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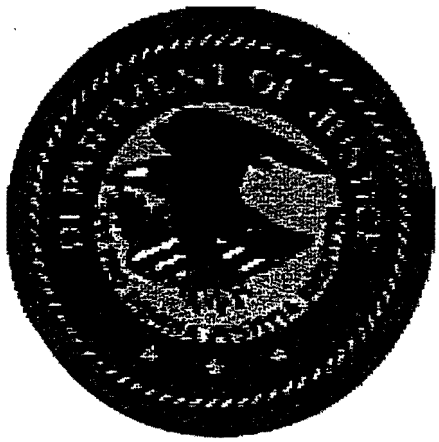

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TO: Paul J. McNulty
Deputy Attorney General

FROM: H. Marshall Jarrett by JSW
Counsel

SUBJECT: Report of Investigation Regarding Misconduct Allegations Arising in Connection with *United States v. Philip Morris USA Inc.*, Civ. A. No. 99-2496-GK (D.D.C.)

INTRODUCTION AND SUMMARY

In a June 8, 2005 letter to the Department's Inspector General, Senator Frank R. Lautenberg and five of his colleagues in the United States Senate requested an investigation to determine whether "improper interference by political appointees led to a reversal of the position [on remedies] advocated by the career professionals" working on *United States v. Philip Morris USA Inc.*, Civ. A. No. 99-2496-GK (D.D.C.). The alleged reversal occurred in closing arguments delivered the previous day in which the government attorneys, according to media reports, "without explanation . . . drastically reduced their most expensive demand [in the case], scaling back a proposed industry-funded smoking-cessation program from $130 billion to $10 billion."[1] In addition, in a separate June 8, 2005 letter to the Inspector General, U.S. Representatives Martin T. Meehan and Henry A. Waxman requested an investigation into the matter. Both letters quoted from media articles identifying Associate Attorney General (Associate AG) Robert McCallum, Jr., as one of the political appointees responsible for the alleged interference. Representatives Meehan and Waxman's letter also suggested that Associate AG McCallum should have been disqualified from participating in the *Philip Morris* litigation because, prior to joining the Department, he served as a partner in a law firm that represented the R.J. Reynolds Tobacco Company.

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[1] Myron Levin, *U.S. Eases Demands on Tobacco Companies*, Los Angeles Times, June 8, 2005.

Furthermore, in a June 9, 2005 letter to the Inspector General, Representatives Meehan and Waxman requested that the investigation include an inquiry into reported efforts to have two government witnesses, Professor Michael Eriksen and Matthew Myers, change their testimony pertaining to the remedies sought in the litigation.

The Inspector General referred these letters to this Office because the allegations fell within our jurisdiction, and we initiated an investigation. After doing so, we received a June 20, 2005 letter from Representatives Meehan and Waxman asking that we expand the investigation to include an allegation, reported that day in *The Washington Post,* that McCallum demanded that another government witness in the case, Professor Max Bazerman of Harvard Business School, "water down" his remedies testimony.[2] Representatives Meehan and Waxman related that Bazerman alleged to the minority staff of the House Committee on Government Reform that, after providing written testimony that was filed in court, he was approached by a member of the Civil Division's tobacco litigation team (TLT) with an "unusual request." The Department attorney allegedly asked Bazerman to amend his testimony when he testified at trial by noting that his recommendation concerning the removal of tobacco company executives would only be appropriate under certain legal conditions. We included this allegation in our investigation.

During the course of our investigation, we obtained and reviewed thousands of documents from more than fifty Department employees who were involved in the *Philip Morris* case. The voluminous documentation included pleadings, briefs, and transcripts, as well as internal e-mails, memoranda, and notes. In addition, we interviewed more than fifty Department employees,

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[2] Carol D. Leonnig, *Expert Says He Was Told to Soften Tobacco Testimony*, The Washington Post, June 20, 2005, at A3.

including Associate AG McCallum; Assistant Attorney General (AAG) Peter Keisler; Principal Deputy Assistant Attorney General (PDAAG) Daniel Meron; [

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] Some witnesses were interviewed more than once, and on occasion a follow-up interview was conducted to allow a prior witness to respond to new information provided by subsequent witnesses. We also interviewed Professor Eriksen, Mr. Myers, and Professor Bazerman.

Based on the results of our investigation, we concluded that neither Associate AG McCallum, AAG Keisler, nor PDAAG Meron committed professional misconduct or exercised poor judgment in this matter. First, we concluded that there were no political considerations or other impropriety involved in the alleged pressuring of witnesses. Career Criminal Division attorneys expressed serious legal concerns about the breadth of some of the remedies the TLT sought to sponsor through those witnesses. The modifications sought by the Criminal Division did not relate to matters of historical fact; they related solely to legal concerns (First Amendment) with the breadth of some proposed remedies, and with policy issues concerning the circumstances under which the Department of Justice should seek certain remedies under the Racketeer Influenced and Corrupt Organizations (RICO) statute. The Criminal Division is authorized to supervise litigation brought under RICO, both in civil and criminal litigation. Consequently, when career attorneys in the Criminal Division insisted that certain remedies proposed by government witnesses were contrary to the law and Department policy governing RICO cases, Associate AG McCallum and the Civil Division leadership acted reasonably in accommodating those concerns. Furthermore, the modifications

sought in the testimony were reasonable and appropriate, and the requests to modify the proposed testimony did not constitute improper "pressure" of any kind.

With respect to the smoking cessation program, we found, based on the results of our investigation, that Associate AG McCallum and the Civil Division leadership had legitimate misgivings – both factual and legal – with the cessation program advocated [ ]. We found further that the factual and legal bases for the cessation remedy approved by Associate AG McCallum and the Civil Division leadership were reasonable. Furthermore, the position adopted by McCallum and the Civil Division leadership was not influenced by any political considerations, but rather was based on good faith efforts to obtain a remedy from the district court that would be sustainable on appeal.

Finally, we concluded that Associate AG McCallum had no conflict in participating in the *Philip Morris* case. To the extent that a perception of partiality could arise from his prior employment with a law firm that represented a party to the tobacco litigation in an unrelated matter, McCallum appropriately consulted the Department ethics officer and obtained permission to continue to participate in the *Philip Morris* case.

Accordingly, we concluded that neither Associate AG McCallum, AAG Keisler, nor PDAAG Meron engaged in professional misconduct or exercised poor judgment in the *Philip Morris* case.

I. THE CIVIL COMPLAINT

A. The Allegations Against the Tobacco Companies

On September 22, 1999, the Department filed a civil complaint in U.S. District Court in the District of Columbia against several tobacco companies and two affiliated entities, alleging that the defendants had engaged in a pattern of mail and wire fraud predicate offences from the 1950's to the

present, to defraud consumers of tobacco products through false and misleading information about the health effects of smoking, the addictiveness of tobacco, and the marketing of tobacco to minors.[3] The suit made four claims under three statutes. In the first count, the government sued pursuant to the Medical Care Recovery Act (MCRA), 42 U.S.C. §§2651-2653, to recover health care costs it had paid to treat individuals injured by the tobacco companies' allegedly tortious conduct. The second count proceeded under the Medicare Secondary Payer provisions at 42 U.S.C. §1395y, for recovery of Medicare payments by the government to reimburse "primary payers" for treatment of such injuries. The third and fourth claims were brought under the civil RICO statute, 18 U.S.C. §§1961-1968. Count Three charged a violation of section 1962(c), which makes it unlawful to "conduct or participate, directly or indirectly," in an enterprise through a "pattern of racketeering activity." Count Four was brought under section1962(d), which makes it unlawful to "conspire to violate" subsection (c). Under the RICO counts, based on allegations that the defendants engaged in a criminal enterprise to effect their cover-ups, and pursuant to section1964(a), the RICO provision conferring upon the district courts the jurisdiction to order remedies to "prevent and restrain" future violations of §1962,[4] the government sought a variety of equitable and injunctive remedies, including disgorgement of hundreds of billions of dollars in allegedly ill-gotten gains, and a sustained smoking cessation program.

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[3] *See United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1192 (D.C. Cir. 2005) (summarizing the suit's allegations).

[4] *See* 18 U.S.C. §1964(a) ("district courts . . . shall have jurisdiction to prevent and restrain violations of section 1962").

B. The Tobacco Litigation Team

The TLT was created as a separate section within the Civil Division led by a Director who reported to the Civil Division leadership. At the time of the events at issue in this report, the TLT comprised more than thirty attorneys and had its own support staff[

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In addition to the Civil Division attorneys on the TLT, the team was assisted by[

]the Criminal Division.[

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In the course of our investigation, we inquired into the contacts Associate AG McCallum and the Civil Division leadership had concerning the *Philip Morris* case with[

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[ ] the White House. [

[5] In particular, we found no evidence that the White House pressured McCallum to settle the case, and no evidence that the White House was consulted or participated in any way on the issue of the cessation remedy.[7] [

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We also inquired into any contacts McCallum had with tobacco company executives, tobacco company representatives, or public officials concerning the *Philip Morris* case. We found no evidence that he had private meetings or discussions about the *Philip Morris* case with any tobacco company executives or tobacco company representatives. Furthermore, we found no evidence that McCallum's decisions in the case were influenced by any public officials.

As noted above, the lawsuit was something of a hybrid, containing counts over which the Civil Division had supervisory authority, and the RICO counts over which the Criminal Division had supervisory authority. *See* 28 C.F.R. § 0.55(s) (civil proceedings filed under RICO in which the United States is the plaintiff "shall" be "conducted, handled or supervised by the Assistant Attorney General, Criminal Division").[9] In practice, the Civil and Criminal Divisions worked smoothly together on the case[

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]this smooth working relationship prevailed until March 2005, three months before closing arguments, when the Criminal Division objected to certain remedies the TLT wished to seek under RICO.

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[9] The Civil Division has authority over civil litigation "not otherwise assigned" under the regulations. *See* 28 C.F.R.§ 0.46. As noted above, civil RICO litigation is "otherwise assigned" to the Criminal Division.

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II. COURT DECISIONS AND THE GOVERNMENT'S RESPONSES

A. Dismissal of the MCRA and Medicare Counts

On September 28, 2000, Judge Kessler dismissed the MCRA and Medicare counts which sought reimbursement for federal health care expenditures. The court also ruled, however, that the government had valid claims for relief under the RICO statute. This decision resulted in an anomaly: although the Civil Division filed and was trying the case, the only remaining counts were based on RICO, over which the Criminal Division had supervisory authority.

In her ruling, Judge Kessler rejected the defendants' challenges to the equitable remedies sought by the government in the case, including the disgorgement remedy and the remedy that would require the defendants to fund a smoking cessation program.[12] The arguments made by the parties on this issue are relevant because they inform the subsequent debates between Associate AG

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[12] 116 F. Supp.2d at 147 & n.25.

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McCallum and Civil Division leadership on the one hand, and the TL1[ ]on the other, regarding the legal availability of a 25-year cessation program priced at $130 billion.

The government's argument to Judge Kessler was straightforward: the defendants' RICO violations over the past four decades – to be demonstrated in the liability phase of the trial – would establish a "reasonable likelihood" that, absent equitable relief, such violations would continue post-judgment.[13] In addition, the government argued that disgorgement of the profits realized from their criminal activities would deter the defendants from committing such acts in the future.

The defendants conceded that their past conduct was relevant to whether a "reasonable likelihood" existed that they would continue such conduct in the future, but argued that the government's reliance on past violations and its speculative allegations of future misconduct were not sufficient to justify any equitable relief. The defendants cited *SEC v. First City Financial Corp.*, 890 F.2d 1215 (D.C. Cir. 1989), for the proposition that the Government cannot rely exclusively on past unlawful conduct to establish its right to equitable relief. The government response, as characterized by Judge Kessler, was that the defendants' arguments would "demand access to a crystal ball" in requiring the government "to describe the detailed contours of acts which ha[d] not yet occurred."[14] Judge Kessler parsed the factors identified by *First City* as bearing on whether a "reasonable likelihood" of future violations was shown, one of which was whether the nature of the

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[13] The Department's RICO Manual states that for the government to obtain equitable relief in a civil RICO suit, it must establish that unless the relief is granted "there is a *reasonable likelihood* of future violations by the defendant." *See* Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Prosecutors, Section VII (4th rev. ed. July 2000) (emphasis added).

