

Congress of the United States
Washington, DC 20515

June 20, 2005

H. Marshall Jarrett
Counsel for Professional Responsibility
U.S. Department of Justice
Office of Professional Responsibility
950 Pennsylvania Avenue, NW, Room 3266
Washington, DC 20530

Dear Mr. Jarrett:

We are writing to request that you investigate whether the Justice Department inappropriately pressured a key government witness to weaken his testimony in the landmark tobacco case. We ask that you immediately add this investigation to your ongoing review of whether improper political interference led the Justice Department to reduce its request for penalties against the industry from \$130 billion to \$10 billion.

The witness is Max H. Bazerman, the Jesse Isidor Straus Professor of Business Administration at Harvard Business School. Professor Bazerman had been invited to testify about appropriate ways to keep the tobacco industry from continuing to conspire against the health and safety of the American people. In his initial written testimony, Professor Bazerman recommended that the court consider structural changes to the tobacco industry, including the removal of senior management and new policies for compensation of managers and executives to promote compliance with the law. According to Professor Bazerman, Justice Department officials outside of the trial team, including a political appointee with ties to the tobacco industry, then demanded that he water down his requests.

Professor Bazerman's revelations are significant because they directly contradict the justification that the Justice Department has given publicly — and in court — for the striking reversal in penalties. According to the Justice Department, the Department reduced its demand from \$130 billion for cessation activities to \$10 billion to comply with an appellate court ruling that remedies be “forward-looking.” Professor Bazerman's testimony, however, addressed a completely different part of the case and one that is inherently forward-looking: the structural changes sought by the Justice Department in the future management of the tobacco companies. For this reason, the attempt to undermine this critical part of the Department's case cannot possibly be justified by the appellate court ruling. But it did directly benefit senior tobacco executives — many of whom are major donors to the Republican party — whose jobs could have been threatened by the remedies proposed by Professor Bazerman.

Recently, Professor Bazerman and his attorney at the Government Accountability Project spoke with the minority staff of the Government Reform Committee. In this letter, we describe what happened to Professor Bazerman. The *Washington Post* also carried an account of

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Professor Bazerman's story in today's edition.¹ His experience strongly suggests that there is ongoing improper political interference in the conduct of the trial.

We also draw your attention to the most immediate implication of Professor Bazerman's account. According to recent news reports, the Justice Department is considering replacing the longtime leaders of the trial team with a more junior attorney at the Department named Frank Marine. According to Professor Bazerman, Mr. Marine was directly involved in efforts to weaken his testimony.

We urge you to take quick action to preserve the integrity of this litigation, which, if successfully prosecuted, could achieve significant public health benefits for the American people.

Professor Bazerman's Account

Professor Bazerman holds a Ph.D. in organizational behavior from Carnegie-Mellon University and is considered a national expert in the fields of corporate decision-making, negotiation, and the psychology of unethical behavior.

His involvement in the case began in March 2005, soon after the D.C. Circuit Court of Appeals ruled that the Justice Department could not pursue the disgorgement of industry profits as a remedy in the tobacco case. According to Professor Bazerman, the Justice Department sought his expert testimony in the wake of the court of appeals decision as an alternative theory on which to pursue significant remedies against the tobacco industry.

The core of Professor Bazerman's initial written testimony, which was provided in his written direct examination as filed with the court in late March, was that "defendants' misconduct will continue absent significant court intervention to change the incentives and systematic biases operating on defendants' managers and executives."² Specifically, Professor Bazerman urged the court to consider structural changes that included:

- Eliminating economic incentives for defendants to sell cigarettes to young people;
- Modifying compensation policies for corporate managers and executives to promote lawful conduct;
- Removing senior management and executives;

¹ *Expert Says He Was Told to Soften Tobacco Testimony*, Washington Post (June 20, 2005).

² Written Direct Examination of Max H. Bazerman, Ph.D., *United States v. Philip Morris USA, Inc.* (2005).

- Requiring subcontracting of all research to independent companies that would be monitored by the court; and
- Requiring defendants to sell all of their research and development related to the creation and marketing of safer cigarettes.³

Professor Bazerman recommended that “the Court appoint monitors who will have the authority, with the utilization of outside experts as needed, to review all aspects of defendants’ businesses and make particularized and specific recommendations for structural changes ... that address the incentives and biases that in my opinion will likely cause misconduct to continue.”⁴

In making these recommendations, Professor Bazerman stated that he had reviewed evidence related to the decisions and actions of the senior management of the nation’s largest tobacco companies. He stated that if the court finds the defendants liable for illegal conduct, “the current management teams cannot and will not move away from the environment of misconduct” and that “it is highly unlikely that incumbents will be able to undertake the changes necessary to prevent fraud from occurring in the future.”⁵

The Justice Department’s trial team approved his written testimony. However, several weeks later, when Professor Bazerman was preparing for his oral testimony, a lawyer from the trial team contacted him with an unusual request. Specifically, Professor Bazerman was asked to amend his written direct testimony to note that certain recommendations — like the suggestion that monitors consider removal of the corporate managers of tobacco companies — would not be appropriate under certain legal conditions.

Professor Bazerman recalls that he did not feel qualified to make such statements since they relied upon legal conclusions that were outside his expertise. He thought that such changes to his testimony would substantially weaken its value. But the pressure to change his testimony continued.

Professor Bazerman had a strong sense that the request to change his testimony did not originate with the core members of the trial team. In his conversation with the lawyer, he learned that attorney Frank Marine was involved in generating the request. Mr. Marine is a lawyer in the criminal division who had participated in the trial in its early stages and who had recently reappeared in the case. From the circumstances of the request, Professor Bazerman had the impression that the Mr. Marine’s role was to support and enforce the decisions of the Department’s political appointees.

