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Tobacco-Settlement: Legal Issues [1]

Tob - set - legal issues

DOJ

Comments on New McCain Bill

Constitutional Issues

1. First Amendment Issues

Sec. 9, p. 24
This provision strips the liability protections from any manufacturer that challenges the advertising restrictions in the Act. This provision raises serious constitutional problems; there may be other ways to achieve this result through non-severability and similar provisions.

Sec. 142(a)(1), p. 32
Several of these provisions (including subsection A, the ban on human and animal images and cartoon characters, subsection B, the ban on outdoor advertising, and subsection F, the ban on the internet, go beyond the FDA regulations and raise serious constitutional concerns. If included at all, they should be made conditional.

Other provisions should be limited. For example, subsections H and I should contain adult-only exceptions, similar to the adult exception to the restrictions on magazine advertising in subsection G.

Sec. 142(a)(2), p. 34
This section should be edited to make clear that it applies to commercial speech and should have an exclusion of adult-only movies and programs, as in Sec. 142(a)(3).

Sec. 143(b), p. 37
This section, which regulates the quantity of point-of-sale advertising based on market share, raises constitutional concerns because it undermines narrow the narrow tailoring of the point-of-sale restrictions.

Sec. 143(d), p. 38
This section should contain an adult-only exception.

2. Appointments Clause Issues

Sec. 1132, p. 269
The governing board of the American Center on Global Health and Tobacco includes members of Congress, heads of public health organizations, heads of media and marketing institutions, and individuals active in education and public health. This raises serious Appointments Clause and separation of powers concerns.

Sec. 222, p. 63
This provision establishes the Tobacco Free Education Board and requires that the Secretary appoint "at least

3 . . . individuals who are heads of a major public health organization." This provision raises issues under the Appointments Clause because it unduly restricts the Secretary's appointment power.

Sec. 224, p. 72
This provision establishes the Tobacco Agreement Accountability Panel. The provision allowing the Director of the CDC to place "his or her delegate" on the Panel may raise Appointments Clause issues.

3. Environmental Tobacco Smoke, p. 109

The ETS provision also raises constitutional concerns under United States v. Lopez because it does not limit its effect to activities affecting interstate commerce. Such a jurisdictional limitation needs to be included.

4. Document Disclosure Provisions

To the extent the definition of trade secret (p. 155) is less protective than the otherwise applicable state law, there may be some takings risk.

In addition, the language on p. 149 that prohibits state courts from reviewing privilege decisions made by the board may raise federalism concerns if it is interpreted to interfere with state court evidentiary rules.

5. Prohibition on Use of Funds to Facilitate Exportation or Promotion of Tobacco, p. 275

This provision appears to interfere with the President's power to negotiate on behalf of the United States with foreign nations. It thus raises separation of powers concerns.

6. Research Related to Patterns of Smoking by Women and Minorities, p. 1171

Subsection (b) requires that research funded under the act be conducted "at minority education institutions, where available, or institutions that provide the greatest amount of health care to minority populations in a State." This provision (particularly the first clause of the quoted language) raises Fourteenth Amendment concerns under the Supreme Court's decision in Adarand.

Tob-sec-legal issues

THE WHITE HOUSE

WASHINGTON

March 26, 1998

MEMORANDUM FOR BRUCE LINDSEY AND CHERYL MILLS

FROM: CYNTHIA RICE, DOMESTIC POLICY COUNCIL

CC: ELENA KAGAN

RE: DEPARTMENT OF JUSTICE REVIEW OF S. 1415

As you know, we have been consulting the Department of Justice as part of our tobacco policy process. Attached for your information is the Department's review of S. 1415, Senator McCain's original bill reflecting the proposed tobacco settlement.

Memorandum

Subject	Date
"Universal Tobacco Settlement Act," S.1415	March 12, 1998

To	From
David Ogden Counsel to the Attorney General	Dawn Johnsen Acting Assistant Attorney General Office of Legal Counsel

This memorandum provides preliminary views regarding constitutional concerns raised by the Universal Tobacco Settlement Act, S.1415, 105th Cong. (1997). Where possible, this memorandum offers suggestions for minimizing the risk of constitutional challenge posed by the provisions contained in S.1415.

Sec. 2. Findings: In light of the provisions contained in Title I that would restrict the marketing and advertising of tobacco products, the legislation should adopt and incorporate the findings that support the Food and Drug Administration's analogous restrictions on marketing and advertising. See 61 Fed. Reg. 44,396 (1996).

Sec. 3. Purposes: We recommend amending subsections (2), (4) and (7) of section 3 as follows:

Subsection (2) provides that it is a purpose of the bill to "ban all outdoor tobacco advertising and ban all cartoon figures and human figures used in connection with tobacco advertising." As discussed below, such categorical restrictions would go beyond the FDA's rule limiting the advertising of tobacco products and would therefore raise significant constitutional concerns that are not presented by the FDA rule. Accordingly, subsection (2) should be amended to accord with our suggested amendments to the substantive provisions of S.1415 that would ban all outdoor tobacco advertising and ban all cartoon figures and human figures used in connection with tobacco advertising.

Subsection (4) provides that it is a purpose of the bill to "subject the tobacco industry to severe financial penalties in the event that underage tobacco usage does not decline radically over the next 10 years[.]" However, the relevant substantive provisions of S.1415 refer to the payments that manufacturers would be required to make as "surcharges." See, e.g., Section 205. The purpose section should be amended to accord with the substantive

provisions, which would minimize the risk of constitutional challenge.

Subsection (7) provides that it is a purpose of the bill to "require the manufacturers of tobacco products to disclose all present and future non-public internal laboratory research regarding tobacco products." (Emphasis added). The substantive provisions of the bill regarding the disclosure of documents are not as broad as the statement suggests. The relevant provisions would permit manufacturers to assert privileges against the disclosure of certain documents that fall within this category. See Title VII. Accordingly, we recommend deleting the word "all" from subsection 7.

In addition, we note that although subsections (9) through (12) make reference to the National Tobacco Settlement Trust Fund, which S.1414, 105th Cong. (1997), would have established, S.1415 does not establish such a fund.

Title I--Regulation of the Tobacco Industry; Subtitle A--Restriction on Marketing and Advertising: Subtitle A contains a number of provisions that would impose restrictions on the advertising and marketing of tobacco products. Many of these provisions track those set forth in the recently promulgated FDA regulations. The Administration believes, as the Department of Justice has explained in the Coyne-Beahm litigation, that the FDA's regulations are consistent with the First Amendment, under the framework for First Amendment review of restrictions on commercial speech, set out by the Supreme Court in Central Hudson Gas & Elec. Corp v. Public Serv. Comm'n, 447 U.S. 557 (1980), and subsequent cases. The FDA restrictions are appropriately tailored to serve the government's wholly legitimate and compelling interest in curtailing demand for and use of tobacco products by those who may not lawfully purchase the product, by reducing minors' exposure to tobacco product advertising. As a result, the advertising restrictions contained in S.1415 that track the FDA regulations are constitutional. Other provisions in S.1415, however, would impose restrictions on the advertising of tobacco products that are broader than those contained in the FDA regulations. These broader provisions raise significant constitutional concerns -- i.e., that they are not appropriately tailored to serve the government's interest in curtailing minors' tobacco use through restricting minors' exposure to tobacco product advertising.

1. Section 101(a)(1) provides that "[n]o manufacturer, distributor, or retailer may use any form of outdoor tobacco product advertising, including bill boards, posters, or placards." This restriction would go beyond the FDA regulation restricting the outdoor advertising of tobacco products. The FDA regulation bans all outdoor advertising of tobacco products within 1000 feet of a school or playground but otherwise requires only that such outdoor

advertising be confined to so-called "tombstone advertising," i.e., black letters on a white background. 21 C.F.R. § 897.30(b) (1997); id. § 897.32(a). The FDA regulation's outdoor advertising restriction is appropriately tailored to serve the government's wholly legitimate and compelling interest in preventing underage consumers' exposure to advertising about products that may not lawfully be sold to them.

The greater breadth of the ban on outdoor advertising contained in section 101(a)(1) gives rise to significant constitutional concerns that are not presented by the FDA regulation. The provision should be redrafted to alleviate these concerns. Instead of imposing a complete ban, the provision could simply confirm the FDA's authority to regulate the outdoor advertising of tobacco products. In addition to confirming the FDA's regulatory authority, the bill could also enact the existing FDA restriction on outdoor advertising or extend the FDA restriction in a more tailored manner. For example, the provision could impose a general requirement that outdoor advertising appear in a tombstone format and then extend the FDA's ban on such outdoor advertising to include geographic areas, in addition to schools and playgrounds, that are frequented by children.

2. Section 101(b) of S.1415 provides that "[n]o manufacturer, distributor, or retailer may use a human image or a cartoon character or cartoon-type character in its advertising, labeling, or promotional material with respect to a tobacco product." This restriction would go beyond the FDA regulation restricting the use of images in the advertising of tobacco products. That regulation provides that, in general, tobacco advertising must take the form of tombstone advertising but permits images to be used without restriction in certain circumstances, for example, in an "adult publication," one that has a readership that is at least eighty-five percent adult and that includes less than two million children. 21 C.F.R. § 897.32(a)(2)(i)-(ii).

Section 101(b)'s broader restriction on the use of images in the advertising of tobacco products would raise significant constitutional concerns that the FDA regulation does not present. These concerns could be alleviated by confirming the FDA's authority to regulate in this area, enacting the FDA regulation, or extending the FDA restriction in a more tailored manner. For example, the bill could adjust the definition of an "adult publication" by lowering the threshold number of child readers for such publications to less than two million and then adopting the newly defined "adult publication" exception. We also note that the imposition of a restriction on the use of "human images" alone might raise constitutional concerns because the use of image advertising depicting animals would not be restricted, even though it would appear that such image advertising would be likely to appeal to children. See Rubin v. Coors Brewing Co., 514 U.S. 476, 488-90 (1995) (explaining concerns raised by underinclusive

restrictions on commercial speech). This concern could be alleviated by extending the restriction to include images of both human and animal figures.

3. Section 101(c) provides that "[n]o manufacturer, distributor, or retailer may use the Internet to advertise tobacco products unless such an advertisement is inaccessible in or from the United States." Insofar as the complete ban on Internet advertising would be for the purpose of diminishing minors' exposure to such advertising, it would raise significant constitutional concerns, because there might be more narrowly tailored means of achieving such a governmental objective. Cf. Reno v. ACLU, 117 S.Ct. 2329, 2346-48 (1997) (discussing less restrictive alternatives to a ban on Internet transmission of indecency in a manner available to minors). Congress should consider whether, in light of available technology, there may be means short of a complete ban that would serve the government's interest in protecting underage consumers from advertising about products that may not lawfully be sold to them. In order to ensure that the government retains necessary flexibility to regulate the advertising of tobacco products on the Internet, however, we recommend that the bill simply provide express statutory confirmation of the FDA's existing authority to regulate such advertising. This approach would ensure that any future regulatory restrictions are targeted at appropriate forms of Internet advertising and are fashioned in a manner that is appropriately sensitive to First Amendment concerns.

4. Section 101(d) would, in general, limit each manufacturer of tobacco products to the display of not more than two separate point-of-sale advertisements in any location at which tobacco products are sold, and would limit each retailer to the display of one point-of-sale advertisement relating to the retailer's or wholesaler's contracted retailer or private label brand product. The bill would also require that these point-of-sale advertisements consist only of black letters on a white background, and not be larger than a prescribed size. However, the bill would include a significant exception to this limitation for "adult-only stores and tobacco outlets." Section 101(d)(2). Section 101(d)'s exception permitting manufacturers with a greater market share to engage in more point-of-sale advertising than their competitors raises significant constitutional concerns. It constitutes a speaker-based preference for certain manufacturers that appears inconsistent with the government's asserted interest in restricting such advertising because it would appear to be unrelated to the objective of reducing youth tobacco use. If the government imposes advertising constraints on some commercial speakers, but declines to impose those same restrictions on an analogous class of speakers, the disparate treatment can "undermine and counteract" the effects of the imposition, and suggest that the government is not truly or fully committed to advancing its claimed interest. See Coors Brewing, 514 U.S. at 488-90.

5. Section 102(c)(1) provides that "[n]o payment shall be made by any manufacturer, distributor, or retailer for the placement of any tobacco product or tobacco product package or advertisement . . . as a prop in any television program or motion picture produced for viewing by the general public; . . . or in a video or on a video game machine." This provision could reach forms of expression other than commercial speech; to the extent that it does, it must be narrowly tailored to serve a compelling governmental interest. See Board of Trustees of SUNY v. Fox, 492 U.S. 469, 473-74, 482 (1989) (describing commercial speech). To ensure that this restriction does not impermissibly limit fully protected, non-commercial speech, the provision should be redrafted to prohibit the placement of "any brand-name tobacco product or brand-name tobacco product package or any tobacco product advertisement."