[14] 116 F. Supp.2d at 148.

defendant's business would "present opportunities to violate the law in the future."[15] Judge Kessler viewed the *First City* factors as weighing in the government's favor and rejected the defendants' contentions, finding that the government had successfully stated a claim for equitable relief. Accordingly, the court denied the motion to dismiss the disgorgement claim.[16]

The case proceeded with the government seeking disgorgement of $280 billion that it traced to proceeds from the defendants' alleged past misconduct.

B. The Court of Appeals Rejects the Disgorgement Remedy

After extensive discovery, the defendants moved in 2003 for summary judgment on the government's disgorgement remedy, arguing that such a remedy would not "prevent and restrain" future RICO violations. On May 21, 2004, the district court denied the motion, noting that in *First City*, the U.S. Court of Appeals for the D.C. Circuit recognized the jurisdiction of district courts to order disgorgement of proceeds obtained from a wrongdoer's past unlawful acts. *United States v. Philip Morris USA Inc.*, 321 F.Supp.2d 72, 78 (D.D.C. 2004).[17] The district court agreed with *First City* that disgorgement was an appropriate remedy "to deprive a wrongdoer of his unjust enrichment and to deter others from violating the . . . laws." *Id.* at 78-79. Judge Kessler went on to find that the RICO requirement to "prevent and restrain" future violations was satisfied under a general deterrence

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[15] *First City* involved the availability of equitable remedies for violation of the Securities and Exchange Act of 1934, but the Department's RICO Manual cites it and the three factors it identified as dispositive on the question of whether such remedies are available for violations of the RICO statute. *See* RICO: A Manual for Prosecutors, Section VII (4th rev. ed. July 2000).

[16] 116 F. Supp. at 149-50, 151-152.

[17] Although *First City* involved a violation of the federal securities laws and not RICO, Judge Kessler specifically rejected the defense suggestion that cases such as *First City* were inapplicable because they were not RICO cases. *See* 321 F.Supp.2d at 79-80.

rationale: "disgorgement deters violations of the law through depriving violators of ill-gotten gains." *Id.* at 80.

On motion of the defendants, the district court certified its ruling for interlocutory appeal.

On February 4, 2005, the U.S. Court of Appeals for the D.C. Circuit reversed the district court and ruled, by a 2-1 vote, that section1964(a) did not allow disgorgement as "a possible remedy in this case."[18] The majority decision of Judge Sentelle reasoned that the goal of section 1964(a) "is to prevent and restrain future violations," and that a district court's jurisdiction to issue orders to prevent and restrain such violations is "limited to forward-looking remedies that are aimed at future violations."[19] Disgorgement, the court determined, was a "quintessentially backward-looking remedy focused on remedying the effects of past conduct to restore the status quo."[20] The court explained:

> Disgorgement . . . is measured by the amount of prior unlawful gains and is awarded without respect to whether the defendant will act unlawfully in the future. Thus it is both aimed at and measured by *past* conduct.[21]

The court expressly rejected the government's "general deterrence" theory, under which disgorgement would prevent and restrain future violations by making them unprofitable.[22]

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[18] *United States v. Philip Morris USA Inc.*, 396 F.3d 1190, 1197 (D.C. Cir. 2005).

[19] *Id.* at 1198.

[20] *Id.*

[21] *Id.* (emphasis in original).

[22] *Id.* at 1200.

Writing in dissent, Judge Tatel noted that the *First City* court had permitted disgorgement as a remedy under the analogous provision of the Securities and Exchange Act, and contended that disgorgement satisfied the "prevent and restrain" requirement based on a theory of deterrence. 396 F.3d at 1219, 1223.

C. The Response to the Disgorgement Decision

The D.C. Circuit's disgorgement decision decimated the government's remedies case and necessitated extensive efforts to adjust the government's case to conform to it.[

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At a conference with Judge Kessler on February 9, 2005, the government requested the court to postpone the time for the government's presentation of its remedies case – which would have commenced on or about March 1, 2005 – until after the defendants presented their liability case. In an Order dated February 10, 2005 (Order #875), the court stated that in light of the D.C. Circuit's

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disgorgement ruling, both the court and the parties "must give renewed consideration to the remedies portion of the ongoing trial." Accordingly, the court directed the parties to provide written submissions addressing the postponement request and "the scope and meaning" of the disgorgement decision.

The TLT[ ]prepared a memorandum addressing the scope and impact of the D.C. Circuit's disgorgement decision and filed it on February 16, 2005. The government argued that a postponement was necessary because the disgorgement decision forced the United States to "substantially revise and alter its remedies presentation."[24] With respect to the D.C. Circuit's ruling, the government argued that the district court could still impose remedies that were designed to "cure the ill-effects of Defendants' past fraudulent conduct."[25] The government argued that the D.C. Circuit's focus on forward-looking remedies was only "dictum insofar as it is sought to be applied to non-disgorgement remedies" and noted that the disgorgement decision "may be the subject of further appellate review."[26] Nonetheless, the government explained that its non-disgorgement remedies were "forward-looking":

> Requiring Defendants to fund . . . smoking cessation programs that have proven to be effective will deprive Defendants of the incentive to continue their approach to the design and marketing of "light" cigarettes, and thereby tend to prevent future unlawful conduct. Further, improving the ability of smokers to quit successfully will reduce the economic benefit to Defendants from continuing to engage in the types of fraudulent marketing of light and low tar cigarettes alleged and proven by the United States in this case. And it will help

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[24] United States' Memorandum Regarding Non-Disgorgement Equitable Remedies at 2 (February 16, 2005).

[25] *Id.*

[26] *Id.* at 8 & n.7.

> cure the ongoing and future untoward consequences of Defendants' unlawful conduct, which was aimed at keeping smokers using cigarettes by designing and marketing cigarettes that maintained smoking addiction, even as the Defendants publicly denied for decades that smoking was addictive or proven to cause any disease at all.[27]

The government also cited a 1984 D.C. Circuit case to argue that the court could order a wrongdoer to create a fund to pay for certain medical procedures "because it . . . served the purpose of 'deterrence of misconduct.'"[28] In addition, the government pointed out that Judge Kessler had previously ruled that district courts had the equitable power to require wrongdoers to pay funds "to address the ongoing ill effects arising from the wrongdoers' misconduct."[29]

The government also argued that it could seek an injunction "preventing and restraining Defendants continued marketing to young people under . . . 21," which "would establish an economic disincentive for Defendants to continue their wrongful conduct of marketing cigarettes to young people and publicly denying that they do so."[30]

The government's legal arguments [

] were understood by the TLT to be fairly aggressive [

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[27] *Id.* at 8, 10.

[28] *Id.* at 11 n.12 (citing *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816 (D.C. Cir. 1984)).

[29] *Id.* at 11 n.12. The government was referring to Judge Kessler's July 1, 2002 decision, reported at 273 F.Supp.2d 3, 11 (D.D.C. 2002), rejecting the defendants' demand for a jury trial as unwarranted in a civil RICO case.

[30] *Id.* at 12.

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On February 22, 2005, the defendants filed a response to the government's memorandum. Focusing on the government's claim that RICO remedies could still be designed to cure the "effects of Defendants' past unlawful conduct," the defense argued that the government had ignored the D.C. Circuit's ruling that remedies had to be designed to prevent and restrain future violations.[34] The defense argued that the government's legal theory was "strikingly in conflict" with the D.C. Circuit's ruling.[35]

The defense argued that the proposed smoking cessation program was "aimed at ameliorating the effects of past violations," namely, "the addiction of smokers allegedly deceived by fraudulent conduct," and had "nothing to do" with preventing future RICO violations.[36] The defense argued further that the government's theory of "depriv[ing] Defendants of the incentive to continue their

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[34] *See* Defendants' Memorandum Regarding Non-Disgorgement Remedies at 2 (February 22, 2005).

[35] *Id.* at 4 & n.1.

[36] *Id.* at 9.

approach" of illicitly marketing light cigarettes was untenable in light of the D.C. Circuit's explicit rejection of the "general deterrence" argument.[37]

The defense submission also urged the district court to deny the government's request to postpone presentation of its remedies case.

In its February 25 reply memorandum, the government argued that the remedies it was seeking would prevent and restrain the defendants from "successfully continuing" their fraudulent conduct in the future. By way of example, the government argued that the defendants continued to market light cigarettes deceptively, and their products generally, "in ways known to appeal to adolescents." As such, requiring them to fund cessation programs would prevent and restrain them from "continuing the practices that they have used in furtherance of their fraudulent scheme."[38]

D. The District Court's Decision

In a February 28, 2005 order, Judge Kessler granted the government's postponement request, ruling that the government could present its evidence on remedies after the close of the defendants' evidence on liability. Judge Kessler, however, strongly rejected the government's arguments concerning the scope and meaning of the D.C. Circuit's disgorgement ruling:

> The Government's Memorandum regarding the scope of the Court of Appeals' ruling . . . reads as if Judge Sentelle had never written his Opinion. . . . Virtually all of the arguments made by the United States in its Memorandum were arguments relied upon by . . . Judge Tatel in his dissent. The fact of the matter is that those arguments were

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[37] *Id.* at 9-10; *see* 396 F.3d. at 1200.

[38] United States Reply Memorandum Regarding Non-Disgorgement Equitable Remedies at 2-3 (February 25, 2005).

> rejected by Judge Sentelle in his 2-1 Opinion and are simply not the law to be followed at this time.[39]

The court stated that Judge Sentelle's opinion had "struck a body blow to the government's case" and had announced a "new legal standard" to govern the case.[40] Furthermore, the court stressed that Judge Sentelle's opinion "simply *does not permit non-disgorgement remedies to prevent and restrain the effects of past violations of RICO*. Rather, this Court's 'jurisdiction is limited to forward-looking remedies that are aimed at future violations' of RICO."[41] The court admonished the government to "be mindful of the plain, explicit language" of Judge Sentelle's decision.[42]

The court noted in closing that it would be "premature . . . to rule out as a matter of law the non-disgorgement remedies" the government identified in its February 16 memorandum (which included the smoking cessation program) before the government had an opportunity to present evidence to support such remedies.[43]

E. Response to the Court Rulings

The period following the D.C. Circuit's ruling on February 4 was one of intense activity on the part of the TLT and of the Civil Division leadership. During that period, the TLT continued to present its liability case at trial, and the leadership was involved in securing the necessary Departmental approvals to seek en banc consideration of Judge Sentelle's decision. On February

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[39] Order # 886 at 2, 4 (February 28, 2005).

[40] *Id.* at 2.

[41] *Id.* at 5 (emphasis added) (the second sentence is a quote from the D.C. Circuit's decision).

[42] *Id.*

[43] *Id.*

16, the same day the government filed its opening memorandum on the scope and meaning of Judge Sentelle's decision, the Solicitor General's office authorized petitioning for rehearing and rehearing en banc. On March 4, 2005, the government filed its Petition for Rehearing and Petition for Rehearing En Banc. The briefing was handled by Deputy Solicitor General Michael Dreeben, one of the Department's most experienced appellate attorneys. The brief argued that Judge Sentelle's decision was "in direct conflict with decisions of two other circuits on the precise issue presented," and that it was "fundamentally flawed and threaten[ed] critical objectives Congress sought to achieve through RICO."[44]

The TLT was forced to retool its existing remedies case and to find new witnesses to present evidence to support arguments under the "new legal standard" announced by the D.C. Circuit.

