

**DEPARTMENT OF JUSTICE OVERSIGHT:
MANAGEMENT OF THE TOBACCO LITIGATION**

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

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WEDNESDAY, SEPTEMBER 5, 2001

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:30 p.m., in Room SD-226, Dirksen Senate Office Building, Hon. Richard J. Durbin, presiding.

Present: Senators Durbin, Feinstein, and Hatch.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. The hearing will come to order. Good afternoon and thank you all for attending. Today's hearing will examine the Department of Justice's management of the Government lawsuit against the tobacco industry.

I want to thank Chairman Leahy for scheduling this hearing and for his continued interest and vigilance on this topic. I also want to thank him for allowing me to preside today.

On September 22, 1999, the United States Department of Justice filed a lawsuit against the major cigarette manufacturers in America.

The current litigation is brought under the Racketeer Influenced and Corrupt Organizations Act, known as RICO. The Government filed this lawsuit to fulfill its duty to U.S. taxpayers to enforce the law, protect the public treasury, and prevent the tobacco industry from continuing to defraud the American public.

The Federal Government has valid legal claims that are supported by extensive evidence, including internal industry documents and other evidence disclosed in State lawsuits against American tobacco companies. The RICO claims are strong and they are appropriate. The district court firmly ruled that the Federal lawsuit against the cigarette companies has merit and that there is no legal reason that the lawsuit should not move forward, stating that the Government has "clearly and overwhelmingly satisfied" each of the factors required in RICO claims.

I am going to enter into the record the United States' initial complaint against tobacco companies with the appendix and the memorandum opinion issued by the U.S. District Court for the District of Columbia holding that the U.S. had properly stated claims for relief under RICO.

Since the case was filed in 1999, the tobacco companies' conduct has not changed. The New England Journal of Medicine published

just 2 weeks ago a study that concluded that the Master Settlement Agreement with the tobacco industry appears to have had little effect on cigarette advertising in magazines and on the exposure of young people to these advertisements. The study found that last year magazine advertisements for youth brands of cigarettes reached more than 80 percent of the young people in the United States of America. According to the Federal Trade Commission, tobacco industry marketing expenditures increased by 22 percent to a record \$8.2 billion a year in 1999, the very first year after the State settlement. This is the largest increase in dollar terms since the FTC began tracking cigarette sales and advertising in 1970, and most of the increases are found in marketing categories most effectively directed at children. A University of Illinois at Chicago study released in July of the year 2000 shows that advertising and promotions actually increased in convenience stores and other retail stores after a billboard ban mandated by the settlement took effect in April of 1999. All of those wonderful television ads notwithstanding, this tobacco industry is pouring more and more money into luring our children into addiction.

Unfortunately, these facts are borne out in the public health statistics. We all know that cigarettes kill more than 400,000 Americans annually. This figure represents more deaths than from AIDS, alcohol, car accidents, murders, suicides, drugs, and fires combined. Lung cancer is now the leading cause of cancer death among women, killing nearly 68,000 this year alone. It surpassed breast cancer years ago.

But what is even more alarming is how effective tobacco advertising is on children. Smoking rates among high school students are on the rise. More than 3 million kids between the ages of 12 and 17 currently are smokers. Today, almost 5 percent, more than 1 out of 3, high school students say they smoke. Smoking among African American high school boys doubled from 1991 to 1997. Smoking among teenage girls rose sharply in the 1990s. Smoking rates for pregnant teenagers climbed by 5 percent between 1994 and 1999.

Given this context, I am concerned about news reports that indicate that the Department of Justice may not be aggressively pursuing the case against the tobacco industry. The Attorney General, Mr. Ashcroft, was confirmed on February 1st of this year. He has had 7 months to review this case. Yet despite repeated congressional inquiries, including more than a few from me, the administration's official position remains that it is still "reviewing the case."

I am going to enter into the record my correspondence with the Department of Justice and each one of their responses.

I am left to assume that the numerous press accounts suggesting the Department is abandoning this lawsuit may be accurate. No official statement, written or verbal, has refused these reports. Further, a number of statements, unofficial and official, have indicated publicly the administration thinks that this case is weak, thus undermining any potential settlement negotiations and reinforcing the perception that the Government is not interested in seriously pursuing this case. Two weeks ago, White House Counsel Alberto

Gonzales was quoted by CNN as saying, “We haven’t fared too well in the courts, which gives us little leverage.”

A number of facts raise questions about how this tobacco case is being managed at the Department of Justice. The end of the fiscal year is now only 25 days away, and the Department still has not said how or if it intends to fund this litigation.

I was encouraged by an August 24th Wall Street Journal report that the Justice Department wants roughly \$50 million to continue the tobacco lawsuit. Unfortunately, despite repeated requests and ample time and opportunity to respond, the Department was unable to confirm the accuracy of this reported statement. Instead, it appears to be another in a series of unofficial statements documenting the mayhem at the Justice Department that surrounds this case. In fact, there have been at least two potentially case-damaging press leaks out of the Department and, according to the Department’s own written response to me and Senators Leahy and Kennedy, which I am also going to enter into the record, no steps have been taken within the Department of Justice to investigate these statements.

This lack of action is irresponsible given the potential magnitude of this case. What is at issue here is not just potentially recovering billions of dollars for American taxpayers, but equally, if not more important, equitable remedies to change the way that tobacco companies do business in America. The lack of action is responsible.

Whether the Department has adequate staff to pursue the case is unclear. The decision to pursue settlement was announced without any official statement from the Department and in the context of comments disparaging the strength of the Government’s case.

I do not profess to be an expert at anything, but I do have some experience when it comes to lawsuits. I made a living filing lawsuits and defending them for years before I was elected to Congress. I cannot imagine that you can hope for a good outcome in a settlement negotiation if you announce publicly before the negotiation begins that your case is basically pretty weak and you don’t have the lawyers to pursue it, you are not going to be ready for trial, you don’t have the resources to get ready. Imagine walking into a settlement conference expecting that you have any leverage to pursue a meaningful negotiated settlement under those circumstances. What I have just described to you is, frankly, the public image of this lawsuit over the last year.

The Department of Justice’s management of this case seems unprofessional. At worst, they are killing this lawsuit and don’t have the political courage to admit it publicly. Under ordinary circumstances, most legal clients in this situation would either file a complaint with the Bar Association or try to find another lawyer. But the American taxpayer has only one lawyer—the Attorney General of the United States and his Department of Justice.

It is my hope that we can at long last clarify the current administration’s commitment to this case which was filed, frankly, on behalf of all of us and millions of Americans who have been defrauded and harmed by the tobacco industry’s conduct. It is time to have our questions answered, and it is time for the Attorney General to be clear about his resolve. The American people deserve

their day in court, but even more importantly, they deserve competent and committed legal representation.

At this point I would yield to Senator Hatch, who may be attending this shortly—I hope he will—and at that point, whenever he arrives, he will be allowed to make any opening statement which he wishes

I want to welcome and introduce our first witness, Stuart Schiffer. Mr. Schiffer, is the Acting Assistant Attorney General for the Civil Division of the United States Department of Justice. It is my understanding that Mr. McCallum, who was confirmed by the Senate several weeks ago, will actually take up his responsibilities in the middle of September.

Mr. Schiffer is a career official who has served many years at the Department of Justice. I would like it to be noted for the record that both Senator Leahy, the chairman of this committee, and I invited Attorney General Ashcroft to testify today. Unfortunately, he declined our invitation, saying that he had to testify before the Senate Select Committee on Intelligence. So I know that it is unfortunate that the Attorney General is not here, but we want to proceed and hope that we can come to some understanding of the position of the Department of Justice on this case.

I welcome Mr. Schiffer, am interested in hearing his testimony, and I understand he is accompanied by Mr. Eugene Schied. Did I pronounce your name correctly?

Mr. SCHIED. Schied.

Senator DURBIN. Schied. I am sorry. Mr. Schied, a Deputy Assistant Attorney General and Controller at the Department of Justice.

I would like at this point to ask Mr. Schiffer to proceed with his testimony.

STATEMENT OF STUART E. SCHIFFER, ACTING ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE; ACCOMPANIED BY EUGENE H. SCHIED, DEPUTY ASSISTANT ATTORNEY GENERAL, JUSTICE MANAGEMENT DIVISION, DEPARTMENT OF JUSTICE

Mr. SCHIFFER. Thank you, Senator, and I emphasize we do appreciate the opportunity to appear before the committee today to discuss the Government suit against the major tobacco companies. And I am certainly not here to argue with the Senator's views, and I understand your opening statement about the management of the tobacco litigation being incompetent and unprofessional wasn't directed at me personally. I do take—I guess "umbrage" is too strong a word. As the Senator indicates, I have served in the Department for 38 years. It has been my only livelihood. I don't do unprofessional and I don't do incompetent. The responsibility for managing the case has been mine since January 20th. I think the case has been well managed and is continuing.

I think that the Senator does understand that I am somewhat limited in what I can discuss today since it would obviously be inappropriate for me to comment on the substance of a pending case or to comment on litigation strategy. That is consistent with our duties as lawyers and, as the Senator knows, with longstanding Department of Justice practice. These issues are before the court,

and that is the appropriate forum for the Justice Department to articulate its views.

At the same time, I also recognize and appreciate the committee's and the Senators' oversight responsibilities. My understanding is, as you have suggested, you want to talk about management of the case, and particularly you want to talk about funding and status of the case. And while I am not sure I can always draw a bright line between substance and those issues, I am here to be as responsive as I can to your questions, and I know that Mr. Schied, who serves as the Department's controller, is also here in that capacity.

The tobacco litigation, which is a suit against the major manufacturers of tobacco in this country and two industry associations, is being conducted by a team of dedicated career attorneys. The team was formed, I think as the Senator knows, after President Clinton in his January 1999 State of the Union address indicated that he had directed the Department or was directing the Department to formulate a plan to take the cigarette companies to court. And as the Senator has indicated, the suit was filed in Federal district court here in Washington, D.C., in late September of 1999.

There were four counts to the complaint, which I am pleased that the Senator is including in the record. Two of them dealt directly with statutes designed to address the recovery of health care costs: the Medical Care Recovery Act and the Medicare secondary payer provisions of the Social Security Act. There were additionally two counts that seek equitable relief, including monetary disgorgement, under the Racketeer Influenced and Corrupt Organizations Act.

As the Senator has indicated, on September 28, 2000, about a year after the case was filed, the district court dismissed the counts pertaining to the two health care cost recovery statutes and denied the defendants' motion to dismiss the RICO counts. Then in orders entered on July 27th of this year, the court rejected our attempts to obtain reinstatement of the Medicare secondary payer count and portions of the Medical Care Recovery Act count. Trial is scheduled to begin in July of 2003. Intensive discovery is in progress and can only be expected to become more intensive as the case progresses.

As the Senator knows, funding for the current fiscal year didn't come into place until the year was well underway. The current \$23 million-plus budget is made up of \$1.8 million in our base budget and is supplemented by substantial reimbursements from client agencies and an additional amount of \$12 million from the Health Care Fraud and Abuse Control Account, which was put in place by the Health Insurance Portability and Accountability Act of 1996. By the end of this year, the entire amount budgeted for the case will have been expended or obligated. Obviously, a larger amount is going to be required for the next fiscal year. The Department is well into the process of identifying appropriate sources for this funding, and it is no secret that we will be looking to the same sources that we looked to this year. We will have the same amount in our base budget as was requested by the last administration and was put in place, and we will be looking to sources of funding similar to what we have used this year.

I have included in my prepared testimony a staffing chart, and I think the Senator has noticed that staffing has increased progressively as the demands of the case have increased. I have been re-

sponsible for making hiring decisions or seeking authority in some cases to hire, and I have encountered no obstacles whatsoever when I have sought to hire people for the case. We project, as the bottom line of the chart indicates, having 38 people in place by the beginning of next month, of whom 29 are attorneys. And as I also note in my prepared statement, these numbers don't include attorneys from other components of the Department who have helped out where help is needed, FBI agents assigned to the case, and our own experts on litigation support since this case has massive documents to deal with.

In summary, the case is proceeding. It is a major undertaking. We have a dedicated staff of attorneys assigned to it. I want to emphasize, Senator, that I have not received any interference in the conduct of the case. While it is not unusual for a new administration to come on duty—and certainly this is the fifth time, I believe—I have lost track—when I have served as the Acting Assistant Attorney General, and it is certainly not unusual for a new administration to come in and review existing cases and certainly large cases, I have received no interference in the conduct of this case.

At the outset of the administration, I made an effort to acquaint new members of the senior management offices with what I thought were major steps we contemplated taking, such as the filing of an amended complaint or the signing of an expensive lease for document control purposes. I have been told from the outset to proceed with the case as I would with any case. I have had no decisions I have made interfered with.

The Senator alluded to the formation of a settlement team. That was my suggestion. I have never been involved in a large case where I didn't think it appropriate to make at least some effort to ascertain whether settlement was feasible. The members of the team were selected by me with no interference. They had a total of about 90 years of Government experience. We had one meeting with representatives of the tobacco companies. There was not another meeting scheduled since the parties were, at least at that initial meeting, quite far apart in their appraisal of the case.

In summary, the case is proceeding. I think the case is proceeding well, and I know that it will continue to proceed.

I would be happy to try and respond to questions.

Senator DURBIN. Thank you, Mr. Schiffer. Thank you very much for your testimony.

I would like to ask Senator Hatch if he would like to make an opening statement.

Senator HATCH. Well, thank you, Mr. Chairman. I appreciate that courtesy, and we welcome everybody here today, especially our witnesses.

Let me start by saying that you and I share an antipathy to the use of tobacco. You may recall that beginning in 1997, in this committee I held 10 hearings on the State tobacco litigation settlement which I strongly supported.

Senator Feinstein and I developed a bipartisan, comprehensive tobacco bill that encompassed the major elements of the settlement agreed to by the State Attorneys General, public health advocates, plaintiffs' attorneys, and the tobacco industry itself. Unfortunately,

the Senate was unable to come to a consensus on any tobacco legislation, and in my view, this happened because the Senate floor vehicle became way too expansive and extremely expensive because some of our friends could not exercise restraint.

Clearly, I am no friend of tobacco use nor am I an apologist for the tobacco industry. Indeed, I have never used tobacco products in my life. However, it is no secret that I have been extremely skeptical of the Federal lawsuit from its inception.

From a policy and constitutional perspective, no administration should be able to circumvent the Constitution and Congress' sole authority to raise and spend revenue for the general welfare by suing for billions of dollars and then spending the money without congressional appropriation. If there is no legitimate lawsuit, the action by the Department of Justice would violate our necessary principles of separation of powers, which is a cornerstone of our Constitution's guarantee of liberty. Simply put, litigation should not replace legislation as the means to effect public policy in a democracy.

Granting the Federal Government the unfettered ability to sue any industry which happens to fall into disfavor in order to effectuate a special goal like reduction in tobacco-related illnesses is a mistake. It would in essence allow the executive branch to bypass Congress and the law and set unilaterally our Nation's tobacco policy.

In 1999, when the Clinton administration decided to file its own suit against the tobacco companies, it based the claim on a distorted—at least in my opinion—interpretation of three Federal statutes: the Medical Care Recovery Act, MCRA; the Medicare secondary payer provisions, the MSP; and the civil provisions of the Racketeering Influenced and Corrupt Organizations Act, RICO. As many will recall, I and others on this committee believed that there was no legal basis at all for the first two claims. It turns out we were right. In September of 2000, Judge Kessler dismissed by the MCRA and MSP claims, leaving only the RICO count standing. She resoundingly reaffirmed that dismissal in the face of the Government's attempt to amend its complaint and re-plead the dismissed counts.

In my opinion, the RICO claim was ill-conceived as well. While Judge Kessler did allow the RICO claim to remain, she also clearly suggests that the Government, at best, has a long way to go to prove its claim. She indicated discomfort with this novel application of the theory of disgorgement. As she noted, "whether disgorgement is appropriate in a particular case depends on whether there is a 'finding that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose.'"

That being said, Judge Kessler also clearly indicated that she was not making any finding endorsing the substance of the Government's RICO claim that "this Court has not made such a finding, nor could it at this stage." I think we can make better use of the taxpayers' money.

As we all know, in 1998, 46 States, the District of Columbia, and five U.S. territories signed a contractual agreement—the Master Settlement Agreement. In addition to paying out large monetary

statements to the States, the agreement imposed restrictions on tobacco advertising, marketing, and promotion. It also addresses the allegations that tobacco companies had long concealed the dangerous health effects of smoking by prohibiting manufacturers from suppressing health research and requiring them to fund anti-tobacco research and education.

Now, it is my understanding that there is no credible evidence that the companies are not in compliance with the terms of the Master Agreement. If the agreement is being violated, then shouldn't the State Attorneys General be taking action to ensure enforcement? If our goal is truly to address health issues related to tobacco use, then we should be seeking to ensure enforcement of the agreement which already deals with those concerns. But if the goal of Federal litigation is to effectively take a legislative function and extort a huge monetary settlement that we can then spend, then aren't we in effect addicting the Federal Government to nicotine?

Since the executive branch elected to pursue this litigation in the Clinton administration—in my opinion, without legal foundation—and the legislative branch declined to act, we should defer to the executive branch and its enforcement arm at the DOJ on how this case is handled absent a clear indication of an overuse of taxpayer money. It is my understanding that the DOJ's budget request in relation to this litigation is identical to its budget request from last year and that they have obtained additional funding from other agencies to support the case. There is no lack of funding here. In fact, is everyone aware of just how expensive it has been for the Federal Government to pursue this case? The budget for this year was approximately \$23 million. If you ask me, that is a lot of money to pursue a case that has a questionable return value given that the majority of its legal claims have been dismissed. Moreover, the Civil Division continues to add staff attorneys as needed to handle the litigation. Staffing needs are being met and funding request levels maintained. I do not see any clear indication of mismanagement here. I sincerely hope that we are not here today to cross-examine the Department on the particulars of the ongoing litigation.

So, Mr. Chairman, I want to thank you for allowing me to make this set of remarks, and I look forward to hearing from our witnesses here today, and I hope that we can resolve this matter in a way that is within the law, that makes sense, and saves the taxpayers' money in the long run, while at the same time making the points on tobacco.

Senator DURBIN. Thank you, Senator Hatch.

Mr. Schiffer, as Acting Attorney General for the Civil Division, how would you characterize this case? Is this one of the more important cases that you are responsible for?

Mr. SCHIFFER. It is certainly a very substantial case, as witness the funding that we have put in place for the case and the staffing of the case. However one approaches it, if one looks simply at the documents involved, the resources that the defendants have in place, it is a case of large magnitude.

Senator DURBIN. Is it a case of some complexity in terms of preparing it for trial?

Mr. SCHIFFER. I think, again, I don't want to get into the merits about how difficult the case is or isn't, but certainly we wouldn't have this many people assigned to the case if we didn't think it was a case of some complexity.

Senator DURBIN. Particularly in the area of discovery, is it not likely that you will be dealing with hundreds of thousands, if not millions, of documents that have to be reviewed and prepared for trial?

Mr. SCHIFFER. That is very much the case.

Senator DURBIN. And also the same when it comes to depositions and motions to produce and that order, it is also a case that is going to demand quite a bit of the Department of Justice. Is that also true?

Mr. SCHIFFER. I don't ultimately know how many depositions there will be. I assume there will be a large amount before the date that has been set for cutting off discovery. So far I think we have taken something like 10 depositions and formally noticed 12 more, and the companies have taken only two. But obviously many more are going to follow.

Senator DURBIN. What is the date that has been set by the court for cutting off discovery?

Mr. SCHIFFER. It is essentially next summer, July and August. The first cut-off is for fact witnesses, and then I think a month later for expert witnesses.

Senator DURBIN. So is it fair to say that you have less than 12 months to do the basic discovery under the current court order for the trial that is scheduled in July of 2003?

Mr. SCHIFFER. That is correct.

Senator DURBIN. Have you personally reviewed the pleadings in this case?

Mr. SCHIFFER. I have looked at most of them. The intensity with which I reviewed—I have unfortunately been—while this is certainly a large case, there are about 20,000 other cases on our docket. And so I won't sit here and tell you I have read every word, but I have asked that any filing of any magnitude or anything other than a routine discovery matter be sent to me.

Senator DURBIN. And have you reviewed any of the documents or depositions that have been produced?

Mr. SCHIFFER. I have not seen any deposition transcripts to date. I am familiar with some of the documents.

Senator DURBIN. And what do you rely on, then, to reach a judgment as to the progress of the case and how well the Department is preparing for trial?

Mr. SCHIFFER. My own views, as someone who has been in this business for longer than many people would say was a good idea, and my conversations with members of the tobacco team.

Senator DURBIN. And let me ask you if you have had a chance to review any of the specific documents that have been produced by the tobacco companies relating to their potential liability in this lawsuit.

Mr. SCHIFFER. I have seen summaries of such documents. I have not reviewed individual documents.

Senator DURBIN. Do you have any doubt in your mind that the allegation of the complaint relative to the tobacco companies' lying

about their knowledge of the dangerous health effect of their product is true?

Mr. SCHIFFER. Well, again, I am not going to comment on the merits of the case other than to say that, as you indicated and as I stated, the district court denied the motion to dismiss, found the RICO counts certainly viable for the purpose of proceeding, and we are proceeding.

Senator DURBIN. But as you sit here today, you have no reason to believe that the allegations of the Government's complaint against the tobacco companies are inaccurate or wrong?

Mr. SCHIFFER. I wouldn't be a part of the case if I thought that they contained false allegations, certainly.

Senator DURBIN. I am going to show you some statements that have been made by Attorney General Ashcroft on this case, and they are too small to read, I am sure, but I will tell you—

Mr. SCHIFFER. I need new glasses, anyway.

Senator DURBIN. Yes, I suffer from the same problem.

Suffice it to say that during the course of his hearings to become Attorney General and since, we have received statements from Attorney General Ashcroft about this case, starting on January 26th of this year when he said, "I will have to review the details of the case before I can make a more informed judgment." This was during his confirmation hearing.

Then later, in March of this year, Justice Department spokeswoman Mindy Tucker said the agency's budget is "neutral" on whether to continue with the tobacco litigation. She said Attorney General Ashcroft has not seen the memo or reviewed the issue whether to proceed with the tobacco litigation.

And then on March 26th, the statement made by President Bush: "I do worry about a litigious society. I remember as Governor of Texas we had all kinds of major lawsuits against tobacco, as in every other State. At some point enough is enough." That is President Bush's interview with Fox News on March 26th.

Attorney General Ashcroft speaking before the Appropriations Subcommittee was asked about this lawsuit on April 26th of this year and said, "I have not made a decision about the case." And then on April 27th, in further testimony, the Attorney General said, "The Department of Justice is proceeding with the case. I support the Department's position."

May 23rd, a statement by Daniel Bryant, Assistant Attorney General, "We have every expectation that confirmation of the new Assistant Attorney General for the Civil Division and the appointment of his remaining Deputies will enable to Attorney General to expedite his review of the case."

And then, finally, the statement I referred to earlier by White House Counsel Alberto Gonzales to CNN on August 15th, just a few weeks go: "We haven't fared too well in the courts, which gives us little leverage."

Have you had any conversations or meetings with Attorney General Ashcroft about this case?

Mr. SCHIFFER. I have. Although I haven't had extensive conversations, I have certainly had a number of conversations with senior members of his staff.

Senator DURBIN. And based on those, do you consider them to be part of a review by the Attorney General as to whether to go forward with this case or how to proceed with it?

Mr. SCHIFFER. I don't want to go through the entire listing there, but, I mean, I see certainly a statement that the Department is proceeding with the case and I support the Department's position. That is the only message I have received. It is probably good for the sake of the Republic that I am not typically given unfettered discretion over cases. In this one, as far as I am concerned, I have been given such discretion, and the case is proceeding, and I have never been told to do or not to do something in connection with the case.

Senator DURBIN. There have been some concerns about statements that have been—unattributed statements that have been leaked to the press from the Department of Justice concerning this case. Could I have Chart 3? And I want to ask you if you are familiar with any of these statements or know who might have made these statements.

April 26th, Wall Street Journal reported that a senior official employed in the Department of Justice commented that the tobacco litigation team “had done a poor job,” may be replaced “due to their performance.”

June 20th, Wall Street Journal reported settlement talks regarding tobacco litigation reflected concerns by the administration about the strength of the case. The article quoted a senior official as saying, “If we're going to lose, then we should settle this.”

August 24th, Wall Street Journal reported Justice Department lawyers want roughly \$50 million to continue the Government's lawsuit inherited from the Clinton administration. The Bush administration had wanted to end the fight. This is from the Wall Street Journal. The article said, “Justice officials hope the new funds will show they're serious about the case and goad the industry to settle.”

Do you have any idea who the sources were for those statements?

Mr. SCHIFFER. I do not, and I consider actually all those statements unfortunate. They don't reflect the position of the Department. I don't know who or anyone—if anyone said those things. I have found in the past that when I say something that people care to dignify, they refer to me as a senior official. If they take a different view of it, I am described as mid-level and very often something much worse. And so I really have no knowledge what the source of those statements was.

Senator DURBIN. I have a number of other questions, but my time on the first round is complete, and I want to defer to Senator Hatch for any questions that he might have.

Senator HATCH. Let me just ask one question. Mr. Schiffer, it is my understanding that the costs of pursuing this lawsuit in 2002 will be significantly higher than in 2001. Could you give me an estimate of the anticipated costs?

