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ONE HUNDRED EIGHTH CONGRESS

# Congress of the United States

## House of Representatives

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April 29, 2003

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The President  
The White House  
Washington, DC 20500

Dear Mr. President:

I am writing to express my continuing concern about U.S. actions involving the Framework Convention on Tobacco Control (FCTC), the global tobacco control treaty that has been negotiated by the member countries of the World Health Organization over the past three years. The goal of the treaty is to stop the deadly spread of tobacco use around the world.

At the most recent, and final, negotiating session, held from February 17 to February 28, 2003, the United States again attempted to weaken the tobacco control treaty on key issues. Indeed, your negotiators even opposed international efforts to restrict the distribution of free samples and to prohibit the sale of tobacco products to children. The United States often justified its positions by asserting supposed limitations on its negotiating authority that your Administration has not asserted in other treaty negotiations or other legal contexts, giving every appearance of creating legal fictions to oppose public health measures.

The United States has become so isolated in its position on tobacco that it is one of the only countries in the world that has refused to agree to the terms of the final agreement. Even more disturbing, your negotiators have said the United States will try to weaken the agreement further when nations reconvene to sign the treaty at the World Health Assembly in May.

I urge you to repudiate these regressive policies and to join the rest of the world in embracing tobacco control measures that will truly curb the spread of one of the deadliest commodities in the world.

### **Prior U.S. Efforts to Weaken the FCTC**

Since your Administration took over negotiation of the FCTC from the Clinton Administration, the United States has repeatedly opposed key public health provisions and attempted to weaken the treaty. At previous meetings the United States has:

- Opposed proposals that would require tobacco warning labels to be written in the language of the country where the tobacco products are sold.<sup>1</sup>
- Opposed proposals for mandatory tobacco taxes.<sup>2</sup>
- Opposed provisions mandating action to protect citizens from secondhand smoke.<sup>3</sup>
- Attempted to weaken proposals to restrict tobacco advertising.<sup>4</sup>
- Opposed prohibitions of the use of deceptive terms like “light” and “low” on tobacco labels, insisting that countries first prove these terms are misleading before prohibiting their use.<sup>5</sup>
- Argued that trade interests should trump public health interests in implementation of the treaty.<sup>6</sup>

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<sup>1</sup> United States, *Textual Proposals of the Second Meeting*, WHO Framework Convention on Tobacco Control (May 1, 2001) (A/FCTC/INB2/WG1/Conf. Paper No. 2:4). After considerable criticism, the U.S. reversed its position.

<sup>2</sup> Minority Staff, Committee on Government Reform, *U.S. Positions on Selected Issues at the Third Negotiating Session of the Framework Convention on Tobacco Control* (Mar. 5, 2002).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*; Rep. Henry A. Waxman, *The Future of the Global Tobacco Treaty Negotiations*, *New England Journal of Medicine*, 346:936–9 (Mar. 21, 2002).

<sup>5</sup> Minority Staff, Committee on Government Reform, *supra* note 2.

<sup>6</sup> *Id.*

In fact, the position of the United States has been in virtual lockstep with the tobacco industry throughout the treaty negotiations. At an early session, your negotiators proposed that the treaty drop 10 of the 11 provisions deemed objectionable by Philip Morris.<sup>7</sup> Prior to another negotiating session, a senior executive at Philip Morris commented in a confidential internal e-mail that the tobacco company had “taken positions on the WHO treaty that, if anything, are to the left of the Bush Administration.”<sup>8</sup>

The United States even sent a confidential diplomatic communication to Saudi Arabia prior to the final February negotiating session, urging the Saudis to join with the United States in last-minute efforts to weaken the treaty.<sup>9</sup>

### **U.S. Positions at the Final Negotiating Session**

At the final negotiating session in February 2003, the United States again intervened to weaken the treaty. In many cases, the legal arguments asserted as the basis for the U.S. position were groundless and conflicted with your Administration’s positions in other treaty negotiations.

#### *Tobacco Warning Labels*

Entering the final negotiating session, the draft treaty included a provision requiring countries to adopt measures to ensure that warnings on tobacco labels would cover a minimum of 30% of the principal display panel. This is an important provision because large tobacco warnings have been shown to increase the motivation to quit, increase concern about health effects of smoking, and increase awareness of the health effects of smoking.<sup>10</sup>

The United States opposed this provision, seeking to make the size of the warning optional. To support its opposition to a mandatory minimum, the United States argued that

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<sup>7</sup> Letter from Rep. Henry Waxman to the President (Nov. 19, 2001); Philip Morris, *Philip Morris International and Philip Morris USA’s Comments on the World Health Organization’s Framework Convention on Tobacco Control* (Mar. 15, 2001).

<sup>8</sup> E-mail communication from Mark Berling to David Tovar et al. (Nov. 19, 2001).

<sup>9</sup> Letter from Rep. Henry Waxman to the President (Feb. 26, 2003); Letter from U.S. Embassy to Ministry of Foreign Affairs of the Kingdom of Saudi Arabia (Feb. 8, 2003).