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[44] Petition for Rehearing and Petition for Rehearing En Banc at 1 (Feb. 16, 2005). On April 19, 2004, the court denied the petition by an equally divided vote. Three judges (Circuit Judges Henderson, Garland, and Roberts) recused themselves; three judges (Circuit Judges Edwards, Rogers, and Tatel) voted to grant the petition for rehearing en banc; and three judges (Chief Judge Ginsburg and Circuit Judges Randolph and Sentelle) voted to deny the petition. Because a majority of judges voting did not vote in favor of the petition, it was denied. *United States v. Philip Morris USA Inc.*, No. 04-5252 (D.C. Cir. April 19, 2005).

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Having lost the disgorgement remedy, the smoking cessation program became one of the most significant (and by far the most expensive) remedy the government continued to pursue.

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[16] The witness that the TLT would ultimately rely upon in presenting a cessation proposal was Dr. Michael Fiore, who in 2003 chaired the Subcommittee on Cessation of the Department of Health and Human Services' (HHS) Interagency Committee on Smoking and Health.[

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The district court ordered the government to identify all of its remedies witnesses by Friday, March 11. The government was to serve and file expert witness reports by March 21, and all witnesses had to be made available for deposition between March 28 and April 11, 2005. The

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defense was given until April 18 to identify its remedies witnesses and to serve and file any expert witness reports, with such witnesses to be made available for deposition between April 25 and May 9, 2005. This tight schedule, together with the burdens of the ongoing trial, ensured a hectic work pace.

The system for presenting evidence at trial began with the identification of the witness and, if the witness was an expert, the filing of an expert report. The witness was then deposed, after which the sponsoring party filed a written direct examination. Following briefing of any motions or objections concerning the witness' report or testimony, the witness testified in court, usually within a week of the filed written direct. The in-court testimony generally consisted of the witness adopting his written direct, and then being subject to cross-examination and redirect examination.

On March 7, 2005, the government closed its liability case-in-chief. The defense then presented witnesses in its defense case-in-chief, presenting its last such witness on May 2. At that time, the government began its remedies case.

III. THE EXPERT TESTIMONY OF PROFESSOR MAX BAZERMAN

A. Professor Bazerman is Retained as an Expert Witness

[[54] was the attorney principally responsible for recruiting and handling Professor Max Bazerman as an expert witness for the remedies portion of the government's case [

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] Bazerman was retained as an expert witness for the government on March 10, 2005.

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Page 24 of the report has been withheld in its entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552(b)(7)(C)

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] the RICO manua [

] describes a monitor's power to establish ethical standards

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[61] Chapter 7 of the Department's RICO Manual contains a section entitled "Court-appointed Monitors, Trusteeships and Officers," which states in its entirety:

> In order to eliminate corruption within an enterprise and to prevent racketeering activity, courts have frequently appointed officers, also referred to as monitors or trustees, to supervise the activities of the enterprise. These officers have exercised broad powers, including the following: (1) conduct the legitimate business of the enterprise; (2) review and approve hiring, certain contracts and financial expenditures; (3) impose and implement ethical practices codes governing members of the enterprise; (4) investigate, prosecute and adjudicate in civil proceedings allegations of violations of the ethical practices codes and other rules; (5) imposition of fines, discipline or **removal** from the enterprise for individuals found guilty of such violations; and (6) implement various reforms in the enterprise, including election reform for corrupt union enterprises. Courts have imposed such court appointed officers and trusteeships following

for members of an enterprise, to investigate and adjudicate alleged ethical violations by those members and, if found guilty after the adjudicatory process, to take appropriate disciplinary action, including removal. Although the RICO manual does not specifically articulate the conditions under which an officer may be removed, the only references to removal of officers are to "defendants" or are in the context of removing officers after an adjudicatory process and a finding of wrongdoing by the officer, not solely upon a finding that the corporation violated RICO.[62]

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> contested trials in government civil RICO lawsuits, and pursuant to court-approved consent decrees upon settlement agreements among the parties to such RICO lawsuits.

RICO Manual at 284-285 (emphasis added and footnotes omitted).

[62] *See* RICO Manual at 282 (referring to "wrongdoers . . . removed from office in the corrupt enterprise); *id.* at 283 (noting that courts have removed "corrupt defendants" from positions in the enterprise); *id.* at 294 & n.14 (civil RICO lawsuits involving labor unions have led to appointment of monitors who implemented reform measure that led to "removal of . . . persons from positions of influence in unions for organized crime related corruption and other misconduct").

Page 27 of the report has been withheld in its entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552(b)(7)(C)

B. The United States' List of Remedies Witnesses and Bazerman's Expert Report Propose the Removal of Corporate Officers as a Potential Remedy

On March 11, the TLT filed a list of its remedies witnesses. The list identified Bazerman as a witness and stated that he would offer expert testimony on the need for "Court-ordered structural changes to defendants' businesses, including . . . removal of senior management."

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[[6]] During the week of March 14, newspaper articles reported that the government was seeking to remove corporate officials of the defendant tobacco companies. *See, e.g.*, Peter Kaplan, *Government Witness to Urge Tobacco Execs Ouster,* Reuters, Mar. 14, 2005.

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]that civil RICO would not authorize the involuntary removal of a corporate officer unless one of the following three conditions was met:

(1) the officer had been named a defendant in the suit and was found to have violated RICO;

(2) the officer was found, after notice and a hearing, to have acted in concert with a named defendant in committing unlawful conduct warranting removal; or,

(3) the officer was found, after notice and a hearing, to have violated a provision of the court's judgment order or consent decree warranting removal.

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Pages 30 thru 33 of the report have been withheld in its entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552(b)(7)(C)

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[78] In his expert report filed on March 21, Bazerman identified "removal of senior [tobacco company] management" as one of several "structural changes" that would likely eliminate the misconduct proven by the government in the case. Bazerman added that it would be "up to the Court to decide" which of the several changes would achieve the objective of preventing and restraining future misconduct. He also recommended that choices among the suggested structural changes "be implemented within a structure that utilizes court-appointed monitors." *See* United States' Expert Disclosure for Max H. Bazerman, Ph.D. at 11-12 (March 21, 2005). The report did not discuss any process for determining whether to remove an officer.

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[82] Section 9-110.101 of the U.S. Attorney's Manual provides: "No RICO criminal indictment or information or civil complaint shall be filed, and no civil investigative demand shall be issued, without the prior approval of the Criminal Division." Review and approval of all civil and criminal RICO matters is handled by OCRS in the Criminal Division. USAM §§ 9-110.210, 9-110.320.

[ ] 28 C.F.R. § 0.46.[83]

[ ] belief that the Criminal Division did not have supervisory authority over the RICO issues in the *Philip Morris* case was wrong. Department regulations specifically provide that the Assistant Attorney General for the Criminal Division shall conduct, handle, or supervise "[c]ivil proceedings in which the United States is the plaintiff filed under the Organized Crime Control Act of 1970, 18 U.S.C. 1963-1968 [the RICO statute]." 28 C.F.R. § 0.55(s).[

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[83] That regulation states: "The Assistant Attorney General in charge of the Civil Division shall . . . direct all . . . civil litigation including claims by or against the United States, its agencies or officers, in domestic or foreign courts, special proceedings, and similar civil matters *not otherwise assigned*" (emphasis added).

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] It was decided tha[ ] should include in that brief a footnote stating the Department's policy on removal of officers, and tha[ ]

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should file the brief simultaneously with Bazerman's expert report. The brief, with the requisite footnote, was filed along with Bazerman's expert report later that day.[88]

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C. Bazerman's Written Direct Testimony

Bazerman's written direct testimony was due to be filed on April 27.[

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[88] *See* United States' Opposition to Defendants' Motion to Strike Any Corporate Restructuring Remedy and Max Bazerman, Ph.D. from the United States' List of Remedies Witnesses at 7 n.3 (March 21, 2005).

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Page 39 of the report has been withheld in its entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552(b)(7)(C)

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[94] In the final version of Bazerman's written direct testimony, Bazerman stated that he would defer to the monitor and "the court" to decide who should be removed.

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D. OCRS's Objections to Bazerman's Written Direct Testimony

[ ]it was filed on April 27[

]it failed to incorporate the qualification regarding

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Pages 42 thru 44 of the report have been withheld in their entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552(b)(7)(C)

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E. Bazerman Is Asked to Clarify his Written Direct Testimony

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] explained that the change was to reflect the Department's position that the removal of officers was allowed only under certain circumstances. [

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Page 47 of the report has been withheld in its entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552(b)(7)(C)

The government's response to defendants' objections to Bazerman's written direct testimony was due to be filed that day inserted a footnote in that brief which read:

> Dr. Bazerman is therefore not offering opinion on the legal standards the Court or any potential Court-appointed agent should apply in pursuing any of the categories of structural changes he has identified. As to his recommendation that the Court consider removal of senior management, the United States has advised Dr. Bazerman that the government has asserted that, as a matter of law and its enforcement policy, the removal of senior management by the court is permissible only in certain situations. Dr. Bazerman is not a lawyer and his testimony expresses no opinion regarding the circumstances when removal of senior management is legally permissible. Such legal matters are entirely for the Court to decide.

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United States' Response to Defendants' Objections to the Written Direct Testimony and Exhibits of Max H. Bazerman, Ph.D. at 4-5 n.2 (April 30, 2005).

F. Bazerman's Testimony in Court

Page 49 of the report has been withheld in its entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552(b)(7)(C)

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On May 4[ ]conducted the direct examination of Bazerman, which included Bazerman's adoption of his previously-filed written testimony. The direct examination included the following exchange:

> Q. Dr. Bazerman, I'm going to represent to you that the United States has taken the position that as a matter of law and enforcement policy, removal is only available under certain circumstances. Do your opinions go to the legal issue of under what circumstances the Court should order removal?
>
> A. They certainly do not. I defer to the Court to interpret legal issues.

Transcript of Proceedings at 20,336 (May 4, 2005).

On May 10, Judge Kessler denied the defendants' motion to strike Bazerman's testimony for failure to meet the standards for admitting expert testimony, but at the same time made clear that the legality of the remedies advanced by him posed "an entirely separate question" that would be determined later. Transcript at 20,691, 20,696 (May 10, 2005).

G. Bazerman Asserts that Political Appointees in the Department Improperly Tried to Change his Testimony

On June 20, 2005, in the wake of the publicity surrounding the allegedly political motives behind the lowering of the government's cessation remedy, *The Washington Post* reported that Professor Bazerman claimed he was asked to change his testimony regarding removal of corporate

officers to say that removal would be legally appropriate only under certain circumstances. Bazerman said he was told that the request came from Associate AG McCallum and [ ] that McCallum threatened to remove him from the case if he did not comply. Bazerman believed that the request represented an "inappropriate influence to weaken the government's case against the tobacco industry."[104] Bazerman told the reporter that he could not "think of an honest, plausible reason other than political interference" for what the Department's leadership was doing.

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The same day, U.S. Representatives Meehan and Waxman wrote to OPR to request an investigation into Bazerman's allegations. The congressmen reported that Bazerman had recently met with the minority staff of the House Government Reform Committee and told them that Associate AG McCallum and [ ] were behind the request that he qualify his testimony, and that he was told that McCallum would remove him from the case if he did not substantially change (and weaken) his testimony. Professor Bazerman's allegation, together with the change in the Department's cessation remedy and the allegations that Professor Eriksen and Matthew Myers were improperly pressured to change their testimony, led the congressmen to conclude: "The evidence is mounting that the Justice Department sabotaged its own case for political reasons."[105]

IV. THE EXPERT TESTIMONY OF PROFESSOR MICHAEL ERIKSEN

The TLT had long planned to use Professor Eriksen as both a liability and remedies witness at trial. From 1992 to 2000, Eriksen was the director of the Office on Smoking and Health at the

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[104] Carol D. Leonnig, *Expert Says He Was Told to Soften Tobacco Testimony*, The Washington Post, p. A3 (June 20, 2005).

[105] Letter from Henry A. Waxman and Martin T. Meehan to H. Marshall Jarrett at 6 (June 20, 2005).