6. Section 102(d) provides that "[n]o direct or indirect payment shall be made by any manufacturer, distributor or retailer to any entity for the purpose of promoting the image or use of a tobacco product through print or film media that appeals to individuals under 18 years of age or through a live performance by an entertainment artist that appeals to such individuals." The scope of the restriction is unclear. For example, is the provision intended only to restrict attempts to promote brand names of tobacco products or is it intended to restrict the promotion of smoking generally? If the latter were the case, the provision would appear to restrict some non-commercial speech, raising significant constitutional concerns. In addition, the phrase "appeals to individuals under 18 years of age" is unclear and could be subject to challenge on vagueness grounds. These concerns could be alleviated by limiting the provision's scope to commercial speech and substituting a more objective definition of the media or types of entertainment that would appeal to underage consumers. For example, the provision could be amended to read: "No direct or indirect payment shall be made by any manufacturer, distributor or retailer to any entity for the purpose of advertising a tobacco product or of promoting the image or use of a brand-name tobacco product through an adult publication, film media that has been rated G through R, or their equivalent, by the motion picture industry, or through a live performance by an entertainment artist that persons under the age of 18 are permitted to attend."

Title I--Regulation of the Tobacco Industry; Subtitle D -- Licensing of Retail Tobacco Sellers: Subtitle D would provide two incentives for states to establish licensing programs for retail distributors of tobacco products. States that establish satisfactory licensing programs (1) would qualify for block grants under section 402 (see §§ 131(a), (c), 402(c)); and (2) would retain control over the regulation of tobacco retailers within their borders instead of ceding regulatory authority in this area to the federal government (see § 131(b)). Congress possesses

authority, under Spending Clause principles discussed in South Dakota v. Dole, 483 U.S. 203, 206-10 (1987), to require states to take regulatory action in order to receive federal funds. When Congress acts in areas where the Constitution permits direct federal regulation, Congress also possesses authority, under principles discussed in New York v. United States, 505 U.S. 144, 167-68 (1992), to offer States a choice between regulating in accordance with federal standards and having state law pre-empted by a federal regulatory scheme.

S. 1415's incentives for states to establish federally approved licensing programs, in our view, should survive any federalism-based constitutional challenge. The spending power, as elaborated in Dole, accommodates the bill's block grant provisions. The commerce power would support a general federal ban on sales of tobacco products and therefore, under the principles described in New York, authorizes a more limited ban -- one that applies only where states fail to take alternative regulatory action.

There is, nevertheless, some risk that courts would take a contrary view. The Court in South Dakota v. Dole, stated that "in some circumstances, the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns to compulsion.'" 483 U.S. at 211 (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)).[1] S. 1415 does not indicate how much money states would receive for establishing and administering a satisfactory tobacco licensing program.[2] And we have no

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[1] Courts have repeatedly rejected arguments that particular spending power inducements exert an impermissibly coercive influence on the states. See, e.g., Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) ("the difficulty if not the impropriety of making judicial judgments regarding a state's financial capabilities renders the coercion theory highly suspect as a method for resolving disputes between federal and state governments"), cert. denied, 493 U.S. 1070 (1990); South Dakota v. Adams, 506 F. Supp. 50, 57 (D. S.D. 1980) ("There is a vast difference between requiring a state to adopt certain regulations and denying funding to a state that refuses to adopt them."), aff'd sub nom. South Dakota v. Goldschmidt, 635 F.2d 698 (8th Cir. 1980), cert. denied sub nom. South Dakota v. Lewis, 451 U.S. 984 (1981). But cf. Virginia Dep't of Educ. v. Riley, 106 F.3d 559, 569-72 (4th Cir. 1997) (en banc) (suggesting, in dictum, that one particular piece of spending power legislation operates in an impermissibly coercive manner) (Luttig, J., writing for six of thirteen judges).

[2] Under S. 1414, the previous version of this bill, states that established and enforced satisfactory licensing programs would have received a total of $2.5 billion in the first two years, increasing to $5.0 billion in the fifth year, before decreasing to $2.5 billion in the sixth and subsequent years. See S. 1414 §§

information as to the costs that states would have to incur to establish and administer acceptable licensing programs. Opponents of the bill's state licensing provisions might be able, depending on the size of the burden that a state was asked to bear and of the incentive for that state to bear it, to argue that the bill's spending power inducement for state licensing is impermissibly coercive.

The bill's reliance on a conditional exercise of the commerce power to encourage state to regulate tobacco sellers might also raise federalism-based concerns. The Supreme Court has not suggested a coercion test for conditional commerce power legislation. However, opponents of the licensure provisions might argue that Dole's anti-coercion principle ought to apply, as a logical matter, when Congress seeks to encourage state action through conditional commerce power legislation as well as when Congress exercises its conditional spending power.

To reduce the risk of a successful federalism-based challenge, Congress might consider revising the bill's incentives for state action. Options could include, but would not be limited to: (1) changing the block grant provisions to call for a reduction rather than a complete cutoff in federal payments to noncompliant states (compare, e.g., Dole, 483 U.S. at 211 (state refusal to establish 21 years old as the minimum drinking age caused it to lose five percent of specified highway funds); and (2) substituting a federal regulatory scheme (such as a prohibition on retail tobacco sales except in adults-only locales) for S. 1415's outright federal ban on tobacco sales in noncompliant states. In addition, the risk of a successful federalism-based challenge would be further reduced if some significant portion of block grant funds to the states -- especially any portion that was identified as reimbursement for state expenditures under the Medicaid program for the treatment of tobacco-related illnesses -- were paid out unconditionally, without any requirement that states perform specified tasks in order to

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401(d)(1)(A)-(E). The current bill omits all of the provisions that appeared as Title IV of S. 1414, which set forth the blueprint for payments into and out of the National Tobacco Settlement Trust Fund (NTSTF). As a result of this deletion, we are unsure how to interpret the current bill's apparent reliance on the NTSTF as the source of funding for the grants to states that satisfy the licensing requirement. See, e.g., S. 1415 §§ 401(a)(1), 401(a)(2) (referring to the Trust Fund established and controlled by (former) section 401).

receive the money or that they spend the money in prescribed ways.[3]

Title I-Regulation of the Tobacco Industry; Subtitle E-Regulation of Tobacco Product Development and Manufacturing: Section 143 would add new sections 908(c) and (d) to the Food Drug and Cosmetic Act (FDCA), 21 U.S.C. 301-395 (1994). These provisions could give rise to takings claims involving the forced disclosure of two classes of propriety information: (1) trade secrets and patents involving risk-reducing technology and (2) trade secrets involving non-tobacco ingredients.[4] We believe that the risk of takings liability arising out of the operation of these disclosure provisions is relatively modest and that minor changes to the bill could reduce this risk still further.

Disclosures of information concerning risk-reducing technology would be governed by newly added section 908(c). This provision would require manufacturers to notify the FDA of newly developed or newly acquired technology that was capable of reducing the health risks of tobacco products. After establishing the viability of the new technology, the FDA could ask the notifying company to manufacture and market the product. If the company declined, the FDA could require the company to license the new technology to other manufacturers for a "commercially reasonable fee." Section 908(c)(1)(B). Finally, if no manufacturer agreed to manufacture the new product, the FDA, acting through the U.S. Public Health Service, could provide for the manufacture and marketing of the new product, either directly or through grants and contracts. Disclosures of the ingredients found in tobacco products would be governed by newly added FDCA section 910. This provision would

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[3] Payment of a significant portion of the block grants to the states on an unconditioned basis would undercut arguments that the bill impermissibly revised the federal-state bargain governing states' past participation in the Medicaid program by reducing states' rights to recoup their Medicaid outlays from parties, such as tobacco companies, whose actions increase health care costs.

[4] The takings issues addressed here and at various later points in this memorandum do not implicate the constitutionality of S. 1415. Successful takings claims would increase the cost of the proposed legislation to federal taxpayers. However, unless the bill unambiguously withdrew the Tucker Act remedy, there would be no taking without just compensation and, therefore, no basis for a judgment invalidating any part of the statute as violative of the Fifth Amendment. See Ruckleshaus v. Monsanto, 467 U.S. 986, 1016-19 (1984) (refusing to enjoin EPA disclosure of pesticide trade secrets where the Tucker Act provided compensation for any taking of trade secrets); accord, e.g., Preseault v. ICC, 494 U.S. 1, 8 (1990). In this respect, the risk of successful takings claims differs in kind from the risks posed by other constitutional claims discussed here.

require the FDA to establish rules governing ingredient labels for tobacco products, patterned on existing ingredient labelling requirements for food products (see 21 U.S.C. § 343 (1994)).[5]

Trade secrets are among the "intangible property rights protected by state law [that] are deserving of the protection of the Taking Clause." Monsanto, 467 U.S. at 1003. Accordingly, if the bill's provisions concerning risk-reducing technology and ingredients labelling required a tobacco company to disclose information to the public or its competitors that would have been protected from disclosure under otherwise applicable state trade secret law, the company could claim a federal taking. Patents, which could also be affected by the reduced risk provisions, also represent a form of property, the contours of which are defined by federal rather than state law. See U.S. Const. art. I, § 8; 35 U.S.C. §§ 101-261 (1994). Although Congress could presumably alter the rights conferred by future patents for risk-reducing tobacco products without paying compensation, retrospective alteration of the terms of an existing patent could well invite takings litigation. Cf. Jacobs Wind Elec. v. Florida Dep't of Trans., 919 F.2d 726, 728 & n.2 (Fed. Cir. 1990) (because patents are property, a state's infringement can constitute a taking actionable under the Fifth and Fourteenth Amendments) (dictum).

Takings claims arising under the risk-reducing technology provisions would most likely be based on alleged disparities between the "commercially reasonable fee" that a company received under FDA regulations and the quantum of compensation that the company was entitled to receive under the Fifth Amendment, an amount often referred to as "fair market value." "Commercially reasonable fees," determined under the FDA's section 908 regulations, might approximate fair market value. Alternatively, licensing might be set below fair market value in order to attract licensees (and to sustain direct development efforts by the Public Health Service where no private licensee steps forward).

If licensing fees are expected to fall short of fair market value, supporters of S. 1415 might want to minimize potential takings liability by adding provisions that would secure tobacco companies' consent to below-market licensing fees. For example,

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[5] Section 910 also would require tobacco companies to provide the FDA with brand-by-brand lists of non-tobacco ingredients. (Current law only requires tobacco manufacturers to submit ingredient data to the FDA in aggregated form -- without any indication of which companies or products use particular ingredients. See 15 U.S.C. § 1335a (1994)). Because the FDA would maintain the confidentiality of these submissions, except for information covered by the ingredients labelling provision, these provisions would not add to the risk of successful takings claims.

the obligation to share risk-reducing technology could be tied to a separate, newly created governmental benefit -- a right, which could be implemented through a permit or registration requirement, to continued access to the U.S. market for tobacco products. This approach would conform to the analysis of Monsanto. There, the Supreme Court ruled that EPA's use and disclosure of pesticide data that Monsanto had voluntarily submitted, under conditions of non-confidentiality, "in exchange for the economic [benefit] of [legally required] registration [could] hardly be called a taking." Monsanto, 467 U.S. at 1007.

We think it unlikely that the ingredients disclosure provisions of S. 1415 would give rise to successful takings claims. We are unaware of any takings challenge to the food ingredients disclosure requirements that the bill identifies as the model for tobacco ingredients disclosure. Moreover, the Supreme Court has rejected claims that state ingredient-disclosure requirements deprived manufacturing companies of property without due process. See, e.g., Corn Prod. Ref. Co. v. Eddy, 249 U.S. 427, 431-32 (1919) ("The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of [the] police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth."). On the other hand, tobacco companies have argued, with some preliminary success, that information concerning the ingredients found in tobacco products is more sensitive than information on the ingredients in food.[6] As in the reduced risk technology context, takings risks could be reduced by provisions that would make company consent to ingredients disclosure a precondition to receipt of statutory benefits.

Title I—Regulation of the Tobacco Industry; Subtitle F—Compliance Plans and Corporate Culture: Under section 152(b)(8), manufacturers of tobacco products would be required to "promulgat[e] corporate policy statements that express and explain

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[6] Massachusetts and Minnesota recently enacted ingredients disclosure laws for tobacco companies doing business within those states. See Mass. Gen. L. Ann. ch. 94, § 307B (West 1996); 1997 Minn. Laws c. 227, § 5 (to be codified at Minn. Stat. Ann. § 461.17). Tobacco companies have sued to block implementation of these laws, arguing, among other things, that disclosure would result in uncompensated takings. In the Massachusetts litigation, the companies have obtained a preliminary injunction against implementation of the Massachusetts statute. Philip Morris, Inc. v. Harshbarger, Civ. No. 11599-GAO (D. Mass. Dec. 10, 1997). There, the district court found that the companies had shown a sufficient likelihood of success on the merits of their claim that the Massachusetts statute would effect an uncompensated taking of their trade secrets to warrant preliminary injunctive relief.

the commitment of" the manufacturer to, inter alia, "(A) compliance with applicable Federal, State, and local laws"; and "(B) reducing the use of tobacco products by individuals who are under 18 years of age." We think that the provision, as currently drafted, could be construed merely to require companies to promulgate a commitment not to engage in certain proscribed conduct. Insofar as it were construed in this manner, it would not appear to raise constitutional problems. If, however, the provision were construed to require manufacturers not only to state what they are doing and will do as required by law, but also to state that they are doing so because of their commitment to the principles underlying those "polic[ies]," that would raise problems of compelled speech. See, e.g., Wooley v. Maynard, 430 U.S. 705 (1977); West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943). Cf. Pacific Gas & Elec. Co. v. Public Util. Comm'n of California, 475 U.S. 1 (1986). The provision should be construed to avoid the constitutional concerns that would be presented by the latter construction.