<sup>10</sup> Focus Canada, *Evaluation of New Warnings on Cigarette Packages* (Oct. 2001); Critical Insights and Arnold Communication, *Summary of Research Findings — Smokeless Tobacco Packaging Labeling Research* (draft), available from the Massachusetts Tobacco Control Program, Boston, MA (July 2000).

under the separation of powers doctrine it had no power to agree to a treaty provision that would require Congress to pass an implementing law.

This argument is simply makeweight. Under the Constitution, treaties must be ratified by the Senate. As part of this ratification process, Congress routinely enacts implementing legislation. Treaties to which the United States is a party that have required implementing legislation include the Stockholm Convention on Persistent Organic Pollutants (signed by the Bush Administration in 2001), the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (implemented by the International Adoption Act of 2000), the World Intellectual Property Organization Copyright Treaty (implemented in part by the Digital Millennium Copyright Act), the Chemical Weapons Convention (implemented by the Chemical Weapons Convention Act of 1998), and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (implemented by the Endangered Species Act).

The position that your negotiators took is also flatly inconsistent with the position the Administration is taking on other treaties it is currently negotiating. Most recently, in international negotiations on a proposed treaty on human cloning, your Administration has argued that such a treaty should ban both reproductive and research cloning.<sup>11</sup> This position does not reflect current federal law and would certainly require Congress to pass implementing legislation.

Fortunately, the United States did not prevail on this issue and the treaty continues to set a mandatory minimum size for warnings.

### *Free Samples*

Free tobacco samples are frequently distributed to children around the world at music events, shopping venues, and sports events.<sup>12</sup> In fact, distribution of free samples is the smokeless tobacco industry's "growth strategy."<sup>13</sup> To combat this obvious means of enticing new tobacco users, the draft treaty included a provision banning distribution of free samples.

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<sup>11</sup> *U.N. Plan Would Ban Cloning to Create Human Baby*, USA Today (Sept. 23, 2002).

<sup>12</sup> Campaign for Tobacco Free Kids, *Overview: The Global Crisis* (online at <http://tobaccofreekids.org/campaign/global/crisis.shtml>).

<sup>13</sup> National Cancer Institute, *Strategies to Control Tobacco Use in the United States: A Blueprint for Public Health Action in the 1990's*, 236 (Oct. 1991) (NIH Publication No. 92=3316).

At the final session, however, the United States successfully opposed a mandatory ban, leaving the treaty with yet another optional provision. To support its opposition, the United States made a potentially far-reaching but unfounded argument: the United States argued that free samples were not “in interstate commerce” because they were not sold, and therefore the federal government was without any jurisdiction over them whatsoever.

This is a radical reinterpretation of federal authority under the Commerce Clause, and one with dramatic implications for federal power, if applied beyond tobacco. The Supreme Court, even in its recent retrenchment on the scope of the Commerce Clause, has always held that the federal government has authority to regulate activities that have “a substantial effect on interstate commerce,” even if those activities are intrastate.<sup>14</sup> It has never suggested that the Commerce Clause confers jurisdiction only on products that are sold. Distribution of free samples of a product by its manufacturer, and particularly of a highly addictive product, is carried out for no other purpose than enticing new customers and eliciting sales of a product in interstate commerce. To suggest that this promotional activity does not substantially affect interstate commerce defies common sense.

If the position your delegates took at the FCTC meeting in fact represents your Administration’s interpretation of the Commerce Clause, you would be without justification for supporting many of the federal laws you have championed, including those that criminalize certain abortion procedures (without any limitation to those that are carried out in exchange for money), that establish national school testing requirements, or that ban certain research techniques involving cloning. Moreover, since the distribution of free samples is a form of tobacco advertising and promotion, the position your delegates took would imply that the Federal Trade Commission’s long-standing authority to regulate unfair or deceptive advertising practices is itself suspect.

It is hard to imagine how this argument could have been made in good faith. Rather, it appears to be a convenient rationale to avoid imposing effective curbs on the marketing of tobacco.

### *Sales to Minors*

Incredibly, the United States even opposed setting a mandatory minimum age of 18 for sales to minors.

The importance of setting a minimum age of 18 is that addiction to tobacco occurs predominantly in those who begin to smoke as adolescents, when they are too young to

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<sup>14</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

understand the consequences.<sup>15</sup> Even in countries where tobacco initiation has historically begun later than adolescence, the age of tobacco initiation is now dropping.<sup>16</sup> In addition, those who begin to smoke in early adolescence smoke more heavily than those who begin later,<sup>17</sup> and are less likely to quit.<sup>18</sup> For these reasons, preventing smoking by children has been a foundation of federal and state activities in the United States to discourage tobacco use.

Despite the relationship between age of smoking initiation and addiction, the United States argued against setting a minimum age for tobacco sales in the treaty. The alleged ground for the U.S. position was that setting minimum ages is solely a state responsibility. The United States prevailed, with the result that the treaty prohibition against sales to minors is now largely meaningless. In fact, the treaty would allow countries to set minimum ages for smoking as low as 12 or 14.