U.S. Department of Health and Human Services' (HHS) Centers for Disease Control.[106] Eriksen became involved in the *Philip Morris* case in 2000 when the TLT asked him to serve as an expert witness. In November 2001, the TLT filed Eriksen's expert report, which addressed both liability issues and proposed remedies. Among the remedies Eriksen proposed were a ban on all imagery in tobacco advertising; allowing only black-and-white advertisements; and recommending restrictions on point-of-sale advertising. [ ] Eriksen was deposed in August 2002 and December 2003 concerning youth smoking and how marketing, such as the Joe Camel advertising campaign, played a substantial role in the decision by young people to smoke.

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A. Preparation of Eriksen's Written Direct Testimony

[ ] Eriksen testified in the liability phase of the case in January 2005. [ ]

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On March 11, the TLT identified Eriksen as one of its remedies witnesses. The government's disclosure stated that Eriksen would testify about the opinions expressed in his expert report, including his opinions relating to the defendants' advertising and promotion of cigarettes to youth.

On March 21, 2005, the government filed an Expert Supplemental Disclosure for Eriksen, listing four additional articles to support his written direct testimony. The Supplemental Disclosure stated that the conclusions stated in Eriksen's expert report filed earlier in the case (prior to the D.C. Circuit's disgorgement ruling) remained unchanged.

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B. First Amendment Concerns with Eriksen's Testimony

Eriksen's written direct testimony was due to be filed by 5:00 p.m. on Monday, May 9. In addition, Eriksen was scheduled to be deposed at 1:00 p.m. that same day. [

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[ ] Eriksen agreed to make the change because it was not contrary to his expert report and therefore was not incorrect or improper, [ ] [ ] As revised, Part III of Eriksen's testimony read:

> I recommend: (1) replacing any youth-appealing or misleading imagery in cigarette advertising and promotion (but not cigarette packaging) to factual, black and white communication; (2) restriction of visibility of any youth-appealing or misleading imagery and logos at retail; and (3) restriction of promotional devices that lower the price of cigarettes.

V. THE TESTIMONY OF MATTHEW MYERS

A. The Development of Myers' Testimony

Matthew Myers, a long-time anti-tobacco advocate, is the president of the Campaign for Tobacco-Free Kids, a private organization established to reduce tobacco use among children. Myers participated in negotiations between the tobacco industry and state attorneys general that led to an agreed proposed resolution in 1997 among those parties.[127] In late February or early March 2005, after the D.C. Circuit's disgorgement ruling [ ] recruited Myers to testify in the remedies portion of the government's case [ ]

[127] The proposed resolution, designed to settle Medicaid suits brought by the states, was contingent upon the enactment of federal legislation shielding the tobacco companies from future class-action suits and capping awards in future individual suits. No such legislation was enacted, however, which led the states and the tobacco industry to enter into a Master Settlement Agreement (MSA) in November 1998.

[

] Myers to provide testimony that would compare the remedies proposed in the 1997 negotiations and the remedies enacted through the MSA; discuss remedies that were the subject of the 1997 negotiations but were omitted from the MSA, including remedies related to tobacco advertising and marketing, youth access to tobacco, funding for public education, and the marketing of light and low tar cigarettes; and explain the impact of the omissions.[128]

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The TLT did not intend to call Myers as an expert witness, and he did not prepare an expert report.[129] Instead, the government intended to present him as a fact witnes [

] In that decision, Judge Kessler ruled that a fact witness

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[128] *See* Deposition of Matthew L. Myers at 51-52 (Apr. 28, 2005).

[129] *See id.* at 56.

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with substantial specialized knowledge could provide inferences, interpretations or opinions regarding factual matters contained in documents that predated his employment with the employer on whose behalf he was testifying; and could describe scientific or technical studies which he conducted or in which he participated, and recount the conclusions reached in those studies.[131]

In explaining her ruling from the bench, Judge Kessler discussed the distinction between the lay opinion of a fact witness with specialized knowledge under Federal Rule of Evidence 701 and the opinion of an expert witness under Rule 702. The court noted that a fact witness may "testify about his 'personal role in the unfolding of the events at issue.'"[132] The court continued:

> [I]t follows that the witness must be allowed, under Rule 602 [limiting witness testimony to matters within personal knowledge], to testify about the results and conclusions that that witness reached in performing whatever it was he did, whether an experiment or an evaluation or an analysis. In doing so, . . . that witness is providing facts under Rule 602 and lay opinion under Rule 701 . . . . He is not providing expert opinion under Rule 702.[133]

Based on the March 29 ruling [ ] believed that Myers could testify as a fact witness about: (1) his role in the 1997 negotiations and the remedies proposed during those negotiations; (2) his personal knowledge of the MSA; (3) how the 1997 proposed remedies and the remedies contained in the MSA differed; and (4) give his opinion, based on those facts and his personal knowledge, of the need for the remedies not implemented through the MSA [ ]

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[131] The defense motions that led to this ruling related to individuals who testified on behalf of their current tobacco company employer, but who gained most of their knowledge while working for a different tobacco company. *See* Transcript of Proceedings at 17,015 (Mar. 29, 2005).

[132] *Id.* at 17,024 (Mar. 29, 2005) (quoting *Gomez v. Rodriguez*, 334 F.3d 103, 113-14 (4th Cir. 2003)).

[133] Transcript of Proceedings at 17,024 (Mar. 29, 2005).

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B. Myers' Written Direct Testimony

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The written testimony was due to be filed at 5:00 p.m. on May 9 [

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Pages 68 through 72 of the report have been withheld in their entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552(b)(7)(C)

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] whether it would

be acceptable for Myers to simply add a statement to his testimony that he is not expressing an

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opinion as to what is legally permissible as a remedy.[142] [

] Myers, who agreed to add the statement to his written testimony.

In answer to the question, "Can you tie this back to the 1997 Proposed Resolution?," [

] the final testimony, as filed on May 9, stated "I do not know what specific remedies the United States will ask for in this case *or what the United States believes is legally permissible.*" United States' Written Direct Examination of Matthew L. Myers Submitted Pursuant to Order #471 at 39 (emphasis added) [

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C. The District Court Strikes Most of Myers' Testimony

Myers was scheduled to present live testimony in court on May 18, 2005. The defendants moved to strike Myers' testimony on a number of grounds, including that his testimony was replete with expert opinions and conclusions, although he was purportedly a fact witness. On May 16, the court issued a ruling on defendants' objections. Judge Kessler prefaced her ruling with the following remarks:

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I'm going to address the legal arguments, of course, regarding Mr. Myers' testimony, but I do want to say that when I first read it, which now is probably about a week ago, I was quite taken aback.

Put simply, the testimony by and large is a straightforward opinion piece. It's presented by what I have reason to believe . . . [is] a dedicated and a long-standing, quote/unquote, antitobacco advocate.

* * *

The testimony is not as the government purports it to be, a piece of evidence – and I want to emphasize that word evidence – presented by a fact witness.

I want to emphasize what, of course, everybody knows. *This is a courtroom. It's not a congressional hearing. It's not a press conference. It's not a speakers podium at one of these million people dinners at the Hilton or the Shoreham.*

I don't mean those comments sarcastically and I don't mean them in any way to convey disrespect for Mr. Myers or the substance of his opinions.

But we are governed by the Federal Rules of Evidence and, in particular, as we've all been over it a hundred times, Rule 401, 402, 403, 602, 701, and 702, [and] *much, if not most, of Mr. Myers' testimony is basically a speech, not admissible evidence.*

* * *

Given that this is a bench trial, I have consistently chosen to err on the side of admitting evidence when the question has been a close one, and we have had numerous difficult evidentiary issues presented in this case.

But testimony *that is so blatantly political – and I want to emphasize when I'm using that word "political," I'm not talking, of course, in a partisan sense, but political in the public policy sense – that kind of testimony just can't be admitted.*

Transcript of Proceedings at 21,041-21,043 (May 16, 2005) (emphases added). Judge Kessler proceeded to strike much of Myers' testimony as expert opinion, including the entirety of the testimony [ ] that was the focus o [ ] objections.

VI. DR. FIORE'S EXPERT REPORT AND TESTIMONY ON CESSATION

A. Dr. Michael Fiore's Expert Report

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In its List of Remedies Witnesses filed on March 11, 2005, the government identified Fiore as one of its nine witnesses. The List stated that Fiore "will offer expert testimony concerning feasible, science-based action steps to promote and achieve tobacco cessation amongst all smokers. . . . He will offer testimony concerning the necessary components, costs, duration and benefits of a national smoking cessation program."

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[ ] "National Action Plan for Tobacco Cessation," a proposal issued on February 13, 2003 by Fiore's interagency Subcommittee on Cessation and presented for consideration by HHS. The National Action Plan comprised six "federal initiatives" and four "Public-Private Partnership Opportunities." [ ] four of the six federal initiative [ ] priced at the same costs estimated in the National

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Action Plan: (1) a "Nationwide Tobacco Cessation Quitline," at a cost of "about $3.2 billion" per year; (2) a "national media campaign" costing "at least $1 billion . . . annually"; (3) a "new tobacco research infrastructure" focusing on tobacco dependence and its treatment, costing "about $500 million per year"; and (4) a "new tobacco training infrastructure" to train clinicians to intervene with patients who smoke, also costing "approximately $500 million per year."[145] These figures amounted to $5.2 billion annually. [

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The 2003 National Action Plan did not state explicitly how many years the program should last; instead, it recommended that the program be "sustained." The Plan did recommend, however, that two of the initiatives -- the new tobacco research and clinical infrastructures -- be funded in five year renewable terms.[146] [

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[145] National Action Plan 11, 13-16, 20-23 (February 13, 2003). The remaining two "federal initiatives" proposed: (1) increasing by $2.00 the excise tax on the sale of cigarettes and other tobacco products, which would raise an estimated $28 billion; and, (2) including cessation counseling and medications in various federally-funded healthcare programs not currently offering them.

[146] *See id.* at 9.

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On March 21, 2005, the government filed Fiore's expert report. In the report, Fiore noted his background as chair of the HHS Subcommittee on Cessation and discussed the National Action Plan. Fiore stated that he intended to testify concerning "steps to promote and achieve tobacco cessation amongst all smokers" and that his plan was based on the National Action Plan.[149]

Fiore's report stated that such a program could be expected to result in a minimum of one million smokers quitting each year, and that it would be "reasonable to expect" that it would take "as many as 25 or more years to create the necessary environment" for "long term success" in reducing smoking levels. (Although the expert report did not set forth the calculation, a $5.2 billion/year program continued for 25 years implied a total cost of $130 billion.) The report concluded by stating that "one of the goals" of the cessation program would be to "prevent and restrain future conduct" by the defendant tobacco companies, and that this goal favored administering the program "for an extended period of time."

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[149] At trial, Fiore testified that his expert report was "based on the [2003] Subcommittee on Cessation report." Transcript of Proceedings at 21,305 (May 17, 2005). The National Action Plan was never funded and realized, except that one health agency established a modest quitline.

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On May 5, 2005, Fiore was deposed and reaffirmed that the cessation remedy he was proposing would cost $5.2 billion annually.[152] On cross-examination, he affirmed that the smoking cessation program he advocated would last for 25 years.[153] Asked whether he had been requested to render an opinion on whether the 2003 National Action Plan would "prevent or restrain" future misconduct by the defendants in the case, Fiore replied: "that was something that the Department of Justice and the rest of their case would support, . . . it was not my responsibility to specifically address . . . the capacity of the cessation plan to prevent and restrain."[154]

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[152] Deposition of Michael Fiore at 103 (May 5, 2005).

[153] *Id.* at 106-107.

[154] *Id.* at 300-301.

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C. Fiore's Written Direct Testimony is Filed

The written direct testimony for Fiore, as well as for Eriksen and Myers, was due to be filed by 5:00 p.m. on May 9, 2005. [

] Fiore's testimony reiterated the

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$5 billion per year/25 years cessation program.[170] [

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[170] Specifically, Fiore's written direct testimony stated, "Given the current size of the smoking population – about 45 million people, about 30 million of who tell us they want to quit – it is reasonable to expect that it will take as many as 25 or more years to allow every smoker in America who wants to quit to do so successfully."

