, former director of the Office on Smoking and Health at the Centers for Disease Control and Prevention, were pressured by Justice Department attorneys to alter the testimony those witnesses had prepared.

It appears that these decisions were transmitted to the litigating attorneys by Robert McCallum, a political appointee who supervises the Civil Division and who ordered the attorneys to abandon their expert testimony in the case. Mr. McCallum came to his post from Alston & Bird, a law firm that has represented R.J. Reynolds, a defendant in this case. Moreover, the tobacco industry--led by co-defendants Philip Morris/Altria, R.J. Reynolds, and Lorillard-- contributed more than \$2.7 million in 2004 alone to the Republican party.

My own experiences with tobacco companies while I was Secretary of Health, Education, and Welfare from 1977 to 1979, as well as the companies' long resistance to public efforts to curb smoking and the documented history of their deceptive behavior,

lead me to suspect the worst about the government's abandonment of its own testimony. When I was secretary, the tobacco industry fiercely lobbied against any funds to support public education of the dangers of smoking. The ridiculously reduced remedies now sought mock any claim that they are sufficient to support an effective public health campaign.

From what I have read in the past few days, I am concerned that the actions of the Justice Department political appointees and the defendants are undermining the integrity of the judicial process.

Your Honor, you yourself have noted that "additional influence" may have been "brought to bear on the government's position." When witnesses are asked to tone down the truth; when attorneys are ordered by their superiors to counter their own expert witnesses; when those superiors are political appointees with close ties to defendants who have contributed millions of dollars to the political party and administration which appointed them, serious questions arise as to whether parties to this case are thwarting the ability of this Court to render justice on the present record.

I urge the Court to conduct a hearing not only to protect the integrity of the judicial process, but also to ensure that the Department of Justice, charged with protecting the interests of the United States, is fulfilling its responsibility. Such a hearing can determine, from witnesses under oath, what happened and whether there were improper attempts to obstruct the judicial process. Furthermore, because it appears that non-experts in political positions ordered the government attorneys trying the case to seek a remedy counter to that proposed by their own expert witnesses, a hearing could also determine what, in fact, an appropriate remedy would be.

The Court has the inherent power to act in this manner. The Tunney Act of 1974 (15 U.S.C. § 16) suggests by analogy procedures the Court might invoke. The Tunney Act was passed in the wake of a similar scandalous situation whereby the Justice Department and International Telephone and Telegraph Corporation (ITT), the defendant in an anti-trust suit, agreed to an unconscionable settlement. It later came to light that ITT had made a substantial donation to the Republican National Convention, and that President Nixon and his White House assistants applied considerable pressure to the Deputy and Associate Attorneys General overseeing the case to reach a settlement advantageous to ITT. The Tunney Act thus was designed to ensure that government anti-trust settlements serve the public interest and that political money and backroom politics not be permitted to corrupt the judicial process.

In this analogous situation, the Court can take testimony from government officials and corporate executives, lobbyists and other representatives of defendants to determine, for example, whether they discussed this case with political appointees in the White House, the Republican National Committee or the Justice Department in order to influence the position the government should take in fashioning relief. The Court can take testimony

from the Justice Department litigators about the pressures they faced to reduce their request for relief. It can ask higher up Justice Department officials whether they were in contact with the tobacco industry or any individuals at the White House. The Court can recall witnesses to obtain from them under oath the content of their conversations with Justice Department lawyers about changing their testimony.

In a politically charged situation such as this, with enormously high financial stakes for the tobacco industry, which has contributed so heavily to the parties in control of the other two branches of government, this Court is the only forum in which to assure an objective examination of what has transpired in this case. At stake is not only the integrity of the judicial process, but millions of lives that might be saved by a full scale smoking cessation and prevention campaign.

Where defendants have such a long record of deception and manipulation of the public, and so many individuals have been killed and crippled by the product they sell, it is essential that justice be both rendered and perceived. The only way that can happen is for this Court to conduct a Tunney-like hearing into the causes of the government's startling change of position.

In view of the foregoing, I urge this Court to hold hearings to determine whether the judicial process in this case has been compromised and to determine appropriate and effective remedies for defendants' misconduct.

Sincerely,

Joseph A. Califano, Jr.

Cc: All counsel on attached service list