Your negotiators took a similar position regarding controls on secondhand smoking, arguing that any such provisions in the FCTC would violate federalism principles. The result is that the treaty contains no provisions mandating protection from this dangerous environmental pollutant.<sup>19</sup>

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<sup>15</sup> U.S. Department of Health and Human Services, *Preventing Tobacco Use among Young People: A Report of the Surgeon General* (1994); World Bank, *Curbing the Epidemic: Governments and the Economics of Tobacco Control*, 16–19 (1999); M. Aghi et al., *Initiation of Tobacco Use*, in *Women and the Tobacco Epidemic: Challenges for the 21<sup>st</sup> Century*, Institute for Global Tobacco Control, Johns Hopkins Bloomberg School of Public Health (2001).

<sup>16</sup> *Curbing the Epidemic*, *supra* note 17.

<sup>17</sup> E. Taioli and E.L. Wynder, *Effect of the Age at Which Smoking Begins on Frequency of Smoking in Adulthood*, *New England Journal of Medicine* 235:13, 968–969 (1991).

<sup>18</sup> N. Breslau and E.L. Peterson, *Smoking Cessation in Young Adults: Age at Initiation of Cigarette Smoking, and Other Suspected Influences*, *American Journal of Public Health* 86(2): 214–20 (1996).

<sup>19</sup> Secondhand smoke causes lung cancer and heart disease; it can also trigger asthma in children. A.K. Hackshaw et al., *The Accumulated Evidence on Lung Cancer and Environmental Tobacco Smoke*, *British Medical Journal*, 315:980–8 (1997); J. He et al., *Passive Smoking and the Risk of Coronary Heart Disease — A Meta-Analysis of Epidemiologic Studies*, *New England Journal of Medicine* 340:920–6 (1999); American Academy of Pediatrics Committee on Environmental Health, *Environmental Tobacco Smoke: A Hazard to Children*, *Pediatrics* 99:639–42 (1997). Smoke-free rules in the workplace and other public places have been shown to prompt more smokers to quit and to reduce the number of cigarettes smoked by continuing smokers, and they

I am not aware of any Supreme Court cases that would prevent the federal government from enacting legislation to set a national age for sales of tobacco to minors or to protect the public from exposure to secondhand smoke. Nor are these assertions of federalism principles consistent with positions this Administration has taken on the role of the federal government in comparable circumstances. In one case after the next, this Administration has supported federal restrictions on traditionally state-regulated activities, from banning specific abortion procedures conducted in doctor's offices to placing federal limits on medical malpractice lawsuits brought in State courts. Your Administration has supported the federalization of state gun laws and national testing requirements for schools, despite the fact that the Supreme Court has specifically identified criminal law enforcement and education as areas "where states historically have been sovereign."<sup>20</sup>

There is no principled reason for injecting flimsy federalism concerns into a discussion of tobacco control when more substantial federalism concerns are routinely ignored in other areas. If your Administration opposes setting minimum ages for smoking as a matter of policy, you should say so directly.

### Conclusion

The United States's role at the FCTC negotiations has brought worldwide criticism. It is a measure of how destructive the United States was in the treaty negotiations that the U.S. tobacco control community called upon the United States to withdraw from the negotiations rather than continue to damage the prospects for a meaningful treaty.<sup>21</sup> The United States did not do this, but instead continued to weaken the treaty throughout the negotiations, only to announce after the negotiations had been completed that it would not sign the treaty.

I urge you not to add to this dismal record by continuing to attempt to weaken provisions of the treaty at the World Health Assembly meeting this May. Most of the arguments your negotiators have advanced as grounds for your continuing opposition the watered-down treaty do

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may also discourage youth from starting to smoke. National Cancer Institute, *Population Based Smoking Cessation: Proceedings of a Conference on What Works to Influence Cessation in the General Population*, Smoking and Tobacco Control Monograph No. 12 (Nov. 2000) (NIH Publication No. 00-4892); A. Farkas et al., *Association between Household and Workplace Smoking Restrictions and Adolescent Smoking*, *Journal of the American Medical Association*, 284(6) (Aug. 9, 2000).

<sup>20</sup> *United States v. Lopez*, *supra* note 14.

<sup>21</sup> American Lung Association et al., *Leading U.S. Public Health Groups Tell U.S. Delegation to Tobacco Treaty Negotiations to Go Home* (Feb. 25, 2003) (joint press release).

The President  
April 29, 2003  
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not stand up to even superficial scrutiny and will undermine our credibility in future treaty negotiations.

I hope you will reconsider the course you have outlined and instead sign the tobacco treaty without further attempts to weaken it.

Signed,

A handwritten signature in black ink, appearing to read "Henry A. Waxman". The signature is written in a cursive style with a large initial "H".

Henry A. Waxman  
Ranking Minority Member