Mr. SCHIFFER. Senator, you are certainly correct. It is going to be more expensive because the pace of the litigation, particularly document discovery, is going to increase. We are still in the process of examining a specific amount. The most recent estimate from the

tobacco litigation team themselves is that they think something on the order of \$44 million would be required in the next fiscal year.

Senator HATCH. That is the only question I have.

Senator DURBIN. Mr. Schiffer, are you familiar with how much money was spent by the State Attorneys General in their action against the tobacco companies?

Mr. SCHIFFER. No, sir, I am not.

Senator DURBIN. Do you know what their ultimate recovery was in their lawsuit?

Mr. SCHIFFER. In rough numbers. I know there was a very substantial recovery.

Senator DURBIN. My notes reflect some \$240 billion over 25 years and some rather substantial changes in the policies of tobacco companies were recovered by the State Attorneys General.

Let me ask you about the settlement issue. I think you indicated in your early testimony that the issue of proceeding with at least settlement exploration was your decision.

Mr. SCHIFFER. Yes, it was.

Senator DURBIN. Did you make that decision in consultation with Attorney General Ashcroft or anyone else in the Department?

Mr. SCHIFFER. No, I did not. I informed people in senior management offices that it was my intention, as I think I am obligated to do in any case, to ascertain whether settlement appeared feasible and that was what I planned to do, and I was told, as I have been with everything else in the case, to go ahead and do so.

Senator DURBIN. Would you agree with the basic premise that your likelihood of a successful settlement conference depends on your apparent strength in the case?

Mr. SCHIFFER. The outcome of settlement negotiations certainly depends on the perceptions that parties have about the strength of their position, or the lack thereof, yes.

Senator DURBIN. Did you feel that you were walking into that settlement conference showing a strong case on the Government side?

Mr. SCHIFFER. I indeed felt that we were. If you are alluding, again, to the statement that was put up on the board, I felt that was an unfortunate statement, if, in fact, it was made.

Senator DURBIN. What would you say, then, were the reasons for your belief that you were in a strong position going into that settlement conference?

Mr. SCHIFFER. Well, again, you know, it wasn't a question even of—if I thought I was in a weak position, I would have also felt the obligation to the taxpayers and to ourselves to ascertain whether settlement was feasible.

As I said before, if I didn't think we had a strong case, I wouldn't be proceeding with the case.

Senator DURBIN. Would some of the elements involving the strength of your case be, for example, the determination by the Attorney General to go forward with the case rather than to still have it under review?

Mr. SCHIFFER. As I said, the case is going forward, and the Attorney General and his staff has made clear that the case is to go forward.

Senator DURBIN. So let me clarify that. Has there been an official review by the Attorney General as he has stated before Congress?

Mr. SCHIFFER. I don't know what constitutes an official review. I do know, as I have said before, that I have been told to proceed with the case, and I have been given what I regard as unfettered discretion to do so.

Senator DURBIN. Could you tell us, in terms of your budgetary requirements for next year—Senator Hatch has noted that they will be more substantial than they have been in the past because of the discovery and closing days moving to trial. Have you been able to the cost of your preparation for trial in the next fiscal year?

Mr. SCHIFFER. Well, as I told you, the tobacco team itself has given us an estimate of something on the order of \$44 million. Obviously, as the case proceeds, we are going to have a better idea of exactly how much money is needed.

Senator DURBIN. And has there been any discretion within the Department about where the \$44 million will come from?

Mr. SCHIFFER. There has indeed.

Senator DURBIN. And where will it come from?

Mr. SCHIFFER. As I indicated in my opening remarks, we anticipate looking to the same sources as we did this year. As Senator Hatch indicated, the amount from our base budget is the same as the amount from our base budget last year, and we will certainly be looking to and we are in the process of beginning negotiations with the Department of Health and Human Services, funding from the health care fraud and abuse control account.

Senator DURBIN. Has the Department consulted with any Appropriations Committees on Capitol Hill about this \$44 million budget for preparing for trial?

Mr. SCHIFFER. I think I will defer to my colleague, Mr. Schied, who has been sitting too quietly here and escaping notice. I don't know the answer.

Senator DURBIN. Mr. Schied?

Mr. SCHIED. No, to this point, we have not provided any specific estimate to the committees of appropriations. We have told them—they have asked what the—as was reflected in the Attorney General's statement that was posted up there, which came from, I believe, the Appropriations Committee hearing, that we are intended to employ the same—look to the same funding sources in 2002 that we have used in 2001.

Senator DURBIN. Is the Department going to use the health care fraud and abuse account at Department of Health and Human Services for this lawsuit?

Mr. SCHIED. We have used that account. We did get \$12 million in the current fiscal year, and we have begun the process of working with HHS to discuss the amounts that we might be able to get from the account in 2002.

Senator DURBIN. Is it kind of unusual that we are almost near October 1st, 25 days away, and these things are still unresolved as to how you are going to fund this action?

Mr. SCHIFFER. It is certainly not unusual in my experience. I have always envied my colleagues in private practice, who, I guess while they have to worry about—we have too many clients, often. They have to worry about clients, but at least they have more con-

tinuity in the budget process than we do. Our budget is rarely enacted for anything at this time of year. It hasn't been enacted. And, of course, last year, funding didn't come into play until well into the new fiscal year, some 2 months into the fiscal year.

Senator DURBIN. Let me just for the record indicate that there is a little difference in approach. This time last year, we had specific estimates from the Justice Department about their needs for this lawsuit. In fact, as early as March of 2000, the Attorney General indicated in testimony before the House Appropriations Committee that she planned to utilize reimbursements to client agencies in DOJ accounts to fund the case in fiscal year 2001.

By July 2000, we had an estimate of need from the Department of \$26 million. By August, we had it in writing from OMB. Throughout the spring and summer, the Clinton administration reiterated time and again their support for utilizing Section 109 to help fund the case despite some attempts on Capitol Hill to block that.

Let me ask you about the Section 109 authority. Do you plan on using that to come up with the \$44 million for the next fiscal year?

Mr. SCHIFFER. Well, as I indicated, we are looking to the same sources as we looked to last year, and this would at some point, I presume, include agency reimbursements. We have used Section 109 in a number of cases, including this one.

Senator DURBIN. Have the other agencies been consulted about Section 109 contributions?

Mr. SCHIFFER. My understanding is we are still at a fairly early stage. We are just beginning—obviously, what we would need is dependent on a lot of factors, not just what happens in the case itself but, as Mr. Schied indicated, the way the health care fraud and abuse control account works is ultimately there is a negotiation between the Secretary of Health and Human Services and the Attorney General. I think the outcome of those negotiations of how much money we are expecting to draw or are able to draw from that account will determine what our remaining needs are.

Senator DURBIN. My round of questioning is over at this point. I would like to welcome Senator Feinstein and ask if she would like to make an opening statement. And, Mr. Schiffer, if you would continue in your position there, I have some more questions after that.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. I would, Mr. Chairman, and I thank you very much for the opportunity. I would like to thank you for your leadership in this and also for conducting these oversight hearings.

I think some might ask, Why should the Federal Government be pursuing a case against the tobacco companies? After all, the State Attorneys General from across the country reached a nationwide settlement with the tobacco companies in 1998. What new ground needs to be tilled?

In the 3 years since the settlement, I believe very strongly that the tobacco industry still has not learned its lesson. The tobacco companies still engage in double talk. They say one thing but they do another.

For example, many of you may have seen a recent ad campaign by Philip Morris, the purveyor of such brands as Marlboro and Virginia Slims. The ads, which began in April, tout the company's humanitarian efforts in airlifting 43 tons of food to Kosovar refugees in Albania. This donation was meritorious, although I do find it interesting that the Wall Street Journal reports the company spent far more on shooting the commercial, \$1 million, than on donating food, approximately \$125,000 worth of food.

But what I find most disturbing and most reflects, in my view, the double talk of the industry, while the company touts its humanitarian efforts in Kosovo, its Czech subsidiary is pushing a scandalous study on smoking to the Czech Republic, arguing that deaths for cigarettes will actually save the Czech Government money.

According to a July Wall Street Journal article, Philip Morris circulated an economic analysis that concludes that cigarette consumption, and I quote, "isn't a drag on the Czech Republic's budget, in part because smokers' early deaths help offset medical expenses."

The study found that premature deaths of smokers saved the Czech Government between \$23.8 million and \$30.1 million on health care, pensions, and housing for the elderly in 1999. This is outrageous. And it illustrates the extent to which at least one company is willing to put economic concerns over the health and safety of the people who smoke its cigarettes.

To suggest that a country derives greater benefit from the "savings due to early mortality" than from a healthy population is cynical and, indeed, borders on the criminal. It is Orwellian in nature and equivalent to morally questionable notions such as destroying a village to save it.

Appalled, I wrote a letter to Jeffrey Bible, chairman and CEO of Philip Morris. I expressed my deep dismay. Mr. Bible, much to his credit, promptly wrote back and took responsibility for the study. He wrote, and I quote, "The funding and release of this study exhibited terrible judgment, as well as a complete and unacceptable disregard of basic human values. This study was not just a terrible mistake. It was wrong." And I thank you, Mr. Bible, for being up front.

But the point is it was done, and the point is that is some of the industry's, at least, point of view. And it is horrible.

At the same time, a company spokesman noted that Philip Morris would be cancelling similar studies in Slovakia and other countries in Eastern Europe. While admitting an error in judgment is commendable, this study for me is just one more piece of evidence that the tobacco industry still doesn't get it, and they still haven't been held accountable.

Now, let me be clear. I don't have a vendetta against tobacco companies or people who use tobacco products. But I was here on this committee, Senator Hatch, and you were as well, Senator Simon of Illinois had brought all of the tobacco executives, lined them up in this room in front of this committee, asked each one of them to raise their right hand, and they all pledged that their products were not addicting. It was something that happened my first year on this committee. I think it was 1993 or 1994. And I

never forgot it. I never forgot it because the CEO becomes the person responsible. And these CEOs were willing to stand here with what we subsequently know were bald-faced lies, and the head of the company, and say that.

So I really believe that this hearing is important. I believe the industry hasn't learned its lesson, and for that reasons, I am very grateful that you are holding this hearing because they must be held accountable.

I recognize that Slovakia isn't the United States of America, but can you imagine an American company doing a study like this, aimed to show that it is economically judicious to sell cigarettes because people die earlier and, therefore, the country saves money?

Thanks, The CHAIRMAN.

Senator DURBIN. Thank you, Senator Feinstein.

I have a few closing questions, but, Senator Hatch, do you have any further questions of the witness?

Senator HATCH. No.

Senator DURBIN. Senator Feinstein, do you have any questions of the witness before I ask mine?

Senator FEINSTEIN. No, I do not.

Senator DURBIN. Mr. Schiffer, let me try then, to draw this to a conclusion. The Attorney General has stated repeatedly the case is under review. Do you believe this case is under review by the Attorney General?

Mr. SCHIFFER. What I believe is that I have been told the case is proceeding and should continue to proceed, and as far as I am concerned—as far as I am concerned, the case is going forward. It is going to go forward with substantially more funding, and I am very pleased to be able to say that.

Senator DURBIN. And how many more attorneys will be you be bringing on board next year for preparation for trial?

Mr. SCHIFFER. Well, happily, within a few weeks, those will be Mr. McCallum's decisions and not those of yours truly. But I think you have seen from the chart that we have submitted that the staffing for the case has been increasing steadily. I think in an effort to be very accurate, I have to tell you that after the testimony was prepared, I learned that one of my colleagues on the tobacco team has submitted a resignation to enter private practice. So I don't know that as of October 1st we will have that particular person replaced, but I think it can be expected that staffing will continue to grow.

Senator DURBIN. And will you be prepared to handle the documents that are produced in discovery, and review those documents, either within the Department or by hiring outside assistance?

Mr. SCHIFFER. I don't know that we are ever prepared to handle cases with hundreds of millions of documents. We have coped in the so-called Winstar cases and in the A-12 litigation where we just obtained a very favorable ruling from the court. When I used to try cases before they told me that I was doing too much damage and I should just be a manager, someone would show me a file cabinet full of documents, and I would think surely we can deal with our best ten. And so it is a massive undertaking, but we will continue to move forward.

Senator DURBIN. Thank you. If there are no further questions, thank you, Mr. Schiffer and Mr. Schied.

Mr. SCHIFFER. Thank you very much for having us.
[The prepared statement of Mr. Schiffer follows:]

STATEMENT OF STUART E. SCHIFFER, ACTING ASSISTANT ATTORNEY GENERAL, CIVIL
DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman, I appreciate the opportunity to appear before the Committee today to discuss the Government's suit against the major tobacco companies.

Since 1978, I have served as the Civil Division's senior career official. As I have done on a number of prior occasions, I have served since January 20TH of this year as the Acting Assistant Attorney General. My responsibilities in this interim capacity include supervision of the Division's tobacco litigation team.

As I know that Members of the Committee can appreciate, I am obviously constrained in my ability to discuss the merits of a pending case. At the same time we recognize and appreciate the Committee's interest in this case, and I shall attempt to be as responsive as I can to the Committee's questions without discussing the substance of the case. My understanding is that the Committee is interested principally in discussing the status of funding and staffing of the case.

The tobacco litigation team was formed after President Clinton announced in his 1999 State of the Union address that he was directing the Department of Justice to formulate a plan to take the cigarette companies to Court. The suit was filed in the District Court for the District of Columbia on September 22, 1999. The suit sought recovery under two statutes dealing directly with the recovery of health care costs, the Medical Care Recovery Act (MCRA) and the Medicare Secondary Payer (MSP) provisions of the Social Security Act. Additionally, the complaint sought equitable relief, including monetary disgorgement, under the Racketeer Influenced Corrupt Organizations (RICO) Act.

On September 28, 2000, the Court dismissed the counts pertaining to the two health care cost recovery statutes and denied the defendants' motion to dismiss the RICO counts. In orders entered on July 27th of this year, the Court rejected our attempt to obtain reinstatement of the Medicare Secondary Payer count and portions of the Medical Care Recovery Act count. Intensive discovery is in progress and trial is scheduled for July 2003.

Funding for the current fiscal year did not come into place until the fiscal year was well underway. The current \$23.2 million budget for the case is made up of \$1.8 million from the Civil Division's base appropriation, \$9.4 million in reimbursements from other agencies and \$12 million from the Health Care Fraud and Abuse Control Account established by the Health Insurance Portability and Accountability Act of 1996. By the end of this fiscal year, the entire amount budgeted for the case will have been expended or obligated. A larger amount will be required for the next fiscal year. The Department is well into the process of identifying appropriate sources for this funding.

As the demands of the case have increased, so too has staffing, as indicated in the following chart:

	Total Positions	Attorney Positions	Other Positions
February 1, 1999	1	1	0
August 2, 1999	18	13	5
September 27, 1999	23	16	7
March 20, 2000	23	15	8
September 27, 2000	27	20	7
March 19, 2001	31	23	8
July 30, 2001	32	24	8
August 31, 2001	34	26	8
October 1, 2001 (projected)	38	29	9

The numbers do not include additional personnel from other components including the Criminal Division, the FBI, and the Civil Division's Office of Litigation Support.

In summary, the case is proceeding. It is obviously a major undertaking, and the staff attorneys assigned to the case deserve great credit for their dedication and hard work.

Mr. Chairman, that completes my prepared remarks. I would be pleased at this time to attempt to respond to any questions that you or other Members of the Committee may have.

Senator DURBIN. I would like to call up the next panel.

Richard Blumenthal is the Attorney General of the State of Connecticut. He directed his State's litigation against the tobacco industry and was one of the national leaders in that effort and was at the forefront of seeking a comprehensive State settlement.

David Ogden, a partner at Wilmer, Cutler and Pickering, is also the former Assistant Attorney General for the U.S. Department of Justice Civil Division, which he directed from February 1999 through January of this year.

Pam DeNardo is one of my constituents from St. Charles, Illinois. I want to especially thank her for making this trip to Washington. She has an illness which has made it more difficult, and I appreciate her sacrifice. I think it is critically important that we recognize that this litigation is not just about groups of lawyers and courts but about real people and the harm they have suffered at the hands of the tobacco industry.

Jonathan Turley, a professor of law at George Washington University, is Senator Hatch's witness.

Robert Blakey is a professor of law at the University of Notre Dame and is one of the chief authors of the RICO statute and one of the Nation's foremost authorities on RICO.

And David Adelman, executive director of Morgan Stanley, is also here at the request of Senator Hatch.

I thank you all for coming. I would like to first ask Ms. DeNardo if she would testify, and we will make any written statement which you have part of the record and invite you to make your remarks and summarize them as you care.

**STATEMENT OF PAMELA DENARDO, ST. CHARLES, ILLINOIS,
ON BEHALF OF THE AMERICAN LUNG ASSOCIATION**

Ms. DENARDO. Thank you, Mr. Chairman and members of the committee. My name is Pam DeNardo. I live in St. Charles, Illinois, where I run my own small business. I am appearing today on behalf of the American Lung Association and EFFORTS, which stands for Emphysema Foundation for Our Right to Survive. I would like to tell you my story. It is not a new nor unusual story. There are literally hundreds of thousands just like me.

I was a smoker. I started to smoke at the age of 17. I started smoking because it was cool. And for many years, I truly believed that I could quit any time I wanted to, that is, until I really tried. That is when I understood the word "addiction." And now I am sick. I have been diagnosed with chronic obstructive pulmonary disease. Even after being diagnosed, quitting was extremely difficult. It was literally the hardest thing I have ever done. I actually know people who will smoke a cigarette, suck on an inhaler, and smoke another cigarette. That is addiction.

For those of you who are not familiar with chronic obstructive pulmonary disease, or COPD, I will attempt to explain to you. It is primarily a smoker's disease and consists of chronic bronchitis and/or emphysema. Each of these diseases share a common characteristic: obstruction of airflow out of your lung, causing shortness of breath and a raspy voice. COPD accounts for over 107,000 deaths per year in the United States alone. It is terminal and it is irreversible. There is no cure and there is not enough research

being done to find a cure. COPD can be asymptomatic, especially in the early stages. Many patients do not report symptoms until they have lost over 50 percent of lung function.

COPD is the fourth largest killer in the United States behind heart disease, cancer, and stroke, which are also smoking-related illnesses. The World Health Organization estimates that in the year 2000, 2.7 million people died of COPD worldwide. In the simplest of terms, COPD robs you of the oxygen your body needs to survive and slowly progresses until you die. It is slow suffocation.

If the non-smoking public believes this is not their problem, they should think again. People with severe difficulty breathing cannot work, they cannot pay taxes or survive without the help of our Government. We have to go on disability, receive Medicare, Medicaid—all paid for by taxes. Chronic bronchitis and emphysema take a heavy toll on the economy. According to estimates made by the National Heart, Lung, and Blood Institute, in the year 2000 the annual cost to the Nation for COPD was an estimated \$30.4 billion. Mortality from COPD has increased sharply for more than two decades. Its increase right now is 16 percent per year. Data provided by the American Lung Association indicates that the number of deaths from COPD more than doubled between 1979 and 1998. This is not a disease or a problem that this country can afford to ignore.

In my case, I have emphysema. And believe it or not, I consider myself lucky. Diagnosed early, I am still able to function well. I run my own small business. I have health insurance, and I am not on oxygen. Indeed, that is one of the reasons that I am here today. There are many people who could speak more eloquently to you and with much more experience than I. However, to book a flight on an airline if you are oxygen-dependent is a nightmare. The rules and restrictions of the airline industry are such that a person on oxygen must start making arrangements months before departure, and some airlines will not take you at all.

So I am here to speak for people who are much braver and much sicker than I, people who suffer every day from this dreadful disease yet continue to help others to cope. If you would like to experience firsthand what it feels like to breathe with this disease, there is a very simple exercise to provide you with this experience. Simply put a straw in your mouth at the beginning of your day. Do not breath in or out except through the straw. Even with healthy lungs, you will tire as you go about your daily activities, and it won't be long before you are very, very tired. COPD patients do not have the option of taking that straw out of their mouth.

I am treated with asthma drugs because there are no drugs available for emphysema. When I was diagnosed, I was shocked. Emphysema to me is an "old person's" disease. That is what I thought at the time. I have since found out otherwise. Today the average age of diagnosis is in the mid-40s, and that average is going down yearly.

When I started smoking, there were no warnings on the packages. Later the packages said, "Cigarettes may be hazardous to your health." Other than tar and nicotine, no other ingredients were listed. They are still not listed. Tobacco products are still on the shelves today. There are today 599 ingredients added to tobacco

in the manufacture of cigarettes by the five major American cigarette companies.

I am just your typical middle-aged, taxpaying citizens. Perhaps I do not have the power or the education that you have. But I do know this: Sometime, somewhere, someone is going to have to pay for all of this illness and death. Some people in this country seem to think that it is all right to give carte blanche to an industry that is killing Americans. I disagree.

I believe that it is crucial that the Department of Justice aggressively continue its lawsuit against the tobacco industry. It is the Department of Justice's responsibility, on behalf of taxpayers like me, to hold the tobacco industry accountable for their actions.

Americans are dying in great numbers from tobacco-related diseases. The tobacco industry needs to be held responsible for these deaths and the years of lies and deception to the American public about the dangers of their products. I am here to urge the continuation of the Department of Justice lawsuit. The American people deserve their day in court.

Believe it or not, I do take responsibility for smoking all those years, and that is why I am here today. I feel very responsible to speak out against smoking. I belong to an Internet organization of people suffering from COPD. EFFORTS encompasses over 1,000 people in many countries. All have this disease and many are in their 30s and their 40s. EFFORTS is non-profit and non-political. Their goals are to provide support to those suffering from COPD, work toward medical research into the disease, educate our youth about the dangers of smoking, and to become the most authoritative and effective source of information about COPD and available treatments. I encourage you to visit our Web site at www.emphysema.net. Once there, you will find endless testimonies regarding the effects of this disease, the difficulties of living with it, and the personal stories of very real people, some still active and some who have passed away.

Please ensure that the Department of Justice aggressively pursues the case against the tobacco industry. It is critical to hold the tobacco industry accountable.

Thank you for allowing me to speak today. I have nothing but admiration for the greatest country on the Earth. I am humbled by this opportunity to speak my mind. Only in this country is it possible for the average citizen to speak before its governing body. I am greatly appreciative of this particular.

Thank you.

[The prepared statement of Ms. DeNardo follows:]

STATEMENT OF PAMELA DENARDO, ON BEHALF OF AMERICAN LUNG ASSOCIATION AND EFFORTS (EMPHYSEMA FOUNDATION FOR OUR RIGHT TO SURVIVE)

Thank you, Mr. Chairman and members of the Committee. My name is Pam DeNardo, I live in St. Charles, Illinois, where I run my own small business, which markets small group health insurance. I am appearing today on behalf of the American Lung Association and EFFORTS, which stands for Emphysema Foundation For Our Right To Survive. I would like to tell you my story. It is not a new story. It is not an unusual story. There are literally hundreds of thousands just like me. I was a smoker. I started to smoke 40 years ago at the age of 17. I started smoking because I thought it was the cool thing to do. And for many, many years, I believed that I could quit at any time. That is until I really tried to quit. Then I truly understood the word "addiction." And now I am sick. I have been diagnosed with Chronic

Obstructive Pulmonary Disease. Even after being diagnosed, quitting was extremely difficult. It was literally the hardest thing I have ever done. Even gasping for breath, I wanted a cigarette. I actually know people who will smoke a cigarette, suck on an inhaler and smoke another cigarette. That is addiction.

For those of you who are not familiar with Chronic Obstructive Pulmonary Disease, or COPD, I will attempt to explain. It is primarily a smokers' disease and consists of chronic bronchitis and/or emphysema. Each of these diseases shares a common characteristic, which is an obstruction of airflow out of the lungs, causing shortness of breath. COPD accounts for over 107,000 deaths per year in the United States alone. COPD is terminal and irreversible. There is no cure and not enough research is being conducted toward finding a cure. Once diagnosed, the patient is told to quit smoking, eat a sensible diet and exercise. COPD can be asymptomatic, especially in the early stages. The lung has a great deal of reserve. Many patients do not report any symptoms until they have lost over 50 percent of lung function.

COPD is the fourth largest killer in the United States behind heart disease, cancer and stroke (also smoking related illnesses). The World Health Organization estimates that in the year 2000, 2.74 million people died of COPD worldwide. What is COPD? In the simplest of terms, it robs you of the oxygen your body needs to survive and slowly progresses until you die. It is slow suffocation.

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In my case, I have emphysema. Believe it or not, I consider myself lucky. I am still able to function pretty well—I run my own small business, I have health insurance, and I am not yet on oxygen. Indeed, that is one of the reasons I was chosen to come here today. There are many people who could speak to you more eloquently and with a great deal more experience than I. However to book a flight on an airline if you are oxygen dependent is a nightmare. The rules and restrictions of the airline industry are such that a person on oxygen must start making arrangements months before departure. Some airlines will not take them at all. So, I am here to speak for people who are much braver and much sicker than I. People who suffer every day with this dreadful disease yet continue to help others learn how to cope. If you would like to experience first hand what it is like to breathe with this disease, there is a very simple exercise to provide you with this experience. Simply put a straw in your mouth at the beginning of your day. Do not breathe in or out except through this straw. Even with healthy lungs, you will soon tire as you go about your daily activities. COPD patients do not have the option of taking the straw out of our mouths. And our lungs are not healthy.