Section 154(b) provides that "[a] manufacturer, distributor, or retailer of a tobacco product shall require that any lobbyist or lobbying firm employed or retained by the manufacturer, distributor, or retailer, or any other individual who performs lobbying activities on behalf of the manufacturer, distributor, or retailer, as part of the employment or retainer agreement refrain from supporting or opposing any Federal or State legislation, or otherwise supporting or opposing any governmental action on any matter without the express consent of the manufacturer, distributor, or retailer." The Supreme Court has stated that "the First Amendment protects the right of corporations to petition legislative and administrative bodies." First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 792 n.31 (1978) (citing California Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-511 (1972)); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961). Section 154(b) would impose a lobbying restriction on tobacco companies that is not imposed on any other persons or entities -- namely, the requirement that the lobbyists for such companies obtain "express consent" of their principal before "supporting or opposing" any governmental action. In other words, tobacco companies -- unlike all other persons and entities -- would be uniquely disadvantaged by being prohibited from giving their lobbyists a general warrant to lobby on their behalf. Assuming that the traditional First Amendment analysis would apply, discrimination against the lobbying activity of a single type of corporate entity, such as that proposed in section 154(b), likely would be subject to strict scrutiny. Such speaker-based distinctions are presumptively impermissible if "based on the content or messages of [the] groups' speech," Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995), or on "the identity of the interests that spokesmen [for the disfavored entities] may represent in public debate over controversial issues," Bellotti, 435 U.S. at 784. Accord Pacific Gas & Elec.

Co., 475 U.S. at 15 (plurality opinion); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657 (1990). In order to survive strict scrutiny, such a speaker-based restriction must be narrowly tailored to serve a compelling state interest. Id. at 657. Thus, even assuming that the contemplated restrictions on lobbying would survive constitutional review if applied more generally, we have serious doubts whether the more limited restriction imposed by section 154(b) would survive the strict constitutional scrutiny to which it would likely be subject.

Section 154(c)(4) would require lobbyists for tobacco-product manufacturers, retailers and distributors to enter into a signed agreement providing that such a lobbyist will "fully comply with the business conduct policies . . . and commitments (including those relating to the prevention of underage tobacco use) of the manufacturer, distributor, or retailer involved." If section 154(c)(4) were construed to prohibit manufacturers and/or their lobbyists from lobbying to achieve certain ends that might be inconsistent with "prevention of underage tobacco use," it would appear to violate such manufacturers' First Amendment rights. See, e.g., City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 379 (1991).

Section 155(a) provides that "[n]ot later than 90 days after the date of enactment of this Act, manufacturers, distributors, or retailers of tobacco products shall provide for the termination of the activities of the Tobacco Institute and the Council for Tobacco Research, U.S.A. and the Institute and Council shall be dissolved." The provisions expressly naming certain institutions and prohibiting them from conducting business would be subject to substantial constitutional challenge as a Bill of Attainder. See Nixon v. Administrator of General Services, 433 U.S. 425 (1977); Cummings v. Missouri, 71 U.S. 277, 320 (1866) ("Disqualification from the pursuits of a lawful avocation . . . may also, and often has been, imposed as punishment); SBC Communications, Inc. v. FCC, 981 F.Supp. 996 (N.D. Tex. 1997). In addition, to the extent that such trade organizations are organized "for the purpose of engaging in those activities protected by the First Amendment," see Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984), their compelled dissolution would impermissibly infringe upon First Amendment rights of expression and expressive association, unless such dissolution served compelling state interests, "unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms." See id., at 623; Sanitation and Recycling Indus., Inc. v. City of New York, 107 F.3d 985, 998-1000 (2d Cir. 1997). We have serious doubts that the provisions requiring the dissolution of these organizations could be justified under this test.

Section 155(b) restricts the manner in which "[m]anufacturers, distributors, or retailers of tobacco products may form or participate in any trade organization or other industry

association." The provision limits the persons who may serve on the board of directors of any industry association. Section 155(b)(2). It also limits the persons with which the association may consult for legal advice. Section 155(b)(2)(C). In addition, it limits the companies with whom the association may meet and prescribes how internal meetings must proceed. Section 155(b)(3). Finally, it provides the Attorney General and, as appropriate, state antitrust authorities, with "access to all books, records, meeting agenda and minutes, and other documents maintained by the association or organization." Section 155(c)(2). To the extent that this provision would apply to industry associations organized "for the purpose of engaging in those activities protected by the First Amendment," see Roberts v. United States Jaycees, 468 U.S. 609, 618 (1984), this provision raises significant constitutional concerns because of the manner in which it would interfere with the internal operations of such associations. See Cousins v. Wigoda, 419 U.S. 477, 487-88 (1975) (striking down law "interfer[ing] with the internal affairs of organization" of a political party); N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958) (striking down compulsory disclosure of member ship lists); Sanitation and Recycling Indus., Inc., 107 F.3d at 998-1000.

Title III—Standards to Reduce Involuntary Exposure to Tobacco Smoke: Section 302 provides that the "responsible entity for each public facility shall adopt and implement at such facility a smoke-free environment policy which meets [certain requirements]." Section 301(2) defines a "public facility" as "any building regularly entered by 10 or more individuals at least 1 day per week, including any such building owned by or leased to a federal, State, or local government entity." The definition does not include buildings or portions of buildings "regularly used for residential purposes," nor does it include buildings that are used as restaurants (other than a fast food restaurant), bars, private clubs, hotel guest rooms, casinos, bingo parlors, tobacco merchants, or prisons. Notwithstanding the finding regarding the substantial effect on interstate commerce of tobacco use that is set forth in section 3 of S.1415, we recommend that the provision be limited to apply to entities that are either "in or affecting" interstate commerce or whose activities are "in or affecting" interstate commerce in order to minimize the risk that the provision would be challenged as exceeding the scope of Congress's power under the Commerce Clause. See United States v. Lopez, 514 U.S. 549 (1995)

Title IV—Public Health and Other Programs; Subtitle B—Other Programs: Section 413 provides that the Secretary of Health and Human Services shall establish "an independent board to be known as the Tobacco Free Education Board (referred to in this section as the 'Board') to enter into contracts with or award grants to eligible public and nonprofit private entities to carry out public informational and educational activities designed to reduce the use

of tobacco products." Section 413 further provides that the Board shall be comprised of nine members, three "of whom shall be individuals who are heads of a major public health organization."

Because the board members would be responsible for awarding federal grants, they would exercise "significant authority" for purposes of the Appointments Clause. See Buckley v. Valeo, 424 U.S. 1, 138-139 (1976) (per curiam). As a result, they would have to be appointed in accordance with the requirements of that Clause. The requirement that three members of the Board must be "heads of a major public health organization" would unduly restrict the constitutionally vested appointment discretion of the Secretary. Accordingly, that limitation should be deleted.

Title V—Consent Decrees, Non-Participating Manufacturers, and State Enforcement: Section 511(a) provides that States, in order to receive certain federal payments, and tobacco manufacturers or distributors, in order to receive certain protection from liability, shall enter into consent decrees. The provision does not, however, describe what, if any, litigation the contemplated decrees would resolve. In the absence of a lawsuit, state courts would likely not possess, and federal courts certainly would not possess, the jurisdiction to enter a consent decree. See Local No. 93, Firefighters v. City of Cleveland, 478 U.S. 501, 525-26 (1986). In addition, although section 511 is presumably intended to condition the receipt of federal benefits on the resolution of only certain types of lawsuits between states and tobacco manufacturers or distributors, section 511(a) does not specify the class of lawsuits that must be resolved by decree. The provision should therefore be amended to specify the kind of litigation that, if outstanding on a certain date, must be resolved in order for the parties to qualify for federal benefits. For example, the provision could state that the federal benefits are conditioned upon States and tobacco manufacturers or distributors entering into consent decrees to resolve any outstanding litigation regarding claims by the States that the tobacco manufacturers or distributors are liable for costs related to the health consequences of smoking.

Section 511(b) provides that the consent decrees referred to in section 511(a) "shall contain provisions to clarify the application and requirements of this Act (and the amendments made by this Act), including provisions relating to" a variety of the substantive provisions set forth in S.1415. The subsection further provides that these provisions clarifying the application and requirements of S.1415 shall include provisions relating to "restrictions on tobacco product advertising and marketing an youth access to such products," 511(b)(1)(B); "the termination, establishment, and operation of trade associations," 511(b)(1)(C); and "restrictions on tobacco lobbying," 511(b)(1)(D).

Section 511(b) would be subject to substantial challenge under the "unconstitutional conditions" doctrine to the extent that it would condition the protections from liability for tobacco manufacturers and distributors on the requirement that they enter into consent decrees that contain otherwise unconstitutional restrictions on expressive activities. Even though the provisions referencing the consent decrees would not directly impose restrictions on speech, they would be subject to substantial constitutional challenge if they would permit a manufacturer or distributor to qualify for federal benefits only by agreeing in consent decrees with the States to refrain from exercising First Amendment rights. In arguably analogous contexts, the Court has struck down statutes that conditioned the receipt of federal benefits on the requirement that the recipient of the benefit refrain from engaging in protected expressive activities. See, e.g., FCC v. League of Women Voters, 468 U.S. 364 (1984). Although cases such as League of Women Voters did not involve restrictions on commercial speech, the lead opinion in the recent case of 44 Liquormart Inc. v. Rhode Island, 517 U.S. 484 (1996), expressly invoked the unconstitutional conditions doctrine in striking down a restriction on commercial speech. See id. at 1513 (opinion of Stevens, J.).

Section 511(b)(3) provides that the "terms and conditions contained in the consent decrees described in subsection (a) shall include a provision waiving the federal or State constitutional claims of the parties and providing for severability of the provisions of the decree." The requirement that the consent decrees include a waiver of constitutional claims as a condition of the receipt of federal benefits would itself be subject to substantial constitutional challenge under the "unconstitutional conditions" doctrine. Cf. Louisiana Pac. Corp. v. Beazer Materials & Servs., Inc., 842 F. Supp. 1243, 1250-55 (E.D. Cal. 1994) (applying heightened scrutiny in upholding a settlement with the government that included a private party's waiver of a right to bring a constitutional challenge in the future); Clark v. County of Placer, 923 F. Supp. 1278, 1287-1288 (E.D Cal. 1996) (striking down provision in a settlement with the government that precluded a private party from bringing a constitutional challenge in the future). Indeed, the risk would arguably be greater here than it would be in the settlement context generally. The federal government would be conditioning the receipt of federal benefits by the manufacturers on their willingness to include waivers of their rights to bring constitutional challenges to speech restrictions contained in settlements to which the federal government is not even a party. For that reason, the federal government arguably would be unable to rely on the unique settlement context to justify the imposition of a condition that the decrees contain such speech restrictions. Accordingly, the significant constitutional concerns presented by conditioning benefits on the requirement that the decrees contain otherwise unconstitutional speech restrictions would not be alleviated by the further requirement that the decrees

also contain provisions waiving the manufacturers' rights to bring future constitutional challenges to those restrictions. Indeed, such a requirement might serve only to increase the grounds for constitutional challenge.

Sections 513(b) appears to heighten the risk of constitutional challenge under the "unconstitutional conditions" doctrine with respect to the provisions concerning the consent decrees. The provision would impose additional fees on manufacturers that do not enter into either a consent decree of the type contemplated by section 511 or the National Tobacco Control Protocol described in section 512. The provisions would therefore arguably serve to "penalize" manufacturers that chose not to accept any otherwise unconstitutional speech restrictions that S.1415 would require to be included as a term of their consent decrees with the States in order for the parties to them to receive the federal benefits.

As to manufacturers that do not enter into the consent decrees described in section 511, section 512 provides that "each tobacco manufacturer to which this Act applies shall enter into a National Tobacco Control Protocol that shall be "developed by the Secretary as a binding and enforceable contract that embodies the terms of this Act[.]" It appears that, notwithstanding the mandatory language of section 512, manufacturers would have the option of electing not to enter into the protocol, and thus that the protocol is intended to serve as a mechanism by which manufacturers may qualify for liability protections without entering into consent decrees with the States.[7] In addition to the protections that would be conferred on participating manufacturers by Title VI, sections 513 provides additional incentives for manufacturers to enter into the protocol by subjecting non-participating manufacturers to "an annual fee" of an unspecified amount to be determined by the Secretary, 513(b), and by requiring them to make higher payments into a Settlement Reserve Fund, 513(c).