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D. The Trial Team Defends the Cessation Remedy in a May 12, 2005 Filing

On May 11, 2005, the defendants filed their joint objections to Fiore's written direct testimony, arguing that the cessation remedy he proposed was "clearly and directly barred" by the D.C. Circuit's February 4, 2005 disgorgement decision "limit[ing] the Court to consideration of only those remedies that are both (1) 'forward-looking,' and (2) 'aimed at future violations.'"[178] The defendants noted that the program "derived entirely" from the National Action Plan, which was

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[178] Joint Defendants' Objections to Fiore's Written Direct Examination 1 (May 11, 2005) (italics and bold-face omitted).

finalized in February 2003, long before the D.C. Circuit's ruling, and thus should be excluded as irrelevant.[179]

The following day, May 12, the government filed an Opposition to the defendants' objections. First, the opposition argued that the legality of the cessation program should be determined later, and that it would be premature to exclude evidence on such grounds. On the merits, the opposition argued that the cessation remedy was "not only forward-looking and aimed at future violations, but [that it] will act directly to prevent and restrain ongoing wrongful conduct of decades-long duration."[180] The opposition stated that Fiore did not need to testify on whether the cessation program would prevent and restrain because that was addressed by other testimony and evidence. The opposition cited Bazerman's written direct testimony:

> Presently in the marketplace, there are smokers who want to quit and smokers. . . who have quit that want to abstain from smoking. I have assumed that defendants are aware of this population . . . and design and market light and low tar cigarettes to address this population. To the extent that effective cessation programs eliminate this population in the long term, or immunize this population against defendants' misleading marketing campaigns, they will also eliminate the incentives . . . to design and market cigarettes in ways intended to appeal to this population.[181]

The opposition also cited Bazerman's opinion that a cessation program would "address a marketing opportunity that provided an incentive for [future] misconduct."[182]

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[179] *Id.* at 1-2 (italics and bold-face omitted).

[180] United States Reply in Opposition to Defendant's Objections to the Written Direct Examination of Michael C. Fiore, M.D., M.P.H., and Accompanying Exhibits at 2 (May 12, 2005).

[181] *Id.* at 3.

[182] *Id.*[

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E. Fiore's In-Court Testimony on May 17 and 18, 2005

On May 17, 2005, Fiore testified in court, adopted his previously-filed written direct testimony, and was cross-examined. On cross-examination, he acknowledged that his expert report and written direct testimony stated that the cessation program needed to last for 25 years.[185] Fiore conceded, however, that the program could be disbanded after 20 years if it proved "extraordinarily successful" and "every smoker who wanted to quit had succeeded."[186]

VII. INTERNAL DISCUSSIONS CONCERNING THE CESSATION REMEDY

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[185] Transcript of Proceedings at 21,349 (May 17, 2005).

[186] *Id.* at 21,350.

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K. June 7 Closing Arguments

[ ] court convened at 9:30 a.m. and closing arguments proceeded on aspects of the government's remedies case other than cessation. [ ] began the presentation, followed by [ ], after which [ ] resumed the podium. [ ] then addressed the court on remedies other than cessation, such as corrective statements, and the court broke for lunch at 12:33 p.m., directing the parties to reconvene at 1:45 p.m.

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Page 123 of the report has been withheld in its entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552(b)(7)(C)

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Court proceedings resumed at 1:47 p.m., with [ ] addressing the court on youth marketing. After a recess, the proceedings resumed at 3:19 p.m. [ ] discussing the trial evidence demonstrating that the tobacco companies marketed low tar cigarettes to intercept would-be quitters – noting that a document in defendant Philip Morris' files had called them a "textbook example of a market opportunity" – under the fraudulent premise that such cigarettes were less harmful.[273] [ ] then asked the court to impose three remedies: (1) a bar on brand descriptors such as mild, medium, and light, which implied health benefits; (2) a bar on advertising and marketing themes for low tar cigarettes carried out for the same purpose; and (3) a smoking cessation program.[274] [ ] discussed additional evidence showing that smokers of low tar cigarettes (wrongly) believed such cigarettes were less harmful.[275] [ ] asked the court to appoint a monitor to ensure that the defendants did not in the post-judgment period develop new brand descriptors and advertising and marketing themes along the lines the government sought to ban.[276]

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[273] Transcript of Proceedings at 23,062-23,081 (June 7, 2005).

[274] *See id.* at 23,081.

[275] *See id.* at 23,081-23,088.

[276] *See id.* at 23,088.

[ ]then turned to the cessation program.[ ]detailed features of the program advanced by Fiore: proactive telephone counseling; pharmacology; the promotional campaign, and other aspects.[277][ ]discussed the evidence supporting a 20% success rate among those choosing to participate in such a program, and argued that Fiore's estimate of a cost of $419 per caller to the quit line went unchallenged.[278] The court interjected that Fiore was cross-examined both on "the lack of any specific financial estimates of the cost of the [cessation] program" and the accuracy of the 20% success rate forecasted for participants in such a program.[279]

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After defending the 20% figure,[28][ ]turned to the defendants' assertion that the cessation and education-funding remedies were "not tied to any wrongdoing by defendants."[281][ ]noted that he had six minutes left to argue.[282] Whe[ ]cited Bazerman's testimony on remedies designed to remove "the incentive for defendants to engage in fraudulent activity in the future," Judge Kessler asked: "How can a cessation program, no matter how desirable it may be on public health grounds, . . . prevent and restrain future RICO violations by the defendants?"[283][ ]responded: "[B]y

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[277] *Id.* at 23,089.

[278] *Id.* at 23,092.

[279] *Id.* at 23,093-23,094.

[280] *See id.* at 23,094-23,095.

[281] Id. at 23,095.

[282] *Id.*

[283] *Id.* at 23,097.

removing the incentive for defendants to engage in exactly the types of activities they have engaged in for decades in the future."[284] [ ] added:

> Your honor can . . . , combined with the evidence of what it takes to take away the benefit from that activity, fashion a smoking cessation program that exists . . . for, at a minimum, a 5-year term to address the fraud that . . . -- Your Honor should find -- will, absent action, occur during the next year.[285]

[ ] stated the 5-year duration was appropriate because "only 20% of the participants are going to quit in any given year."[286]

[ ] then said:

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> And in order to do that, we ask Your Honor to impose upon defendants the requirement to fund a smoking cessation program that will provide the types of treatments outlined by Dr. Fiore at a cost, including treatment and marketing, of $2 billion a year for the next five years.[287]

Because the cessation program was to "work in synergy with the removal of the brand descriptors and the other prohibitions," [ ] explained that the government "hope[d]" that the program would not need to be extended beyond five years. But the government was also asking the court to have a monitor "assess during the initial 5-year term" whether "continuing fraudulent conduct" would necessitate extending the program for another five year term.[288]

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[284] *See id.* [ ]

[285] *Id.*

[286] *Id.*

[287] *Id.* at 23,097-23,098. The government reiterated this $2 billion per year for five years figure in its Post-Trial Brief filed on August 24, 2005 (at page 208).

[288] *Id.* at 23,098.

Statin[ ]had "a couple of minutes left,"[ ]addressed a concern previously voiced by Judge Kessler about whether such an award would be "well spent," an[ ]maintained that the court-appointed monitor would ensure that it was.[289][ ]referred to "a number of instances" in which "frameworks have been set up with investigations officers and hearing officers . . . tasked with enforcing provisions of . . . [a] final judgment of the court," adding that the government "strongly believed" that such a structure could be utilized in this case.[290][ ]then stated tha[ ]had run ove[ ]allotted time by two minutes, an[ ]concluded his argument.[291]

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[289] *Id.* at 23,099.

[290] *Id.* at 23,101.

[291] *Id.* at 23,102.

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L. June 8-9

During court proceedings on June 8, counsel for one of the tobacco companies stated that, after fighting "tooth and nail" in discovery over the cessation program, "suddenly at 4:00 yesterday it's a whole new program." This "change almost on a dime" was "the most powerful evidence" that the government's case was a "house of cards." Judge Kessler speculated: "[P]erhaps [the change in position] suggests that there are some additional influences being brought to bear on what was the government's . . . position in this case."[296]

The following day, June 9 [ ] gave rebuttal on the cessation program issue [[297]]

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Following closing arguments, *USA Today* provided the Department with an opportunity to publish an opinion piece on the controversial drop in the cessation demand. A draft in which McCallum defended the change was provided to the White House on June 8, 2005. White House approval was secured and the piece ran the following day. The consultation with the White House was limited to the wording of the editorial. We found no evidence of any consultation regarding the change itself.

M. Post-Trial Developments

In a July 7, 2005 submission, the defendants claimed that the government's "admission" at closing that its "remedies must be designed to prevent and restrain future violations . . . signal[ed]

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[296] Transcript of Proceedings at 74-75 (June 8, 2005). This statement by Judge Kessler was reported in the press.

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the end of the cessation remedy in this case, regardless of the Government's *post hoc* attempts [to] adjust [the] amounts paid or the length of time covered by the proposed cessation program." According to the defendants, the admission "clearly required the exclusion of all of the Government's remedies experts."[298]

On August 24, 2005, the government filed its Post-Trial Brief reiterating the $2 billion per year, 5-year cessation program figures that [ ] mentioned during closing argument on June 7. [ ] calculations proceeded under the assumption that the tobacco companies should have to fund a cessation program that would result in an equivalent number of smokers quitting whose entry into the market or decision to stay smoking was substantially impacted by defendants' continuing post-judgment violations. [ ] the assumption of one year of continuing post-judgment violations, as well as the theory that it would impact two categories of individuals, youth entrants and down-switchers[299]; the 20% success rate of program participants; the consequent need to run the program for five years; the $375 million per year figure to promote and advertise the program; and the $419 cost per quit attempt and the 1.6

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[298] Reply Brief in Support of Motion to Strike Expert "Remedies" Opinions at 2 (July 7, 2005).

[299] Specifically, the government asked the court to find that in the year following imposition of a final remedial order, the defendants would continue to "act as a substantial contributing factor to youth smoking initiation" and "cause smokers to switch to lower tar cigarettes in the mistaken belief that they are less hazardous." According to the government, the "myriad ways" that the defendants appeal to youths "will not disappear overnight," nor would their marketing messages regarding low tar cigarettes "disappear immediately." Government's Post-Trial Brief at 210-211 (August 24, 2005).

multiplier accounting for the forecast that only ten quit attempts would result from every sixteen callers, resulting in an adjusted per call cost of $670.[300]

Regarding down-switchers, the Post-Trial Brief's calculations continued to assume that 75% of switchers switch down to low tar and that, citing Dr. Weinstein, 50% of low tar cigarette smokers mistakenly believed that such cigarettes were less hazardous or a step in the direction of quitting altogether.[301] [ ] there were assumed to be 730,000 new youth entrant [ ] The resulting range of per year figures was $1.93 billion to $2.56 billion (implying a total range over five years of $9.65 billion to $12.8 billion), and the Post-Trial Brief asked the court, in the "discretion afforded it in equity," to simply require $2 billion per year for five years.[302]

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The government's Post-Trial Brief also argued that the cessation program should be extended for an additional five years "in the event of future misconduct beyond the first post-judgment year," namely, conduct prohibited by the court's forthcoming remedial order undertaken by the tobacco companies "with the intent to prevent smokers who want to quit from doing so or fraudulently to induce new smokers to begin daily smoking."[303] The Post-Trial Brief noted that Circuit Judge Williams, in his concurring opinion on February 4, 2005, stated that the district court was empowered under 18 U.S.C. § 1964(a) to "establish schedules of draconian contempt penalties for

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[300] Government's Post-Trial Brief at 212, 215, 217 (August 24, 2005).

[301] *Id.* at 211.

[302] *Id.* at 217.