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ception to the American public about the dangers of their products. I am here to urge the continuation of the Department of Justice lawsuit. The American people deserve their day in court!

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EFFORTS' goals are to provide support to those suffering from COPD, to actively work towards medical research into the disease, to show responsibility in educating our youth about the dangers of smoking, to work diligently in making sure that insurance companies and Medicare do not withhold reimbursements for treatments of our disease and to become the most authoritative and effective source for information about emphysema and available treatments. I encourage you to visit our website at <http://www.emphysema.net>. Once there you will find endless testimonies regarding the effects of this disease, the difficulties of living with it and the personal stories of very real people, some still active and some who have passed away.

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Thank you for allowing me to speak today, I have nothing but admiration for the greatest society on the face of the earth and am humbled by this opportunity to speak my mind. Only in this country is it possible for the average citizen to speak before its governing body. I am greatly appreciative of this opportunity.

Thank You.

Senator DURBIN. Thank you, Ms. DeNardo. We are honored that you have joined us and greatly appreciate your testimony.

The Attorney General of the State of Connecticut, Richard Blumenthal, has received national recognition for his leadership on the State lawsuits, successful lawsuits against the tobacco industry, and we are happy to have your testimony today.

STATEMENT OF HON. RICHARD BLUMENTHAL, ATTORNEY GENERAL, STATE OF CONNECTICUT

Mr. BLUMENTHAL. I am happy and honored to be here, Senator Durbin, and wish to begin by thanking you and Senator Hatch and others on this committee, including Senator Feinstein and Senator Kennedy and others in the Senate, for your leadership over the years in this very, very important cause and for holding these hearings, which really are designed to hold the Justice Department accountable for a lawsuit that is vitally important to the health of our Nation and the public interest.

This effort really has been bipartisan and it is, as you have said very eloquently, Senator Durbin, about real people like Ms. DeNardo. And the lawsuit, in my view, absolutely must be vigorously prosecuted for reasons that I have set forth in my written testimony and won't repeat completely here. But let me just say that Big Tobacco continues to use the same kinds of tactics, targeting children, deceiving the public, and profiting literally billions of dollars, by misrepresenting and addicting the American public, particularly children.

This long-sought Federal lawsuit—and I was questioned at the time I testified here on the first settlement about why the Federal Government was not receiving any of the money from the Attorneys General settlement, and I said, in effect, in response to that line of questioning, you have to bring a lawsuit. This lawsuit will not be settled unless the Department of Justice demonstrates the resources and resolve to win.

The tobacco industry only understands unequivocal commitment, and it will come to the negotiating table only if the Department of Justice devotes the resources and resolve that are necessary to meet the very demanding schedule that you have heard described today. To complete discovery by the summer of 2002 is a huge undertaking. It is a mammoth challenge, not just because of the volume of documents and depositions and other discovery that will have to be obtained and then analyzed and reviewed and processed and made ready for trial, but also because the tobacco industry certainly will not willingly or eagerly provide any of that discovery.

I personally litigated and argued in court this case on behalf of the State of Connecticut. I helped to lead the negotiating effort. My personal experience shows that the determination to stay the course against the delay, obfuscation, and deception that will be encountered by the Department of Justice are absolutely essential. And unless the Department of Justice demonstrates that resolve and devotes the resources, it will not be prepared for trial and it will not win.

Let me also say that these Federal RICO remedies are very distinct and different from the available remedies in most of our State lawsuits and from the remedies that we eventually obtained. The majority of our claims were based largely on State law, brought in State courts, claiming violations of our State consumer protection statutes, antitrust, and other laws, as well as our common laws.

Most States did not apply this Federal statute for reasons relating to Federal jurisdiction, but several States that did rely on the Federal RICO statute found that Big Tobacco was absolutely petrified of those claims. One example, Texas, in much the same position as the Department of Justice today, found that all of its other claims, State claims, were dismissed but the Federal RICO claim was preserved by the court, and the tobacco industry settled with Texas as one of the first States to do so. Other States brought these claims based on their State RICO statutes—Arizona, Colorado, Florida, Oregon—and four on the Federal statute—New York, Texas, Utah, and the city of San Francisco—and found much the same reaction. These RICO claims are powerful and compelling. And the best evidence of it is the district court's opinion, Judge Kessler's ruling, in which she said that there was apparent merit to these claims and they should go forward.

You have recited, Senator Durbin, some of the very persuasive statistics that are a compelling reason to go forward with this action, and those same basic facts are the same ones that made our State lawsuits so compelling to the industry. But the point is that the industry is continuing with many of these actions. There is no requirement for disclosure in our Master Settlement Agreement. That is one of the objectives of the RICO claims, disclosure of documents and other scientific research that this industry has done that belies their claims that tobacco is not addictive and that they have not targeted children.

The need to stop those companies from continuing those statements has not been achieved by the Master Settlement Agreement, and we are now involved in litigation. Connecticut is one of six States that has sued RJR again because it is advertising in magazines that have high youth readership. There are four other court

actions currently pending seeking to enforce the Master Settlement Agreement, and there is substantial reason to think that other claims may be made as well. There are ongoing disputes about the terms of the settlement, and the point is that this industry continues to rely on the same tactics—Joe Camel may be dead, but the industry’s tactics are alarmingly alive.

In closing, let me say that money and appropriations, while they are very legitimately and importantly a topic of this committee today, are no substitute for a resolve to pursue this litigation as long and hard as is necessary. Only after the tobacco companies are persuaded that the Department of Justice means business will they come to the table in a realistic way, and talking settlement prematurely is unacceptable as a risk, let alone as a result. This lawsuit is a law enforcement action. It doesn’t make new law. It doesn’t create a new statute. It is about enforcing laws that now exist and preventing the tobacco companies from bringing to the table again 20 or even fewer years from now other victims, other people who were addicted as children, like Ms. DeNardo. We can prevent it as long as we hold the industry accountable.

Thank you.

[The prepared statement of Mr. Blumenthal follows:]

STATEMENT OF HON. RICHARD BLUMENTHAL, ATTORNEY GENERAL, STATE OF CONNECTICUT

I appreciate the opportunity to speak before the Senate Judiciary Committee on the subject of the Department of Justice (DOJ) lawsuit against the tobacco companies—a lawsuit vitally important to public health and consumer protection in our nation.

The lawsuit must be vigorously prosecuted, because Big Tobacco continues to lure children into lifetimes of addiction and disease, still causing tens of thousands of deaths each year, costing taxpayers millions of dollars, and reaping billions of dollars in profits. But this long sought federal legal action cannot bring Big Tobacco to the courtroom, let alone the bargaining table, unless the Department of Justice has both resources and resolve. I personally litigated and argued Connecticut’s case in court, prepared to try it and negotiated with the tobacco companies—helping to lead the 50-state effort. My personal experience shows that both resources and resolve are indispensable. The determination to stay the course against delay, obfuscation and deception—and the financial wherewithal to win—are essential.

As an early and active leader of the states’ legal action, allow me to state the obvious: the state lawsuits were a profoundly significant step, but not the end-all solution. The federal lawsuit is a necessary next step, and this Administration’s support—undelayed and undiminished—will determine the outcome.

Big Tobacco will stop at nothing to defeat law enforcement. It will spend many multiples of the federal outlay. It will file endless, exhaustive motions to dismiss and disqualify, motions to delay and deny documents and discovery, motions to obfuscate and obstruct.

Big Tobacco’s strategy is to create motion sickness—paralyzing the process of justice.

Joe Camel may be dead, but Big Tobacco’s old tactics are alarmingly alive. Its spending on advertising and promotion is now more than \$8 billion per year, about 20% higher than at the time of the states’ settlement. Its billboards are gone, but its ads in magazines with high youth readership are more numerous and seductive than ever. Its profits, stock prices and executive pay all are climbing. Earlier this year, a tobacco company explained in a report to the Czech Republic why promoting smoking is fiscally prudent because the government saves \$146 million yearly on welfare, pensions, housing, and health care otherwise spent on smokers whom tobacco kills. In short, Big Tobacco’s basic mindset and culture—its contempt for human life—are unchanged.

The DOJ has the moral and legal authority—indeed legal obligation—to prosecute violations of federal law, but equally important is the practical federal remedy for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) sought in this lawsuit: disgorgement of cigarette company profits obtained through viola-

tions of RICO, disclosure of all relevant internal cigarette research on smoking and health, and court orders to stop the companies from making false, misleading and deceptive statements about cigarettes and concealing the harms of smoking and to stop the companies from marketing their deadly product to kids.

The federal RICO remedies are very distinct and different from available remedies in most of our state lawsuits. The majority of our claims were based largely on state law, brought in state courts, claiming violations of consumer protection, antitrust and other state statutes and common law. Most states did not apply the federal statute, for reasons relating to judicial jurisdiction. But several states that did rely on federal RICO or their state's version of RICO found that Big Tobacco was petrified of losing on RICO grounds. In Texas, for example, the tobacco industry settled for the then-largest payment when a federal district court allowed that state to proceed on its RICO claim even after all other state claims were dismissed.

The DOJ lawsuit lists 106 separate acts by Big Tobacco comprising a pattern of racketeering activity. These 106 separate acts chronicle the systematic, calculated campaign by Big Tobacco to deceive the American people. The companies' own documents produced in our state lawsuits show how well and long they knew of the disease and addiction caused by smoking—indeed, how they targeted children and spiked nicotine levels to make their products more addictive. The result of this campaign: each day, 6,000 children in the United States start smoking and more than 3,000 become daily smokers. At this rate, 5 million of today's children will eventually die of smoking related diseases. These basic facts are the same ones that made the state lawsuits so compelling.

The federal government's enforcement of RICO offers remedies providing a powerful new deterrent to Big Tobacco's unconscionable misconduct, forcing payment of penalties exceeding the profits obtained from their illegal activity.

The lawsuit's remedies—additional penalties, damages and injunctive relief—greatly enhance the deterrent value of the Master Settlement Agreement (MSA) negotiated by the state attorneys general, which prohibits tobacco companies from marketing to children. Big Tobacco still spends more than \$8 billion per year on an advertising and promotion campaign that continues to reach children. In a recent *New England Journal of Medicine* article, researchers found that tobacco companies spent more than \$120 million advertising cigarettes in youth oriented magazines. Young people, 12 to 17 years of age, every year see 50 or more ads for RJ Reynolds' products in magazines they regularly read. Other tobacco companies have similar strategies of saturation bombing—through relentless marketing in magazines widely read by children. Hence, my state and 5 others are again suing RJ Reynolds, and considering action against other tobacco companies for MSA violations. These insidious advertisements and promotions clearly hit their target: In Connecticut for example, 30% of our high school students are smoking, starting down the path of addiction to debilitating illness and premature death. No wonder that the average age children start smoking in Connecticut is 11 years old.

The MSA sets a starting point for reform, permitting stronger federal limits on marketing and larger disgorgement of profits earned from unlawful activities. A federal court order also provides the states with a significant partner in monitoring and enforcing tobacco industry compliance. It will add force and effect to state consumer protection enforcement as a deterrent.

More broadly, and bluntly, the message is compelling: the Department of Justice will not tolerate lawbreaking conspiracies that promote drug addiction and disease. It will act to protect the health of all citizens from the scourge of tobacco—a product different from all others, because tobacco is the one consumer product that, when used exactly as intended by its manufacturer, commonly kills the customer.

In short, the federal lawsuit will advance state law enforcement goals, reduce state and federal health care spending on tobacco-related diseases, save lives and send a powerful signal about addiction and drug abuse as well as the credibility and staying power of public health commitments.

The federal lawsuit can be successful only if the Department of Justice has the resources and resolve to aggressively prosecute its claims. The appropriation necessary for the lawsuit during this fiscal year is a significant amount of money, but a mere pittance compared to the federal costs of \$35 billion annually in tobacco-related health care expenditures alone.

A successful lawsuit against the tobacco companies—based on state attorneys general experience—requires a resolve to fight for many years and adequate resources to counter the industry's take no prisoners litigation tactics.

Big Tobacco's tactics are well-calculated, time-consuming and costly. They have been successful against every individual victim who dared to seek justice against the tobacco manufacturers. Against us, they included attempts to remove our state court action to federal court, multiple attempts to disqualify legal counsel, motions to dis-

miss on personal jurisdiction and subject matter grounds and efforts to use the state freedom of information act to circumvent court production rules.

The states needed substantial resources simply to obtain and review industry documents—often previously provided to other plaintiffs under protective orders that prevented such states from obtaining them from other plaintiffs, further duplicating costs, time and work. No doubt the DOJ will encounter similar trench warfare in its lawsuit.

Money is no substitute for the resolve to pursue this litigation as long and hard as necessary. Only after the tobacco companies were persuaded that the state attorneys general were united and unequivocally committed to fight and win, did they agree to discuss settlement.

Talking settlement prematurely—without showing plainly the resources and resolve to win—is a recipe for retreat and defeat. It constitutes surrender—simply unacceptable as a risk let alone a result.

The federal lawsuit is a law enforcement action against an outlaw industry. The federal courts have explicitly upheld its merit and ruled it should move forward. It will help hold this industry accountable for its illegal actions—past, present and future.

Senator DURBIN. Thank you, Attorney General Blumenthal.
Professor Turley?

**STATEMENT OF JONATHAN TURLEY, PROFESSOR OF LAW,
GEORGE WASHINGTON UNIVERSITY, WASHINGTON, D.C.**

Mr. TURLEY. Thank you, Senator Durbin, Senator Hatch. Thank you for giving me the opportunity to appear again before this committee and to talk of a subject that is of great importance to us all.

Listening to Ms. DeNardo certainly shows that this is a subject upon which we cannot debate the merits of the campaign against tobacco. No one would contest the merits. Like Senator Hatch, I have been very critical of tobacco companies. I have been very critical of their conduct, both legal and social, and I have been very supportive of individual lawsuits against tobacco.

What brings me here today is not to debate whether tobacco should be held accountable but the means to hold them accountable. This can be very, very difficult when you have some question, as I do, as to the means used by the Federal Government.

I come to this with a purely academic interest. I have not received money from the tobacco industry or the anti-tobacco groups, and I have no particular interest in their future. This hearing brings together a number of areas which I have written on as an academic. I have shamelessly cited all of my work, which is demanded by academic vanity. But the thrust of what interests me about this subject as an academic—and forgive me for seeming somewhat arcane and abstract—is constitutional and historical. In a Madisonian democracy, it is often more important how we do something than what we do. This is a difficult, difficult point to make because the people who support the tobacco lawsuit are doing it for the world's best reason. The question here is simply whether they are using the wrong means for a worthy end.

Justice Brandeis once said that what we have to worry about is not evil men, but men of zeal, well-meaning but without understanding. Not to be too harsh on this issue, I believe this lawsuit is well-meaning, but it fails to understand some of the foundational principle of the Madisonian democracy, particularly the dangers of legislative circumvention.

I have attached an article—once again, as a shameless academic device—that I wrote for the Harvard Legislative Journal that is en-

titled "Crisis of Faith," and it deals with the constitutional implications of the Federal lawsuit.

I am not going to repeat these insular points because it is already laid out in the attached article. Suffice it to say, the Federal tobacco lawsuit is the most open and flagrant example of legislative circumvention that I have ever seen as an academic. The Attorney General who started this, Attorney General Janet Reno, actually said in her press conference the Justice Department was going to bring suit because Congress did not do what it wanted Congress to do in this area.

So you often hear, particularly in testimony today, that we have to go forward because of inaction from Congress. But, by doing so, you change the political equation from convincing 535 representatives of the people to convincing one, an Article III judge, as to what to do with this industry. Whether you like tobacco or not—most of us do not—there are a lot of people who are smokers. There are a lot of people who are obviously not smokers. This is an issue that divides our Nation, and that is one of the reasons Congress has not gone further in this area—it is because we are divided as a Nation.

The solution is not to circumvent Congress. The solution is to convince, to use the crucible of the legislative process, the open and deliberative process, to convince. That is what James Madison wanted. James Madison didn't write a particularly inspiring document when he wrote the Constitution. He wrote a document to last. He knew what our inclinations were. He knew the temptations in a democratic society to solve problems at any cost to look at the ends and not the means. He knew about factions. If you look in this room, and you can see the face of faction. There are a dozen different factual interests present in this room alone.

Madison used a system of constitutional implosion. He said that as a people we would direct our divisions to Congress where they would be resolved. There they would coalesce and transform.

I have serious questions about the method used by the Justice Department because this is clearly an effort of legislation by litigation. You read what is requested in relief and the Department of Justice looks like it followed Oscar Wilde's rule that they could resist everything but temptation. This list is virtually identical to lists that were floated in Congress in terms of a Federal settlement, a bill that would essentially resolve all these issues. They have been taken from there and put in front of a single judge, who I respect, but I don't believe that she is the one that should decide this for the Nation.

I also have serious questions about RICO which I have put into my written statement, but I wanted to emphasize the Madisonian issue so it will not get lost. But in some ways, legislative circumvention is like what Clausewitz said about war. He said that war is nothing but the continuation of political intercourse by another means. In the same way, people who look to litigation to legislate view it as a form of political intercourse by a different means. But it is very, very dangerous because the Government has habits, too. When you expand the power of the executive branch to the loss of this branch, it is a habit that is hard to break.

I encourage Congress to deal with tobacco, deal with it firmly, and I will rally in support. And I know, Senator Durbin, probably more than anyone in the Senate, you feel passionately about this subject, and I respect that. I simply ask that you consider whether this institution's interest, crafted by James Madison, demands a level of self-defense. Regardless of what happens with tobacco, it is very important that we preserve a certain covenant that we made with people like James Madison as to how we would solve problems. We have never been defined as a people by our problems. We have always been defined by how we solve those problems. And I would submit this is the wrong way.

I notice my time is out, so I will stop there.

[The prepared statement of Mr. Turley follows:]

[Additional material is being retained in the Committee files.]

STATEMENT OF PROFESSOR JONATHAN TURLEY, SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, D.C.

Thank you, Mr. Chairman, it is an honor to appear again before this Committee and its distinguished members.

I. INTRODUCTION

Chairman Leahy, Senator Hatch, members of the Committee, my name is Jonathan Turley and I am a law professor at the George Washington University Law School where I hold the J.B. and Maurice C. Shapiro Chair for Public Interest Law. I know that your time is limited today and, with the consent of the Committee, I would like to submit a longer written statement to augment my oral testimony, including a copy of a law review article that offers a more comprehensive academic treatment of some of these issues.

At the outset, I wish to emphasize that I come to this question with a purely academic interest.¹ Over the last decade, I have periodically taught and written on the subject of the Racketeer Influenced Corrupt Organization Act (RICO)² and specifically the varied applications of civil RICO.³ I have also given prior testimony⁴ as well as presentations and commentary⁵ on the tobacco litigation. My most recent academic piece, *A Crisis of Faith: Tobacco and the Madisonian Democracy*,⁶ looks at governmental lawsuits against the tobacco industry from both a constitutional

¹I do not consume tobacco products and I have neither consulted for nor received money from either the tobacco industry or the anti-tobacco organizations. While I have spoken to investor groups (as well as other organizations) on likely impact, outcome, and implications of the tobacco litigation, I have not advised or consulted with the tobacco industry. I did speak years ago to the tobacco industry on combating environmental crimes in their industry but I declined the \$4000 speaking fee.

²Organized Crime Control Act of 1970, P.L. No. 91-452, 84 Stat. 922 (codified as amended in scattered sections of 18 U.S.C.); see 18 U.S.C. 1961-1968 (1994).

³My academic writings include Jonathan Turley, *Laying Hands on Religious racketeers: Applying Civil RICO to Fraudulent Religious Solicitations*, 29 William and Mary Law Review 441 (1988); Jonathan Turley, *The RICO Lottery and the Gains Multiplication Approach: An Alternative Measurement of Damages Under Civil RICO*, 33 Villanova Law Review 239 (1988); see also Jonathan Turley, *A Crisis of Faith: tobacco and the Madisonian Democracy*, 37 Harvard Journal of Legislation 433 (2000) (discussing the various theories of the federal litigation, including civil RICO claims). It is fair to say that since I began writing on this subject over a decade ago, my views have evolved on the proper use of RICO and, more importantly, on the inefficiency or inequity of some types of racketeering actions.

⁴See, e.g., *Big Government Lawsuits: Are Policy Driven Lawsuits in the Public Interest? Hearings Before the Senate Comm. on the Judiciary* 105th Cong. (1999) (testimony of Professor Jonathan Turley).

⁵See, e.g., Jonathan Turley, *A Bad Canadian Law Heads South*, The Wall Street Journal, February 28, 2000, at A41; Jonathan Turley, *Madison Felled by Tobacco?*, The National Law Journal, December 13, 1999, at A28; Jonathan Turley, *Reforming the Great Litigation Lottery*, Chicago Tribune, Nov. 1, 1999, at A11; Jonathan Turley, *The New Profiteers of the Tobacco War*, Wall Street Journal, Sept. 20, 1999, at A29.

⁶*Turley, Crisis of Faith*, *supra* note 2. It is not my habit to attach such writings, but, given the fact that the hearings was called with only a couple of days notice, there was limited time to prepare the type of comprehensive written testimony that this subject clearly merits. For that reason, I have yielded to practicality (and no small measure of academic vanity) in citing past work on some of the discrete issues.

and statutory viewpoint, including discussion of the use of civil RICO by the federal government.⁷

Despite prior academic work in the RICO area, my primary interest in today's hearing is more constitutional than statutory. While I have serious reservations regarding of the government's RICO claims against the tobacco industry, my paramount concern is with the overall use of the courts to achieve the government's objectives rather than its particular theories of recovery. It is important to emphasize that I do not contest the need for legal accountability for the tobacco industry, including civil liability. Rather, it is the means used by the government that should raise fundamental questions for this Committee. In a Madisonian democracy, it is often more important how you do something than what you want to achieve. It is my view that the federal lawsuit is an inappropriate means to achieve an otherwise worthy end. For that reason, I believe that the continuation of the federal tobacco lawsuit under the remaining civil RICO claim is ill-advised and should be declined as a matter of discretion by the Bush Administration.

II. THE DANGERS OF LEGISLATIVE CIRCUMVENTION AND THE INTEGRITY OF THE MADISONIAN DEMOCRATIC PROCESS.

Because my views on the dangers of legislative circumvention are already part of prior congressional testimony⁸ and specifically addressed in the attached copy of *Crisis of Faith*, I will not dwell on this aspect of the federal lawsuit. However, it is important to explain what I mean by "legislative circumvention." The tobacco litigation is one of the most flagrant examples of the Executive Branch circumventing Congress in modern times. In January, 1999, former Attorney General Janet Reno was quite plain in the press conference announcing the federal lawsuit: "[A]s I had indicated, we had hoped that this matter would be resolved through legislation. When the legislation failed to pass, I still felt very, very strongly that we should be able to recover damages."⁹ The federal lawsuit was filed only after the Clinton Administration concluded that Congress would not agree to the relief that it now seeks from a federal judge. By filing, the Clinton Administration changed the political equation from convincing 535 representatives of the nation to convincing a single judge in Washington, D.C. This was done to force massive changes in an area of almost unrivaled controversy in the nation. To secure this tactical advantage, the Clinton Administration, in my view, jettisoned some of our most important constitutional values.

To understand the danger of legislative circumvention in the tobacco litigation, it is necessary to understand the most fundamental precepts and requirements of the Madisonian democracy. The brilliance of James Madison was found not in his articulation of our collective strengths as a people but his understanding of our individual flaws as citizens. The Madisonian democracy is based on a frank understanding of our human vulnerability to factional and even tyrannical impulse. In this sense, it can be fairly stated that Madison created a system designed to last rather than to inspire. He understood the dangers of factions in destabilizing governments. This danger was magnified by the tendency of constitutional drafters to emphasize those qualities and objectives that unified a people. In these systems, factional interests would remain below the surface where they would continue to fester and potentially explode. Madison not only recognized the presence of factions but encouraged their expression in the legislative system where they could be converted from discrete factional interests into a majoritarian compromise. It is the legislative system that allows for a type of "constitutional implosion" to occur that brings both stability and legitimacy to our system.¹⁰ Rather than have factional interests ex-

⁷ In the interests of full disclosure, this past work is generally critical of the government's legal action against the tobacco industry. While expressing great reservations about this litigation, I have also been highly critical of the industry and supportive of lawsuits by citizens in seeking damages for injuries caused by this harmful product. One of the my central concerns over the course of the tobacco litigation is the distributive problems of awards and the potential for windfall judgments to some questionable litigants (particularly governmental and institutional litigants) and purely symbolic judgements for worthy individual litigants. See generally Turley *Crisis of Faith*, *supra* note 2, at 467-481; Turley, *Reforming the Great Litigation Lottery*, *supra* note 4, at A11; Turley, *The New Profiteers*, *Supra* note 4 A29; see also *Senate Hearing*, *supra* note 3.

⁸ See also *Senate Hearing*, *supra* note 3.

⁹ Attorney General Janet Reno, Department of Justice Press Conference (Jan. 21, 1999).