³ *Id.* at 2

⁴ *Id.*

⁵ *Id.* at 54-55

Specifically, Professor Bazerman learned that the pressure from Mr. Marine was backed by a senior political appointee supervising the case, Associate Attorney General Robert D. McCallum. Mr. McCallum is the same attorney believed responsible for the decision to slash the government's request for penalties in the case.⁶ He is a former partner of the Atlanta law firm Alston and Bird, which has represented R.J. Reynolds Tobacco Company, one of the defendants in the case.

Professor Bazerman learned from the litigation team that if he did not substantially change and weaken his testimony, Mr. McCallum was threatening to remove him from the case and not allow him to testify. But Professor Bazerman did not change his testimony. Several days later, after a period of uncertainty, Professor Bazerman was permitted to testify. He is not sure what happened.

Although Professor Bazerman was deeply troubled by this threatening behavior, because he was ultimately allowed to testify without making the change, he believed that the Justice Department would advocate for his full recommendations. Then, last week, he read news reports of possible political interference in the case. He also noted the involvement of Mr. Marine and Mr. McCallum in the allegations of impropriety, and the suggestion that lead trial attorneys might be replaced by Mr. Marine for final briefing in the case. Professor Bazerman became concerned that such an action could substantially undermine the Justice Department's case.

Political Interference at the Department of Justice

Two weeks ago, the Justice Department made an unexpected and stunning reversal in the tobacco litigation, cutting its request for relief for cessation activities from \$130 billion to \$10 billion. A day after the Department's reversal was disclosed, the media reported that the Department had also pressured two of its expert witnesses — Dr. Michael Eriksen and Matt Myers — to change their testimony.⁷ Professor Bazerman's account corroborates these previous allegations. It also directly contradicts the Justice Department's explanation for its recent changes in legal strategy.

Until now, the Justice Department has defended itself against charges of political interference by pointing to a February 2005 decision of the D.C. Circuit Court of Appeals. This decision barred the Justice Department from seeking to recover the profits of past illegal conduct by defendants and required all remedies to be "forward-looking" and designed to "prevent and restrain" future bad acts.⁸ The Department has claimed that all of its recent changes in position

⁶ *Tobacco Escapes Huge Penalty*, Washington Post (June 8, 2005).

⁷ *Tobacco Witnesses Told to Ease Up*, Washington Post (June 9, 2005).

⁸ *U.S. v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Circuit, Feb. 4, 2005)

were made to confirm to this decision. As Mr. McCallum wrote in an op-ed in *USA Today*, the reversal in remedy sought by the Department was necessary to be “consistent with the Circuit Court opinion.”⁹

This appellate ruling had no impact on Professor Bazerman’s testimony, however. To the contrary, the logic of the ruling bolstered the remedy Professor Bazerman recommended. Changing the corporate structure of the tobacco industry is an indisputably forward-looking remedy. Such remedies seek to prevent future violations by changing the conditions that allowed them to occur in the past. Indeed, this is precisely why Professor Bazerman was asked to testify *after* the appellate court issued its decision.

In his op-ed, Mr. McCallum argued that the Justice Department has “proven time and again a strong commitment to holding the tobacco industry accountable for past fraud and abuse.”¹⁰ But the remedies Professor Bazerman recommended — and that Mr. McCallum sought to weaken — were those that tobacco executives may have feared most. Of all the remedies sought by the Department, only Professor Bazerman’s remedies directly threatened the jobs of the executives currently running the major tobacco companies.

The tobacco industry is a major supporter of the Republican Party, contributing over \$2.7 million in the last 2-year election cycle, with much of this money directly paid by senior executives at defendant corporations.¹¹ It is exactly these same executives who were covered by Professor Bazerman’s testimony and who would be affected by his recommendations. And it is exactly these same executives who benefited most directly from the attempt to undermine Professor Bazerman’s testimony.

Conclusion

In the early 1970s, the Justice Department, under the Nixon Administration, reached a sweetheart deal in an antitrust case to impose minimal penalties on the ITT Corporation at the same time that it made major contributions to the Republican Party. The government’s corrupt settling of that case led Congress to pass the Tunney Act, which requires court approval of all antitrust settlements.

We are concerned that the Justice Department under the Bush Administration may be orchestrating a surrender reminiscent of the ITT case. The Justice Department’s position attributing its strategy to the ruling of the appeals court is not credible. According to recent news reports, recent reversals in position were opposed by the expert attorneys who have led the

⁹ Robert D. McCallum, *Remedy is Forward Looking*, USA Today (June 9, 2005).

¹⁰ *Id.*

¹¹ Center for Responsive Politics, www.opensecrets.org (2005).

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litigation for the past five years and were contradicted by a brief filed by the Department itself just five weeks earlier.¹² Now we have learned that a major witness whose testimony was not affected by that ruling was pressured to change his testimony.

The evidence is mounting that the Justice Department sabotaged its own case for political reasons. Yet it would be highly improper for the Department to allow political favoritism to influence a case of such great importance to the public health.

We are concerned that this interference is continuing, even now. It has been reported that the Administration is considering replacing the expert attorneys who have led the case for six years with the same lawyer, Frank Marine, who was directly involved in the pressure to change Professor Bazerman's testimony.

We urge you to investigate these issues immediately and to take steps necessary to maintain the integrity of the Justice Department and of this case.

Sincerely,



Henry A. Waxman
Ranking Minority Member
Committee on Government Reform



Martin T. Meehan
Democratic Co-Chairman
Congressional Task Force on
Tobacco and Health

¹² *Lawyers Fought U.S. Move to Curb Tobacco Penalty*, New York Times (June 16, 2005); *Justice Department Defended Larger Tobacco Penalty*, Washington Post (June 15, 2005).