To the extent that the protocol would contain terms and conditions that would place restrictions on expressive activity that would violate the First Amendment if imposed directly by statute, it, too, would be subject to substantial constitutional challenge under the "unconstitutional conditions" doctrine. Manufacturers would be required to comply with certain speech restrictions in order to be exempt from the increased payments to the federal government that they otherwise would be required to pay under sections 513 and 514 and to qualify for the liability

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[7] We note that S.1415 is somewhat confusing on this point both because section 512 contains mandatory language and because it does not identify the federal benefits that manufacturers would receive upon entering into the protocol. The benefits are instead set forth in Title VI, which confers liability protections only on manufacturers that have entered into the protocol.

protections described in Title VI. Accordingly, both the manufacturers who entered into the contracts and later wished to break them, and the manufacturers who did not wish to agree to the terms of the protocol in return for the federal benefits, would be positioned to challenge the terms of these provisions.

Title VI—Provisions Relating to Tobacco-Related Civil Actions: By virtue of section 511(a), manufacturers who enter into the consent decrees referenced in Title V would receive the liability protections set forth in Title VI (which erroneously cross-referenced to as Title VII), including, for example, a ban on class actions for certain claims. In addition, Title VI would provide manufacturers that had entered into the National Tobacco Control Protocol with the same protections against liability from claims that arise from the use of a tobacco product. Insofar as these protections would preempt state rules of procedure for state law causes of action in state court, they may be subject to substantial federalism-based constitutional challenges.

As an initial matter, section 601(a)(1) extinguishes pending "[c]ivil actions that have been commenced by a State or local governmental entity, or on behalf of such an entity against a manufacturer, distributor, or retailer that is a signatory to the National Tobacco Control Protocol."[8] The provision should be amended to define with greater specificity the types of pending "civil actions" that would be extinguished. This might be accomplished by incorporating the language used in section 601(a)(2): "all claims arising from the use of a tobacco product."

Section 601(b) then extinguishes all pending "[c]lass actions for claims arising from the use of a tobacco product" against a manufacturer, and grants manufacturers that sign the protocol immunity from all such future actions. Section 602(c) further provides that "[n]o class action suits, joinder of parties, aggregation of claims, consolidation of actions, extrapolations, or other devices to resolve cases other than on the basis of individual actions shall be permitted without the consent of the defendant." These provisions would bar the use of class actions and other state court procedures for consolidating actions in connection with state law claims brought in state court.

Although there is no Supreme Court precedent directly on point concerning the constitutionality of federally imposed prohibitions on state court procedures for state law causes of action in state court, we believe that such prohibitions would be constitutional

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[8] We note that the provision makes an erroneous cross-reference to section 612. The cross-reference should be amended to refer to section 512 in order to conform with the provision in S. 1415 that establishes the protocol.

under the principles set forth in FERC v. Mississippi, 456 U.S. 742 (1982). The Court has repeatedly noted, however, that "[t]he general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them." Johnson v. Fankell, 117 S. Ct. 1800, 1805 (1997) (internal quotations omitted). There are therefore risks that the provisions would be challenged on federalism grounds.

The substantial risks of federalism-based challenges that are raised by these provisions could be reduced if a state's compliance with them were made a condition on the State's receipt of federal funds, see South Dakota v. Dole, 483 U.S. 203 (1987), New York v. United States, 505 U.S. 144 (1992), or as a more limited alternative to the federal government's restriction on the sale of cigarettes within states, see FERC, supra. For example, the provision could state that the sale of cigarettes at other than adults-only locations is prohibited unless a State bars the availability of class actions, as well as the other procedures and remedies that are identified in Title VI, against participating manufacturers.

Alternatively, the risk of challenge could be minimized if the federal statute were to establish a federal mechanism for permitting recovery on claims against participating manufacturers that were related to the use of tobacco products. The federal statute could preempt all such claims unless they sought recovery from the monies that the manufacturers would be required to pay into a federal liability fund -- or otherwise to set aside -- as a condition on their qualifying for federal liability protections. The federal statute could provide that recovery of these reserved funds would be subject to the annual liability caps set forth in Title VI, as well as other recovery rules designed to ensure allocational equity within the substantive caps. These rules could include those that would preclude recovery of damages for claims that were brought as part of a class action or that were ordered pursuant to a finding of punitive damages.

This approach would accord with the constitutional principles that permit Congress to require state courts to adopt certain federal procedures as incidents of the federal causes of action that they entertain. Felder v. Casey, 487 U.S. 131 (1988); Dice v. Akron, C. & Y.R. Co., 342 U.S. 359 (1952). We believe that these same principles should also permit Congress to require state courts to adhere to certain federal procedures when entertaining state law claims that are subject to federally imposed substantive limitations on the damages that may be recovered upon a finding of liability. Cf. Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) (state law punitive damages may be preempted). Thus, here, Congress could prohibit consolidated state law causes of actions in state courts as a permissible procedural incident of the substantive defenses against damages actions that federal law would

provide to those tobacco manufacturers that had placed funds in reserve in order to provide payments for liability judgments.

The risk of a federalism-based challenge could also be reduced if the federal statute were to establish a federal cause of action for claims by smokers against manufacturers of tobacco products that would supplant analogous state law causes of action but incorporate the existing state law standards of liability. See In re TMI, 940 F.2d 832 (3d. Cir. 1991), cert. denied, 503 U.S. 906 (1992) (discussing Price-Anderson Act). State courts entertaining these federal causes of action could then be required to adhere to the procedural limitations on consolidated actions when entertaining such suits. See Felder, supra; Dice, supra.

The provisions that would permit participating manufacturers to remove consolidated state law causes of action involving non-diverse parties to federal court would raise concerns regarding whether federal courts would possess "federal question" jurisdiction under Article III to hear them. See Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1993); In re TMI, supra. The risk would be reduced by establishing a federal cause of action as described above, see In re TMI, supra, or by providing for minimal diversity in such cases rather than for removal in all cases without regard to the diversity of parties.

Title VII-Public Disclosure of Health Research: Title VII would establish a uniform federal scheme for compelling disclosure of documents held by tobacco companies. To secure the civil liability protections described in Title VI, tobacco companies would be required to deliver to a central depository documents pertaining to health research, addiction or dependency, safer tobacco products, and the relationship between advertising and youth smoking. Companies could withhold documents from the depository based on claims of attorney-client privilege, work product privilege, or trade secret protection, but these claims could be disputed by federal, state and local government officials and by members of the public. Disputes over tobacco claims of privilege from disclosure, whether raised in conjunction with the establishment of the tobacco document depository or in litigation, would be decided by a three-member dispute resolution panel. The panel would apply uniform federal standards. Attorney-client and work product privileges would be decided under the ABA/ALI Model Rules or "the principles of federal law." Trade secret claims would be decided under the Uniform Trade Secrets Act.

These provisions raise several constitutional concerns:

1. Compulsory disclosure of company documents could create a risk of significant takings liability, since companies could argue that the uniform federal trade secret standard, specified in the bill, failed to shield documents that would have been protected

under otherwise applicable state-law standards. See Ruckleshaus v. Monsanto, 467 U.S. 986, 1003 (1984). Section 702(a) of the bill appears to eliminate this risk by making consent to the federal document disclosure regime part of the price of civil liability protection under Title VI. Compare Ruckleshaus, 467 U.S. at 1007 (voluntary disclosure of trade secrets "in exchange for the economic benefit of [pesticide] registration can hardly be called a taking"). The bill, however, is not entirely clear on this point. Section 702(a) invites tobacco manufacturers to "establish and maintain" the document depository in order "[t]o be eligible to receive the protections provided under title VI." Although a manufacturer's decision to "establish and maintain" the depository presumably encompasses a decision to accept the federal document disclosure regime, other provisions of section 702 suggest that the disclosure rules are mandatory. Section 702(c) states that "manufacturers . . . shall provide" documents to the depository, not that "consenting manufacturers" shall do so. In addition, section 702(d) speaks of "documents required to be provided." If, as we assume to be the case, the drafters of S. 1415 intend to make document submission by manufacturers a condition of receipt of a federal benefit and not a mandatory obligation, sections 702(c) and (d) should be revised to clarify this point.

Title VII could also give rise to takings claims based on the compulsory disclosure of documents belonging to the Tobacco Institute and the Council for Tobacco Research, U.S.A. Although the bill apparently contemplates inviting tobacco manufacturers to submit documents to the depository in exchange for liability protection, the Council and Institute would be required to make such submissions without obtaining any corresponding benefit. The takings risk associated with these compulsory disclosures, however, would appear to be limited. It is likely that many of the documents that the bill would direct the Institute and Council to place in the depository have already been disclosed in litigation. It is also likely that few documents belonging to the Institute and Council would qualify for trade secret protection under state law but under the newly established uniform federal standard. Moreover, it seems likely that relatively few of the documents that the bill would require the Institute and Council to disclose would contain trade secrets of great commercial value. Nevertheless, the possibility exists that section 702 would compel the Institute and Council to disclose trade secrets that would have been protected from disclosure under otherwise applicable state law. In addition, wholesale compulsory disclosure of documents belonging to these entities, compelled by statute rather than by court-supervised discovery processes, might be treated as a compensable infringement on a constitutionally protected property interest.[9]

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[9] Compare Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992) ("history, custom and usage" qualify presidential papers as personal property of the President, and abrogation of former

Apart from the risk of takings claims by the Institute and Council, we note that the compulsory disclosure provisions implicate the constitutional concerns regarding the First Amendment and Bill of Attainder Clause discussed in connection with the corporate culture provisions contained in Title I, Subtitle F.

2. Section 702(d)(3) provides that decisions of the dispute resolution panel will be "final and binding upon all Federal and State courts." This provision would require state courts to admit evidence, based on the federal panel's rejection of certain privilege and trade secret claims, that those state courts would otherwise exclude in cases premised on state-law causes of action. This provision could implicate the federalism concerns described in our discussion of the Title VI provisions that would preempt state procedures concerning consolidation of actions for state-law causes of action in state court.

3. The bill calls for the dispute resolution panel to be staffed by "Federal judges," appointed by the Judicial Conference of the United States (§ 702(d)(1)) and empowered to employ special masters (§ 702(d)(6)). If the bill is intended to ensure the broadest possible public participation in the resolution of document disclosure questions, the dispute resolution procedure could be revised to provide for initial determination by an administrative agency or Article I court, where individuals would not have to demonstrate Article III standing, followed by appropriate Article III review of disputes where the requirements of Article III standing could be satisfied.[10]

Title VIII-Assistance to Tobacco Growers and Communities; Subtitle C-Farmer and Worker Transition Assistance: Section 831 of the bill provides for federal transition assistance to farmers and workers whose livelihoods are adversely affected by the bill's reform of the tobacco industry. The mechanism for determining workers' eligibility for this assistance includes a preliminary state-level review of requests for assistance. Section 831(b)(2) provides that upon receipt of a petition for assistance, each "Governor shall" notify the Secretary (of either Labor or Agriculture, the reference is obscure)[11] of the petition; complete

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President Nixon's rights to his papers, including most critically the right to exclude others, constitutes a taking).

[10] We are continuing to consider constitutional issues that may be raised by the structure and manner of appointment of the dispute resolution panel described in the bill.

[11] Section 802(5) indicates that within Title VIII the term "Secretary" refers to the Secretary of Labor in some instances and to the Secretary of Agriculture in others. However, because the

and transmit to the Secretary a preliminary assessment of whether the petition satisfies the bill's eligibility criteria; and provide immediate assistance under other federal assistance statutes to workers who are preliminarily found to qualify for transition assistance. These gubernatorial responsibilities appear to be mandatory rather than elective. The bill does not characterize performance of these tasks as the price of federal benefits to the state government.

The bill might arguably be construed to afford governors the option of declining to perform any of the tasks listed in section 831(b)(2). The consequence of their refusal, on this reading, would be that affected workers in their states would not obtain Title VIII certifications or, as a consequence, transition assistance. If the mandatory reading of the governors' obligations is the correct one, section 831 would appear to effect an unconstitutional commandeering of the state's sovereign powers. See Printz v. United State, 117 S. Ct. 2365, 2383 (1997) ("'The Federal Government may not compel the States to enact or administer a federal regulatory program.'" (quoting New York v. United States, 505 U.S. 144, 188 (1992)). Accordingly, if the governors' assistance in evaluating claims for transition assistance is deemed necessary, we recommend that the provision of this assistance be made a precondition to the states' receipt of specified federal funds.

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cross-references in section 802(5) are obviously incorrect, it is unclear to which Secretary the Governors would report under section 831(b).

OCL COMMENTS ON S.1415

As a general matter, we question the need to superimpose a new statutory scheme on top of the Federal Food, Drug, and Cosmetic Act (FDCA) to deal with tobacco products that deliver nicotine to the human body. We, instead, favor an approach like that taken in Title II of Senator Conrad's bill, S.1638, which simply modifies the FDCA to expressly allow for the regulation of nicotine and tobacco products as the Food and Drug Administration has already done and to permit such future regulation as the agency may find necessary and appropriate under the FDCA.