¹⁰ See generally Jonathan Turley, *Senate Trials and Factional Disputes; Impeachment as a Madisonian Device*, 49 *Duke Law Journal* 1, 110-117 (1999); see also Jonathan Turley, *An Improving Union: The Antithetical Elements of Military Governance in a Madisonian System* (forthcoming).

plode outwardly, they implode within the system where they are directed to its core: Congress. Ideally, it is here that factional interests coalesce and transform through open and deliberative debate.¹¹ Conversely, while some academics have disparaged the significance of the so-called “countermajoritarian problem,”¹² the courts can be the most dangerous branch for a democratic system.¹³ This countermajoritarian danger is realized when the Executive Branch attempts to use the courts as a more receptive branch for significant policy changes. By circumventing the Legislative Branch, the Executive Branch can achieve what may be too costly or too difficult to achieve in Congress.

The tobacco litigation initiated by the Clinton Administration is the quintessential example of legislative circumvention. Likewise, if there is one example of the countermajoritarian danger realized, it is this image of a government arguing for a judge to order a massive transfer of wealth from an industry to governmental coffers as well as mandatory changes in an industry’s structure and conduct. Congress has been repeatedly asked to take significant measures to curb or control the tobacco industry.¹⁴ Such measures included unsuccessful efforts to place tobacco under the jurisdiction of the Food and Drug Administration (FDA).¹⁵ Facing obvious opposition in Congress, the Clinton Administration attempted to circumvent the Congress with a litigation effort to secure the same authority from the courts. The Supreme Court rebuffed this effort in *FDA v. Brown & Williamson Tobacco Corp.*¹⁶ Ironically, this attempt to expand the FDA’s jurisdiction was more defensible than the later effort at securing massive damages from the tobacco industry in the federal tobacco litigation.¹⁷ As noted earlier, the federal lawsuit was only filed after Attorney General Reno concluded that the Executive Branch could not achieve its goals in the legislative process.¹⁸ In this litigation, the Clinton Administration attempted to seek reimbursement and damages under the Medical Care Recovery Act (MCRA)¹⁹ and the Medicare Secondary Payer (MSP)²⁰ provisions. These two claims offered wild departures from any notion of textualist or intentionalist statutory construction and, at points, bordered on the frivolous.²¹ It was clear that Attorney General Reno was correct that any effort to amend either the MCRA or MSP provisions in this way would have drawn considerable opposition and a dubious chance of success in Congress.²² However, the attempt to have a judge effectively amend these laws demonstrated a lack of discretionary judgment from a federal official sworn to protect the Constitution. To her credit, Judge Gladys Kessler made fast work of these claims in dismissing them from the federal lawsuit.²³ She rejected, however, motions to dismiss the RICO counts.²⁴

Putting aside the merits of the remaining RICO counts (which will be addressed below), the very initiation of this litigation effort should be a matter of concern for anyone who believes strongly in the tripartite system, and specifically the importance of the legislative process in dealing with divisive national issues like tobacco. As a nation, our views of tobacco have radically changed over time and these views continue to evolve. The only point of agreement in this on-going national debate is

¹¹This is, of course, an ideal that is sometimes unrealized. The public choice school has shown that the legislative process can fall victim to special interest. See generally Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 Boston University Law Review 339, 349–70 (1990) (citing and discussing various theories of legisprudence and public choice).

¹²See Jonathan Turley, *The Constitutional Guild: The Problem With Banality in Constitutional Law*,—Northwestern University Law Review—(2001) (forthcoming).

¹³Alexander Hamilton referred to the judiciary as “the least dangerous branch.” The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Conversely, it is Congress that is often viewed as the most dangerous given its ability to extend with “the sphere of its activity and drawing all powers into its impetuous vortex.” The Federalist No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961). However, Madison viewed Congress, and not the courts, as the active component for social and political change. Because of their life tenure and constitutional authority as articulated under *Marbury v. Madison*, judges have the potential to exercise unbridled bias and to frustrate legitimate majoritarian goals.

¹⁴See Generally Turley, *Crisis of Faith*, *supra* note 2, at 443–459.

¹⁵*Id.* at 454–455.

¹⁶120 S.Ct. 1291 (2000).

¹⁷See Turley, *Crisis of Faith*, *supra* note 2, 457.

¹⁸See *infra* note 9.

¹⁹42 U.S.C. § 2651 (1994 & Supp. IV 1998).

²⁰42 U.S.C. § 1395(b)(2)(2000).

²¹See generally Turley, *Crisis of Faith*, *supra* note 2, at 460–462.

²²As will be discussed below, the Justice Department demands relief that reads like prior drafts of the omnibus tobacco proposals once floated (and then scuttled) in Congress.

²³*United States v. Philip Morris Inc.*, Civil Action No. 99–2496 (D.D.C. 2000); see also *United States v. Philip Morris*, 116F.Supp.2d 131 (D.D.C. 2000).

²⁴*Id.*

that we remain deeply divided on the consumption and marketing of tobacco. Even our government's role in tobacco has been evolutionary and conflicting with periods as tobacco's greatest protagonist and other periods as its chief antagonist.²⁵ What is clear is that a significant number of Americans either want to consume this product or support the right of citizens who wish to do so (subject of time and place restrictions in public accommodations). The federal lawsuit places the future of this industry (and therefore this product) in question by demanding a massive judgment in its lawsuit. When the government seeks the disgorgement of an entire industry for decades of past "gains," the lawsuit takes on an obvious and important public policy dimension. Yet, the debate over this governmental action will not be part of the open and deliberative process of Congress but a dialogue between litigants and a single judge - a dialogue which will affect not only an industry and its employees and shareholders but every citizens in this country, smoker or non-smoker.

The most obvious cost of circumvention is the loss of the quality of legislation formed through the open and deliberative process of Congress. This process is not only important for the expression of democratic values but it is also important to the crafting of good law. The pressures of this system and the influence of the presidential veto authority mold legislation in a highly efficient and beneficial way. As the members of this Committee know, legislation can be transformed in the crucible of the legislative process to make it more balanced and moderate. Legislative committees have the resources and expertise to research and analyze core assumptions. Floor debates and later conferences bring further amendment and refinement to the final product. The use of a single judge's equitable authority to achieve such results reduces a collective process of revision to a personal judgment of entitlement or equity.

Circumvention also has a deleterious effect on the political process and the integrity of the legislative process by insulating representatives from controversial policy decisions. It is not surprising that, despite increased public statements condemning this industry and this product, there has been little interest in Congress for a frontal assault on tobacco. Millions of Americans continue to consume this product despite well-known governmental warnings and campaigns against consumption.²⁶ Certainly, congressional representatives are aware that many of their constituents would actively oppose any significant increase in the price of this product due to increased government-mandated costs. Circumvention adds various barriers for the public in moving from the relatively open and deliberative debate of Congress to the more closed environment of the courts.²⁷ This circumvention also diminishes political accountability for representatives. While most politicians would be unwilling to take legislative action to ban this product or gut this industry, a court action can achieve the same result with simple acquiescence of Congress.²⁸ While Congress can use a variety of powers to check Executive Branch excesses in court,²⁹ it can also remain silent and play a purely pedestrian role in the process. When an industry is fatally damaged or a product restricted, politicians are protected from any public backlash by the perception that it was part of a purely legal decision by the courts and not a political decision.³⁰ The public does not associate the failure to act vis-à-vis a court action with a political decision of its congressional representatives.

If successful, the government will have secured a major change with both economic and social implications without a single vote of this body. The interests of the affected smokers and investors will be left to the judgment of a single judge and a handful of appellate judges. Regardless of the outcome of this legal debate, the process is clearly not the best method to deal with such matters. As discussed below, even if the government can prevail in such an effort, this is a case where discretion should militate in favor of what is right as opposed to what is convenient.

²⁵ See Turley, *Crisis of Faith*, *supra* note 2, 438-449.

²⁶ See Turley, *A Bad Canadian Law Heads South*, *supra* note 4, A41 (discussing efforts to educate and deter tobacco consumption).

²⁷ This argument is held in a courtroom with a small live public audience, due to the ban on television coverage, and decisions are rendered in the context of arcane statutory provisions. The courts further increase informational costs for citizens by translating significant public policy issues into legalistic terminology and forms. Obviously, Congress is neither entirely open nor free of informational costs or barriers for the public. However, it remains considerably more accessible than the legal system for citizens.

²⁸ Smoking is an interesting political issue since, due to its addictive elements, consumers have a concentrated interest in its future and their numbers are spread fairly evenly across congressional districts and states.

²⁹ See Turley, *Crisis of Faith*, *supra* note 2, 466.

³⁰ Notably, the most significant legislative effort to curb tobacco was a passing legislative interest in expanding the jurisdiction of the FDA, an agency that would have acted with a degree of political distance from Congress.

III. THE CONSTITUTIONAL AND PUBLIC POLICY IMPLICATIONS OF THE FEDERAL TOBACCO LAWSUIT.

Today's hearing offers a unique opportunity to consider when it is appropriate for the government to play the role of litigant and when it is inappropriate to do so. The foregoing discussion of the dangers of legislative circumvention largely encourages Congress to use its persuasive and coercive authority to oppose legislation by litigation like the tobacco lawsuit. However, the Bush Administration faces a slightly different question of whether to use its discretionary authority to decline further litigation of the tobacco lawsuit as a matter of good policy. While it appears that such a declination is not in the offing, I believe that the tobacco lawsuit offers a useful example of when the government should not assume the role of a litigant.

Because of the power of the government to do great harm as well as great good, the tripartite system largely leaves to Congress to determine the conditions under which the United States can appear as a party in federal court. While the United States exercises discretion as to how it uses this authority, the government must largely act under authority that is both granted and tolerated by the electorate.³¹ There are obviously a great number of statutes under which the government commonly acts that range from criminal prosecution to consumer protection to environment. In most civil actions, the government can either be characterized as a victim or a regulator. In the first category of cases, the government sues for recovery of damage done directly to the government; on behalf of a victim; or as a statutorily defined representative of victims. In the second category of cases, the government sues to enforce federal laws, often through an agency with delegated authority.

The Justice Department under the Clinton Administration determined that there was not sufficient evidence to prosecute tobacco officials or corporations on a criminal basis. The use of civil RICO by the government is an available option to deter future misconduct in the absence of criminal violations. However, when the government acts as a civil litigant, the legitimacy and basis for the lawsuit can be more problematic than in the criminal prosecution. Despite their manifest weakness, the government's claims under MCRA and MSP did advance a valuable notion of government injury. In alleging the loss of federal monies under programs like Medicare, the government was advancing a "government as victim" theory. It lost that alleged status with the dismissal of the MCRA and MSP claims by Judge Kessler. It now is acting as neither a classic victim nor a classic regulator. This does not in itself make the government's use of civil RICO inappropriate. What makes the civil RICO claims disturbing is not the fact that the government is bringing the action, but that the government is bringing the action against an entire industry as opposed to a single company. Not only has the government sued nine corporations³² controlling the tobacco market but also two associational organizations.³³ The government not only seeks to change the way that the industry operates but to restrict corporate speech by associational groups as well as corporate associational contacts³⁴. To attempt such changes in the ambiguous role of a civil RICO litigant is, in my view, dangerously opportunistic.

The clear intent behind the lawsuit is to fundamentally change an industry with significant collateral effects on both the market and its consumers. To my knowledge, the government has never attempted such a massive public policy change in civil litigation without a prior congressional decision. Without addressing the other issues below, basic principles of good government and comity should have militated heavily against such an effort. The obvious legislative character of the relief only reaffirms this conclusion. As noted earlier, the government has asked the judge to mandate industry changes that appear to come directly out of prior proposals that were advanced and then abandoned in Congress. These include barring industry use of particular industry association groups; restrictions and supervision of public relations statements and activities; funding for a national education campaign; compelled disclosure of internal documents and material; compelled public statements

³¹ Obviously, there are circumstances where the Executive Branch litigates to advance constitutional or common law authority that is not dependent upon congressional authorization. However, the vast majority of government filings are based on congressional authorization.

³² These include Philip Morris, Inc.; R.J. Reynolds Tobacco Co.; Brown & Williamson Tobacco Co.; Lorillard Tobacco Company; The Liggett Group, Inc.; American Tobacco Co.; Philip Morris Cos.; B.A.T. Industries p.l.c.; British American Tobacco (Investments) Ltd. See *United States v. Philip Morris*, 116 F.Supp.2d at 4 n.1.

³³ These two organizations are The Council for Tobacco Research—USA, Inc. and The Tobacco Institute, Inc. *Id.*

³⁴ Some of the government's detailed acts supporting the racketeering claims against these associations include the distributing of a news article and the mailing of press releases to media.

by the corporations; funding of cessation programs for smokers; and a separate national campaign to discourage smoking by minors.³⁵

In reviewing this list, Justice Department lawyers appear to follow Oscar Wilde's rule that the only way to be rid of temptation is to yield to it. It is particularly alarming to have an industry-wide reform package pushed through the courts that includes government demands that restrict speech. The court is asked to not only bar association with industry groups like the Tobacco Institute but to compel statements and public conduct by these corporations. Any such restrictions or manipulation on speech rights for either individuals or corporations raise fundamental questions that should be debated in Congress and not simply imposed by fiat by executive officers. While industry can be compelled to issue warnings or information and can be restricted in their marketing of products, these restrictions are not part of any congressionally authorized agency power.³⁶ They are simply ad hoc restrictions to be imposed directly by the Executive Branch "in equity" with the cooperation of a federal judge.

The demand for disgorgement of "gains" from the last forty years only magnifies these concerns. As an institutional matter, it should be clear that a federal court is the least competent institution to perform such an undertaking. The government has refused to put a figure on this amount, stating that the court will have to determine the extent of the gains linked to the alleged fraudulent conduct of the industry. Thus, a judge will have to set a value on the percentage of tobacco products in the last forty years that are due to industry misconduct. A host of congressional committees could work years on such a daunting statistical issue with dozens of different views heard in expert testimony. Instead, the Justice Department wants the country to abide by the conclusion of Judge Kessler on her deduction of the statistical percentage of attributed ill-gotten gains. Moreover, whatever figure would result, such disgorgement will impose costs that could radically increase the price of tobacco for millions of citizens. This increase would be ordered by a politically unaccountable judge at the behest of largely unaccountable federal bureaucrats. The question for the Justice Department should not have been whether it could prevail but whether it should prevail in such circumstances.

By circumventing the legislative process, the Justice Department opted for a course that sacrificed legitimacy for convenience. Every administration should be concerned that its objectives are not only realized but accepted by the public. The legislative process can bring a legitimacy and a consensus that is sorely needed in the area of tobacco. There are many aspects of the tobacco industry that may be ripe for public condemnation and legislative reform, including the question of the possible prohibition of tobacco as an addictive product. Such reforms can be given persuasive authority by collective decision-making in the political process. Rather than work for such a meaningful result, the Justice Department has sought to impose its view on the industry despite a still divided nation. In doing so, it has not only lost the legitimization of the legislative process but the value of that process to educate and unify the public behind a new policy initiative.

Any of these issues should have prompted a declination from the Justice Department. However, even if these issues were not viewed as determinative, one would expect that the legal theories used to demand such relief would be settled and uncontroversial. Yet, in the tobacco litigation, the government sought not only to secure unprecedented relief but did so on the basis of highly debatable statutory interpretations. As noted earlier, the MCRA and MSP claims were largely meritless.³⁷ The civil RICO claims were more plausible because of RICO's history of elastic interpretations. However, as indicated below, the government's RICO claims raise disturbing questions not only for this industry but for many other industries involved in debates over the injurious products.

³⁵ *United States v. Philip Morris*, 116 F.Supp.2d at 147 n.24. There are many disturbing aspects to this "broad equitable relief" but the most disturbing is the image of a few Justice Department officials expressing their own preferences and interests in shaping a national industry. Adding a federal judge to this equation does not materially improve the image.

³⁶ In fact, some of the items on this list would effectively negate the effect of the Supreme Court's ruling in *FDA v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291 (2000), refusing to judicially expand the jurisdiction of the FDA. Here, the Justice Department would impose many of the same conditions that would have been sought from the FDA under the guise of equitable relief rather than administrative action.

³⁷ See, e.g., Turley, *Crisis of Faith*, *supra*, at 460-64.

IV. STATUTORY ISSUES RAISED BY THE GOVERNMENT'S CIVIL RICO INTERPRETATION.

As should be obvious, I have major reservations with the attempt to use the courts to secure industry-wide reforms in this area-regardless of the particular legal theory or statutory vehicle. Nevertheless, I do want to briefly raise a few aspects of the government's RICO claims that should warrant your attention and, in my view, your concern. Given the limited time to prepare this testimony, I will dispense with the controversial history and application of civil RICO. Suffice it to say, civil RICO has been the subject of considerable criticism for its seemingly infinite variety of uses. Requiring only a couple of instances of mail or wire fraud as predicate offenses³⁸ to establish a "pattern" of racketeering, businesses and individuals accused of fraud are vulnerable to substantially enhanced penalties and stigma. While I believe that some of this criticism is over-stated and that civil RICO serves an important deterrent function, I do believe that some interpretations of RICO have lowered the prerequisite standards to a dangerous degree. There is no greater example of this problem than the theories advanced by the government in their tobacco lawsuit.

While there are a fair number of RICO issues that will present problems for its case, the government is most vulnerable on (1) the inference of an enterprise; (2) the evidence of a reasonable likelihood of future violations; and (3) the use of disgorgement in a civil RICO context. The first issue of the requisite showing of an "enterprise" is a matter of division among the circuits. Adopting the broadest possible interpretation, Judge Kessler ruled that the government did not need to support the elements of an "enterprise" and a "pattern of racketeering" with separate evidence. Rather, Judge Kessler followed a rule accepted in the District of Columbia and other circuits that the government could essentially infer an enterprise from the predicate offenses composing the pattern of racketeering. Quoting the Fifth Circuit, Judge Kessler noted that an enterprise can be "an 'amoeba-like infra-structure that controls a secret criminal network.'"³⁹ This Circuit requires evidence of an enterprise that shows "(1) a common purpose among the participants, (2) organization, and (3) continuity."⁴⁰ Moreover, there is no question that other circuits have accepted that the enterprise requirement only demands a showing of "some structure . . . but there need not be much."⁴¹ However, in this context, the inference of an enterprise should receive a closer review on the appellate level. How much structure and evidence is needed to show an enterprise in an industry of competing companies is a matter of first impression. While the government is certainly correct that there is evidence of coordination, the implications of such a relaxed standard must weigh heavily in any review.

While the government might prevail on the first issue, the government is in a far more precarious position over its claim of a reasonable likelihood of future violations. As noted above, the government's role as a litigant is problematic in this litigation. Most litigants file under 18 U.S.C. 1964(c) because of personal property loss attributed to the alleged racketeering. The government could not claim such a loss and was compelled to try a filing under 18 U.S.C. 1964 (a) and (b) seeking equitable relief. However, these provisions are designed to prevent future violations and are not to be used to impose punitive measures for past conduct. To fit this theory, the government claimed, and Judge Kessler accepted, that there was evidence of a reasonable likelihood of future violations based on the past conduct of the industry over the past forty years.⁴² The government presents support for this assertion that is both conclusory and rather dated. There is no question that this industry has historically acted in a reprehensible manner, a point not seriously contested by the defendants. Moreover, the defendants accepted that past conduct as relevant to this question.⁴³ However, such evidence should be the start and not the end of the judicial review. A great deal has happened in the last few years that makes the government's exclusive reliance on past violations rather dubious. First, the industry has changed its public stance and no longer contests research linking smoking with serious health risks. The largest companies have issued statements confirming the dangers of smoking and would be highly unlikely to reverse that position in future activities. Second, and more importantly, the industry has entered into the Master

³⁸ See 18 U.S.C. §§ 1341 (mail fraud); 1343 (wire fraud); 1961 (5) (racketeering pattern).

³⁹ *United States v. Philip Morris*, 116 F.Supp.2d at 152 (quoting *United States v. Elliott*, 571 F.2d 880, 898 (5th Cir. 1978)).

⁴⁰ *United States v. Perholtz*, 842 F.2d 343, 362, (D.C. Cir 1988).

⁴¹ *Burdett v. Miller*, 957 F.2d 1375, 1379 (7th Cir. 1992).

⁴² *United States v. Philip Morris*, 116 F.Supp.2d at 147-150.

⁴³ *Id.* at 148 ("Defendants concede that 'past allegations may be relevant to whether. . . a 'reasonable likelihood exists' that such acts will continue into the future'" (quoting Defendants' Trial Memorandum at 65.).

Settlement Agreement (MSA) that contains strong equitable provisions that bar the future misconduct that is the subject of the Justice Department's claims. Not only does the MSA already bind these companies but it augments the already high-level of scrutiny for tobacco companies in their future dealings. This not only diminishes the opportunity for such misconduct but the rational expectation that such conduct would succeed. Third, the industry also faces a much greater level of scrutiny in private lawsuits and discovery after the success of various lawsuits—in a sharp departure from prior efforts to hold tobacco companies liable for tobacco-related injuries. Judges have become much more critical of the industry and recent judgments are expected to draw additional contingency lawsuits—with an added level of monitoring. Deterrence is determined by levels of detection and penalty. In this area, both the detection and penalties for the industry have increased significantly in the last few years.

Judge Kessler's decision sweeps too broadly in accepting the government's claims. While this can be defended in part by the generous standard of review on a motion to dismiss,⁴⁴ Judge Kessler adopts a view that makes it also impossible for the defendants to rebut. The MSA should have weighed heavily in this equation, but Judge Kessler simply dismisses its relevance: "Even assuming the Court could take judicial notice of the MSA, that document's existence certainly does not mean that the Court can or should assume that the MSA will be fully enforced or otherwise accomplish its intended objectives."⁴⁵ It is difficult to imagine any evidence that would be viewed as relevant under this view. Obviously, a company can take every effort to reorganize and to repent but it can never erase history. When faced with a regulated industry subject to a formal comprehensive settlement and intense scrutiny from Congress, the media, and independent legal actions, a court should demand more than a recitation of prior conduct over a forty-year span. After all, the government itself has gone from one of tobacco's chief marketers and supporters to one of its greatest rivals in the same span of time.⁴⁶ The government's exclusive reliance on past acts only reinforces the view that this civil RICO action is a thinly veiled effort to secure punitive relief in the absence of a compelling criminal case.

The third area of concern also highlights the punitive aspect of the government's case. As noted earlier, the government has asked for disgorgement of gains that extend over forty years for this industry. This was part of the equitable relief folded into the 18 U.S.C. 1964(a) and (b) claims. Disgorgement, however, is generally viewed as a punitive sanction⁴⁷ and is specifically provided under criminal RICO. The use of disgorgement in a civil RICO action against an entire industry combines the ultimate punitive measure for a corporation in the criminal area with the lesser standard of proof in the civil area. Such a combination would invest the government with a disturbing level of coercive authority in the market. Even with civil RICO's history of expansion, such an interpretation would produce a grotesque exaggeration of the original function of civil RICO.

In fairness to Judge Kessler, her decision on the motion to dismiss did not hold that she would find that gains in the industry "are being used to fund or promote the illegal conduct, or constitute capital available for that purpose."⁴⁸ Rather, Judge Kessler is simply holding that she will not rule out such relief. She is supported in this view by the Second Circuit's decision in *United States v. Carson*.⁴⁹ However, there was a strong basis to bar such relief and Judge Kessler was not bound by the decision in *Carson*. Not only does such relief remove critical distinctions between criminal and civil actions under RICO, but it departs from the approach under the Clayton Act, which was the model for RICO.⁵⁰ At least one district court in the District of Columbia has rejected the use of disgorgement under the Clayton Act.⁵¹ Judge Kessler clearly felt that disgorgement is a proper remedy in an action that is by definition future-oriented and non-punitive. I respectfully disagree with that view.

Obviously, people of good faith can disagree on these interpretations and their implications. What I do not understand is why the government has elected to advance

⁴⁴ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (holding that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."); see also *United States v. Philip Morris*, 116 F.Supp.2d at 136 (quoting *Conley* and other cases on standard of review).

⁴⁵ *United States v. Philip Morris*, 116 F.Supp.2d at 149.

⁴⁶ See generally Turley, *The New Profiteers*, *Supra* note 4, at A29.

⁴⁷ *Alexander v. United States*, 50 U.S. 544, 550 (1993) (noting that disgorgement or forfeiture is "not a prior restraint. . . but a punishment for past criminal conduct.").

⁴⁸ *United States v. Philip Morris*, 116 F.Supp.2d at 151 (quoting *Carson*, 52 F.3d at 1182).

⁴⁹ *Carson*, 52 F.3d 1173.

⁵⁰ See Turley, *The RICO Lottery*, *supra* note 2, at 249–261.

⁵¹ *FTC v. Mylan Labs., Inc.*, 62 F.Supp.2d 25, 40–42 (D.D.C. 1999).

such sweeping claims in an already controversial suit against an entire industry. These theories fit an image of a purely outcome-driven lawsuit that employs any means and embraces any theory to achieve its goal. If the government prevails in all of these theories, civil RICO would be radically altered into a tool for industry-wide actions. This expansion of authority would be accompanied by an expansion of available penalties. Such an expansion should raise serious concerns of governmental abuse and the chilling effect of governmental authority. The greatest dangers lie in the misguided, not the malicious, use of authority. As Justice Brandies once warned, “[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.”⁵²

V. CONCLUSION

Legislative circumvention has an interesting comparison to Count Carl von Clausewitz’s view of war. In his book *On War*, Clausewitz stated that “war is nothing but a continuation of political intercourse. . . by other means.”⁵³ The same can be said of some types of governmental litigation. For foes of the tobacco industry, the use of the courts can be easily justified as politics “by other means” to achieve a just result.⁵⁴ However, in a Madisonian system, there is a distinct danger raised by “political intercourse. . . by other means.” While courts clearly have some social transformative role, we have always been weary of the countermajoritarian problem of judges deciding questions left unanswered by the legislative process.