[303] *Id.* at 218-219.

future violations."[304] The Post-Trial Brief proposed that, in each year of such a five-year extension period, the tobacco companies should be required to fund a quit attempt (at $670 per attempt) for 15% of the total U.S. smoking population, plus pay promotional expenses of $375 million, resulting in $4.7 billion each year for five years or a total of a potential additional $23.5 billion.[305]

Meanwhile, on July 18, 200[redacted] the Department appealed the D.C. Circuit's disgorgement ruling to the U.S. Supreme Court in an effort to get the $280 billion disgorgement remedy reinstated. On October 17, 2005, the U.S. Supreme Court denied the government's petition for a writ of certiorari. *United States v. Philip Morris USA Inc.*, 126 S.Ct. 478 (U.S. Oct. 17, 2005) (No. 05-92).

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VIII. THE ALLEGED CONFLICT OF INTEREST FOR McCALLUM

A. The Allegation

In a letter dated June 8, 2005, Congressmen Waxman and Meehan alleged that Associate AG McCallum should have been recused from participating in the *Philip Morris* case because his former law firm represented one of the defendants, R.J. Reynolds Tobacco Company, in an unrelated matter.[306] The congressmen cited to a *Los Angeles Times* article that reported:

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[304] *Id.* at 219.

[305] *Id.*

[306] [redacted]

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> Before his appointment in the Justice Department in 2001, McCallum had been a partner at Alston & Bird, an Atlanta-based firm that has done trademark and patent work for R.J. Reynolds Tobacco. In 2002, McCallum signed a friend-of-the-court brief by the administration urging the Supreme Court not to consider an appeal by the government of Canada to reinstate a cigarette smuggling case against R.J. Reynolds that had been dismissed. The department's ethics office had cleared McCallum to take part in that case.[307]

B. Actions Taken by Associate AG McCallum to Determine Whether He Could Participate in the *Philip Morris* Case

Prior to his employment with the Department, McCallum was a partner in the law firm of Alston & Bird, headquartered in Atlanta, Georgia. McCallum joined the Department in September 2001 as Assistant Attorney General for the Civil Division. His duties as Assistant Attorney General included overseeing all litigation handled by Civil Division attorneys, including the *Philip Morris* case.

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[307] Myron Levin, *U.S. Eases Demands on Tobacco Companies*, Los Angeles Times (June 8, 2005).

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[ ] GlaxoSmithKline PLC (Glaxo), a pharmaceutical company, had intervened in the *Philip Morris* case for the limited purpose of protecting trade secrets and other confidential commercial information in the possession of the Food and Drug Administration that appeared to be responsive to a discovery request by defendants. [ ] Alston & Bird had represented Glaxo in unrelated litigation [ ]

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[ ] submitted a memorandum to Associate Deputy Attorney General (ADAG) David Margolis requesting authorization, under 5 C.F.R. § 2635.502, for McCallum to participate in the *Philip Morris* case. That regulation states generally that an agency may authorize an employee to participate in a matter in which the employee's impartiality could be questioned if the agency designee determines "that the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." *Id.* § 2635.502(d). The [ ] memorandum explained that McCallum's former law firm [ ], represented Glaxo. [ ]

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On October 15, 2001, based on th[ ]memorandum, ADAG Margolis authorized McCallum to continue to participate in *Philip Morris*.

One year later, in October 2002, the Civil Division was involved in preparing an amicus brief to be filed by the United States in a RICO suit brought by the Attorney General of Canada against R.J. Reynolds. Canada alleged that R.J. Reynolds had engaged in a cigarette smuggling scheme to evade Canadian taxes on cigarettes. The Second Circuit ruled that Canada's suit was barred by the "revenue rule," which provided that courts of one nation will not assist another sovereign to collect taxes due under the other nation's laws. *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001). Canada filed a petition for certiorari, arguing that the revenue rule did not apply because it brought its cause of action under the RICO statute. The Supreme Court invited the United States to provide its views.

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Ultimately, the Office of the Solicitor General decided that the Justice Department would urge the court to interpret RICO consistent with the revenue rule[

]In accordance with Department protocol, McCallum, as the AAG for the Civil Division, was one of the ten attorneys listed on the signature block of the United States' brief, although he did not have personal involvement in drafting or reviewing the brief.[311]

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[31]*see* Brief for the United States as Amicus Curiae, *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, No. 01-1317 (U.S. Oct. 2002).

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IX. APPLICABLE STANDARDS OF CONDUCT

A. OPR's Analytical Framework

OPR finds professional misconduct when an attorney intentionally violates or acts in reckless disregard of a known, unambiguous obligation. An attorney intentionally violates an obligation or standard when the attorney (1) engages in conduct with the purpose of obtaining a result that the obligation or standard unambiguously prohibits; or (2) engages in conduct knowing its natural or probable consequence, and that consequence is a result that the obligation or standard unambiguously prohibits.

An attorney acts in reckless disregard of an obligation or standard when (1) the attorney knows or should know, based on his or her experience and the unambiguous nature of the obligation or standard, of an obligation or standard; (2) the attorney knows or should know, based on his or her experience and the unambiguous applicability of the obligation or standard, that the attorney's conduct involves a substantial likelihood that he or she will violate, or cause a violation of, the obligation or standard; and (3) the attorney nonetheless engages in the conduct, which is objectively unreasonable under all the circumstances. Thus, an attorney's disregard of an obligation is reckless when it represents a gross deviation from the standard of conduct that an objectively reasonable attorney would observe in the same situation.

If OPR determines that an attorney did not engage in professional misconduct, OPR determines whether the attorney exercised poor judgment, engaged in other inappropriate conduct, made a mistake, or acted appropriately under all the circumstances. An attorney exercises poor judgment when, faced with alternative courses of action, he or she chooses a course of action that is in marked contrast to the action that the Department may reasonably expect an attorney exercising good judgment to take. Poor judgment differs from professional misconduct in that an attorney may act inappropriately and thus exhibit poor judgment even though he or she may not have violated or acted in reckless disregard of a clear obligation or standard. In addition, an attorney may exhibit poor judgment even though an obligation or standard at issue is not sufficiently clear and unambiguous to support a professional misconduct finding. A mistake, on the other hand, results from an excusable human error despite an attorney's exercise of reasonable care under the circumstances.

B. Rules of Professional Conduct

A determination of what rules of professional conduct apply to the conduct at issue is governed by Department of Justice regulations set forth at 28 C.F.R. part 77.3, *Ethical Standards for Attorneys for the Government*, which implement 28 U.S.C. § 530B. The regulations provide that government attorneys shall, in all cases, conform to the rules of ethical conduct of the court before which a particular case is pending. Because the *Philip Morris* case was pending before the U.S. District Court for the District of Columbia, we first reviewed that district court's local rules.

Pursuant to Local Civil Rule 83.15(a), the district court adopted the District of Columbia Rules of Professional Conduct (DC RPC) as the applicable standards of professional conduct.[314]

DC RPC 3.4(b) provides that a lawyer "shall not . . . falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."[315]

DC RPC 1.3 provides in section (a) that a lawyer "shall represent a client zealously and diligently within the bounds of the law"; and in section (b) that a lawyer "shall not intentionally: (1) fail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules; or (2) prejudice or damage a client during the course of the professional relationship."[316]

DC RPC 3.1 provides that a lawyer "shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law."[317]

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X. McCALLUM DID NOT NEED TO BE RECUSED FROM *PHILIP MORRIS*

Based on the results of our investigation, we concluded that McCallum took appropriate steps to ascertain the potential for a conflict of interest with respect to the *Philip Morris* case, and that there was no need for him to recuse himself from the litigation. McCallum had never personally represented R.J. Reynolds or any of the other named defendants in the tobacco litigation. Furthermore, his former law firm, Alston & Bird, played no role in *Philip Morris*. Therefore, the only potential conflict in this matter stemmed solely from Alston & Bird's representation of *Philip Morris* defendants on other matters.

In general, Office of Government Ethics regulations indicate that a conflict of interest may exist for a government attorney working on a case where: (1) the lawyer previously represented one of the parties in the case in this exact matter or any other matter; or (2) the lawyer previously worked for a firm that represented one of the parties in the case in this exact matter. 5 C.F.R. § 2635.502. Neither of those situations was present in this case: McCallum never personally represented a party to the *Philip Morris* case, and his former firm did not participate in the case.

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[318] DC RPC 1.9 provides: "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."

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] Because Alston & Bird's representation of R.J. Reynolds was not in the same or a substantially related matter as the *Philip Morris* case, and because McCallum did not acquire confidential information about R.J. Reynolds during his tenure at Alston & Bird, we concluded that McCallum's participation in the *Philip Morris* case did not violat[ ]bar rule.

To the extent that McCallum's impartiality could reasonably be questioned by the fact that his former firm represented a party to the *Philip Morris* case in unrelated matters, the Department's ethics designee had the authority to grant McCallum a waiver allowing him to work on the case. For

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example, with regard to Glaxo's limited intervening in the case[ ]determined that McCallum had no actual conflict based on Alston & Bird's previous representation of Glaxo on unrelated matters, but out of an abundance of caution sought and obtained a formal waiver allowing McCallum to continue to participate in the litigation.

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When McCallum first learned in October 2002 that Alston & Bird may have represented R.J. Reynolds in patent or trademark matters, he immediately took steps to determine the precise nature

of Alston & Bird's representation of R.J. Reynolds. [

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] the Department's Ethics Office had opined that no conflict existed, and that there was no need to obtain a waiver even out of an abundance of caution, McCallum's obligation was fully discharged. *See* 5 C.F.R. § 2635.502(a)(1).

XI. THERE WAS NO IMPROPER PRESSURE ON PROFESSOR BAZERMAN

Based on the results of our investigation, we concluded that there was no improper pressure put on Professor Bazerman to clarify his testimony. The evidence showed that career attorneys in the Criminal Division, not Associate AG McCallum or the Civil Division leadership, raised the concerns about the manner in which the remedy of removing corporate officers was portrayed in Professor Bazerman's expert report and in his written direct testimony. Furthermore, the evidence showed that Bazerman's proposals – opinions of an expert that the Department had no obligation to sponsor – were materially inconsistent with existing Department policy on the circumstances under which a court-appointed monitor could recommend removal of corporate officers. The Criminal Division retained the authority to supervise litigation brought under civil RICO, and its objections had valid bases. Accordingly, we found that Associate AG McCallum and the Civil Division leadership acted reasonably in attempting to modify Bazerman's testimony in light of the Criminal Division's concerns.[319]

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[319] Because the Civil Division leadership and the Criminal Division attorneys sought to modify Bazerman's recommendations testimony to accurately reflect the law and the Department's policies, their actions did not constitute counseling or assisting a witness to testify falsely. *See, e.g.*,

On March 11, 2005, the TLT filed its List of Remedies Witnesses, in which it stated that Professor Bazerman would offer expert testimony on the need for "Court-ordered structural changes to defendants' businesses, including . . . removal of senior management."[

career Criminal Division attorneys immediately objected that removing a corporate official based solely on a finding of corporate liability was contrary to RICO law and to long-standing Department enforcement policy regarding RICO. Their objections were based on RICO principles; we found no evidence of "political" motivation.

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DC RPC 3.4(b).

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For the reasons stated above, we concluded that there was no improper pressure put on Professor Bazerman to clarify his testimony, and that the modifications sought were based on legitimate institutional concerns of career Criminal Division attorneys.

XII. THERE WAS NO IMPROPER PRESSURE ON PROFESSOR ERIKSEN

Based on the results of our investigation, we concluded that there was no improper pressure – political or otherwise – put on Professor Eriksen to modify his recommendations, and that the modifications were driven entirely by the concern that his remedies may conflict with the First Amendment.[327]

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[327] In addition, because the changes to Eriksen's testimony were solely to avoid advocating an arguably unconstitutional remedy, and because Eriksen agreed that the changes were consistent with his expert report, the Civil Division leadership did not counsel or assist false testimony. *See, e.g.*, DC RPC 3.4(b).