On September 17, 1997, President Clinton announced five principles that he said should be the cornerstones of any legislative proposal to implement that settlement. (See White House document, "President's Plan for Comprehensive Tobacco Legislation to Protect America's Children" which is attached.): Point 2. was "Provide full statutory authority for the FDA to regulate nicotine without any conditions." To follow the approach established for FDA regulation in S. 1415 would contradict one of the President's principles.

Section 907(a) of the bill allows FDA to adopt a performance standard requiring the modification of a tobacco product to reduce gradually the nicotine yield of the product and to reduce or eliminate other constituents or harmful components of the product. Under Section 907(d), however, FDA is absolutely barred, for a period of twelve years, from adopting any performance standard that "requires the complete elimination of nicotine yields in a tobacco product." Moreover, Sections 907(b)(1) and 907(e)(2) of the bill prohibit FDA from adopting any performance standard with respect to nicotine yield, whether before or after the expiration of the 12-year grace period, unless the agency makes three specific findings: that the standard "will result in a significant overall reduction in the health risks associated with the use of the tobacco product," that the standard is "technologically feasible," and that the standard "will not result in the creation of a significant demand for contraband products." Overlaying these restrictions on the agency's regulatory authority, Sections 907(b)(2) and 907(e)(3) of the bill specify additional factors (e.g., number of nicotine-dependent tobacco users, availability of alternative products and tobacco cessation techniques) that FDA must consider in making its determinations with respect to demand for contraband products and the health risks of reducing or eliminating nicotine yield.

The absolute 12-year "prohibition" of any performance standard that would eliminate the nicotine yield of any tobacco product bars FDA from taking into account scientific and technological advances, societal changes and any other factors that may evolve during that period. Although, FDA has concluded that, at the present time, the public health harms that could flow from completely eliminating nicotine outweigh any potential benefit to be derived from such an action, the agency should not be foreclosed from reaching a different conclusion based on changing circumstances. Furthermore, while the various findings and factors that the bill imposes as preconditions to any performance standard may well be appropriate and, indeed, were carefully considered by FDA in adopting its current tobacco regulations, the ultimate decision as to what factors are most relevant, what weight they are to be given, and what findings will support a given standard should be left to the agency and not limited by statute.

Antitrust Division Comments on Section 155 of S.1415 McCain Tobacco Legislation

March 12, 1998

Proposed section 155 would require the dissolution of the two existing tobacco industry trade associations and would set the requirements for any new tobacco industry trade association. Those requirements include complete independence for directors and officers from any association member; the hiring of a legal advisor who is likewise independent from any association member; the adoption of by-laws that prohibit meetings among association members who are competitors of each other except under association sponsorship; strict adherence of every meeting to an agenda pre-approved by legal counsel and circulated in advance; and maintenance of minutes of every meeting in the association's records for five years following the meeting. The provision also requires the Department of Justice and the state attorneys general to oversee the association, with access, for the first ten years of the association's existence, to all its directors, officers, employees, and records. Any trade association established under section 155 would be exempt from the antitrust laws.

The Antitrust Division has a number of concerns about this proposal. First, and most important, exempting the association from the antitrust laws would likely have the effect of immunizing a wide range of anticompetitive conduct from the antitrust laws. While trade associations generally engage in many procompetitive activities, it must be remembered that an important incentive for them to do so is that they are subject to the antitrust laws. Historically, trade associations have been a significant source of antitrust problems; indeed, as gatherings of firms who are competing against one another, trade association meetings can be a breeding ground for anticompetitive conduct. Over the years, antitrust enforcement actions against trade associations have led to greater awareness of the dangers involved, and trade associations are generally very careful to educate their members on what conduct is and is not appropriate. Indeed, a major element of most remedial decrees against trade associations is the institution of an antitrust education program for directors, officers, employees, and members.

We would be very concerned about an antitrust exemption for the association. The risks of anticompetitive conduct would not be eliminated by the various requirements set forth in the proposed section 155.

Second, we would strongly urge that the law not give the Department of Justice the kind of oversight envisioned in the proposed section. Such a role would impose on the Antitrust Division the duties of a regulator, necessitating the construction of a regulatory apparatus in order for those duties to be performed. We do not believe it is appropriate for the Antitrust Division to be essentially a taxpayer-supported antitrust counsel for any particular trade association. This is foreign to the law enforcement mission of the Antitrust Division, and would impose significant costs and burdens on the Division as well as on the private parties involved.

Indeed, such an oversight role would be especially unwise if the association were exempt from the antitrust laws. If the Antitrust Division would no longer have any authority to bring an enforcement action against even the most serious antitrust violations, what would be the utility in the Division having access to the association's records and its directors, officers, and employees?

It is much less burdensome, and more in keeping with our nation's free enterprise traditions, to give trade associations latitude to make their own decisions regarding their conduct, subject to traditional antitrust proscriptions, than to require trade associations to seek government approval for each activity through some kind of petition or oversight.

If the association remains subject to the antitrust laws, the other parts of proposed section 155 are likely to be unnecessary. The independence from individual members, adherence to agendas approved by legal counsel, and discouragement of meetings among competitors except openly and through association aegis are all typical hallmarks of a trade association operated with careful regard for the strictures of the antitrust laws. The access by antitrust enforcement authorities to association records is already available under current law whenever there is reason to believe an antitrust violation may have taken place. Nevertheless, if Congress believes -- either for reasons unrelated to competition policy or because it wants to implement specific procompetitive relief -- that the historical tobacco industry trade associations should be terminated or that it is important to mandate independence of the association's directors,

officers, and legal advisors, and to require the new trade association to keep certain records and to make them more readily available to the Antitrust Division outside of normal investigatory procedures, the Antitrust Division would have no objection.

ISSUES IN SECTION 224: ACCOUNTABILITY PANEL

Summary. The primary and extremely serious problems created by this proposal are the following:

I. This provision has the potential to gut the look back and assessment provisions of the Act.

II. The role of the Food and Drug Administration and its Commissioner is confounded with the Commissioner's role at the head of this Panel in ways that threaten the FDA's traditional regulatory functions.

III. The operation of the Panel will require the creation of a new and cumbersome bureaucracy.

Discussion.

I. Section 224 shifts from the manufacturers to the Panel the obligation to prevent and excuse non-achievement of the companies' youth tobacco use reduction goals.

A. The bill obligates the Panel to approve a manufacturer's plan to meet its goals or to recommend amendments to the plan to achieve the goals. Thus, a manufacturer can rely on having gotten a "pass" from the Panel or having agreed to the amendment of its plan as suggested by the Panel as an endorsement that its efforts to meet its goal are adequate. Indeed, Section 224(e) states that compliance with Panel recommendations must be a consideration in determining whether the manufacturer made "reasonable efforts" to meet its look back goals. We don't yet have the full language of Sections 201 and 202, but the import of Section 224 appears to be that Panel acquiescence provides a defense for failure to meet look back targets..

B. Sections 224(d) and (e) speak to those look back targets directly. Subsection (d) requires the Panel (made up of the Surgeon General, a CDC representative and the Director of the HHS Office of Minority Health) to report to the Commissioner of FDA, as Panel head, the "danger" that a manufacturer will not attain its youth tobacco use reduction target. [A "miss" by any amount appears to trigger this notification.] The Commissioner must then commence a court action seeking suspension of the manufacturer's liability protection. The Secretary must prove, in that action, that there is a danger of the goal being missed [by even a very small percentage], and if the court so finds, it may suspend the defendant's liability protection.

One irony of this process is that within a year after such litigation is begun, the results of a yearly survey will reflect whether the target at issue was actually missed. If it was not, the litigation may drag on nonetheless, since the question at issue may be whether the suit was well founded when filed, not whether the target was actually missed.

Subsection (e) provides that where the Secretary determines (what her interaction with the Panel is in making this determination is not stated at all) that a manufacturer may miss its goal by more than 20 percentage points, she must commence an action under Section 203 of this act or "...issue a finding that the manufacturer made reasonable efforts to reach attainment targets."

Should either the Commissioner, under Subsection (d) or the Secretary, under Subsection (e), fail to commence an action, their failure to do so will undoubtedly be used by a manufacturer as evidence that the manufacturer should be excused from sanction for failure to meet its goals. Subsection (e)'s reference to compliance with Panel recommendations constituting evidence of adequate performance makes the use of that defense a virtual certainty.

C. The standard in Section 224 for manufacturer action that excuses failure to meet statutory obligations is different from and weaker than that elsewhere in the bill.

Section 203(c) provides that, in the event of a 20% or greater miss of its goal by a manufacturer, the court must determine whether the defendant "...failed to comply substantially" with its federal, state or local statutory or regulatory obligations or whether the manufacturer "has taken any material action to undermine" achievement of its goal.

By contrast, Section 224 appears to protect a manufacturer against sanction on a showing that the manufacturer complied with its plan as presented to the Panel or with the Panel's plan amendment recommendations. Such compliance constitutes a showing by the manufacturer of "reasonable efforts to meet [its] goals." This appears to be a complete defense to an action to lift a manufacturer's liability protection.

II. The role of the FDA Commissioner as the head of the Panel is in potential conflict with her or his role as the head of the Agency.

Section 224 (b) provides that the Panel recommend to manufacturers measures to reduce underage tobacco use. Resort to this method, rather than traditional rulemaking through FDA's statutory authority to regulate, is not an appropriate means through which the FDA Commissioner should act. Sections 224 (c) contemplates reports to Congress recommending additional measures manufacturers should undertake to meet their youth tobacco use reduction targets. Does this language require the FDA to engage in rulemaking? If the FDA engages in rulemaking, is that process subject to an APA challenge that the responsible agency official has, through the Panel process, pre-determined FDA's course before publication, notice and comment by the Agency?

III. The obligations imposed on the Panel cannot be met without creating a new bureaucracy at HHS and a significant burden on the Department of Justice to carry out the Panel's work.

A. Each year, Section 224(c)(1) requires the Panel to "describe in detail each tobacco manufacturer's compliance with the provisions of this Act and its plan" to meet its look back goal. A huge complement of personnel and much effort, some part of it duplicative of regular

Agency work, will be necessary to review not only each manufacturer's plan implementation (both its adoption by the company and its use in the field) but also whether the manufacturer is meeting all of its duties under this Act. The obligations to accomplish this work will fall to the Panel members -- the Surgeon General, a CDC representative, the Director of the HHS Office of Minority Health and the FDA Commissioner. Even assuming these officials were given a bureaucracy adequate to meet their Panel obligations, the work imposed by Section 224 would be a considerable distraction of these officials from the work they are currently authorized and obligated to do in their positions.

B. The obligations to litigate imposed by Section 224 are considerable, first because the failure to litigate will be used by manufacturers as evidence that they are blameless in failing to meet their statutory obligations (see above), but morcover because the Commissioner (Subsection d) and the Secretary (Subsection e) must litigate under certain circumstances, with no discretion to determine that other actions may better serve the public health. These litigation burdens will fall on the Department of Health and Human Services and as well on the Department of Justice which represents HHS in court. The intersection of these litigations [with their unspecified venues, procedures and consequences] with Section 203 litigations is unclear and likely to be cumbersome.

Tob-set-legal issues

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April 24, 1998

The Honorable Orrin G. Hatch
United States Senate
131 Russell Building
Washington, D.C. 20510

Dear Senator Hatch:

We are pleased to respond to your request for our legal views on pending tobacco legislation. You have specifically asked us about any constitutional concerns and the consequences. There are three key issues of concern to us:

1. the difficulty of accomplishing several provisions of the legislation without the industry's waiver of constitutional challenges;

2. the potential for creating a contraband market; and

3. potential bankruptcy of the industry.

We are glad that Congress is now seriously focusing on passing comprehensive tobacco legislation and that full Senate consideration is likely in the near future. We have appreciated the opportunity to work with you, Senator McCain, and others throughout the hearing process and committee consideration of tobacco issues. Your leadership in holding the first Congressional hearings last year addressing the legal complexities of the tobacco settlement was especially helpful. We look forward to continuing to share whatever insight and expertise we have gained from several years of engaging in legal battles with the tobacco industry.

The landmark agreement reached on June 20, 1997, was not perfect, but it includes critical themes which should provide the framework for any Congressional action. Tobacco legislation must be comprehensive. It must pass constitutional muster so the war against teen smoking moves to the streets and not the courthouse. And any financial settlement must not bankrupt the industry and produce even greater problems for the nation.