Suffice it to say, as a parent, I would like nothing better than for my sons to inherit a world free of addictive products like tobacco. Yet, I would also like them to inherit a government fully grounded in the principles of representative democratic process and limited government. The greatest dangers lie not in the conspicuous influence of a given product on the health of individuals but in the insidious encroachment of governmental authority on the rights of individuals. It is far easier to quit or avoid the addiction of a voluntary product than it is to reduce the authority of the government once it has developed new avenues of expression.

Tobacco is a product that is thankfully in decline in terms of consumption, but, regardless of the continuation of this trend, it is a product that will ebb and flow with the individual tastes of our citizens. However, the Framers understood that government never loses its taste for expansion or new forms of authority. For that reason, it created a tripartite system in which no branch could govern alone. The intention was to give each branch the self-interest to resist the usurpation or expansionist inclinations of the other branches. In this system, the most destabilizing effect is not action but inaction; when one branch, particularly the legislative branch, acquiesces to a unilateral expansion. When Congress remains silent as the Executive Branch circumvents the legislative process in areas like tobacco, it undermines the integrity of a system in which the most divisive and important issues are directed to Congress and not the courts.

The process by which a government acts to achieve its objectives defines both that government and its people. In this sense, we have never been defined as a people by our problems but how we chose to settle them. To put it simply, means that we use matters in a democratic system. It is the very distinction between a democracy and an oligarchy or, at its greatest extreme, a tyranny. We have been vigilant in keeping the individual branches in check because we know that power itself can be addictive and, once government is allowed to exercise extra-constitutional power, it is a habit that is hard to break.

I have tremendous respect for the members of Congress and many of my friends on the other side of this debate. I respectfully disagree with the means that they have chosen to combat this problem. As citizens, we have always had significant divisions over a variety of issues in governance but we have remained unified in our faith in the process. The use of novel theories in court to achieve what has been denied in the Congress will bring far greater long-term costs to our system than the short-term benefits of combating this one product. It often falls to elected officials like yourself and appointed officials like Attorney General Ashcroft to protect this system by resisting the temptations of circumvention. I encourage you to assert the authority of this institution in resolving the tobacco controversy and to resist the use of litigation as legislation “by other means.”

⁵² *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

⁵³ Carl Von Clausewitz, *On War*, (Anatol Rapoport ed. & Col. J.J. Graham, Penguin Books 1968).

⁵⁴ It is interesting that Clausewitz defined war as “an act of violence intended to compel our opponent to fulfill our will.” *Id.* at 101. So too, governmental litigation can be used on an industry that does not readily yield or conform to its demands.

I would be happy to answer any questions that the Committee may have on this subject.

Senator DURBIN. Thank you, Professor Turley.
Professor Blakey?

**STATEMENT OF G. ROBERT BLAKEY, PROFESSOR OF LAW,
NOTRE DAME LAW SCHOOL, NOTRE DAME, INDIANA**

Mr. BLAKEY. My name is G. Robert Blakey. I am the William J. and Dorothy O'Neill Professor of Law at the Notre Dame Law School. I want to thank the committee for asking me to come and testify before it. In a sense, I am coming home, as I worked for this committee a number of years ago, for Senator McClellan and Senator Bayh. So I am happy to be here. I thank you for asking me to come.

I ask that my full statement, my resume, and the charts that I have prepared to illustrate the suit be printed in the record in full at this point, Mr. Chairman.

Senator DURBIN. Without objection.

Mr. BLAKEY. I understand that the committee wants me to discuss the Federal racketeering statute in the context of the Government's civil suit under RICO against the tobacco industry. It is litigation that I recommended to the Department in 1999 that it undertake.

If time permits me, I will comment on Professor Turley's view of Madison and Mr. Adelman's view of the chance of the Government's RICO suit succeeding.

I am not just an academic. I not only drafted the Federal RICO statute, I drafted the Florida RICO statute. I drafted the complaint in Florida. I argued it in Florida. And we won. The tobacco industry settled. This was a Government-initiated suit under Florida State statute. The court held that we did have disgorgement powers, and it was, frankly, only after that decision that the case settled.

I also redrafted the Texas suit. The Texas suit was based on Federal RICO. I argued the Texas suit. We faced similar questions. We were winning when the industry decided to settle.

In contradistinction to Mr. Adelman, or my good friend Professor Turley, I have seen the evidence. I studied it in detail. I know what it is on liability, that is, on all the elements of RICO. I saw the punitive damage presentation that was made in Florida. I was also one of the lawyers that argued in court successfully to pierce the attorney-client privilege in the litigation because, in fact, this decades-old conspiracy was managed and orchestrated by the lawyers.

I know what I am talking about. This industry produces the only consumer product that kills or injures when used as directed. I have heard enough about this being a "legal product sold legally." In fact, it is illegal in 50 States to sell it to children. Period. End of the matter. When it is sold to children, it is not a legal product. Even libertarians—and on this issue I consider myself a libertarian—draw the line at children.

People are suggesting somehow that this suit is illegitimate because the statute was originally designed for organized crime. In 1969 and 1970, that issue was debated on the Senate floor, it was debated on the House floor, and it was resolved after debate to ap-

prove this statute's application beyond organized crime. RICO applies to "any person" for those people who make that objection, I would ask the following question: What part of "any" don't you understand in "any person"?

When the tobacco industry sells nicotine to children, they fall within "any person."

They are indistinguishable from drug dealers who sell cocaine to children.

They are both illegal.

If that argument were good, we couldn't apply the Ku Klux Klan Act of 1871, which was designed to prohibit "white-capping" in the South by the klan, to violence by the LAPD officers against Rodney King. That result would be bizarre.

The Sherman Act of 1890 was aimed at the Rockefeller oil trust. It is now applied legitimately, if Notre Dame were to sit with George Washington and figure out what to fix the amount to award with scholarships. That is beyond the "specific intent" of Congress; it is not beyond the "scope" of the legislation.

The Supreme Court took issue of organized crime not once, but twice, and rejected it each time.

I will not go into the details of the elements of the claim. I have done it in my outline.

This is a good suit.

The evidence supports it, and the remedy is wholly appropriate.

Senator Hatch, you and I have discussed RICO in hearings here for something like 15 years now from time to time. People say I have never seen a RICO suit that I didn't like. We could discuss one suit, the *Scheidler* suit, that I didn't like. But this is not a suit that I don't like. This is not even on the outer edge with a novel remedy.

My good friend Mr. Adelman doesn't know the law. He should read my statement. Most of what he says is contrary to the law.

And my good friend Mr. Turley has a wrong conception of Madison. Madison suggested that we have three branches of Government, not in order that they would, always in opposition one to another. He envisioned that they would also cooperate.

Let me cite for you the example of the civil rights movement. Repeatedly, Congress declined to enact civil rights legislation. Because they couldn't get relief from Congress, the NAACP went to the United States Supreme Court in *Brown v. Board of Education*. They got relief. When they got relief from the Court, Congress then got off its duff and enacted civil rights legislation.

I don't see anything illegitimate in that story. I think the three branches of government work in tandem.

Sometimes the other two branches stimulate you, Mr. Hatch, Mr. Durbin, and sometimes Congress stimulate the executive on the judiciary.

That is the cooperation in Government.

Senator Hatch, I am with you. Reform should have been done with legislation. It was irresponsible that Congress didn't do it with legislation.

But that is not a reason for the executive not to take an existing statute, apply it to conduct that falls within its language, and se-

cure appropriate equity relief to stop this industry from pushing cigarettes on our children today.

Thank you.

[The prepared statement of Mr. Blakey follows:]

STATEMENT OF G. ROBERT BLAKEY, PROFESSOR, NOTRE DAME LAW SCHOOL

My name is G. Robert Blakey.

I am the William J. and Dorothy O'Neill Professor of Law at the Notre Dame Law School.¹

I understand that the Committee wants me to discuss the federal racketeering statute, 18 U.S.C. § 1961 et. seq. ("RICO"), in the context of the Government's civil suit under RICO against the tobacco industry in *United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131 (D.C. D.C. 2000) ("Philip Morris"), litigation that I recommended 1999 to the Department that it undertake.

Candor requires that I acknowledge, before making this statement, that I represented Florida,² Texas,³ and several other states, in their successful litigation against the industry;⁴ I represented several Taft-Harley Funds in their unsuccessful litigation against the industry; and, I represented the Government of the Republic of Guatemala in its unsuccessful suit against the industry.⁵

BASIC FACTS OF FRAUD AND DISEASE: A PRIMER

Cigarette smoking is the "most important preventable cause of...premature mortality in the United States. . . ." ⁶ "[T]obacco-related diseases are the most common disorders found among hospitalized populations and disproportionately affects low-income medically indigent [individuals]."⁷ Smoking related disease cost upward 50 billion dollars each year.⁸

That this impact is brought about by a decades old illicit conspiracy, which was only recently unmasked, is intolerable.

It was intolerable when I recommended this litigation to the Department in 1999.

It is intolerable today.

After a meeting in the Plaza Hotel in New York City on December 15, 1953, called to develop a public relations response to a Sloan-Kettering Institute report that established cigarette smoke condensate as a cause of cancer in mice, the tobacco industry began its conspiracy to mislead, deceive, and confuse smokers, physicians, health care payers, and government officials about nicotine, its lethal and addictive properties.⁹

The industry produces the only consumer product that injures or kills when used as directed.

The industry manipulates the nicotine content in cigarettes.

Despite its own scientific studies telling it otherwise for decades, the industry misrepresented, concealed, and suppressed information about the health consequences of smoking and the addictive character of nicotine.

During this period of time, the industry engaged in deceptive practices relating to "light" cigarettes, and it illicitly restrained the market in less dangerous cigarettes.

Even though it is illegal to sell cigarettes to children in fifty states, the industry targets children to replace smokers who die.¹⁰ The model who portrayed the "Marl-

¹ Attached to this statement is my resume.

² Florida settle for \$11.3 billion. John Schwartz, *Cigarettes Makers Settle Florida Suit for \$11.3 B.*, Wash. Post, Aug 26th, 1997, at A. 1.

³ Texas settled for \$1.45 billion. Sandra Torrey & Ceci Connolly, *Tobacco Firms Set to Pay Texas 14.5 Billion*, Wash. Post, Jan. 16, 1998, at A1.

⁴ See generally Stasia Mosesso, *Up in Smoke: How the Proximate Cause Battle Extinguished the Tobacco War*, 76 Notre Dame L. Rev. 257 (2000) ("Smoke").

⁵ *In Re/Governmental Health Care Cost Litigation*, 83 F. Supp. 2d 125 (D.C.D.C. 1999), aff'd 249 F.3d 1068 (D.C. Cir. 2001).

⁶ *Medical-Care Expenditures Attributed to Cigarette Smoking-United States 1993*, Morbidity and Mortality Wk. Rep. 469 (1994).

⁷ Raymond Gangaroua, et. al., *Suits by Public Hospitals to Recover Expenditures for Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, 22 Forham Urban L.J. 81, 87 (1994).

⁸ *Id.*

⁹ See generally *Philip Morris*, 116 F. Supp. at 135-38; *Smoke* at 262-84.

¹⁰ Jennifer McCullough, Note, *Lighting up the Battle Against the Tobacco Industry Prohibiting Cigarettes Sales to Minors*, 28 Rutgers L.J. 709, 727 n. 114 (1997) (collecting state statutes and

Continued

boro Man” testified before Congress: “I was clearly told that young people were the market that we were going after.”

Almost 3,000 children begin smoking each day, about 1 million a year. One out of three of these children will die of smoking related diseases.

More than 400,000 people die each year from smoking related diseases, more than auto accidents, AIDS, alcohol use, illicit drugs, homicides, suicides, and fires combined.¹¹ Smoking related causes account for one out of five deaths each year. Second-hand smoke kills another 53,000 people. Approximately 85% of lung cancer is smoking related; it surpasses breast cancer for a cause of death among women; and it accounts for 30% of cancer deaths.

Repeatedly, company executives lied to Congress and the Executive Branch about tobacco. James W. Johnston, the chief executive officer of R.J.R Tobacco, for example, told Congress that “smoking is no more addictive than coffee, tea or Twinkies.”¹²

The cigarette industry is the most profitable in the United States; its profit margins run as high as 30%.

Internal reports in Philip Morris describe the delivery system of nicotine:

The cigarette should be conceived not as a product but a package. The product is nicotine. . . . Think of the cigarette pack as a storage container for a day’s supply of nicotine. . . . Think of the cigarette as a dispenser of a dose unit of nicotine.

Approximately 82% of daily smokers in the United States began before the age of 18; 62% before 16, 38% before the age of 14. Approximately 46 million adults in the United States are current cigarette smokers.¹³ A person who does not begin smoking in childhood or adolescence is unlikely ever to begin. Approximately, 66% of teenagers who smoke say they want to quit; 51% who try and make a serious effort fail. Children and adolescents buy the most heavily advertised cigarettes. Adults tend to buy more generic or value-based cigarettes.

The tobacco company’s illicit conspiracy was designed, supervised and implemented by lawyers working in concert for the tobacco companies.¹⁴

Tobacco may be a legal drug when it is sold to adults, but it is illegal, addictive, and lethal when it is pushed on children.

¹⁵at this conduct continues is intolerable in a free society.

RICO: INTRODUCTION

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as “RICO.”¹⁵ Title IX was drafted to deal with enterprise criminality, that

other data on child smoking). Even libertarians, draw the line at children. John Stuart Mill, on Liberty 10 (1859).

¹¹See *Mortality Trends for Selected Smoking-Related Cancers and Breast Cancer United States, 1950–1990*, 42 *Morbidity and Mortality Wkly. Rep.* 857 (1993).

¹²*Castano v. American Tobacco Co.*, 870 F. Suppl. 1425, 1433 (E.D.La. 1994) (reporting the testimony of chief executive officers of major tobacco companies that nicotine is not addictive and a Philip Morris add following the testimony: “Philip Morris does not believe cigarette smoking is addictive.”).

¹³*Cigarette Smoking Among Adults—United States, 1993*, 43 *Morbidity and Mortality Wkly. Rep.* 925 (1994).

¹⁴*American Tobacco Co. v. Florida*, 697 So. 2d 1249, 1257 (4th Dist. Fla 1997) (crime fraud exception to lawyer-client privilege established) (“[T]he defendants utilized their attorneys in carrying out their misrepresentations and concealment to keep secret research and other conduct related to the true health dangers of smoking.”).

¹⁵Pub. L. No. 91–452, 84 Stat. 922 (1970) (codified as amended at 18 U.S.C. §§ 1961–68 (1988 & Supp. I 1989). Commentary on RICO is extensive. See generally G. Robert Blakey, *of Characterization and Other Matters: Thoughts About Multiple Damages*, 60 *Law and Contemporary Problems* 97 (1997); G. Robert Blakey & Kevin P. Roddy, *Reflections on Reves v. Ernst & Young: Its Meaning and Impact on Substantive, Accessory Aiding and Abetting, and Conspiracy Liability Under RICO*, 33 *Am. Crim. L. Rev.* 1345 (1997) (“Reflections”); G. Robert Blakey & Thomas A. Perry, *An Analysis of the Myths that Bolster Efforts to Rewrite RICO and the Various Proposals for Reform*, 43 *Vand. L. Rev.* 851 (1990) (“Myths”); G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 *Notre Dame L. Rev.* 237 (1982) (“Civil Fraud Action”); G. Robert Blakey & Scott D. Cessar, *Equitable Relief Under Civil RICO*, 62 *Notre Dame L. Rev.* 526 (1987) (“Equitable Relief”); G. Robert Blakey & Brain Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 *Temp. L.Q.* 1009 (1980) (“Basic Concepts”); Gerard E. Lynch, *RICO: The crime of Being a Criminal* (pts.1–4), 87 *Colum. L. Rev.* 661, 920 (1987); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 *Colum. L. Rev.* 774 (1988); Gerard E. Lynch, *A Reply to Michael Goldsmith*, 88 *Colum. L. Rev.* 892 (1988). Some of the best student pieces on RICO are collected in *Reflections* at 1348 n.3. See also U.S. Department of Justice, *Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors* (1990). RICO type legislation has been enacted by the states, twenty nine of which now have it. *Myths* at 988 (Chart comparing federal and state legislation).

is, “patterns” of violence, the provision of illegal goods and services, corruption in the labor or management relations, corruption in government, and criminal fraud by, through, or against various types of licit or illicit enterprises. Because Congress found that the sanctions and remedies available were unnecessarily limited in scope and impact, it enacted RICO to provide enhanced criminal and civil sanctions, including fines, imprisonment, forfeiture, injunctions, and treble damage relief for persons injured in their business or property by reason of a violation of the statute.

The legislative history of RICO clearly demonstrates that “it was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots.” *Russello v. United States*, 464 U.S. 16, 26 (1983). The major purpose of RICO was to address the “infiltration of legitimate business by organized crime,” but the statute was designed to reach both “illegitimate” and “legitimate” enterprises. *United States v. Turkette*, 452 U.S. 576, 590–91 (1981). As the Supreme Court observes, the idea that RICO is limited to “organized crime”—however defined—“finds no support in the Act’s text, and is at odds with the tenor of its legislative history.”¹⁶ *H.J. Inc. v. Northwestern Bell Telephone Co.* 492 U.S. 229, 244 (1988). Accordingly, RICO fits well into a pattern of legislation enacted by Congress over the years as general reform, aimed at a specific target, but not limited to the specific target.

I. LIBERAL CONSTRUCTION

Congress directed that RICO be liberally construed to effectuate its remedial purposes. If RICO’s language is plain, it controls. *NOW v. Scheidler*, 510 U.S. 249, 261–62 (1994); *Turkette*, 452 U.S. at 587 n.10; *Russello* 464 U.S. at 29; *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 239 (1987); *United States v. Monsanto*, 491 U.S. 600, 606 (1989); *H.J. Inc.*, 492 U.S. at 249. *If its language, syntax, or context is ambiguous, the construction that would effectuate its remedial purposes by providing “enhanced sanctions and new remedies” is to be adopted.* *Turkette*, 452 U.S. at 587–88, 593; *Russello*, 464 U.S. at 27; *Sedima*, 473 U.S. at 497–98; *Monsanto*, 491 U.S. at 609; *Tafflin v. Levitt*, 493 U.S. 455, 465 (1990). Its language is to be read in the same fashion, whatever the character of the suit. *Sedima*, 473 U.S. at 489; *Shearson*, 482 U.S. at 239 (“a ‘pattern’ for civil purposes is a ‘pattern’ for criminal purposes”) (quoting *Page v. Moseley, Hallgarten Estabrook & Weeden, Inc.*, 806 F.2d 291, 299 n.13 (1st Cir. 1986)); *H.J. Inc.*, 492 U.S. at 236 (pattern) (“appl[ies] to criminal as well as civil applications of the Act”).

II. INTERPRETATION OF RICO

Four basic assumptions are integral to any principled effort to interpret a statute:

- (1) legislative supremacy within the constitutional framework;
- (2) the use of the statutory vehicle to exercise that supremacy;
- (3) reliance on accepted means of communication; and
- (4) reasonable availability of the statutory vehicle to those to be governed by it, not only its text, but any other part of its legislative context that serves to give it meaning.

See Reed Dickerson, *The Interpretation and Application of Statutes* 7–12 (1975); *United States v. Whitridge*, 197 U.S. 135, 143 (1905) (Holmes, J.) (“[T]he general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.”).

The Supreme Court’s principal RICO decisions include: *Turkette*; *Russello*; *Sedima*; *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143 (1987); *Shearson*; *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989); *Monsanto*; *Tafflin*; *Holmes v. Securities Investor Protection Corp.*, 491 U.S. 617 (1989); *Reves v. Ernst & Young*, 503 U.S. 258 (1992); *NOW*; *Klehr v. A.O. Smith Corp.*, 507 U.S. 170 (1993); *SalinaT1 v. United States*, 525 U.S. 299 (1999); *Humana, Inc. v. Forsyth*, 528 U.S. 494 (2000); *Beck v. Prupis*, 528 U.S. 549 (2000); *Rotella v. Wood*, 529 U.S.

¹⁶To be sure “a” purpose of RICO was to combat “organized crime,” but that specific purpose was not its “only” purpose. “[A]lthough the legislative history of RICO vividly demonstrates that it was primarily enacted to combat organized crime, nothing in that history, or in the language of the statute itself, expressly limits RICO’s use to members of organized crime.” *Owl Construction CO., Inc. v. Ronald Adams Contractors, Inc.*, 727 F.2d 540, 542 (5th Cir. 1981). “[C]ommentators have persuasively and exhaustively explained why the stature . . . [does] not require [such a showing].” *Id.* (Citing *Civil Fraud Action*, 58 Notre Dame L. Rev. at 284–85). Accord *Sedima S.P.R.L. v. Imrex Co. Inv.*, 472 U.S. 479, 499 (1984) (not just “mobsters and organized criminals”) (“Congress wanted to reach both ‘legitimated’ and ‘illegitimate’ enterprises. . . . The former enjoy neither an inherent incapacity for criminal activity nor immunity from its consequences.”)

494 (2001); and *Cedric Kushner Promotions, Ltd. v. King* 121 S. Ct. 2087 (2001). In these decisions, the Court acknowledges several general propositions of statutory construction and establishes the basic principles that govern the reading of RICO. The Court consistently applies these principles to the statute:

- (1) read the language of the statute (*Turkette*, 452 U.S. at 580, 593; *Russello*, 464 U.S. 16, 20 (1983) (citing *Turkette*); *Sedima*, 473 U.S. at 495 n.13; *Shearson/American Express*, 482 U.S. at 227; *Monsanto*, 491 U.S. at 606 (citing *Turkette*); *H.J. Inc.*, 492 U.S. at 237 (citing *Russello*); *Holmes*, 503 U.S. at 265–66; *Reves*, 507 U.S. at 177 (citing *Turkette* and *Russello*), *Beck*, 120 S. Ct. at 1613; *Cedrick Kushner Promotions, Ltd.*, 121 S. Ct. 2090);
- (2) language includes its structure (*Turkette*, 452 U.S. at 581, 587; *Russello*, 464 U.S. at 22–23; *Sedima*, 473 U.S. at 490 n.8, 496 n.14; *Agency Holding Corp.*, 483 U.S. at 152);
- (3) language should be read in its ordinary or plain meaning, but must be viewed in context (*Turkette*, 452 U.S. at 580, 583 n.5, 587; *Russello*, 464 U.S. at 20 (citing *Turkette*), 21–23, 25; *Sedima*, 473 U.S. at 495 n.13; *H.J. Inc.*, 492 U.S. at 238 (citing *Richards v. United States*, 369 U.S. 1, 9 (1962); *Reves*, 507 U.S. at 178); *Cedric Kushner Promotions, Ltd.*, 121 S. Ct. at 2090), and common law words must be given common law meanings (*Salinas*, 522 U.S. at 60 (criminal conspiracy) *Beck*, 120 S. Ct. at 1615) (civil conspiracy);
- (4) similar language should be given a similar construction (*Sedima*, 473 U.S. at 489; *Reves*, 507 U.S. at 177);
- (5) language should not be read differently in criminal and civil proceedings (*Sedima*, 473 U.S. at 489, 492; *Shearson*, 482 U.S. at 239–40); *H.J. Inc.*, 492 U.S. at 236); but see *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188 (1997) (different considerations apply to civil and criminal statutes of limitations); *Beck*, 120 S. Ct. 1614 n.6 (application of conspiracy implicates both criminal (“violation”) and civil (“conspiracy”) principles);
- (6) look to the legislative history of the statute (*Turkette*, 452 U.S. at 586, 589; *Sedima*, 473 U.S. at 486, 489; *Shearson*, 482 U.S. at 238–41; *Agency Holding Corp.*, 483 U.S. at 151; *Monsanto*, 491 U.S. at 613; *H.J. Inc.*, 492 U.S. at 236–39 (citing *Sedima*); *Tafflin*, 493 U.S. at 461; *Holmes*, 503 U.S. at 267; *Reves*, 507 U.S. at 179; *Cedric Kushner Promotions, Ltd.*, 121 S. Ct. at 2092);
- (7) if the statute is unambiguous, legislative history must be clear to warrant a different construction (*NOW*, 510 U.S. at 261 (citing *Reves* and *Turkette*));
- (8) look to the policy of the statute (*Turkette*, 452 U.S. at 590; *Russello*, 464 U.S. at 24; *Sedima*, 473 U.S. at 493; *Tafflin*, 493 U.S. at 467; *Cedric Kushner Promotions, Ltd.*, 121 S. Ct. at 2092);
- (9) the statute was aimed at the infiltration of legitimate business by organized crime (*Turkette*, 452 U.S. at 591; *Russello*, 464 U.S. at 26, 28 (citing *Turkette*); *Caplin & Drysdale*, 491 U.S. at 630; *H.J. Inc.*, 492 U.S. at 245 (citing *Russello* and *Turkette*); *Cedric Kushner Promotions, Ltd.*, 121 S. Ct. at 2092);
- (10) the statute was not limited to the infiltration of legitimate business by organized crime (*Turkette*, 452 U.S. at 590–91; *Russello*, 464 U.S. at 28; *Sedima*, 473 U.S. at 495, 499; *H.J. Inc.*, 492 U.S. at 242–49 (citing *Sedima*); *NOW*, 510 U.S. at 260 (citing *H.J. Inc.*));
- (11) the statute is to be broadly read and liberally construed (*Turkette*, 452 U.S. at 587, 593; *Russello*, 464 U.S. at 21; *Sedima*, 473 U.S. at 491 n.10, 497–98; *Monsanto*, 491 U.S. at 609 (citing *Sedima*); *H.J. Inc.*, 492 U.S. at 237; *Tafflin*, 493 U.S. at 467 (citing *Sedima*); *Holmes*, 503 U.S. at 274);
- (12) liberal construction, while it seeks to ensure that an overly narrow construction is avoided, is not an invitation to apply RICO beyond the purposes that Congress intended (*Reves*, 507 U.S. at 183–84);
- (13) where Congress rejects proposed limiting language in a bill, it may be presumed that the omission was intended (*Russello*, 464 U.S. at 23–24; *Sedima*, 473 U.S. at 498);
- (14) where Congress includes or omits limiting language in a bill, it is presumed that it did so intentionally (*Turkette*, 452 U.S. at 581; *Russello*, 464 U.S. at 23–24); and
- (15) RICO was modeled on the antitrust statutes, but it is not necessarily limited by antitrust doctrine (*Sedima*, 473 U.S. at 498; *Shearson*, 482 U.S. at 241; *Agency Holding Corp.*, 483 U.S. at 150–51; *Holmes*, 503 U.S. at 269 n.15; *Rottela*, 120 S. Ct. 1082–83).