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Based on the results of our investigation, we found no evidence to suppor[ ]belief that the changes to Eriksen's testimony were politically motivated[ ]a career Criminal Division attorne[ ]based o[ ]own familiarity with First Amendment law, reasonably believed that the proposed remedies – which were more restrictive than those struck down by the Supreme Court in *Lorillard v. Reilly* – were not constitutional [

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In addition, we found no evidence that the Civil Division leadership acted in bad faith in agreeing with the Criminal Division that the remedies appeared to be overbroad under First Amendment analysis. Rather, the evidence supports a finding that they were motivated by a desire to prevent the United States from sponsoring an unconstitutional remedy.

XIII. THERE WAS NO IMPROPER PRESSURE ON MATTHEW MYERS

Based on the results of our investigation, we concluded that it was not improper for the Civil Division leadership to request modification of Myers' testimony; that the modification related to Myers' recommendation on remedies, not matters of historical fact; and that the motivation for the

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requested change was based on First Amendment requirements, not on improper political or other considerations.[332]

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We found no evidence that Meron's actions with regard to Myers' testimony were motivated by anything other than a legitimate concern that the Department not overreach and propose a remedy that was unconstitutional.[

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[332] Because the changes to Myers' opinion testimony were solely to avoid advocating an arguably unconstitutional remedy, the Civil Division leadership did not counsel or assist false testimony. *See, e.g.*, DC RPC 3.4(b).

As with Eriksen's testimony, we found no evidence to support allegation that Meron had an improper motive in requesting a change to Myers' testimony.

Meron reasonably believed that the proposed remedies, which were more restrictive than those struck down by the Supreme Court in *Lorillard v. Reilly*, were unconstitutional

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For these reasons, we concluded that Meron did not improperly pressure Myers to modify his testimony.

XIV. THE CESSATION REMEDY ADVOCATED BY ASSOCIATE AG McCALLUM AND THE CIVIL DIVISION LEADERSHIP WAS NOT IMPROPER

Based on the results of our investigation, we concluded that Associate AG McCallum, AAG Keisler, and PDAAG Meron did not engage in professional misconduct or exercise poor judgment with respect to the smoking cessation remedy advocated by the government. The evidence showed they had legitimate and substantial concerns with the factual and legal bases for a $130 billion/25-year cessation program. The evidence showed further that their attempts to craft an alternate cessation program reflected good-faith efforts – supported both by facts and the law – to obtain a remedy from the district court that would be sustainable on appeal. Furthermore, we found no evidence that the White House or any other political interest exerted any influence in this matter.

A. The Allegations

[ ] advocated seeking a $130 billion/25-year cessation program that would force the defendant tobacco companies to pay for each existing smoker who wanted to quit to do so. [ ]

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[33] [ ]

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As discussed in detail below, we found that the evidence did not suppor[ ]charges.

B. The Leadership Sought to Craft a Cessation Program that Would be Sustainable on Appeal

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As Judge Kessler noted, the D.C. Circuit's disgorgement ruling "struck a body blow" to the government's case, much of which had focused on decades of past misconduct by the tobacco companies.[342] The efforts by McCallum, Keisler, Meron[ ]to craft a legal theory that would be "forward-looking" within the meaning of the "new legal standard announced"[343] by the D.C. Circuit were designed to find a cessation program that would be sustainable on appeal [

]we found no evidence that political influence or considerations played any role in their efforts, nor any evidence undermining their assertion that their motive was to fashion a sustainable cessation remedy.

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342 Order # 886 at 2.

343 *Id.*

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[15] The cessation program sponsored by Fiore was based on an extant National Action Plan that outlined the components and costs of a program whose goal was to "achieve tobacco cessation" for an existing population of 32 million smokers who said they wanted to quit [ ] Fiore calculated that it would take 25 years for the program to enable that entire population to quit. Combining a 25-year duration with the costs from the National Action Plan ($5.2 billion per year), the cessation program would cost $130 billion.

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McCallum, Keisler, Meroi [ ] also had well-grounded concerns tha [ ] legal theory for imposing the cessation program did not comport with the D.C. Circuit's disgorgement ruling and thus would not survive appeal. As Judge Kessler noted, the D.C. Circuit's disgorgement ruling established a "new legal standard" for determining whether a remedy was available under civil RICO; in particular, it prohibited non-disgorgement remedies designed to prevent and restrain "the effects" of past misconduct.[346] Furthermore, it specified that a remedy could not be "measured by *past* conduct."[347] This decision posed significant obstacles [

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[346] Order # 886 at 5.

[347] 396 F.3d at 1198 (emphasis in original).

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McCallum, Keisler, Meror held legitimate concerns that theory for a cessation program was inconsistent with the D.C. Circuit's directives and would not be sustainable on appeal.

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C. The Alternate Cessation Program Had Reasonable Bases in Fact and Law

contended that McCallum's motive was to reduce the cost of the cessation program to protect the tobacco companies from an enormous award, and that the legal arguments based on the D.C. Circuit's disgorgement ruling were merely a vehicle for accomplishing that goal

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[56] Based on the results of our investigation, we concluded that the evidence did not suppor[']claim.

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] the approach to the cessation program crafted by McCallum and Meron was grounded in record evidence and in a reasonable interpretation of the law, and reflected a good-faith effort to create a program that was sustainable, both factually and legally, on appeal.

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In post-trial briefing, the defense argued that this aspect[ ] violated due process because it created an "irrebuttable presumption" of post-judgment violations despite the imposition of the cessation program.[365][

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[365] Defendants' Motion for Judgment on Partial Findings Pursuant to Fed. R. Civ. P. 52(c) at 15 & n.7 (July 20, 2005).

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] we did not find that the legal basis for the McCallum/Meron approach was unfounded.

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The evidence also showed that there was ample factual support in the record for the cessation program outlined by McCallum and Meron.[

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b5]cessation program reflected a good-faith effort to
b6 create a legally viable theory, and that it was supported by record evidence and a reasonable legal
b7C theory.[375]

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Page 166 of the report has been withheld in its entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552(b)(7)(C)

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D. The Alleged Pressuring of Witnesses

[ ] asserted that the directives to alter the testimony of Eriksen and Myers were inappropriate and supported an inference that political pressure was at work.[38] [

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As detailed in Section XI, *supra*, the modifications to Bazerman's recommendation were sought by career Criminal Division attorneys who were concerned that Bazerman's position should not be sponsored by the Department because it was inconsistent with the law and with long-standing Department enforcement policy with regard to RICO. We concluded that the Criminal Division had the authority to insist on the modifications, and that Associate AG McCallum, AAG Keisler, and PDAAG Meron did not act improperly in accommodating those concerns. Furthermore, we found no evidence to suggest that their efforts were based on political considerations

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As detailed in Sections XII and XIII, *supra*, the evidence does not support allegations concerning the Eriksen and Myers testimony. McCallum and the Civil Division leadership were concerned that certain remedies recommended by Eriksen and Myers were unconstitutional under the First Amendment.

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Pages 169 thru 170 of the report have been withheld in its entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552(b)(7)(C)

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F. The Alleged Pressure to Settle the Case

We found no evidence that the White House[

,]or anyone else attempted to influence Associate AG McCallum or the Civil Division leadership in their handling of the *Philip Morris* litigation. In particular, we found no evidence that the White House or anyone else pressured McCallum to settle the case, or to reduce the cessation

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program to facilitate settlement.[39]

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Page 173 of the report has been withheld in its entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552(b)(7)(C)

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we found no evidence that McCallum's decisions in the case were influenced by any public officials.

G. The Department's Authority to Supervise Litigation

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OPR's investigation focused on the conduct of Associate AG McCallum, AAG Keisler, and PDAAG Meron, because it was they who allegedly reduced the government's cessation remedy and pressured three government witnesses in response to improper political influences. In addition, McCallum was alleged to have a conflict of interest because his former law firm had represented R.J. Reynolds in a separate matter. Consequently, McCallum, Keisler, and Meron were the subjects of our investigation.

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Page 175 of the report has been withheld in its entirety pursuant to 5 U.S.C. 552(b)(5), 5 U.S.C. 552(b)(6) and 5 U.S.C. 552(b)(7)(C)

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] As a general matter, the politically-appointed officials in the Department of Justice are entitled and expected to set policy and to guide the course of the Department's litigation.[400] Nor is it improper for the politically-appointed leadership to participate in day-to-day decision-making, particularly in significant matters such as the *Philip Morris* case. Indeed, they are authorized by statute to do so.

In accordance with 28 U.S.C. § 519, the Attorney General of the United States possesses the authority to "supervise all litigation to which the United States, an agency, or officer thereof is a party [and to] direct all United States attorneys, assistant United States attorneys, and special attorneys . . . in the discharge of their respective duties.[401] Furthermore, since 1933, the Attorney General has had the authority to determine "whether and in what manner to prosecute, or to defend,

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[400] *See* Memorandum from the Professional Responsibility Advisory Office to All Department Attorneys at 1 (August 2005) ("the Department attorney's client is the Executive Branch of the government, inasmuch as Department attorneys represent the position of the current Administration and articulate its position when litigating, negotiating and carrying out their official duties").

[401] The Attorney General is also said to possess this authority at common law. *See* 6 U.S. Op. OLC 47, 48 (Jan. 4, 1982).

or to compromise, or to appeal, or to abandon prosecution or defense" in any case handled by the Department of Justice.[402]

Thus, the Attorney General and those exercising his delegated powers in this case – Associate AG McCallum, AAG Keisler, and PDAAG Meron – possessed the authority to direct the trial team regarding the content of the witnesses' recommendations, and regarding the nature and amount of relief sought in connection with the demand for a cessation remedy. [ ]

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CONCLUSION

For the reasons stated above, we concluded that Associate AG McCallum AAG Keisler, and PDAAG Meron did not engage in professional misconduct or exercise poor judgment in connection with the *Philip Morris* litigation. Accordingly, we consider this matter to be closed.

cc: David Margolis
Associate Deputy Attorney General

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[402] Executive Order 6166 (June 10, 1933), reprinted in 5 U.S.C. § 901, note.

U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266

Washington, D.C. 20530

NOV 28 2006

Pete Yost
The Associated Press
2021 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Yost:

This is in response to your June 8, 2006 Freedom of Information Act (FOIA) request for a copy of the "Report of Investigation Regarding Misconduct Allegations Arising in Connection with United States v. Philip Morris USA Inc., Civ. A. No. 99-2496-GK."

Records pertaining to investigations conducted by this Office are maintained in a system of records covered by the Privacy Act. The Privacy Act prohibits agencies from disclosing records contained in a system of records absent written authorization from the subjects of those records. 5 U.S.C. §552a(b). However, the Privacy Act does not prohibit the disclosure of records that are required to be disclosed pursuant to the FOIA. You are being provided access to that information which the FOIA requires.

I have determined that this Office's report of investigation may be released to you in part. A copy is enclosed. I am withholding the remaining information in the report pursuant to 5 U.S.C. §552(b)(5), (b)(6) and (b)(7)(C). Exemption (b)(5) permits the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Exemption (b)(6) permits the withholding of information about individuals in "personnel and medical files and similar files" when disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." Exemption (b)(7)(C) allows for the withholding of information compiled for law enforcement purposes the release of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

If you are not satisfied with this response, you may appeal in writing within sixty days of your receipt of this letter to the Director, Office of Information and Privacy. Your letter and envelope should be marked "FREEDOM OF INFORMATION APPEAL" and addressed to:

RJF

Office of Information and Privacy
United States Department of Justice
1425 New York Ave., N.W.
Suite 11050
Washington, D.C. 20530-0001

If you are dissatisfied with the result of any appeal you make, judicial review may thereafter be available to you in the United States District Court for the judicial district in which you reside, or in which you have your principal place of business, or in the District of Columbia.