As lawyers, we believe that the industry's waiver of constitutional challenges is necessary to accomplish many of the public health goals within the bounds of the Constitution. Losing the

voluntary nature of the settlement agreement may have severe legal repercussions. Therefore, the following consequences should be considered:

NO CONSENT DECREES - Consent decrees are essential to ensure long-term compliance by the industry with key elements of the comprehensive package. Consent decrees, by definition, require the consent of all parties to the litigation. If a party does not agree to the terms of a proposed decree, then the court cannot thrust a settlement upon the parties. Theatre Time Clock Co., Inc. v. Motion Picture Advertising Corp., 323 F.Supp. 172, 173 (E.D.La. 1971). Therefore, if any party objects to a term contained within a proposed consent decree, a court cannot order its acceptance. Flight Transportation Corp. Securities Litigation v. Fox and Co., 794 F.2d 318, 321 (8th Cir. 1986). Consequently, if the tobacco industry will not enter into the consent decrees, particularly the advertising restrictions, corporate culture, payments, and other enforcement mechanisms of the decree, the lawsuits cannot be settled with assurance. The states will lose those enforcement mechanisms that were contemplated to be included in such consent decrees.

LOOK-BACK PENALTIES - Penalties must have a direct relationship to the harm being prevented. Penalties imposed by the government must be "rational in light of [their] purpose to punish what has occurred and to deter its repetition." Pulla v. Amoco Oil Company, 72 F.3d 648, 658 (8th Cir. 1995). Therefore, there must be a reasonable relationship between the penalties imposed and the harm likely to result from the defendant's conduct as well as the harm that has actually occurred. Id. at 659 (quoting TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993)).

Although the courts have not articulated any precise formula for ascertaining the "reasonableness" of penalties, Justice Scalia observed that the touchstone is the value of the fine in relation to the particular offense. Austin v. United States, 509 U.S. 602, 627 (1993) (Scalia, J., concurring in part and concurring in the judgment). If there is no reasonable relationship, the penalties would be considered an excessive fine and would not withstand judicial scrutiny. See generally TXO, 509 U.S. 443; Pulla, 72 F.3d 648.

The June 20 agreement with the tobacco industry had a formula for the penalties imposed, which linked the actual cost of a youth who begins smoking and the profit received from that youth over the course of his life, to the amount of the penalty. This demonstrates precisely the type of rational relationship required by courts.

However, the proposed look-back penalty may not pass judicial scrutiny. At $3.5 billion, the fines are the largest imposed on any industry for any conduct. As originally proposed, the penalties could be suspended if the manufacturers made serious, good faith efforts to curb youth smoking but, unfortunately, failed to successfully change the behavior of teenagers. This approach provided a due process review, rather than imposing penalties through strict liability. Under the current Senate Commerce bill, the companies will be penalized even if they make every reasonable attempt to halt youth smoking.

A look-back penalty closely tied to tobacco company behavior, or a penalty voluntarily agreed to by the companies, is constitutionally sound and a valuable mechanism for fighting youth smoking.

ADVERTISING AND MARKETING RESTRICTIONS - The District court in Beahm v. U.S. Food and Drug Administration, 966 F.Supp. 1374 (M.D.N.C. 1997), held that the FDA's regulations relating to restrictions on tobacco advertising were beyond the authority of the FDA and, therefore, were invalid. This case is currently on appeal to the Fourth Circuit. Although that court has not yet ruled on the validity of existing FDA advertising regulations, even if it should find that those regulations are within the purview of FDA control, the advertising and marketing restrictions set forth in the June 20th agreement may not survive First Amendment review. This is in part because the restrictions envisioned by the June 20 agreement are much more expansive than the FDA restrictions currently being litigated. The total ban on outdoor advertising, black and white only ads, prohibition on Internet advertising, and prohibition on event sponsorship are but a few examples of the marketing and advertising restrictions contained in the June 20 agreement, implemented by the voluntary Master Settlement Agreement, Protocol and consent decree.

It has been recognized that the First Amendment "directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495, 1508 (1996). Furthermore, even communications that do no more than propose a commercial transaction are entitled to the coverage of the First Amendment. Id. In recognition of the seriousness of this issue, the Supreme Court has stated that "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process," strict scrutiny is applicable. Id. at 1506. Consequently, in order to survive judicial review, the government must demonstrate that its restriction on speech was no more extensive than necessary. Id. at 1509. Because of this heavy burden, "speech prohibitions of this type rarely survive constitutional review." Id. at 1508.

Although the June 20 agreement with the tobacco companies does not propose a total ban on advertising, its expansiveness may nonetheless cause a reviewing court to apply the strict scrutiny review utilized in Liquormart. As that court recognized, not all commercial speech regulations are subject to a similar form of constitutional review. Id. at 1507. Therefore, when a state regulates commercial messages to protect consumers from deceptive, misleading, or otherwise harmful advertisements, "less than strict review" is appropriate. Id. However, because the advertisements forbidden by the June 20 restrictions would have presumably been truthful in nature and the restrictions are being implemented for purposes other than protecting the bargaining process, it seems likely that this less stringent standard of review would be inapplicable. Consequently, the government would have to demonstrate that there were no less intrusive means available to accomplish their goals. As the court in

Liquormart recognized, application of this standard usually acts as the death knell for government restrictions. Id. at 1508.

In this same vein, the restrictions included in the June 20 agreement could probably not be characterized as time, place or manner of expression restrictions, which carry with them a less stringent standard of review. Specifically, such bans are content neutral. See generally Kovacs v. Cooper, 336 U.S. 77 (1949). Conversely, the bans envisioned in the agreement are obviously content driven.

In sum, the expansiveness of the proposed advertising restrictions as well as the high burden that must be met in order to justify such restrictions, rasie serious concerns that without the industry's voluntary consent and participation, the advertising prohibitions envisioned in the June 20 agreement may not survive First Amendment scrutiny.

Additionally, the June 20 agreement incorporated the FDA regulations, which, if overturned by the Fourth Circuit, would also be unavailable as a regulatory mechanism. While it is true that the industry would have some incentive to limit its advertising and marketing to achieve the look back requirements, if the look back penalties are also found to be legally deficient, their value as an incentive would be eliminated.

ADVERTISING RESTRICTIONS AGAINST RETAILERS, DISTRIBUTORS, WHOLESALERS, AND ADVERTISING BUSINESSES - The June 20 agreement contemplated that the participating companies would police their retailers, wholesalers, distributors, and advertising agencies by contract and by refraining from placing ads with them. These voluntary implementation mechanisms were to be built into the Master Settlement Agreement, Protocol and consent decrees. However, any legislation that could be unconstitutional as to the industry could also be unconstitutional as to the related agents. Therefore, the same First Amendment issues that could preclude the government from instituting blanket prohibitions on advertising by tobacco manufacturers may also preclude prohibitions affecting industry agents.

DOCUMENT DISCLOSURE The public depository of documents set forth in the June 20 agreement presumed some level of voluntary participation on the part of the tobacco industry. While documents filed in court, or otherwise made available to the public, can certainly be put in a central public depository, it is questionable that the industry can be required to release documents not otherwise available, including documents it considers privileged or confidential, as well as any future documents or research.

Obviously, almost any American business would object to the government seizing its internal corporate documents and opening them for inspection. The depository raises both private property and search and seizure concerns.

The Fifth Amendment provides in part: "nor shall private property be taken for public use, without just compensation." U.S.C.A. Const. Amend. 5. It has been widely recognized that the property to which this amendment applies is that which "is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement." Nixon V. U.S., 978 F.2d 1269, 1275 (1992) (recognizing that former President had a property interest in presidential papers). Those property interests may be created in a myriad of ways, including uniform custom and practice. Id. at 1276.

Accordingly, the documents that were to be deposited by the tobacco companies in a public depository constitute "property" for Fifth Amendment purposes. This conclusion is consistent with the district court's decision in Nika Corp. v. City of Kansas City, 582 F.Supp. 343 (W.D.Mo. 1983), wherein it was held that a corporation's documents constituted "property" invoking Fifth Amendment protections. See also U.S. v. Dauphin Deposit Trust Co., 385 F.2d 129 (3rd Cir. 1967) (trust company had a property interest in various business records). In Nika the court held that the government could not confiscate particular business documents without providing for a method of compensation for such taking. Id. Although the court found that there were adequate means provided in that case, this clearly demonstrates that corporate documents constitute "property" for Fifth amendment purposes, thereby invoking the necessity for compensation when the government takes such for public purposes. Consequently, there is a strong possibility the tobacco companies could not be compelled to deposit the documents specified in the June 20 agreement without just compensation.

Furthermore, if the Fifth Amendment protects the industry from being required to hand over to the government all of its documents, it seems that it would also protect them from being required to pay the costs of the depository, unless the costs are somehow built into other licensing fees.

The tobacco companies would almost certainly raise objections based on case or controversy and standing against individuals wishing to challenge a decision by the companies to withhold documents. Under Article III, § 2 of the Constitution, the federal courts have jurisdiction over disputes only where there is a "case" or "controversy." Raines v. Byrd, 117 S.Ct. 2312, 2317 (1997). One element of that test requires the complainant to establish that they have standing to sue. Id. This requires the complainant to demonstrate that he has suffered a personal injury fairly traceable to the defendant's allegedly unlawful conduct...." Id. Therefore, any individual wishing to protest tobacco companies' refusal to disclose documents would have to establish that they were injured by such refusal. Presumably, the only means of doing so would be to assert that the refusal negatively impacted their own personal pending litigation with a particular tobacco company. However, this would be difficult to demonstrate because a tobacco company's refusal to deposit documents in a public depository is not the equivalent of refusing to produce those documents in a particular action. Consequently, any individual wishing to protest the tobacco companies' refusal to disclose documents might have to wait until their own suit was

filed, motions for discovery were made, and a particular tobacco company refused to comply, before they would have standing on this issue. Even then, they might not be able to demonstrate that they were somehow injured by the tobacco company's refusal to place such documents in a public depository.

One of the primary benefits to individual claimants of having the industry documents placed in a public depository, aside from having ready access to the documents, is the voluntary agreement of the companies not to challenge the authenticity of the documents when they are offered as evidence in individual trials. The companies are now well-known for fighting vigorous evidentiary battles. If the industry does not enter into the voluntary agreements, one can also assume that they will challenge the introduction of these documents in individual trials, resulting in considerably more expense for the plaintiffs than was envisioned under the June 20 agreement.

CONTRABAND - As law enforcement officials of the states, we are also concerned about the danger of creating a contraband market for tobacco products. Our children will not be helped by creating a new product line for organized crime, nor by providing a new entry market for drug dealers. Additionally, the adverse health consequences of smoking cigarettes produced in unregulated foreign or clandestine domestic markets are likely to be even more significant than cigarettes produced by the existing U.S. companies.

The experience of the states with relatively high tax rates on tobacco produces has been studied in some detail. Revenues lost to smuggling cigarettes into these states has been a major concern. This is estimated to be a $1 billion per year problem nationwide. In 1988 California increased its tobacco tax from 18 cents to 35 cents per pack and today the contraband market is estimated to be between 17.2% and 23% of cigarettes sold. Michigan increased its cigarette tax in 1994 from 25 cents to 35 cents a pack. Michigan lost an estimated $144.5 million per year in tax revenue. Washington State increased its tax in 1997 to 82.5 cents per pack, and lost an estimated $110 million a year to smuggling. New York State, with a 56 cent state tax estimates it is losing about $300 million of tax revenue per year due to smuggling. The typical scenario after a state makes a significant increase in its cigarette tax is a decrease in sales in that state, but a marked increase in sales in neighboring states. Smoking rates in the higher-tax state typically remain the same, so the increase in sales reflects purchases to take into the higher-tax state.

There is a definite correlation between tax rates and the level of smuggling. For many years, the differential in tax rates on tobacco products was mainly an interstate problem with contraband products being smuggled into those states with the highest tax rates. The problem has now reached international proportions. At first, popular American brands were smuggled into other countries. We are now seeing that as tobacco taxes rise nationwide, foreign manufactured cigarettes and other products are being smuggled into the United States.

BANKRUPTCY - Finally, we believe it to be in the best interests of accomplishing the broad public health goals of legislation to avoid bankruptcy of the tobacco industry.

Critics of the June 20 settlement have suggested that bankruptcy is not a great risk. This industry has a history of annual domestic profits. For example in 1996 Philip Morris and RJR (76 percent of the market) had domestic profits of $6.3 billion. While it is not possible to determine precisely the market value of the domestic tobacco companies (not the parent companies), it is possible to estimate their market value -- if they were sold today. The stock of the Nabisco Food Company, which is 80.5 percent owned by RJR, trades publicly. This allows an extrapolation of the value which the market places on RJR's tobacco operations. That value is $1.184 billion. Part of that is comprised of international operations and part is domestic. Foreign tobacco companies like Imperial and Gallaher trade at price earning rations of 10 to 11. If one uses a 10.5 P/E for Reynolds' international earnings, Reynolds' domestic operations have a negative market value of $1.1196 billion. Using similar valuation methods for the other companies, Brown & Williamson is worth a negative $240 million; Lorillard is worth a positive $641 million and Philip Morris USA is positive $3.855 billion. If one were to ignore the fact that foreign tobacco companies trade at P/E's higher than the imputed value of domestic companies and assume identical valuation of domestic and foreign companies, the entire domestic industry could be worth as much as $21.484 billion. On this basis, the total market value of the industry (both foreign and domestic) is estimated to be less than $50 billion. Liability to the states alone exceed several hundred billion dollars. The conclusion is obvious -- this is an industry that produces significant cash but has questionable inherent value as many industry assets cannot be converted to other uses and have little value outside the tobacco environment.