III. NO PREEMPTION

When Congress enacted RICO, an issue arose whether it should preempt other federal or state statutes or remedies when it entered RICO's "new domain." *Turkette*, 452 U.S. at 586. The question, however, was quickly resolved; Congress decided to save provisions of "federal, state, or other law imposing criminal penalties or affording civil remedies in addition to those provided for" in RICO. 892 Stat. 947 (1970); *Haroco, Inc. v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384, 392 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) ("Congress enacted RICO in order to supplement, not supplant, the available remedies since it thought those remedies offered too little protection for the victims."). Such overlap between statutes "is neither unusual nor unfortunate." *SEC v. National Secur., Inc.*, 393 U.S. 453, 468 (1969). The existence of cumulative remedies furthers remedial purposes. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 386 (1983).

IV. STANDARDS

RICO sets forth standards of "unlawful" conduct, which are enforced through criminal and civil sanctions. Section 1963 of Title 18 sets out the criminal remedies, while Section 1964 of Title 18 sets out the civil remedies. Since Section 1962 states what is "unlawful," not "criminal," RICO is *not* primarily a criminal statute; indeed, the civil scope of RICO is *broad*er than its criminal scope. As such, RICO is *not* primarily criminal and punitive, but rather primarily civil and remedial. *See Sedima*, 473 U.S. 497–98 ("read broadly" to "effectuate its remedial purpose"); *Turkette*, 452 U.S. at 593 (RICO is "both preventive and remedial"); *United States v. Corrado*, 227 F.3d 543, 552–52 (6th Cir. 2000) (broadly interpreted to effectuate its remedial purpose) (citing *Russello v. United States*, 464 U.S. 16, 26–27 (1983)). Based on a showing of the preponderance of the evidence, RICO's civil remedies are available to the Government or other parties. *United States v. Cappetto*, 502 F.2d 1351, 1357 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975) (Government suit); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1303 (7th Cir. 1987) (private suit), *cert. denied*, 492 U.S. 917 (1989). *See generally Civil Fraud Action* at 258 n.59 (legislative history, analogies, and economic analysis).

V. THE CRIMINAL ENFORCEMENT MECHANISM

The criminal enforcement mechanism of RICO provides for imprisonment, fines and criminal forfeiture. RICO authorizes imprisonment of up to twenty years, or life, where the predicate offense authorizes life. *See* 18 U.S.C. §1963(a) (1988); U.S.C. §2E1.1.

VI. THE CIVIL ENFORCEMENT MECHANISM

The civil enforcement mechanism of RICO provides for injunctions, treble damages, and counsel fees, 18 U.S.C. §1964.

RICO authorizes United States Courts "to prevent and restrain" violations of the statute. 18 U.S.C. §1964(a). The phrase is a "common law couplet" that carries with it the meaning all forms of equitable relief. *deBeers Consoliates Mines Ltd. v. United States*, 325 U.S. 212, 218 (1945); Ernest Weekly, *Cruelty To Words* 43 (1931) (Anglo Saxon peasants could not understand French after conquest in 1066, so law was expressed in pairs of words, one Anglo-Saxon and one French). Neither inadequacy of the remedy at law nor irreparable injury need be shown. *United States v. Cappetto*, 502 F.2d 1351, 1358–59 (7th Cir. 1974), *cert. denied*, 420 U.S. 925 (1975).

18 U.S.C. §1964(b) expressly authorizes the Government to seek equity relief under RICO. Significantly, equitable disgorgement of profits obtained from a RICO violation is a well-established RICO remedy. *See, e.g., United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk*, 44 F.3d 1082, 1084 (2nd Cir. 1995). It is also well-recognized in other areas of federal law. *See, e.g., SEC v. First Jersey Sec. Inc.*, 101 F.3d 1450, 1474–77 (2nd Cir. 1996) (securities fraud) ("The primary purpose of the disgorgement as a remedy. . . is to deprive violators of their ill-gotten gains. . . thereby effecting. . . deterrence. . ."), *cert. denied*, 118 S. Ct. 57 (1997); *Commodity Futures Trading comm v. British Am. Commodity Options Corp.*, 788 F.2d 92, 94 (2nd Cir.) (commodities fraud) ("to depriv[e] the wrongdoer of his ill-gotten gains and deter [. . .] violations of law"), *cert. denied*, 479 U.S. 853 (1986). Beyond equitable disgorgement, far-reaching other forms of equity relief may also be granted to reform and restructure corrupted entities. 18 U.S.C. §1964(a).

Today, the Government is employing these powers almost exclusively in the effort to weed out mob influence in unions. *See, e.g., United States v. Local 560 IBT*, 780 F.2d 267 (3rd Cir.), *cert. denied*, 476 U.S. 1140 (1986); *Oversight on Civil RICO*

Suits, Hearing Before the Senate Committee on the Judiciary, 99th Cong., 1st Sess., 109–11 (1986) (testimony of Assistant Attorney General Stephen Trot).

RICO's use, however, need not be so limited. The legislative history of RICO, § 1964 in particular, indicates that the “only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and making due provision for the rights of innocent parties.” S. Rep. No. 91–617, 91st Cong., 1st Sess. 160 (1969). In fact, the Senate Report includes an extensive and approving discussion of such federal antitrust decisions as those authorizing divestment, *United States v. duPont & Co.*, 366 U.S. 316, 326–27 (1961), and the prohibition of engaging in the future in certain fields of work, *United States v. Grinnell Corp.*, 384 U.S. 563, 579 (1966). *Id.* at 79–83.

Private suits under 18 U.S.C. § 1964(c) “provide a significant supplement to the limited resources available to the Department of Justice” to enforce the law.¹⁷ Like the antitrust laws, RICO creates “a private enforcement mechanism that (1) deters violators, (2) deprives them of their illicit proceeds, and (3) provides ample compensation to the victims. *Blue Shield of Va. v. McCreedy*, 457 U.S. 465, 472 (1982).¹⁸ In fact, RICO and the antitrust statutes are well-integrated.¹⁹ Together, they legally promise a market that is economically free and characterized by integrity and the absence of patterns of violence.

VII. SUMMARY OF ELEMENTS

The Second Circuit aptly summarized the substantive elements under 18 U.S.C. § 1962 of RICO:

- (1) that the defendant (2) through the commission of two or more acts (3) constituting a “pattern” (4) of “racketeering activity” (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an “enterprise” (7) the activities of which affect interstate or foreign commerce.

Moss v. Morgan Stanley, Inc., 719 F.2d 517 (2^d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984). See also *St Paul Mercury Ins. Co. v. Williamson*, 244 F.3d 524, 445 (5th Cir. 2000) (plain English restatement of RICO's elements).

VIII. PERSONS

“Persons” may violate the provisions of § 1962 and sue under § 1964 (c). The term is defined to include individuals and entities capable of holding a legal or beneficial interest in property. 18 U.S.C. § 1961(3). Despite this all-inclusive language, the circuits exclude federal and local governmental agencies from those who may be sued, and the federal, but not foreign, state and local governments from those who may sue for damage relief. See, e.g., *Berger v. Pierce*, 933 F.2d 393, 397 (6th Cir. 1991)

¹⁷Ritter, 442 U.S. at 344. In fact, between 1960 and 1980, of the 22,585 civil and criminal cases brought under the antitrust provision by the government or private parties, 84% were instituted by private plaintiffs. See *United States Dep't of Justice, U.S. Department of Justice Source Book of Criminal Justice Statistics* 431 (1981). Professor (now Chief Judge Seventh Circuit Court of Appeals) Richard Posner also argues on economic grounds forcefully for private enforcement of more than actual damages awards against all forms of deliberate antisocial conduct, particularly where the factor of concealment is present. See Richard A. Posner, *Economic Analysis of Law* 462 (private enforcement), 143, 272 (more than actual damage awards for deliberate conduct) 235 (concealment) (2^d ed. 1977). The number of criminal to civil RICO suits is now running at roughly the same ratio. See *Myths* at 1020 (150 against 1000). Since 1989, the date of the Supreme Court's *H.J. Inc.* “pattern” decision, the number of civil RICO decisions filed has steadily declined. From 1980–1996, the number of civil cases filed in federal courts increased from 168,800 to 272,700 per year. *Statistical Abstract of the United States 1997 at 216 (Table No. 346)*. The total number of civil RICO cases filed, however, decreased from 903 each year to 840 from 1993 to 1997. *Judicial Business of the United States Courts 1997 Table C–2A*.

¹⁸See also *Agency Holding Corp.*, 483 U.S. at 151 (“private attorneys general [for] a serious national problem for which public prosecutorial resources are deemed inadequate”); *Shearson / American Express, Inc. v. McMahon*, 482 U.S. at 421 (“vigorous incentives for plaintiffs to pursue RICO claims”); *Sedima*, 473 U.S. at 493 (“private attorney general provisions. . . designed to fill prosecutorial gaps”) (citing *Reiter*, 442 U.S. at 344)).

¹⁹There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power.” Carl Kaysen & Donald F. Turner, *Antitrust Policy* 17 (1959). RICO focuses on the first two; antitrust focuses on the third. See also *American Column & Lumber Co. v. United States*, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) (“Restraint may be exerted through force or fraud or agreement.”) See generally Judith A. Morse Nore, *Treble Damages Under RICO: Characterization and Computation*, 61 Notre Dame L. Rev. 526, 533–34 (1986) (“(1) encourage private citizens to bring RICO actions, (2) deter future violators, and (3) compensate victims for all accumulative harm. These multiple and convergent purposes make the treble damage provision a powerful mechanism in the effort to vindicate the interests of those victimized by crime.”).

(Federal Insurance Administration not “person”) (“[I]t is self-evident that a federal agency is not subject to state or federal criminal law.”); *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404–05 (9th Cir. 1991) (municipal entity incapable of criminal intent; “market share” not property within mail fraud), *cert. denied*, 502 U.S. 1094 (1992); *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 908–14 (3^d Cir. 1991) (municipality not liable for racketeering activity of its officers or agents); *United States v. Bonnano Organized Crime Family*, 879 F.2d 20, 21–27 (2^d Cir. 1989) (federal government not “person”), but see 18 U.S.C. § 1964(b) (attorney general may sue under “section”); *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1358 (9th Cir. 1988) (en banc) (foreign government is a “person”), *cert. denied*, 490 U.S. 1035 (1989); *Illinois Dep’t of Revenue v. Phillips*, 771 F.2d 312, 314–17 (7th Cir. 1985) (state); *cf. County of Oakland v. City of Detroit*, 866 F.2d 839, 845 (6th Cir. 1989) (county), *cert. denied*, 497 U.S. 1003 (1990). *Fleischhauer v. Feltner*, 879 F.2d 1290, 1299 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990).

IX. INTERSTATE AND FOREIGN COMMERCE

Each section of § 1962 requires either interstate or foreign commerce or an effect on it. *United States v. Robertson*, 514 U.S. 669, 671–72 (1995). *Local enterprises affect commerce if the pattern of racketeering activity affects commerce. See e.g., Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1288–89 (7th Cir. 1983). “[E]ven a minimal effect on interstate commerce” is sufficient. *United States v. Bagnariol*, 665 F.2d 1877, 892 (9th Cir. 1981) (purchase of natural gas from out of supplier), *cert. denied*, 456 U.S. 962 (1982).

X. ELEMENTS OF SECTION 1962(A)

The standards of 18 U.S.C. § 1962(a) embody four essential elements: (1) income derived from a “pattern” of racketeering or the collection of an unlawful debt (2) the use or investment” of the income in the acquisition, establishment, or operation by a defendant (3) of an “enterprise” (4) engaged or affecting interstate commerce. *Pelletier v. Zweifel*, 921 F.2d 1465, 1489–90, 1518–19 (11th Cir. 1991), *cert. denied*, 502 U.S. 855 (1991).

The investment of the illicit funds may be direct or indirect. *Compare A.W. Hemmings v. Barian*, 822 F.2d 688, 692 (7th Cir. 1987) (direct) with *United States v. McNary*, 620 F.2d 621, 628 (7th Cir. 1980) (indirect). The circuits are split on requiring an “investment or use” injury in civil suits under § 1962(a). *See Court Watch: A Circuit-by-Circuit Analysis of the Statute’s Most Litigated Issues*, Civil RICO Report (Special Report June 15, 2001) (“Court Watch”). Other courts also require “acquisition” injury under § 1962(b). *Advocacy Org. for Patients & Providers v. Auto Club Ins. Ass’n*, 176 F.3d 315, 329–31 (6th Cir. 1999), *cert. denied*, 528 U.S. 871 (1999); *Viscon, Inc. v. Nynex Corp.*, 93 F.3d 1055, 1062–63 (2^d Cir. 1996) (cases collected on § 1962(a) and § 1962(b)), *vacated*, 525 U.S. 128 (1998). While the collection of an unlawful debt need not be part of a pattern, it must be in connection with a business; an isolated transaction is not within the statute. *See Wright v. Sheppard*, 919 F.2d 665, 673 (11th Cir. 1990).

XII. EXCURSUS: “PATTERN” AND “ENTERPRISE”

The two basic elements of RICO that give litigants the most trouble are “pattern” and “enterprise.” Each is unique. The Supreme Court clarified the “pattern” element in *H.J. Inc.*, in which the Court developed a fairly precise six-step process that can be used for determining if a “pattern” is present within the meaning of RICO. Two goals must be realized: relationship and continuity (or its threat). 18 U.S.C. § 1961(5); *H.J., Inc.*, 492 U.S. at 237 (“pattern” reflects relation and continuity); *Western Assocs. Ltd. Partnership v. Market Square Assoc.*, 235 F.3d 629, 633–36 (D.C. Cir. 2001) (pattern includes relation and continuity; single scheme to achieve single real estate objective not pattern) (citing *H.J. Inc.*, 492 U.S. at 239)); *Ahmed v. Rosenblatt*, 118 F. 3^d 886, 889 (1st Cir. 1997) (purposes, participants and methods plus continued activity or its threat). Justice Scalia’s call in dissent in *H.J., Inc.* for a reexamination of the constitutionality of RICO’s “pattern” concept resulted in the statute being uniformly upheld in the circuits. *Compare H.J., Inc.*, 492 U.S. at 239 with *Court Watch*; *G. Robert Blakey, Is ‘Pattern’ Void for Vagueness?*, Civil RICO Report at 6 (December 12, 1989) (arguing no).

To see if these two goals are met up to six questions must be asked:

- (1) Are the acts in a series (at least two) related to one another, for example, are they part of a single scheme?
- (2) If not, are they related to an external organizing principle, for example, to the affairs of the enterprise? *H.J., Inc.*, 492 U.S. at 238; *United States*

v. *Elliot*, 571 F.2d 880, 899 (5th Cir. 1978), *cert. denied*, 439 U.S. 953 (1978), and *United States v. Sinito*, 723 F.2d 1250, 1261 (6th Cir. 1983), *cert. denied*, 469 U.S. 817 (1984). See generally, John Robert Blakey, *Could Prosecutors Convict John Gotti in the Fifth Circuit? A Criticism of Heller v. Grammco's Approach to the Relatedness Requirement*, Civil RICO Report at 6 (April 17, 1996) (criticizing the restrictive approach of *Heller Fin. Inc. v. Grammco Computer Sales*, 71 F.3d 518 (5th Cir. 1996), and *Vild v. Visconsi*, 956 F.2d 560 (6th Cir. 1992), *cert. denied*, 506 U.S. 832 (1992)).

If both questions are answered in the negative, relationship is not present, one prong of the two-prong test is not met, and it is not necessary to proceed further. If either question is answered in the affirmative, up to three additional questions must be asked:

- (3) Are the acts in the series open-ended, that is, do the acts have no obvious termination point? 492 U.S. at 241–43;
- (4) If not, did the acts in the closed-ended series go on for a substantial period of time, that is, more than a few weeks or months? *Id.* at 242.

If either question is answered in the affirmative, continuity is present.

If both questions are answered in the negative, up to two additional questions must be asked:

- (5) May a threat of continuity be inferred from the character of the illegal enterprise? *Id.* at 242–43.
- (6) If not, may a threat of continuity be inferred because the acts represent the regular way of doing business of a lawful enterprise? *Id.*

If either question is answered in the affirmative, a threat of continuity is present. See generally *Court Watch*.

As a rule of thumb, a closed-end scheme that does not extend beyond twelve months lacks continuity. *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 (9th Cir. 1992); *Hughes v. Consol-Pennsylvania Coal Co.* 945 F.2d 594, 609–11 (3^d Cir. 1991), *cert. denied*, 504 U.S. 955 (1992). But see *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1528 (9th Cir. 1995) (refusing to adopt a per se rule). Continuity is assessed prospectively, not from hindsight, that is, after the pattern ends. *United States v. Aulicino*, 44 F.3d 1102, 1112 (2^d Cir. 1995), *cert. denied*, 522 U.S. 1138 (1998). A threat of continuity may be shown by establishing that the conduct is a “regular way of doing business.” See, e.g., *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1296–97 (7th Cir. 1992) (extortion to coerce shareholders).

The “pattern” must, of course, be in the affairs of the enterprise under § 1962(c). See, e.g., *United States v. Miller*, 116 F.3d 641, 676–67 (2^d Cir. 1997) (related to activities, even if not in furtherance or if able to commit solely by virtue of position in enterprise), *cert. denied*, 524 U.S. 905 (1998); *United States v. Starrett*, 55 F.3d 1525, 1542 (11th Cir. 1995) (effect upon the common, everyday affairs of the enterprise or that the facilities or services of the enterprises were regularly and repeatedly utilized), *cert. denied*, 517 U.S. 1111 (1996). If not, liability will not obtain. *Palmetto State Medical Ctr. v. Operation Lifeline*, 117 F.3d 142, 149 (4th Cir. 1997) (no evidence conduct in affairs of enterprise).²⁰

The application of the “enterprise” concept to legitimate entities presents few problems. See, e.g., *United States v. Beasley*, 72 F.3d 1518, 1525 (11th Cir. 1996), *cert. denied*, 518 U.S. 1027 (1996); See 18 U.S.C. § 1961 (4) (enterprise definition is an ostensive or a partial denotative definition; it is not connotative; its list of “enterprises” is illustrative, not exhaustive); *United States v. Masters*, 924 F.2d 1362, 1366

²⁰The definition of “pattern” affects the running of the statute of limitations. See. U.S. Department of Justice, *Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors*, 155–61 (1990) (application of 18 U.S.C. § 3282 (five years) to criminal RICO); *Agency Holding Corp.*, 483 U.S. at 156, held that the civil period, borrowed from anti-trust law, is four years. The Court did not decide *when* the four year period began to run or *how* to calculate the damages within the period. The Court granted certiorari in *Grimmett v. Brown*, 75 F.3d 506 (9th Cir. 1996), *cert. granted*, 518 U.S. 1003 (1996), to decide the *when* issue; it then dismissed it, 519 U.S. 233 (1997), and granted certiorari in a new petition. *Klehr v. A.O. Smith Corp.*, 87 F.3d 231 (8th Cir. 1996), *Cert. granted*, 520 U.S. 1154 (1997). Unfortunately, it only decided on the accrual issue that the “last predicate act” rule was inappropriate. 521 U.S. 179 (1997) (due diligence required for tolling through fraudulent concealment; last predicate act rule of *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1126 (3^d Cir. 1988) rejected (other cases collected)). In *Rotella v. Wood*, 120 S. Ct. 1075, 1079–89 (2000), the Court then precluded us of the “injury pattern” rule. Left open was the adoption of an “injury occurrence” or “injury discovery” rule. 120 S. Ct. at 1080 n.2 (injury occurrence rule not focused on by parties; not on it “without more attentive advocacy”). Left open, too, was the situation where an injury occurs, but is not yet part of a pattern. *Id.* at 1084. The best general discussion of the conflicting civil rules in the circuits prior to *Klehr* and *Rotella* is found in *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1463–66 (7th Cir. 1992).

(7th Cir. 1991) (includes a group of individuals, a law firm and two police departments), *cert. denied*, 500 U.S. 919 (1991). See *Helvering v. Morgan's Inc.*, 293 U.S. 121, 125 n.1 (1934) (“means” and “includes” distinguished); *Aetna Casualty Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1557 (1st Cir. 1994) (insurance fraud). See *Now v. Scheidler*, 510 U.S. 249, 259 n.5 (1994) (enterprise includes, of course, lawful entities that may be victimized; “prize,” “instrument,” “victim” and “perpetrator”) (citing *Civil Fraud Action* at 307–25).

Its application to other RICO enterprises called “associations-in-fact,” however, has its difficulties. The Supreme Court attempted to clarify the issue in *Turkette*, in which the Court observed:

An association in fact “is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. . . . The [enterprise] is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.”

Turkette, 452 U.S. at 583 (enterprise not limited to licit entities). See also *United States v. Arthur*, 248 F.3d 11, 19 (1st Cir. 2001) (illegitimate drug ring is an enterprise); *United States v. Phillips*, 239 F.3d 829, 845–46 (7th Cir. 2001) (evidence supports gang as a RICO enterprise).

Prior to *Turkette*—with the exceptions of the First and Eighth Circuits whose approach was rejected by the Supreme Court in *Turkette*—the decisions of the courts of appeals reflected little difficulty finding that associations-in-fact existed. See, e.g., *United States v. Errico*, 635 F.2d 152, 156 (2^d Cir. 1980) (“community of interest and continuing core of personnel”), *cert. denied*, 453 U.S. 911 (1981); *United States v. Elliott*, 571 F.2d 880, 898 (5th Cir. 1978) (diversified criminal enterprise), *cert. denied*, 439 U.S. 953 (1978).

Since *Turkette*, the courts of appeals still reflected difficulty in implementing the approved perspective, but the focus of the difficulties is different. Nonetheless, a few enterprise rules have evolved:

1(1) not only individuals, but also corporations may compose associations-in-fact. See (*United States v. Perholtz*, 842 F.2d 343, 353, 356–59 (D.C. Cir. 1988) (cases collected), *cert. denied*, 488 U.S. 821 (1988));

(2) an association-in-fact is not a conspiracy; it may include the victim. (*Aetna Cas. & Sur. Co. v. P. & G. Auto Body*, 43 F.3d 1546, 1557 (1st Cir. 1994) (not conspiracy); *United States v. Feldman*, 853 F.2d 648, 655–57 (9th Cir. 1988) (not conspiracy), *cert. denied*, 489 U.S. 1030 (1989); *United Energy Owners Comm., Inc. v. United States Energy Mgmt. Sys.*, 837 F.2d 356, 362–64 (9th Cir. 1988) (include victim); see also *Jacobson v. Cooper*, 882 F.2d 717, 720 (2^d Cir. 1989) (similar)); and

(3) while an association-in-fact must have more structure than a mere conspiracy, it need not be much. (*United States v. Korando*, 29 F.3d 1114, 1117–19 (7th Cir. 1994), *cert. denied*, 513 U.S. 993 (1994) (continuity and differentiation of roles provides structure); see generally *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 440–41 (5th Cir. 2000) (association-in-fact requires evidence of an ongoing organization, formal and informal, that functions as a continuing unit over time through a hierarchical or consensual decision-making structure); see also *United States v. Davidson*, 122 F.3d 531, 534–35 (8th Cir. 1997), *cert. denied*, 522 U.S. 1034 (1997) (“small but prolific crime ring” will suffice)).