Sincerely,

Marlene M. Wahowiak
Special Counsel
for Freedom of Information and Privacy Acts

Enclosure

OPR:DHALL:crh
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cc: chron
File F06-0040
Hall

FOIA Case Processing Documentation

Case # FA-0040

Date	Action Taken
6/9/06	OPR received request via fax on 6/8/06.
6/9/06	Logged request in. Requester asked for expedited processing and a fee waiver.
6/9/06	Review 28 CFR 16.5(d) regarding expedited processing. According to 16.5(d)(1)(ii). it appears that components are required to refer requests under 16.5(d)(1)(ii) to OPR for a determination. Requester does not specifically cite this provision but alludes to it in his reason for asking for expedited process.
6/9/06	Conducted search of DOJ press releases. Found nothing pertaining to OPR's report.
6/9/06	P.C. left message with OPA to have someone call me regarding request for expedited processing.
6/9/06	Reviewed AG News Briefings for June and located an AP article in 6/8/06
6/9/06	Rec-d phone call from Brian Roehrkasse Dep Dir. He said OPA would not be call on expedited processing. He said usual processing is faster than to receive requests from OIP. I told him I did not contact OIP. He will check proper method and call me back. I told him that Pete Yost had copy of letter. He said this letter was circulated among all media representatives
6/9/06	Received call from Melanie Purkey re: expedited processing. Told her I would fax request.
6/9/06	Faxed request to Melanie Purkey OIP

FOIA Case Processing Documentation

Case # F06-0540

Date	Action Taken
6/9/06	Rec'd a call from Pete Yost inquiring about whether OPR has rec'd his request. Informed him that OPR has his request
6/9/06	Conducted a search of BRS case tracking database to identify the investigative file. Case number is COS-0065
Plan	- Hold for OPR decision on expedited processing - Prepare interim response regarding decision on expedited processing, fee waiver, etc. - Obtain copy of the report - Read report & assess contact and question for attorneys of record. - Process request accordingly applying all applicable exemptions. - Provide partial denial response. after assessing whether there are any personnel or disciplinary actions pending.
6/9/06	Rec'd VM from Melanie Hustan that she had not rec'd fax.
6/9/06	P.C. to Melanie Hustan. Advised her assistant that original fax was completed at 10:19 am. Told her I would resend
6/9/06	Fax Yost request to OIP. on 2nd time
6/14/06	Rec'd call from Melanie Hustan advising that 28 CFR 16.5(d)(1)(iv) did not apply and that OPR should make its own determination
6/15/06	JBW decided OPR should grant request for expedited processing.
6/16/06	OPR sent letter granting expedited processing and fee waiver.
8/15/06	Met c James and Peggy to discuss ROI. Prepare preliminary response for review by James & Peggy
8/28/06	Draft letter sent.

Expedited Processing was granted by OPR on June 16, 2006.

1. 9/31/06 Peggy - My additional withholdings are marked in green and tabbed

2. James JBT 9/7/06 ~ concur with PM's comments; additional comments tabbed in yellow + white in end

Attached is my preliminary mark up of the report of investigation concerning alleged misconduct in the handling of the tobacco litigation. Based on our prior discussions, I have designated those portions of the report in pink that qualify for protection pursuant to one or more exemptions of the FOIA. I have tried to segregate for release that information that would reveal information concerning publically acknowledged allegations, factual information concerning the underlying tobacco litigation, and OPR's findings concerning those allegations. I tried to include only as much information that was necessary to make the disclosure understandable to the public. I disclosed AAG McCallum's name where appropriate based on the disclosure of OPR's letter of findings to AAG McCallum, which has been disclosed by OPA, and because of his position as the AAG. I did not find sufficient evidence in public news reports to warrant the disclosure of the names of the other two political appointees. However, I did designate for release those references in the report where it referred to "the Civil Division leadership" without the names.

Because of the nature of the issues discussed in the report, the vast majority of the report deals the ongoing discussions and deliberations of DOJ management and trial attorneys concerning litigation strategies. Most of this information required the assertion of Exemptions (b)(5) for deliberative process, attorney work product and attorney client information in conjunction with the use of Exemptions (b)(6) and (b)(7)(C) to protect the personal privacy of third-party individuals (b)(5)

(b)(5)

Please review my proposed release determination and provide me with your comments and recommendations on information that you feel should either be released or withheld. Because of the sensitive nature of the information in the report, please review the proposed redactions for the report carefully to ensure that I properly identified all of the deliberative information (b)(5) I will submit my proposed release determination to Marlene based on your input.

Thanks,
Dale
8/30/06

OPR 73
F06-0040

Expedited Processing granted by OPR on June 16, 2006

Marlene 8/23

Attached is a status letter to Pete Yost of The Associated Press advising him that his request has come for review and will be processed accordingly. I recommend that OPR should also inform him about the request number assigned to his request as Mr. Yost had not been previously provided with this information. I also recommend that OPR should provide him with OPR's phone number.

Dale 8/15/06

(b)(6)

Please prepare and mail the response letter to the requester. Return the file to me for further action.

Thanks,
Dale

OPR 52
F06-0040

RIP

Hall, Dale

From: McCarty, Margaret S
Sent: Tuesday, August 15, 2006 1:31 PM
To: Hall, Dale; Duncan, James; Colby, Paul
Subject: RE: Pete Yost Request

I'm available anytime.
Peggy

-----Original Message-----
From: Hall, Dale
Sent: Tuesday, August 15, 2006 12:36 PM
To: Duncan, James; Colby, Paul; McCarty, Margaret S
Subject: RE: Pete Yost Request

Anytime this afternoon works for me. I leave at 4:00 p.m.

-----Original Message-----
From: Duncan, James
Sent: Tuesday, August 15, 2006 12:29 PM
To: Hall, Dale; Colby, Paul; McCarty, Margaret S
Subject: RE: Pete Yost Request

Dale - perhaps Peggy and I could meet with you this afternoon. -James

---

From: Hall, Dale
Sent: Tuesday, August 15, 2006 12:04 PM
To: Colby, Paul; Duncan, James; McCarty, Margaret S
Subject: Pete Yost Request

Paul/James/Peggy,

The above request concerning OPR's report of investigation pertaining to the tobacco litigation has come up for review. I need to speak to all or one of you to obtain background information prior to processing the report. The information that would be helpful to me includes: a brief overview of OPR's investigation; sources that would reveal what information is in the public domain regarding the underlying litigation and OPR's investigation; (b)(5)

(b)(5)

I am available anytime that is convenient for you as I know that each of you are probably busy catching up from the flood. I will be here every day except Friday. I don't think that I would need more than about 15 minutes. I will also need a copy of the report and information on where the report should be stored when I am not processing it.

Dale

PROJECT Record: C05-0065-01

Date Opened: June 9, 2005

Date Closed: June 1, 2006

Subject Name: MCCALLUM, ROBERT D. (ASSOCIATE ATTORNEY GENERAL)

Subject Position: P04 -- DOJ Attorney

Subject Location: L011 -- Associate Attorney General's Office.

Case Name: U.S. v. PHILIP MORRIS, INC., ET AL. (civil case, USDC D.C.)

Attorney: Colby, Paul L.; Duncan, James G.; McCarty, Margaret S.

Secondary Attorney: None

Source Name: IG GLENN A. FINE

Source Code: S10 – DOJ/OIG.

Complainant Name: CONGRESSMEN HENRY WAXMAN and MARTIN MEEHAN; SENATOR KENNEDY, FRANK LAUTENBERG, RICHARD DURBIN, ROY WYDEN, TOM HARKIN, and BILL NELSON

Complainant Code: S08 – Congressional referral.

Allegation/Disposition Codes:

A002 D00 -- Abuse of prosecutive or investigative authority (general).
A062 D00 -- Conflict: general, including appearance of conflict.
A341 D00 -- Failure to Diligently Represent the Interest of the Client (Model Rule 1.3)
A412 D00 -- Improper Coercion/Intimidation of a Witness.
A412 D00 -- Improper Coercion/Intimidation of a Witness.
A412 D00 -- Improper Coercion/Intimidation of a Witness.

Allegations:

By faxes dated 6/9/05, IG Glenn Fine provided OPR with a copy of a June 8, 2005 letter from Congressman Henry Waxman and Martin Meehan (and by separate letter dated June 8, 2005 signed by Senators Edward Kennedy, Frank Lautenberg, Richard Durbin, Rony Wyden, Tom Harkin, and Bill Nelson) concerning news reports that Associate Attorney General Robert McCallum pressured and forced government prosecutors in U.S. v. Philip Morris, et al to request less monetary damages from the defendant tobacco companies. Counsel Jarrett advised that the (b)(6) (b)(6) a RICO expert from Criminal Division is assigned to the team.

Disposition:

No disposition

Remarks:

Deputy Wish advised that both Associate Counsel Colby and Duncan are primary attorneys handling this investigation. Duplicate file made for AC Duncan. On 6/22/05, Assistant Counsel Peggy McCarty was added as another co-counsel

OPR 55
F06-0040

Expedite - Expedited Processing

Marlene

Attached is an interim response letter to Pete Yost of The Associated Press responding to his requests for expedited processing and a fee waiver. Mr. Yost is requesting a copy of OPR's report concerning allegations of misconduct in the handling of the tobacco litigation.

Based on a decision by Deputy Counsel Judith Wish, I recommend that OPR should grant Mr. Yost's request for expedited processing and a fee waiver. Because OPR is currently processing another expedited request received before his, I recommend that OPR should inform him that OPR will begin processing his request upon completing the processing of the other request.

Dale 6/15/06

(b)(6)

Please prepare and mail the response letter to the requester. Return the file to me for further action.

Thanks,
Dale

F06-0040

Pete Yost
The Associated Press
2021 K Street, N.W.
Washington, D.C. 20006

Requested a copy of OPR's report entitled Report of Investigation Regarding Misconduct Allegations Arising in Connection with United States v. Philip Morris USA Inc., Civ. A. No. 99-2496-GK (D.D.C.).

6/8/06 received 6/8/06

Marlene,

Please review and return for further action.

Dale

U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266
Washington, D.C. 20530

JUN 16 2006

Pete Yost
The Associated Press
2021 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Yost:

This is in response to your June 8, 2006 Freedom of Information Act (FOIA) request for "a copy of the "Report of Investigation Regarding Misconduct Allegations Arising in Connection with United States v. Philip Morris USA Inc., Civ. A. No. 99-2496-GK. " We received your request on June 8, 2006.

In your letter, you requested expedited processing pursuant to 28 C.F.R. §16.5(d). You also requested a fee waiver pursuant to 28 C.F.R. §16.11(k) for possible public dissemination in a news article. I have determined that both of your requests should be granted.

For your information, this Office is currently processing a FOIA request received before your request that was also granted expedited processing. We will begin processing your request as soon as we have completed processing this earlier request.

Sincerely,

Marlene M. Wahowiak
Special Counsel
for Freedom of Information and Privacy Acts

OPR:DHALL:crh
G:\dhall$\Myfiles\Docs\yost pete interim expedited granted.wpd

cc: chron
File F06-0040
Hall

U.S. Department of Justice

Office of Professional Responsibility

950 Pennsylvania Avenue, N.W., Suite 3266

Washington, D.C. 20530

AUG 28 2006

Pete Yost
The Associated Press
2021 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Yost:

This is in further response to your June 8, 2006 Freedom of Information Act (FOIA) request for a copy of the "Report of Investigation Regarding Misconduct Allegations Arising in Connection with United States v. Philip Morris USA Inc., Civ. A. No. 99-2496-GK." Your request is now under review and we will process it accordingly. For your information, your request has been assigned request number F06-0040. Please refer to that number in any correspondence pertaining to this matter.

Upon completion of processing and attorney review, you will be notified of our release determination. If you have any questions about this request, please feel free to call me at (202) 514-3365.

Sincerely,

Dale K. Hall

Dale K. Hall
Freedom of Information Specialist

RIF

OPR:DHALL:crh
G:\dhall$\Myfiles\Docs\yost pete status response.wpd

cc: chron
File F06-0040
Hall