State Attorneys General do not seek financial ruin of any industry. It is our job to bring about compliance with the laws and that is what we seek from the tobacco companies. This is an industry that sells a legal product, employs thousands of people, and provides a living to many more, ranging from farmers to retailers. Our goal has been to hold the industry accountable for its actions, and to provide for significant public health gains. If the current companies are liquidated, new companies can be expected to step into the breach, within or outside this country. We would have virtually no claims against these replacement tobacco companies for past industry practices. Further, foreign tobacco companies (possibly with manufacturing operations abroad) might immediately step in to satisfy US demand for cigarettes. This, of course, could hurt our farming communities and those whose employment depends on this industry.

In conclusion, we appreciate your interest and efforts to move comprehensive legislation forward. We are concerned that the fundamental goal of reducing youth smoking may be lost in the current political rhetoric. It's time for action and for comprehensive legislation to achieve this goal now, not after years of additional litigation and debate.

Sincerely,

GALE A. NORTON
Attorney General
State of Colorado

BETTY D. MONTGOMERY
Attorney General
State of Ohio

JAN GRAHAM
Attorney General
State of Utah

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

cc: The Honorable John McCain
The Honorable Slade Gorton

AG FILE: P:\AG\AGCONNPA\HATCH.DOC

Have $ come from states – not participating states.

language – why clear "can't pursue admin expenses agst US.

3. State + local preemption

wipes out st/local claims. losing RTs to sue / not reimbursed

what $s being sued for?

it open door, states will commiserate w/ localities –

get back in for 2nd round.

switch this provision to p. 14!

5/7 Legal Issues

1. Asbestos

Harkin - creation of fund - authorizing 21 b to 2014
suits to approps
for claims to asbestos whers

OMB / DOL - Think we should NOT support
pvrs fed govt on both for misfeasance of priv actors

DOL: end up w/ lots of people at our doorstep

Rts of Then people NOT cut off - no longer a K prohibition.

- Essentially bail-out for asbestos ind.

Money not enough anyway

BL: if you have in findings on addiction / disease - That will help Then people.

TP: add additional premium on smoking + asbestos?

2. Attys Fees

a. Preference - not to do anything.

concerned abt any provisn interfering w/ vested rts.

in bill now: anti-wipeout provisn (not anti-windfall)

Smokes since They put something

DOS provisn - also an art. provisn - but not interfere w/ vested rts. (where suits have been settled and 11 states w here...

Need This drafted plus: no money used for...

Add: only apply to participatory manufacturers.

Vested rts provisn should be redrafted.

Level of risk - absent from list of factors

Proposal for cap: $250 benchmark - can be adjusted up or down.

for other claims:

Moderate provisn:

simpler, more logical model

Tobacco - settle - legal issues

Bruce R / Bruce L —
On the issue Frank Hunger raised at the DPC meeting (i.e., class action v. other aggregation devices)

U.S. Department of Justice
Office of the Associate Attorney General

Deputy Associate Attorney General — Washington, D.C. 20530

August 4, 1997

EK —
Could you explain this whole area of law to me sometime? Thanks.
—BR

MEMORANDUM

TO: Elena Kagan
Deputy Assistant to
the President for Domestic Policy

FROM: Francis M. Allegra
Deputy Associate Attorney General

SUBJECT: **Background Paper on Multi-district Litigation**

Attached is a segment from a larger report that I helped draft two years ago concerning mass torts and multi-district litigation. While the paper is slightly dated, I think it still summarizes well the issues that would arise and some of the possible options that are available if you decide to consider incorporating some form of existing or enhanced multi-district litigation as part of the tobacco agreement.

One point that should be added to the segment -- I am informed by the Civil Division that the Congress is currently considering multi-district litigation reform as part of H.R. 1252. Specifically, Section 10 of that bill would expand federal jurisdiction as to mass tort litigation arising from a "single event or occurrence" -- this provision appears to be somewhat similar to the ALI proposal discussed in attached segment. While the Department of Justice did not object to Section 10 of H.R. 1252, we do have major concerns with other provisions in that bill, *e.g.*, provisions that would require state referenda to be reviewed by three judge courts.

After you have had a chance to review these materials, I would be glad to discuss whether there are specific proposals you would like us to develop or consider. Feel free to give me a call (514-2987), if you need additional information.

cc: George Phillips

Tobacco-settlement-legal issues

(9) Mass Tort Reform

Product liability actions often involve products sold widely across the country which have injured many individuals. This phenomenon is reflected in case statistics. According to a report made to the Federal Judicial Conference, while there were 85,694 product liability suits filed in Federal court between 1970 and 1986, only 34 companies were the lead defendants in over 35,000 of these cases. Ad Hoc Comm. on Asbestos Litig., **Report to the Judicial Conference of the United States** 7-10 (1991). *See also* Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System -- And Why Not?*, **140 U. Pa. L. Rev.** 1147, 1204-05 (1992). Moreover, about 60 percent of the cases filed in Federal court, as well as a significant portion of those filed in state courts, were attributable to a handful of products, notably Benedectin, DES, Agent Orange, the Dalkon shield and asbestos. *Id.*[1] Experience suggests that these cases are most fairly and efficiently dealt with by consolidating them in a single Federal court, which allows for the establishment of discovery libraries and facilitates global settlements. However, there are jurisdictional impediments that complicate, and in some instances preclude, these consolidation efforts. *See, e.g.*, Note, *Mechanical and Constitutional Problems in the Certification of Mandatory Multistate Mass Tort Class Actions Under Rule 23*, 49 **Brooklyn L. Rev.** 517 (1983).

Various groups have proposed ways to overcome these hurdles to consolidation. Among the major approaches that have been suggested are the following:

- The American Law Institute recently proposed a set of procedures to govern complex cases, including mass torts. The ALI would create a Complex Litigation Panel (CLP) to replace the existing Judicial Panel on Multidistrict Litigation. Under a new version of 28 U.S.C. §1407, the CLP would be authorized to transfer civil actions pending in more than one district to any district for consolidated pretrial proceedings or trial, or both. A separate provision would allow the CLP to remove state actions to a designated Federal court. The transferee Federal court would be afforded broad discretion to consider ancillary claims and to group and handle separately categories of individual claims. The ALI proposal also includes a mechanism for resolving choice of law questions and for making the results of the consolidated action binding on parties with related claims who have not filed suit. *See* American Law Institute, **Complex Litigation: Statutory Recommendations** (1994).

- A special committee of the American Bar Association that studied punitive damages proposed that Congress establish a process for creating a national class action for multiple punitive damage claims arising out of conduct that results in similar injuries. This proposal would carve out an exception to the State Anti-Injunction Act that would allow a federal judge to assume control of

[1] Asbestos alone accounted for 20,888 of the Federal cases. *Id.* at 1204. *See also* Terrence Dungworth, **Product Liability and the Business Sector: Litigation Trends in Federal Courts** 35-38 (1988).

all state cases. This procedure would be triggered by a district court's finding that there is a reasonable possibility that adequate compensatory damages would not be available if punitive damages are not handled in consolidated manner. Special Committee on Punitive Damages, Section of Litigation, **Punitive Damages: A Constructive Examination**, *supra* at 78-81. *See also* ABA Commission on Mass Torts, **Revised Final Report and Recommendations** (1989). The American College of Trial Lawyers has made a similar recommendation. American College of Trial Lawyers, **Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice** 20-26 (1989).

- Judge William Schwarzer (until recently the Director of the Federal Judicial Center) and others have proposed to amend the multidistrict litigation statute to permit discovery and pre-trial coordination of large-scale litigation pending in state and federal courts. This proposal would amend the Federal multistate litigation statute (28 U.S.C. §§ 1404-1407) to authorize removal on a minimal diversity basis of state court cases related to federal multidistrict litigation to a "multidistrict transferee court." Unlike the proposals of the ABA, ALI and American College of Trial Lawyers, however, this proposal would leave all merit determinations (and hence any choice of law rulings) to be made in the court where the suit originated. *See* William W. Schwarzer, Alan Hirsch and Edward Sussman, *Judicial Federalism -- A Modest Legislative Proposal* (1993) (unpublished).[2]

Variations on these proposals have surfaced in Congress in bills such as the "Multiparty, Multiforum Jurisdiction Act of 1991," H.R. 2450, 102d Cong., 1st Sess. (1991). *See* Robert W. Kastenmeier & Charles G. Gegh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature*, 73 **Marq. L. Rev.** 535 (1990). *See also* Thomas D. Rowe, Jr., *Jurisdictional and Transfer Proposals for Complex Litigation*, 10 **Rev. Litig.** 325 (1991) (cataloging additional proposals)

As the summaries above illustrate, proposed legislation to improve the resolution of mass torts can be complex. Most proposals are designed to diminish or eliminate obstacles to consolidated treatment of related litigation scattered among various courts. The proposals

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[1] Although it did not deal extensively with the subject of mass torts, the Federal Courts Study Committee similarly recommended that the Congress amend the multi-district litigation statute to permit consolidated trials as well as pretrial proceedings and that it create a special Federal diversity jurisdiction, based on the minimal diversity authority conferred by Article III, to make possible the consolidation of mass tort cases. **Report of the Federal Courts Study Committee** 44 (1991). This proposal is noteworthy as most of the Federal Courts Study Committee's recommendation were to constrict, rather than expand, Federal jurisdiction.

differ primarily depending upon whether they would: (i) be limited to mass torts or include other categories of complex cases, including those involving mass accidents; (ii) statutorily define the concept of "mass tort" or allow some court to exercise discretion in invoking a mass tort procedure; (iii) affect only cases originally filed in Federal court or allow for the consolidation of cases spread between state and federal courts or among courts of different states; and (iv) consolidate only pretrial and discovery proceedings or consolidate all or a part of trials on the merits. The broader-reaching proposals are necessarily more intricate, and include detailed procedures for enjoining state court proceedings, removing cases from state courts and resolving questions involving choice of law. Such proposals, moreover, are more readily criticized as infringing upon state sovereignty and the autonomy of the parties to control their own destinies. More streamlined proposals are less subject to these criticisms often because they do not envision the removal of state cases. However, such less ambitious proposals may leave unresolved some of the more nagging problems posed by mass torts which principally derive from the current lack of intersystem coordination between state and federal courts.

Striking a balance between these shifting concerns is not an easy task. Yet, the existing proposals can be distilled into several building blocks from which a viable Federal mass tort reform legislation can be developed.

High on the list of jurisdictional obstacles to the consolidation of mass tort cases is the complete diversity requirement of 28 U.S.C. § 1332, which requires *all* plaintiffs to be of diverse citizenship from *all* defendants. This requirement now irredeemably divides much mass tort litigation between state and federal courts because parties who can satisfy this requirement file in federal court while others with related claims are forced to remain in state courts. Judge Schwarzer, the Federal Courts Study Committee and others would address this problem by adopting minimal diversity in mass tort cases, using the full range of Congress' Article III authority to confer jurisdiction on the federal courts whenever *any* plaintiff is of diverse citizenship from *any* defendant.[3] According to Judge Schwarzer, "minimal diversity would open the jurisdictional door much wider because few cases in mass litigation would not have at least one pair of diverse parties." Schwarzer, *supra* at 13-14. Precedent for the use of such minimal diversity is found in the federal statutory interpleader statute, 28 U.S.C. § 1335, which has passed constitutional muster. *See* State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 530-31 (1967).[4]

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[3] *See* Report of the Federal Courts Study Committee, *supra* at 44-45; Schwarzer, *supra* at 35. *Cf.* Linda Mullenix, *Complex Litigation Reforms and Article III Jurisdiction*, 59 Fordham L. Rev. 169, 196 (1990) (arguing against this proposal).

[4] The ALI proposal would go farther and would grant federal courts ancillary or supplemental jurisdiction over claims and indemnification arising "from the same transaction, occurrence, or series of related transactions or occurrences" as a claim before the court. Such jurisdiction would be used to support removal efforts to allow for the consolidation of

Expanding Federal jurisdiction alone, however, would not necessarily result in the desired aggregation of cases in a single court. Some parties doubtlessly would perceive tactical advantages in filing in state court, choosing either to proceed independently or to await the outcome of a consolidated Federal action. Leaving such cases in the state courts might fail to achieve a fair and efficient resolution of a mass tort controversy. To avoid this, the most common approach suggests authorizing a federal multidistrict transferee court to remove state court cases related to federal multidistrict litigation either on the motion of a party or *sua sponte*. *See, e.g.*, ABA Commission on Mass Torts, Revised Final Report and Recommendations at i-iii; ALI, **Complex Litigation: Statutory Recommendations**, at 446-447. Sensitive to the federalism concerns posed by the prospect of involuntary removals, some of these proposals would vest the authority to remove state cases not in a single judge, but rather in a judicial panel similar to the judicial panel on multidistrict litigation currently authorized by 28 U.S.C. § 1407(d). As a precondition to invoking this authority, the panel would determine whether consolidation of federal and state cases was necessary, either by making certain statutorily prescribed findings or by weighing a set of statutory factors or guidelines.[5] Proponents of such removal procedures assert that this authority will need to be invoked only rarely once the advantages of proceeding in a consolidated fashion become apparent. ALI, Complex Litigation: Statutory Recommendations, at 446-447.