Under § 1962(c), the “person” and “enterprise” must be separate. *Cedric Kushner Promotions, Ltd.*, 121 S. Ct. at 2090 (must prove a “person” and an “enterprise” that are separate; employees separate from corporation; collecting decision from 12 circuits); *Bessette v. AVCO Fin. Servs., Inc.*, 230 F.3d 439, 448–49 (1st Cir. 2000) (subsidiary not “person” distinct from parent company “enterprise”), *cert. denied*, 121 S. Ct. 2016 (2001); *Begala v. PNC Bank, Ohio, N.A.*, 214 F.3d 776, 781 (6th Cir. 2000) (corporation cannot be both a “person” and an “enterprise”), *cert. denied*, 121 S. Ct. 1082 (2001).²¹

The person-enterprise rule is generally not held to apply to § 1962(a) and § 1962(b). See, e.g., *United Energy Owners Committee, Inc.*, 837 F.2d at 364.

²¹In *United States v. Hartley*, 678 F.2d 961, 988 (11th Cir. 1982) *cert. denied*, 459 U.S. 1170 (1983), overruled by *United States v. Goldin Indus.*, 219 F.3d 1268, 1271 (11th Cir. 2000), the Eleventh Circuit did not adopt the enterprise-person rule. *Hartley* was correctly decided, though *Cedric Kushner Promotions, Ltd.* virtually precludes revisiting the rule. Why the rule should not have been adopted is set out in *Equitable Relief* at n.235; Henry A. LaBrun, Note, *Innocence by Association: Entities and the Person-Enterprise Rule Under RICO*, 63 Notre Dame L. Rev. 179 (1988).

The rule may not be circumvented by pleading respondent superior, aiding and abetting, or conspiracy. *See Cox v. Adm'r United States Steel & Carnegie*, 17 F.3d 1386, 1403–06 (11th Cir. 1994), *modified*, 30 F.3d 1347 (11th Cir. 1994) (*en banc*) (cases collected), *cert. denied*, 513 U.S. 1110 (1995).

Secondary liability is appropriate where the entity is a “person”, but not an enterprise, under § 1962(c). *See, e.g., Davis v. Mut. Life Ins. Co. of N.Y.*, 6 F.3d 367, 379 (6th Cir. 1993) (*Schofield* distinguished), *cert. denied*, 510 U.S. 1193 (1994).

The rule does not apply to associations-in-fact, unless they are composed of only two entities, one of which is the putative defendant, as “sufficient” separation would not then be present. *Crowe v. Henry*, 43 F.3d 198, 206 (4th Cir. 1995). Accordingly, an association-in-fact may not be composed of simply a corporation, its officers, employees and agents. *See e.g., Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 154–56 (5th Cir. 1997) (enterprise and person must be distinct; employees and agents not distinct from corporation, but may be individually named; parent and subsidiary not distinct), *vacated as moot*, 525 U.S. 979 (1998); *United States v. Robinson*, 8 F.3d 398, 406–07 (7th Cir. 1993); Feldman, 853 F.2d at 656–59 (containing an excellent discussion of associations-in-fact composed of entities).

The “enterprise” must be separate from the “pattern of racketeering activity.” *Turkette*, 452 U.S. at 583 (RICO requires “separate elements,” though proof may “coalesce”). The Eighth Circuit initiated a split in the circuit courts when it added gloss to *Turkette* in *United States v. Bledsoe*, 674 F.2d 647, 664–65 (8th Cir. 1982) (association-in-fact requires: (1) common purpose, (2) ongoing organization with members functioning as continuing unit, and (3) an ascertainable structure distinct from that inherent in pattern of racketeering activity) (“the command system of a Mafia family is an example of this type of structure”), *cert. denied*, 459 U.S. 1040 (1982). *Accord Chang v. Chen*, 80 F.3d 1293, 1297–1301 (9th Cir. 1996) (reviewing decisions and adopting structure approach, which must be plead). *See Handeen v. Lemaire*, 112 F.3d 1339, 1351–53 (8th Cir. 1997); *United States v. Kragness*, 830 F.2d 842, 854–60 (8th Cir. 1987); *see State v. Ball*, 268 N.J. Super. 72, 87, 632 A.2d 1222, 1237 (N.J. Super. Ct. App. Div. 1993) (federal and state cases collected; majority rule requiring “structure” rejected under N.J. statute), *aff'd*, 141 N.J. 142, 661 A.2d 251 (1995), *cert. denied*, 516 U.S. 1075 (1996).

Under the *Bledsoe* rule, the easiest way to show separateness is to show that the enterprise is a legal entity or possess functions other than racketeering. *See, e.g., Bennett v. Berg*, 685 F.2d 1053, 1060 n.9 (8th Cir. 1982) (legal entity), *aff'd in part and reversed in part*, 710 F.2d 1361 (8th Cir. 1983) (*en banc*), *cert. denied*, 464 U.S. 1008 (1983); *United States v. Blinder*, 10 F.3d 1468, 1473–75 (9th Cir. 1993) (other activities). It is not, however, necessary, even in those circuits following *Bledsoe*, to show that the association-in-fact engaged in lawful conduct beyond the pattern or even engaged in more than one kind of illegal conduct. *Webster v. Omnitrition Int'l Inc.*, 79 F.3d 776, 786–87 (9th Cir. 1996) (corporation set up to perform only unlawful activities nonetheless enterprise separate from illegal activities), *cert. denied*, 519 U.S. 865 (1996). *Compare United States v. Pelullo*, 964 F.2d 193, 210–12 (3^d Cir. 1992) (organization may be inferred from pattern; need not engage in conduct beyond pattern) (citing *Perholtz*, 842 F.2d at 363), with *United States v. Console*, 13 F.3d 641, 649–52 (3^d Cir. 1993) (mail fraud RICO), *cert. denied*, 511 U.S. 1076 (1994). *See generally, Reflections* at 1646–56.

XII. ELEMENTS OF SECTION 1962(B)

The standards of 18 U.S.C. § 1962(b) embody three essential elements: (1) the acquisition or maintenance through a “pattern” of racketeering activity or the collection of an unlawful debt by a defendant (2) of an interest in or control of an “enterprise” (3) engaged in or affecting interstate commerce. *Pelletier*, 921 F.2d at 1490, 1518–19. The circuits are split on requiring an “acquisition or maintenance” injury in civil suits under 18 U.S.C. § 1962(b). *See Court Watch*.

XIII. ELEMENTS OF SECTION 1962(C)

The standards of 18 U.S.C. § 1962(c) embody four essential elements: (1) employment by or association of a defendant with (2) an “enterprise” (3) engaged in or affecting interstate commerce (4) the affairs of which are “conducted by or participated in” by a defendant through a “pattern” of racketeering activity or the collection of an unlawful debt. *Sedima*, 473 U.S. at 496 (“A violation of § 1962(c). . . requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.”).

In *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993), the Supreme Court resolved a split in the circuits and held that under § 1962(c) “conduct or participate” requires “some part in directing those affairs” through “operation or management.” 507 U.S.

at 177–86. The *Reves* test is used to include and exclude defendants. Compare *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 598 (7th Cir. 2001) (person charged with violating RICO must have participated in the operation or management of the enterprise and must have asserted some control over the enterprise); *United States v. Viola*, 35 F.3d 37, 43 (2^d Cir. 1994) (unwitting janitor and handyman excluded), *cert. denied*, 513 U.S. 1198 (1995), with *Aetna Casualty Sur. Co. v. P. & B. Autobody*, 43 F.3d 1546, 1559 (1st Cir. 1994) (causing insurance payments to be made included in “operation”). See generally G. Robert Blakey and Marc Haefner, *Did Reves Give Professionals A Safe-Harbor Under RICO?*, Civil RICO Report (August 11, 1993) (arguing that *Reves* did not alter aiding and abetting or conspiracy liability).

That a particular defendant does not fall within the class that can violate a substantive offense, however, is no defense to aiding and abetting if the person he aids or abets falls within the class. *Coffin v. United States*, 156 U.S. 432, 447 (1895); *In Re Nofziger*, 956 F.2d 287, 290 (D.C. Cir. 1992). RICO jurisprudence reflects this general principle. See *United States v. Rastelli*, 870 F.2d 822, 831–32 (2^d Cir. 1989), *cert. denied*, 493 U.S. 982 (1984); *United States v. Margiotta*, 688 F.2d 108, 131–33 (2^d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983).

Defense attorneys are also seeking under *Reves* to avoid the impact of § 1962(d) (conspiracy); they are having little success. See, e.g., *Smith v. Berg*, 247 F.3d 532, 536–37 (3^d Cir. 2001) (no need to actually operate corrupt enterprise, so long as defendant facilitates scheme, including RICO enterprise) (*Reves* does not apply to § 1962(d) in light of *Salinas v. United States*, 522 U.S. 52 (1997)), *cert. denied*, 526 U.S. 1031 (1999); *United States v. Starrett*, 55 F.3d 1525, 1542 (11th Cir. 1995) (*Reves* applies to criminal RICO, but operation or management rule does not apply to conspiracy under § 1962(d)), *cert. denied*, 517 U.S. 1111 (1996); *Viola*, 35 F.3d at 43 (need not be within prohibited class to conspire; knowledge required, but not shown); *United States v. Quintanilla*, 2 F.3d 1469, 1484–85 (7th Cir. 1993) (*Reves* “did not address the principle of conspiracy law undergirding § 1962(d)”; *United States v. Norton*, 867 F.2d 1354, 1358–59 (11th Cir. 1989) (*pre-Reves* RICO conspiracy conviction upheld, although the defendant was not an officer of a union under 18 U.S.C. § 1954, the predicate offense), *cert. denied*, 491 U.S. 907 (1989). See generally *Reflections* (scope of *Reves*).

XIV. ELEMENTS OF SECTION 1962(D)

Section 1962(d) makes it unlawful for any person to conspire to Violate subsections (a), (b) or (c). See *United States v. Gonzalez*, 921 F.2d 1530, 1539–40 (11th Cir. 1991) (“That the many defendants and predicate crimes were different, or even unrelated, . . . [is] irrelevant, so long as it . . . [can] be reasonably inferred that each crime was intended to further the enterprise.”) personal acts not required unless single objective conspiracy (citations omitted), *cert. denied*, 502 U.S. 827 (1991); *United States v. Friedman*, 854 F.2d 535, 562 (2^d Cir. 1988) (A RICO conspiracy is “by definition broader than an ordinary conspiracy to commit a discrete crime. . .”), *cert. denied*, 490 U.S. 1004 (1989); *United States v. Valera*, 845 F.2d 923, 930 (11th Cir. 1988) (“Under RICO Act. . . a series of agreement, which, pre-RICO, would constitute multiple conspiracies, can form, under RICO, a single ‘enterprise’ conspiracy”), *cert. denied*, 490 U.S. 1046 (1989); *United States v. Rosenthal*, 793 F.2d 1214, 1228 (11th Cir. 1986) (“Congress intended to authorize the single prosecution of a multifaceted, diversified conspiracy. . . . The RICO statutes permit the joinder into a single RICO count or counts several diverse predicate acts. . . .”), *modified on other grounds*, 801 F.2d 378 (11th Cir. 1986) (en banc), *cert. denied*, 480 U.S. 919 (1987); Nancy A. Ickler, Note, *Conspiracy To Violate RICO: Expanding Traditional Conspiracy Law*, 58 Notre Dame L. Rev. 587 (1983).²² The traditional law of conspiracy is followed. *United States v. Neapolitan*, 791 F.2d 489, 494–97 (7th Cir. 1985)

²²The circuits were split on whether or not injury must be by an overt act or a predicate act in civil suits under § 1962(d), but *Beck v. Prupis*, 120 S. Ct. 1608, 1616 (2000), resolved the split; it held that an overt act, not otherwise wrongful under RICO, is not sufficient to give rise to a claim for relief. The Court left open requiring an investment injury, not only in § 1962(a), but also in a conspiracy to violate § 1962(a). *Id.* at 1616 nn. 9–10. See G. Robert Blakey, *Foreword RICO Symposium*, 64 St. John's L. Rev. 701, 721 n. 111 (1990) (authorities collected). The federal courts of appeal were also split on requiring a “personal” act. See, e.g., *United States v. Vaccaro*, 115 F.3d 1211, 1211, (5th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998). The issue is analyzed in *Reflections* at 1453–55, which reflects a view that prevailed in *Salinas v. United States*, 522 U.S. 52, 60 (1997) (“1997” (“to conspire” reflects usual rules; agree that they be committed, not to commit personally).

(“a conspiracy to violate RICO should not require anything beyond that required for a conspiracy to violate any other statute”), *cert. denied*, 479 U.S. 939 (1986).

XV. Application Of RICO To The Tobacco Industry

On the application of RICO to a suit brought by Blue Cross against the tobacco industry, United States District Judge Jack Weinstein aptly concluded:

Application of RICO to the facts alleged in the complaint is entirely consonant with the statute's stated aims and purpose. The alleged injury to the Blues' business and property has undermined the financial health and stability of a critical industry in this nation's economy. This country is currently said to be facing a crisis of health care finance. * * * If the allegations are true, the well orchestrated racketeering on the part of the defendants has played a major role in precipitating this crisis and inflating this nation's health care costs to their current levels. The Blues provide medical care and coverage to almost 70 million Americans.

Just as the legislative history of RICO forewarned, the defendants' racketeering has allegedly “drained billions from the American economy.” It is difficult to imagine a sector in the economy, a portion of the nation's resources, or an aspect of its economic life, which has not been severely affected by the defendants' alleged racketeering. For example, the nation's employers have found it increasingly expensive and difficult to fund health care coverage for their own employees * * * In order to stay competitive, businesses have been forced to devote larger and larger portions of their resources to providing health care or have reduced benefits to their workers, forcing taxpayers, the Blues, and premium payers to subsidize the medical treatment of those who can no longer afford insurance. Research or treatment which would have been supported by resources of the health care industry have, it is contended, been neglected as a result of the defendants' alleged pattern of racketeering.

In sum, the allegations in the complaint describe precisely the type of far-reaching, economic dislocation which RICO was intended to combat. The Blues represent the kind of business which RICO is designed to protect from racketeering. It may be reasonable to conclude that Congress assumed plaintiffs with personal injury claims would avail themselves of existing remedies under state law. It is not reasonable to believe that the systemic, economic injuries allegedly sustained by the plaintiffs in the instant case were beyond the designed scope of RICO when Congress explicitly provided that “any person injured in his business or property” shall have a cause of action under the statute.

Any doubts concerning the applicability of the statute should be resolved in favor of the vigorous enforcement of RICO's remedies. Congress specifically instructed the courts to interpret the statute broadly. It provides, “the provisions of this title shall be liberally construed to effectuate its remedial purposes.” * * * In *Sedima, S.P.R.L. v. Imrex Co.*, . . . the Supreme Court firmly rejected the attempt by the court of appeals for the Second Circuit to narrow the reach of RICO's civil provisions, pointing out, “RICO is to be read broadly. . . . This is the lesson not only of Congress' self-consciously expansive language and overall approach but also of its express admonition. . . .” (citation omitted). Enforcement of RICO to compensate for economic and business injuries such as those claimed by plaintiffs is entirely consistent with the statute's meaning and purpose.²³

(A) THE PATTERN OF RACKETEERING ACTIVITY

Unquestionably, the industry's conduct since the 1950s constitutes a “pattern.” *H.J. Inc.*, 492 U.S. at 238–43 (relationship and continuity).

That conduct also constitutes a “scheme to defraud” under 18 U.S.C. §§ 1341 (mail fraud), 1343 (wire fraud).

The focus of the concept of “scheme to defraud” is on “dishonest methods or schemes and [it] usually signifies] the deprivation of something of value by trick, deceit, chicanery or overreaching.” *Carpenter v. United States*, 484 U.S. 19, 27 (1987). The Fifth Circuit originated the *Gregory* standard, the broadest understanding of “scheme to defraud” in the circuits: *Gregory v. United States*, 253 F.2d 104, 109 (5th Cir. 1958) (“moral uprightness, or fundamental honesty, fair play and right dealing in the general and business life of members of society”). It is properly followed in most circuits. *Reflections* at 1586.

Proof of “intent to defraud” is usually accomplished by showing the conduct of the defendant from which his state of mind is inferred. *See generally, Reflections* at 1591–94. Here that conduct includes:

²³ *Blue Cross and Blue Shield of New Jersey*, 36 F.Supp. 2d 560, 572 (D.N.Y. 1999). Judge Weinstein's opinion is not free of criticism. *See e.g., Int'l Bhol. of Teamsters Local, 734 Health & Welfare Fund. V. Philip Morris Inc.* 196 F. 4d 818, 827 (7th Cir. (1999) (Easterbrook, J.)

- (1) the intentional sale of a defective product that is both addictive and lethal;
- (2) the targeting and sale of the product to children in *Violation of the law and ethical standards adopted by the industry itself*;
- (3) the failure to market an available safer product;
- (4) the suppression of a less hazardous product;
- (5) the covert manipulation of an addictive drug (nicotine);
- (6) the unethical generation of a false scientific “controversy” surrounding the health effects of tobacco;
- (7) the creation of bogus doubts about the addictive quality of nicotine and its dangers to the life and health of those who use it;
- (8) the suppression of unfavorable “useful” data on their product; the public discrediting of “favorable” useful data on their product;
- (9) false statements to the public and to governmental bodies’ concealing relevant information from public and governmental bodies that had requested the information and had a right to obtain it from the industry; and
- (10) the illegal and unethical abuse of the attorney client privilege.²⁴

(B). DEFENSES

The industry’s record of fighting smoker litigation is nothing short of extraordinary.

Until the state attorneys general started to bring their litigation, a pack of cigarettes could hardly be purchased with what the industry had paid out in damages.

That success is attributable in part to rhetorical fallacies. Judge Jerome Frank once observed: “It would be time-saving if [courts] had a descriptive catalogue of recurrent types of fallacies encountered in arguments addressed to [them].” *United Shipyards v. Hoey*, 131 F.2d 525, 526 (2nd Cir. 1942), *cert. denied*, 318 U.S. 791 (1943). The field of public debate is no different. One source of that success is the “mini-skirt” fallacy, which focuses litigation against the industry on the conduct of the “victim” and away from the conduct of the industry. *See generally, Note, Plaintiff’s Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 Harv. L. Rev. 809 (1986).

Another source of that success is the “twinkie” fallacy. You are going after tobacco today. Will you be going after sugar tomorrow? Or alcohol, fat, caffeine, lead. . . or another noxious substance? Jeremy Bentham, *The Handbook of Political Fallacies* 93–99, 136–38, (Harper Torchbooks 1962) variously called this fallacy the “Hobgoblin Argument” or “Fallacy of Artful Diversion.”

Bentham observed:

“Here it comes!” exclaims the barbarous or unthinking servant in the hearing of the a frightened child, when, to rid herself of the burden of attendance, such servant does not scruple to employ an instrument of terror. . . .

Or:

The Device Here in Question may be explained by the following directions or recipe for its manufacture and application: When a measure is proposed which on any account whatever it suits your interest or your humor to oppose at the same time that, because of its undeniable utility, you find it inadvisable to condemn directly, hold up some other measure which will present itself to the minds of your hearers. . . .

As a product openly sold to consumers, tobacco is, in fact, unique, no matter how the industry might want to divert our attention with a supposed parade of horrors. When the case that is made today against tobacco can be made against another substance, *and its illicit marketing*, if ever, it will be time enough then to consider those other products and ways to remedy their abuse.

Our attention should be focused today on tobacco.

It is difficult enough to get one thing at a time done.

Fortunately, Government litigation outflanks those defenses. We may expect that, though, that the industry will make every effort at trial and on appeal—and in the court of public opinion—to assert against the Government any defense that it can imagine.

Those efforts should fail.

²⁴ Charts illustrating the application of the “scheme to defraud” theory that is appropriately alleged against the tobacco industry are attached to this statement.

Only a few defenses can be plausibly asserted affirmatively against the Government in civil RICO. None should succeed.²⁵

(I) TIME BARS

Traditionally, statutes of limitations or laches do not bar the Government from seeking equity relief. *United States v. Beebe*, 127 U.S. 338, 344 (1888) (cited with approval in S. Rep. No. 91-452, 91st Cong., 1st Sess. at 160 (1969)). *Accord Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 125 (1919) (citing *United States v. Kirkpatrick*, 22 U.S. (9 Wheat) 720, 735 (1824) (Story, J.)).

Similarly, the failure to enforce a statute does not make it unenforceable. *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100, 113-143 (1953) (civil rights); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 549, 623-24 (1953) (antitrust); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225-27 (1940) (antitrust).

(II) CONDUCT OF THE VICTIM

The common law knew two possible defenses of “unclean hands.” *Criminally*, it was known as *particeps criminis*. It was not recognized as a defense to a crime. *See, e.g., State v. Wellenberger*, 95 P.2d 709, 710-20 (Ore. 1939) (leading decision; obtaining money by false pretenses; other decisions reviewed). Civilly, it was known as *in pari delicto*. JOSEPH STORY, *Equity Jurisprudence* 304-05 (13th ed. 1886) (“equal fault”).

Common law defenses do not, however, generally limit statutory provisions enacted in the public interest. *See, e.g., Perma Life Muffler, Inc. v. Int’l Parts Corp.*, 392 U.S. 134, 138 (1968) (securities; private enforcement); *see also Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 214 (1951) (antitrust) (“unclean hands”), *but see Pinter v. Dahl*, 486 U.S. 622, 634 (1988) (equal involvement defense limit on private securities enforcement); *Eichler v. Berner*, 472 U.S. 299, 306-19 (1984) (same).

Similarly, consent of the victim, unless it negates an element of the offense (*e.g., rape*), is not a defense to a crime, nor is contributory negligence nor condonation. *See, e.g., Martin v. Commonwealth*, 184 Va. 1009, 37 S.E. 2d 43 (1946) (leading decision; victim hearing of defendants’ homicidal intentions gave perpetrator gun and ammunition; no defense); *Levin v. United States*, 119 U.S. App. D.C. 156, 338 F.2d 265 (1964) (larceny by trick established by inducing victim to part with embezzled funds; no defense); *State v. Moore*, 129 Iowa 514, 106 N.W. 16 (1906) (leading decision; contributory negligence not defense to crimes); *State v. Craig*, 124 Kan. 340, 259 P.802 (1927) (mother forgave son’s burning barn; no defense to arson, even though *beforehand* would have negated liability).

Since RICO civil liability is premised on the “violation” of its *criminal* provisions, these general principles of *criminal* responsibility ought to negate any “victim defenses” by the tobacco industry in the civil context as well.²⁶

(C) REMEDIES: DISGORGEMENT

Disgorgement is a familiar equitable remedy. “[I]t is simple equity that a wrongdoer should disgorge his fraudulent enrichment.” *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965). *See also FTC v. Gem Merchandising*

²⁵ The industry often raises another fallacious defense, but seldom in public debate: it is the “Grim Reaper” Fallacy. I will not dignify it by putting it in the text. We kill a lot of people, it goes, but when you count our taxes or the money you save by not paying pensions, etc., we save you money! *See, e.g.,* cnfr.cnn.com/2.16/companies/czech-morris/index.htm (reporting July 10, 2001 a Philip Morris study given to the Czech government claiming that while healthcare costs were substantial, the Government had a net gain of \$147 million, mainly in tax revenue, but also \$24 to \$30 million in health care, pension and public housing, due to the early death of smokers, a “positive” benefit of smoking). Omitted from the study is the “value” of the pain and suffering of the smokers and their families, as the government does not “pay” it. Nor does it include the “value” of life lost by early death. Beware of the hired gun economist, like lawyers, they will argue whatever their master demands!

²⁶ *See generally Sedima*, 473 U.S. at 489, 492 (language read same in civil and criminal decisions); *H.J. Inc.*, 492 U.S. at 236 (same), *cf. United States Ex. Rel. Marcus et. al. v. Hess*, 317 U.S. 537, 542 (1943) (False Claims Act) (Black, J.) (“[W]e cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is involved by the informer”); *Northern Sec. Co. v. United States*, 193 U.S. 197, 401 (1904) (antitrust) (Holmes, J., dissenting) (“The words cannot be read one way in a suit which is to end in fine and imprisonment and another way in one which seeks an injunction”); *Wayne LaFave et. al., Criminal Law* §5.11 at 477-483 (2nd ed. 1986).

Corp., 87 F.3d 466, 469 (11th Cir. 1996) (“Among the equitable powers of a court is the power to grant restitution and disgorgement.”); *SEC v. AMX*, 7 F.3d 71, 76 n.8 (5th Cir. 1993) (“a disgorgement order is considered to be in the form of a continuing injunction in the public interest”); *Sec. Exch. Comm’n v. Huffman*, 996 F.2d 800, 803 (5th Cir. 1993) (“disgorgement is more like a continuing injunction in the public interest than a debt”); *Sec. Exch. Comm’n v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978) (purpose of disgorgement is to “deprive the wrongdoer of his ill-gotten gains and deter[] violations of the law”); *United States v. Furllett*, 781 F. Supp. 536, 544 n.5 (N.D. Ill. 1991) (“disgorgement is a remedial rather than punitive measure”).

In *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), a landmark decision, the Supreme Court confirmed that equitable jurisdiction was present to disgorge rents collected from Minneapolis tenants in violation of federal price controls. *Id.* at 396. The statute provided for “a permanent or temporary injunction, restraining order, or other order,” but it did not mention restitution of profits or disgorgement. *Id.* at 397. Nevertheless, the Court concluded that it was “readily apparent” that once a trial court’s equitable jurisdiction was invoked, “a decree compelling one to disgorge profits, rents or property acquired in violation” of the statute was proper. *Id.* at 398–99 (emphasis added). The Court explained:

Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. Power is thereby resident in the District court, in exercising this jurisdiction, “to do equity and to mold each decree to the necessities of the particular case.” . . . Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Id. at 398 (emphasis added) (citations omitted).