The passage of jurisdictional and removal mechanisms along these lines could result in most mass tort cases being brought into the Federal system. To complete the loop, any federal legislation would then have to address how to improve the actual coordination and resolution of mass tort cases. Several proposals would accomplish this by modifying substantially the multidistrict litigation procedures found in 28 U.S.C., § 1407(a). *See, e.g.*, ALI, **Complex Litigation: Statutory Recommendations**, *supra* at 442-44. Currently, that section provides that "[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings ...." This section might be amended to allow a transferee court to retain a transferred action for trial, perhaps with a presumption in

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state cases with related cases already before the Federal courts. ALI, **Complex Litigation: Statutory Recommendations**, at 446. By comparison, the ABA Commission on Mass Torts recommended giving federal courts "federal question" jurisdiction over certain mass torts, while requiring the courts to apply state substantive law. ABA Commission on Mass Torts, **Revised Final Report and Recommendations**, *supra*.

[5] In some instances, similar authority might be used, in cooperation with state authorities, to consolidate actions involving a particular mass tort in a single state court. Having such "reverse removal" authority might be beneficial in situations in which the wide majority of actions involving a particular mass tort are filed in a single state and only a few cases are filed in Federal court or in other states. Under those circumstances, it might be inappropriate to remove the litigation from the local courts. *See* ALI, Complex Litigation: Statutory Recommendations, at 439.

favor of remanding the case to the transferor court for individual determinations of damages. However, as noted above, the prospect of having joint trials on the merits raises a host of thorny issues, none the least of which is the need to adopt some standard convention for resolving choice-of-law issues. While several proposals provide just such a convention, there is so much disagreement on this point as to raise the prospect that this issue could derail any major reform of consolidation authority. *See* Rowe, Jr., *supra* at 333 ("A specter lurking in the background is the possibility that choice of law problems could be so daunting and agreement on approaches so elusive, as to prevent major expansions in consolidation authority.")

An alternative proposed by Judge Schwarzer would be to limit consolidation to discovery matters and related pretrial activity and, at least in cases removed from state courts, leave all dispositive rulings to be made in the courts of the originating state. Schwarzer, *supra* at 42-45. This approach would eliminate duplicate and uncoordinated interrogatory and document discovery, clearly the most significant and readily identified source of inefficiency in large-scale litigation. Moreover, it would provide for equal access to and ready dissemination of discovered information, thereby creating a setting conducive to global settlements. Finally, absent a settlement, the proposal would return state court actions back to the state courts for final disposition, either by motion or trial, thereby largely avoiding the choice-of-law thicket. The results of the coordinated discovery, including the scope of discovery, would remain binding in these subsequent proceedings. *Id.*

Various policy and mechanical issues will need to be resolved in developing Federal mass tort reform legislation. The most important point, however, is that we strongly believe that mass tort proposals hold significant promise for ameliorating the lion's share of problems being experienced in product liability cases and, particularly, could introduce efficiencies into the civil justice system that would benefit plaintiffs and defendants alike.

Tobacco-settlement - legal issues

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

July 16, 1997

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

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

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

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

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

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

I.

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

A number of objections have been raised against these provisions.

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

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

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

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

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

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

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

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

(1856).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Perhaps because its proponents have recognized the constitutional difficulties raised

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

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

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

III.

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

• prohibit the use of non-tobacco brand names for tobacco products, except those in existence as of Jan. 1, 1995;

• restrict tobacco advertising to FDA-specified media;

• restrict tobacco advertising (except for that in adult facilities and adult publications) to black text on a white background;

• ban all non-tobacco merchandise carrying names and logos;

• ban sponsorships of concerts and sporting events.

The legislation would also:

• ban the use of human images and cartoon characters in all tobacco advertising;

• ban all outdoor tobacco product advertising;

• prohibit tobacco advertising on the Internet unless designed to be inaccessible to or from the United States;

• ban payments for tobacco product placements in movies, TV shows, and video games; and

• severely restrict point-of-sale advertising.

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

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

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

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

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

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

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

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

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

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

IV.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

• Some have intepreted the provision in Appendix VIII that the determinations of the panel be "binding upon all federal and state courts in all litigation in the United States" as

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

* * *

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

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

Tobacco-settlement-legal issues

U.S. Department of Justice
Office of Legal Counsel

Washington, D.C. 20530

DATE: July 31, 1997

FACSIMILE TRANSMISSION SHEET

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NUMBER OF PAGES: 4 PLUS COVER SHEET

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PROPOSAL TO LIMIT THE FEDERALISM AND ARTICLE III CONCERNS RAISED BY THE "PROCEDURAL PREEMPTION" AND REMOVAL PROVISIONS OF THE JUNE 20TH PROPOSED RESOLUTION ON TOBACCO

In what follows herein, we suggest the outlines of a federal statute that could effectively limit multi-party actions against participating tobacco manufacturers in federal and state courts, in a manner that raises the fewest constitutional questions while at the same time not unnecessarily foreclosing plaintiffs' ability to seek relief in state courts. Although we think that the specific concepts and rules we recommend probably should each appear in a federal statute, we have not attempted to use traditional legislative language or terminology; instead, we have tried to outline the theoretical basis for a possible statute. We must emphasize at the outset that, although we believe our approach is sound, there exists a not insignificant risk that a court would invalidate all or a portion of such a statutory scheme. Accordingly, we would urge that attention be given to whether statutory language should be included regarding whether invalidation of all or a portion of the provisions addressed in this memorandum would require the invalidation of the statute as a whole.

We have included the removal provision in Section B on the theory that if the substantive rule of recovery regarding multiparty actions in Section A is invalidated as to state courts, the statute would contain a federal court "fallback." We cannot say, however, that this fallback is beyond reasonable challenge and there is some chance that its inclusion might increase the risk that the substantive parts of the proposal (Section A) would be held unconstitutional insofar as they would apply in state court. Moreover, the fallback provision could have the effect of allowing cases to be heard in federal court that plaintiffs would prefer to remain in state court. On balance, our tentative recommendation is to include the fallback provision in the statute.

SECTION A. NEW FEDERAL "SUBSTANTIVE" RULES OF RECOVERY

The following rules shall be controlling in all suits, in any federal or state court, brought by any person against "participating" manufacturers of tobacco products,[1] for damages caused by such products[2]

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[1] The Resolution apparently contemplates that these damage-cap rules shall apply only to manufacturers who make the "annual industry base payment" specified elsewhere in the Resolution. It is unclear whether the federal Act would specify which manufacturers those might be, or whether the Act would simply provide that any manufacturer making specified payments according to a set formula will be eligible for participation in the damages cap regime.

[2] The literal words of the Resolution suggest that the damage-cap regime is to apply to any "suits for relief" by persons "claiming injury or damage" caused by any "conduct" of the settling manufacturers. Resolution at 39. We understand, however, that the regime is intended to control only those suits involving injuries alleged to be caused by such manufacturers' products, and will not include, e.g., suits sounding in breach of contract, antitrust, defamation, etc.

1. Execution of all money judgments against, or settlements with, participating manufacturers, shall be made exclusively from funds that are subject to the federally-established rules of recovery set forth below in points 2-6.

2. As set forth in the Resolution, there shall be an "annual aggregate cap" for all judgments and settlements executed against tobacco companies. We understand this to mean that an individual manufacturer would be entitled to defer execution of judgment to the extent that payment of that judgment would push the total amount of payments by the participating manufacturers over the annual aggregate cap. We anticipate that federal law would provide a mechanism by which an individual manufacturer could obtain certification that the aggregate cap had been reached and that this certification could then be presented in state court as a defense against payment. Individual manufacturers would liable only for the damages that they had caused; there would be no federal requirement of shared liability.[3] The judgments and settlements that would not be subject to execution because of the annual aggregate cap would "roll over" into the next year. Federal law shall determine whether such judgments and settlements would be given priority for execution in the following year or years.

3. No more than $1,000,000 of any particular judgment or settlement may be executed in any given year. The remainder of any judgment or settlement in excess of $1,000,000 shall "roll over" into the next year, and federal law shall determine whether such remaining portions of judgments and settlements shall be given priority for execution in the following year or years.

4. There shall be no execution of any judgment or settlement for any punitive damages awarded as a result of any conduct by defendants occurring prior to the effective date of this act.

5. Execution of a final judgment may be made from funds subject to the caps set forth above only with respect to plaintiffs who have "individually" demonstrated liability of the defendant[s] under any federal or state cause of action, and have "individually" demonstrated that they suffered damages as a result of such liability. Demonstration of liability or damages shall not be considered to have been "individually demonstrated" where the plaintiff was a member of a class or where the plaintiff's claim or action was joined with the

[3] Of course, manufacturers could privately agree to share liability. Shared liability would appear to have the effect of ensuring that a plaintiff could recover even when the particular manufacturer sued by the plaintiff was bankrupt.

claims or actions of more than "n" other plaintiffs.[4]

6. A manufacturer's payment of judgments and settlements from funds that are subject to the caps set forth above shall be credited towards the annual payment that each manufacturer must make pursuant to the Resolution. Federal law would establish the formula for determining the amount of credit each manufacturer would receive.

7. As an alternative to the imposition of the recovery rules set forth above, we note that federal law could actually create a separate "fund" from which all judgments and settlements for claims against tobacco companies would be paid. Such a "fund" would provide a mechanism for shared liability among manufacturers and could take either of two forms. First, federal law could establish a fund and provide for a federal cause of action against the fund for payment of damages by the fund. This option would diminish concerns about preempting state court procedures but would raise independent constitutional concerns, such as whether the federal cause of action was sufficiently similar to state court causes of action to require state courts to hear it. Second, federal law could create a fund that would indemnify participating manufacturers who incurred liability in suits or settlements (subject to the liability limits and recovery rules set forth above). This option may serve to increase the federal interest involved and help bolster the argument that the effective preemption of state court procedures is in furtherance of a comprehensive set of substantive federal rules governing tobacco liability.

SECTION B. FEDERAL COURT JURISDICTION

1. The fact that a judgment sought by a plaintiff pursuant to a state cause of action is subject to the recovery rules set forth in Section A, above, shall not alone be sufficient to establish federal court jurisdiction under 28 U.S.C. § 1331.

2. Notwithstanding ¶ 1, above, any suit brought in state court by any person against "participating" manufacturers of tobacco products,[5] for damages

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[4] We should note that the Resolution refers to a bar on "extrapolation" of claims. We do not know to what this is meant to refer; in particular, we do not know whether it is intended to be a prohibition on res judicata and/or collateral estoppel against tobacco companies. We have not included any such limitation in our Proposal.

In our view, barring joinder of more than, say, 20-25 plaintiffs would be substantially more defensible than barring joinder of only a few plaintiffs.

[5] Again, the Resolution apparently contemplates that the new liability, procedural, and removal rules shall apply only to manufacturers who make the "annual industry base payment" specified elsewhere in the Resolution. See supra note 1.

caused by such products,[6] may be removed by any defendant to the federal district court in [venue restriction], if:

a. The defendant may remove a suit to the extent that an action would be removable in the absence of the provisions set forth in Section A (e.g., diversity jurisdiction); or

b. The suit includes more than "n" named plaintiffs [where "n" is the same here as in § A4, above] or seeks to assert claims on behalf of unnamed plaintiffs; and any two adverse parties are citizens of different states.

SECTION C. PREEMPTION

1. All claims or causes of actions in any state court, brought by any person against "participating" manufacturers of tobacco products for damages caused by such products are preempted and shall be dismissed EXCEPT where plaintiffs, if they prevailed, would be entitled to execute the judgment from funds that are subject to the recovery rules and limitations specified in section A above.

2. All claims or causes of action to the extent that they seek punitive damages in any suit brought in state court by any person against "participating" manufacturers of tobacco products for damages caused by such products, where such punitive damages are sought as a result of any conduct by defendants occurring before the operative date of this Act, are preempted.

SECTION D. SEVERABILITY

1. The provisions of this act would be severable such that the diversity removal provisions of Section B would still operate even if the direct restrictions on state courts in Section A were invalidated. Similarly, the provisions of this title would be severable such that the direct restrictions on state court in Section A would still operate even if the diversity removal provisions of Section B were invalidated. In addition, in light of the constitutional concerns raised by Sections A and B, attention should be given to whether the portion of the Act addressed in this memorandum should be made severable from other provisions of the act.

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[6] See supra note 2.