A possible limit on the extent of disgorgement is the Second Circuit’s sadly mistaken and misguided decision in *United States v. Carson*, 52 F.3d 1173 (2^d Cir. 1995), *cert. denied*, 517 U.S. 1210 (1996), which reversed a RICO disgorgement order requiring a former union official to return \$76,000 in ill-gotten gains. Carson accepted kickbacks from 1972 to 1988 and then retired. The Second Circuit confirmed that, “[a]s a general rule, disgorgement is among the equitable powers available to the district court by virtue of 18 U.S.C. § 1964.” *Id.* at 1181. Disgorgement “serve[s] the goal of foreclosing future violations.” *Id.* at 1182. The Court, however, held that the test for determining whether disgorgements are permissible is “whether the disgorgements. . . are designed to ‘prevent and restrain’ future conduct”; “disgorgement of gains ill-gotten long ago” could not be justified. *Id.*

Categorical disgorgement of all ill-gotten gains may not be justified simply on the ground that whatever hurts a civil RICO violator necessarily serves to “prevent and restrain” future RICO violations. If this were adequate justification, the phrase “prevent and restrain” would read “prevent, restrain and discourage”. . . .

Id.

The Court suggested that disgorgement even of “gains ill-gotten long in the past” would be permissible if “there is a finding that the gains are being used to find or promote the illegal conduct, or constitute capital available for that purpose.” *Id.* “The disgorgement of gains ill-gotten relatively recently is more easily justifiable on the basis of the same analysis.” *Id.* See also *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1475 (2^d Cir. 1996) (“a divestiture order under RICO must be designed to prevent future conduct rather than to remedy past wrongdoing”).

Even if correctly decided, *which it is not*, *Carson* is distinguishable here.²⁷ *Carson* involved a retiree who was not in a position to commit any more RICO predicate offenses. In the tobacco context, however, the predicate offenses and the RICO enterprise are still ongoing. Recently earned tobacco profits that are poured back into industry marketing efforts are used to fund additional acts of mail and wire fraud as part of its “schemes to defraud.” In fact, despite a national agreement not to target children, the industry continues its reprehensible practice. See, Alex Kuczynski, *Tobacco Companies Accused of Still Aiming At Youths*, *N.Y. Times*, Aug. 15, 2001, col. 2., p.1.

A substantial portion of those sums would, even under *Carson*, be subject to disgorgement, if they are being used to fund an ongoing “scheme to defraud.” Not all tobacco profits are, of course, used to fund wrongdoing: many are paid to shareholders and others are used for legitimate corporate purposes. Nonetheless, a sig-

²⁷ *Carson* is criticized and rejected as wrongly decided in *Reflections* at 1627–37.

nificant amount of disgorgement should be available. The precise amount would depend on the companies' financial statements and expert accounting testimony. But the sum would likely prove to be large.

Carson, moreover, is poorly reasoned; and it is, in fact, wrongly decided. Disgorgement is a well-settled remedy of traditional equitable powers. The legislative history of RICO indicates that its authors intended to grant courts *at least as much* authority as they possessed under the antitrust statutes. *See, e.g.*, 115 Cong. Rec. 9567 (1969) (statement of Sen. McClellan) ("Nor do I mean to limit the remedies available to those which have already been established."); *Id.* at 69993–94 (statement of Sen. Hruska) ("The bill is innovative. . . . Hopefully, experts on organized crime will be able to conceive of additional applications of the law. The potential is great.").

While § 1964(a) contains the phrase "prevent and restrain," the legislative history indicates that this language was not intended to confine the courts to purely forward-looking remedies. The list is "illustrative, not exhaustive." S. Rep. No. 91–617 at 160 ("the list is not exhaustive").

Tobacco profits are, like illicit drug profits, subject to forfeiture criminally and disgorgement civilly.

That the product may be "legal" under certain circumstances is no defense when it is, in fact, marketed illegally. Disgorgement is ordered, for example, in cases involving the sales of securities, *United States v. DuPont & Co.*; *SEC v. First Jersey Secs., Inc.*, 101 F.3d 1450, 1474–75 (2^d Cir. 1996), security alarm services, *United States v. Grinnell Corp.*, sanitation services, *United States v. Private Sanitation Industry Ass'n*, 44 F.3d 1082, 1084 (2^d Cir. 1995), and union activities, as noted above.

The Government also sometimes seeks equitable relief in civil RICO actions involving "legitimate" business activities. For example, in *United States v. Ianniello*, 824 F.2d 203, 206–07 (2^d Cir. 1987), the Second Circuit affirmed a district court order granting an application by the Government for the appointment of a receiver pendente lite to run a restaurant; in *United States v. Local 6A, Cement and Concrete Workers*, 663 F. Supp. 192 (S.D. N.Y. 1986), the Government brought an action under 18 U.S.C. § 1964 requesting the appointment of trustees to conduct the business of Local 6A. In *United States v. Local 359*, 87 Civ. 7351 (S.D.N.Y., filed Oct. 15, 1987), the Government sought to seize control of the Fulton Fish Market in lower Manhattan—in effect requesting that an entire commercial center be placed under court supervision. Thereafter, pursuant to default and consent judgments entered against the Genovese crime family and individuals named as defendants in the lawsuit, an administrator for the Fulton Fish Market was appointed by the district court to ensure compliance with the judgments, including prohibitions against the defendants' having dealings with Local 359 or with the Fish Market. The District Court rejected the Government's efforts to take control of Local 359 itself, but this aspect of the District Court's judgment was, in fact, later vacated by the Second Circuit. *United States v. Local 359*, 705 F. Supp. 984 (S.D.N.Y. 1989), *vacated in part*, 889 F.2d 1232, 1235 (2^d Cir. 1989).

No legal obstacle stands in the way of the success of the Government's case against the industry, least of all the successful state suits.²⁸

CONCLUSION

While criminal and civil RICO is controversial, the statute's two track system of public and private enforcement is operating today largely as it was written. Its impact on organized crime, for example, is unparalleled in the history of criminal law enforcement. *See President's Commission on Organized Crime, Report to the President and the Attorney General—Impact: Organized Crime Today*, at 133–34 (1986) (concluding that RICO is one of the most powerful and effective weapons in existence for fighting organized crime); Selwyn Raab, *A Battered And Ailing Mafia Is Losing Its Grip On America*, N.Y. Times, Oct. 22, 1990, p. A12, Col. 1.

At one time, legitimate businesses shunned the civil provision of the statute, feeling that to use it would legitimate a litigation technique that in the early days of its implementation was widely felt to be illegitimate. That day is no more. *See, e.g.*, *Saul Hansell, Bankers Trust Settles Suite With P. & G.*, N.Y. Times, May 10, 1996, P.1., Col. 5 (reporting the settlement of a civil RICO suit between two major corporations over an investment fraud).

²⁸The Government seeks to require the industry itself to rectify its own wrongs by conducting anti-smoking campaigns. 116 F. Supp. at 147. Such an advertising campaign would be welcome in light of the failure of the states to use their tobacco funds for health purposes. Stephanie Simon, *Little of Tobacco Money Goes to Kicking Habit*, Los Angeles Times, Aug. 26, 2001, p.1., col. 1.

The Government is now properly using RICO, not only criminally, but civilly. In short, RICO's use by the Government in its civil suit against an unreformed industry, which addicts children with a drug that horribly kills them as adults, is wholly proper, and it is manifestly necessary to bring an outlaw industry to book under the law.

Senator DURBIN. Thank you, Professor Blakey.
Mr. Adelman?

**STATEMENT OF DAVID ADELMAN, EXECUTIVE DIRECTOR,
MORGAN STANLEY, NEW YORK, NEW YORK**

Mr. ADELMAN. Chairman Durbin, Senator Hatch, it is a pleasure to be before you once again and to share with you my assessment of the Department of Justice's lawsuit. To put my comments into context, I am an executive director at Morgan Stanley, where I have been the firm's senior U.S. tobacco industry analyst for the last 10-plus years, and my primary function is to provide insight to institutional and retail investors into the risks facing the U.S. tobacco manufacturers, and I constantly strive to provide an objective, realistic assessment. I am not an advocate of the industry. I am not a critic of the industry. And it is within that context that I would like you to evaluate my comments.

There is no question that the U.S. tobacco manufacturers face several serious legal challenges, but I do not consider the Department of Justice's lawsuit to be among them, and I believe that the lawsuit will either ultimately be dismissed or resolved at very low or minimal cost to the manufacturers. And I base that view primarily on three factors:

First, all of the health care cost recovery claims have been dismissed not once but twice by Judge Kessler. And if you go back to the Department of Justice's original commentary when this case was announced, that was a fundamental premise of the lawsuit, and the DOJ emphasized the fact that they felt that those claims, as well as the RICO claims, had strong legal basis. That has subsequently, at least from Judge Kessler's view, proven to be inaccurate.

Also, in assessing her dismissal of all health care counts, I think it is important to recognize that many outsiders consider her to be particularly sympathetic, given her leanings, towards the Federal Government's claim. And she also recognized that the Federal Government has a far narrower cause of action than the States who were ultimately successful in their lawsuit. So point one is that all health care cost recovery claims have been dismissed. This is a much narrower case than it once was, and as a result, the potential financial risks have been substantially reduced.

The second key point is that, in my view, the RICO counts face very substantial legal and factual challenges, and I will only raise three of them with you.

First of all, it will be the burden of the Government to establish that the tobacco manufacturers are engaged in ongoing wrongdoing because the entire premise of the statute is to prevent and restrain. You can't look backwards. You need to look forward with RICO. And what is interesting about the Government's allegation is that they plead essentially no post-1995 wrongdoing by the tobacco manufacturers. They don't take on board the substantial restrictions under the Master Settlement Agreement that the industry

currently operates under. Nor do they take into account the consent decrees in which they operate. And as a result of that, I think it is going to be difficult to establish that this industry is engaged as an ongoing criminal enterprise.

Secondly, essentially all of the injunctive relief that the Government is requesting, there are analogous restrictions that they currently operate under, under the Master Settlement Agreement, whether it deals with false misrepresentations about the risks associated with smoking or targeting minors, and General Blumenthal and all the other State Attorneys General are certainly fully authorized to enforce those consent decrees, as he is. But, again, I think that that is going to provide a significant hurdle to the Government.

And then, thirdly, in terms of the specific issue of disgorgement of ill-gotten gains in the past, which, without question, is the bulk of the financial threat to the manufacturers, I think it is important to recognize that the statute certainly doesn't say disgorgement is available. The D.C. Circuit, where this case is pending, has never authorized a claim of disgorgement. The Second Circuit, which has authorized disgorgement, financial disgorgement in a claim, has said that you can't go far back in time. It cannot be punitive in nature, but it can only be put into place to impact future ongoing illegal activity. Again, it gets back to the first point. You have to establish that there is ongoing illegal activity. And I also think it will be difficult to establish that the industry's prior gains were ill-gotten, which is certainly a fundamental threshold that will have to be crossed because, as you are well aware, there has been a warning label on cigarettes since 1966, and since 1964 the Surgeon General has been publishing biannual reports on the risks associated with smoking.

Finally, I think it is important to recognize that since this case was filed, the U.S. Court of Appeals for the D.C. Circuit dismissed unanimously two groups of novel tobacco reimbursement claims brought by foreign governments and brought by private third-party payers. Both of those claims included RICO counts, different than the RICO count that the Federal Government is pursuing but, nevertheless, including RICO counts. And that increases my confidence that the D.C. Circuit is not going to twist existing precedent to target what is currently an unpopular industry.

So for those three key reasons—the fact that all of the health care cost recovery claims have been dismissed, the fact that the RICO claims I think objectively face serious and substantial legal and factual hurdles, and the fact that the appellate jurisdiction in which this case relies has not shown itself to be particularly flexible in interpreting existing statutes and legal principles—I don't view the Department of Justice's lawsuit as representing a substantial risk facing the U.S. tobacco manufacturers.

Thank you, and I would be more than happy to answer any questions you may have.

[The prepared statement of Mr. Adelman follows:]

STATEMENT OF DAVID ADELMAN, EXECUTIVE DIRECTOR, MORGAN STANLEY, US
TOBACCO INDUSTRY ANALYST

Chairman Leahy, Senator Hatch, and members of the Committee, it is my pleasure to provide you with my assessment of the Department of Justice's (DOJ) lawsuit

currently pending against the leading US cigarette manufacturers. I am an Executive Director at Morgan Stanley, where I have been the Firm's senior US tobacco industry equity analyst for more than ten years. I am neither an advocate nor an opponent of the tobacco industry; rather, I endeavor to provide our Firm's retail and institutional clients with an accurate and objective assessment of the various issues facing the industry. It is in that spirit and context that I am providing to you my assessment of the DOJ's tobacco lawsuit this afternoon. My key conclusion is that while the US tobacco industry faces many legal challenges, I do not believe that the DOJ's tobacco claim represents a significant legal threat to the industry. I believe that the lawsuit will ultimately be dismissed or otherwise resolved at little financial cost to the Defendants. My assessment is primarily based on five factors:

First, on two separate occasions lower court Judge Gladys Kessler has dismissed all of the DOJ's claims for tobacco-related health care cost reimbursement. Recall that the primary original rationale for the DOJ's tobacco lawsuit was to seek the recovery of tobacco-related health care costs. Following the rejection of all claims based on the Medical Care Recovery Act (MCRA) and the Medicare Secondary Payers (MSP) provisions, only the RICO components of the Government's tobacco claim remain. As a result, the potential financial threat of the lawsuit has already been significantly reduced.

Second, I believe that the remaining RICO counts represent novel legal claims and face significant legal and factual challenges. In particular, the DOJ will be required to establish that prior industry profits were "ill gotten;" that future industry wrongdoing is likely despite the extensive restrictions placed on industry conduct as a result of the Master Settlement Agreement (MSA); and that disgorgement is an allowable and appropriate remedy under the equitable provisions of RICO.

Third, since the DOJ's tobacco lawsuit was originally filed, the US Court of Appeals for the DC Circuit has unanimously dismissed two separate groups of tobacco health care cost recovery claims. Importantly, Judge Kessler had initially allowed the RICO claims in one of these groups of lawsuits to proceed to trial. The US Court of Appeals for the DC Circuit's ruling in those cases, in my opinion, indicates an unwillingness to alter existing precedent to punish a currently unpopular defendant. As long as existing law is applied fairly to the remaining RICO claims, we believe that the DOJ's tobacco lawsuit will ultimately be dismissed or otherwise resolved at little financial cost to the Defendants.

Fourth, Judge Kessler's earlier rulings, in our opinion, provide little ground for DOJ-optimism regarding the ultimate outcome of the lawsuit. As outlined above, Judge Kessler has twice rejected much of the lawsuit. Equally important, given the fact-based nature of the RICO claims, while it is not surprising and we anticipated that Judge Kessler did not dismiss the DOJ's RICO claims in response to the industry's Motion to Dismiss, in our opinion, she left little ground for DOJ-optimism regarding her ultimate evaluation of the RICO counts. In particular, she indicated that "The Government has stated a claim for injunctive relief; whether the Government can prove it remains to be seen." For example, the government will probably have to prove that the industry is currently in violation of the MSA and that it is currently engaged in an ongoing criminal Enterprise.

Finally, we believe that it is important to recognize that many of the advocates of the DOJ's remaining tobacco RICO claims were earlier optimistic regarding the prospects for other ultimately unsuccessful legal attacks against the US tobacco industry. These included the FDA's effort to claim tobacco regulatory authority, the initial health care cost recovery claims in the DOJ's tobacco lawsuit, and the RICO counts in private third-party payer tobacco health care cost reimbursement actions.

Below, I review some of these points in greater detail.

First, lower court Judge Gladys Kessler has TWICE dismissed ALL of the DOJ's claims for tobacco-related health care cost recovery. In reaching these decisions, Judge Kessler indicated that the Federal Government lacks any common law right to seek health care cost reimbursement, lacks any statutory right to seek cost recovery on a direct or independent basis, and cannot seek recovery of any Medicare or Federal Employee Health Benefits Act ("FEHBA") costs. It is important to note that these claims were originally lauded by the DOJ as having a sound basis in law. As a result of Judge Kessler's rulings, the potential financial threat of the DOJ's tobacco claim has been significantly reduced, and the Government's remaining claims have been limited to potential RICO recovery.

Second, the remaining RICO counts are novel claims and face significant legal and factual challenges. Under the infrequently utilized equitable provisions of RICO (Section A), the DOJ is pursuing "disgorgement" of allegedly "ill gotten" gains that resulted from the industry's alleged wrongful conduct, and other equitable injunctive relief that it considers necessary to reform industry practices. The Government alleges that equitable relief is necessary to prevent and restrain the Defendants from

continuing their unlawful conduct in the future. As an initial threshold matter, we know of no instance in which an equitable RICO claim has been allowed to proceed to trial without a prior criminal conviction based on the same underlying activity. The DOJ has indicated, however, that it has dropped all of its criminal investigations of the US tobacco industry. More significant legal and factual hurdles facing the DOJ's RICO claims include:

A) *Can the DOJ establish that prior industry wrongful conduct generated "ill gotten" gains?* The core of the government's RICO claim for disgorgement of "ill gotten" gains is that the tobacco industry deceived the public and the government regarding the health risks associated with smoking. In our opinion, there has been decades-long widespread awareness of these risks, and in particular, the federal government has required a health warning on all cigarettes sold in the US since 1966, has published ongoing Surgeon General reports on the health risks associated with smoking since 1964, and concluded in 1988 that cigarette smoking is "addictive." As a result, we believe that it may prove difficult for the Government to establish that a causal nexus exists between the industry's alleged wrongful conduct and its "ill gotten" gains. Note that the industry has often prevailed against allegations of prior wrongful conduct (e.g., the unanimous defense verdict in *Ohio Iron Workers*, and the rejection of all RICO claims in *Empire Blue Cross*).

B) *Can the DOJ distinguish the industry's prior "ill gotten" gains?* Even if the DOJ can prevail in establishing prior industry wrongful conduct, we believe that it may face a significant challenge in quantifying the extent to which prior industry gains were "ill gotten." In particular, we believe that the DOJ would likely have to establish which consumers, at which specific times, and at which specific transactions, were deceived by the industry regarding the risks associated with cigarette smoking (and would not have purchased cigarettes absent the deception). Although the DOJ would presumably intend to rely on statistics and extrapolations to determine the magnitude of the industry's allegedly "ill gotten" gains (e.g., it will likely argue that people would have smoked some percentage less if they were aware of the true risks associated with cigarette smoking), courts have typically rejected the use of statistics and/or aggregation to determine damages.

C) *Can the DOJ establish a reasonable likelihood of future industry wrongdoing in light of the Master Settlement Agreement (MSA)?* Irrespective of prior alleged wrongful conduct, equitable relief under RICO must be closely tied to a threatened future occurrence of wrongful conduct so as to "prevent and restrain" future RICO violations. Importantly, the DOJ's complaint alleges essentially no post-1995 wrongful industry conduct, and the MSA arguably addresses essentially all of the equitable relief that the DOJ is seeking. As a result, we believe that it may prove difficult for the DOJ to argue that additional equitable relief is necessary.

For example, while the DOJ seeks an injunction against making misrepresentations, the companies are barred from making any material misrepresentations regarding the health consequences of smoking under the MSA. While the DOJ seeks the disclosure of smoking and health research, the manufacturers are already required to do so under the MSA. While the DOJ seeks an injunction against future advertising campaigns targeting minors, the manufacturers are explicitly barred from doing so under the MSA (and are subject to a variety of extensive marketing restrictions). Finally, while the DOJ seeks the funding of a "corrective public education campaign," under the MSA the Defendants are required to contribute \$1.7 billion to an independent foundation to take such action.

Although at this early stage of the litigation Judge Kessler was understandably not willing to assume that the Defendants have complied with the MSA, or that the MSA has adequate enforcement mechanisms in the event of non-compliance (e.g., consent decrees with each settling State and Territory), as the case proceeds we expect the Court to fully consider these issues in the context of the need to "prevent and restrain" future wrongful conduct.

D) *Is disgorgement an available remedy under the equitable provisions of RICO?* Traditionally, equitable relief has been provided through an injunction or specific performance, in contrast to monetary damages. While disgorgement of allegedly "ill gotten" gains is the primary financial threat remaining in the DOJ's tobacco claim, several factors, in our opinion, limit the potential financial threat associated with disgorgement. First, disgorgement is not even listed as a remedy under the equitable RICO statute. While the statute lists divestiture, injunctions, and reorganization as possible relief, it does not mention disgorgement (which is arguably not "forward looking"). Second, disgorgement has never been authorized under the equitable provisions of RICO within the DC Circuit. Third, while among Federal Courts of Appeal only the Second Circuit in *United States v. Carson* has authorized disgorgement under the equitable provisions of RICO (to our knowledge, only in *Carson* has the Government been awarded monetary relief under the specific RICO

cause of action being pursued in this case), that Court: i) required evidence that disgorgement of particular “ill gotten” gains was necessary to “prevent and restrain” future RICO violations “rather than to punish past conduct;” ii) determined that “RICO does not authorize disgorgement of gains ill-gotten long in the past;” and iii) ruled that whether disgorgement is appropriate in a particular circumstance depends on whether there is a “finding that the gains are being used to fund or promote illegal conduct.” Each of these rulings, in our opinion, limits the potential financial threat of disgorgement under the equitable provisions of RICO in the DOJ’s tobacco claim, if such relief is allowed.

With respect to the legal challenges confronting the pursuit of disgorgement under RICO, also note that a DC District Court in *FTC v. Mylan Labs*, a 1999 decision, ruled that disgorgement was not a permissible remedy under the Clayton Act—whose remedial provisions are similar to RICO’s—because it considered disgorgement a retrospective, rather than prospective, remedy. In *Mylan Labs*, the DC Court ruled that disgorgement is only available under statutes that explicitly provide for that remedy.

Third, since the DOJ’s tobacco lawsuit was originally filed, the US Court of Appeals for the DC Circuit has unanimously dismissed two separate groups of tobacco health care cost recovery claims. Its rulings were consistent with the unanimous decisions of seven other Federal Courts of Appeal, and in our opinion, indicate an unwillingness to alter existing law to punish a currently unpopular defendant. Given existing law and the issues outlined above, we believe that DOJ’s tobacco lawsuit will ultimately be dismissed or otherwise resolved at little financial cost to the Defendants.

Let me conclude with an observation based on my training and experience as a financial analyst. The public policy purpose of this lawsuit is presumably to stop any unethical behavior by the tobacco companies; for example, marketing to children. While the federal government could strongly support the MSA to promote that worthwhile goal, further monetary transfers from the tobacco industry, in my opinion, will not. Rather, monetary payments will only increase the economic partnership between the industry and the federal government, resulting in further taxes on people who in many cases can least afford to pay them.

Senator DURBIN. Thanks, Mr. Adelman.
Mr. Ogden?

STATEMENT OF DAVID W. OGDEN, PARTNER, WILMER, CUTLER AND PICKERING, AND FORMER ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. OGDEN. Thank you, Mr. Chairman, Senator Hatch. I am pleased to respond to the committee’s request that I testify about how the Justice Department managed *United States v. Philip Morris* during my tenure at the Justice Department.

I served at the Department of Justice from August of 1995 until January of this year, first in the Deputy Attorney General’s Office, then as counselor and chief of staff to Attorney General Reno, and finally from February 1999 until January of 2001 as the Acting Assistant Attorney General and then the Assistant Attorney General in charge of the Civil Division.

While on the Attorney General’s staff, I represented the Department in the administration’s efforts to work with the Congress on the enactment of comprehensive tobacco legislation in 1998. During the consideration of that legislation, the Department did put on hold its consideration of a lawsuit by the Justice Department against the cigarette manufacturers. But with all respect to the points that Professor Turley made earlier—and I have not read his article and will do so—I think one critical aspect of what that legislation was about needs to be understood to understand why the Justice Department put consideration of the lawsuit on hold. While that legislation would have done much that you can’t do with a lawsuit, such as establishing FDA jurisdiction, for example, over to-

bacco, which we still do not have, it would also have done a couple of things that legislation very rarely does: Number one, it would have provided a stream of payments from the industry over a long period of time to the Federal Government, and, number two, it would have extinguished any claims that the Federal Government had against the tobacco industry. So, effectively, the legislation would have constituted a settlement of those claims.

Now, it is because those claims were encompassed within the legislative process that we held off. Obviously it would have been far better to resolve any such claims in the context of a global settlement arrived at by the Congress. But when that effort collapsed, we then began to look very seriously at the underlying claims because they had not been resolved and because very similar claims had been successfully prosecuted by State Attorneys General across the country with great effect.

Attorney General Reno had previously indicated that she did not believe that there were claims by the Federal Government for Medicaid payments, but she all along was very interested in the question of whether there was a claim for Medicare payments, other Federal health care payments, and specifically for injunctive relief.

In December of 1998, the Attorney General concluded that there were viable theories along both lines, but that much work needed to be done to decide the specific shape of any lawsuit that would be filed.

I was appointed Acting Assistant Attorney General for the Civil Division on February 1, 1999. One of my tasks was to establish a process to ensure a full evaluation of such a lawsuit and to make a recommendation to the Attorney General. Soon after I arrived, we completed a process begun by my predecessor to establish the Tobacco Litigation Team, comprised of career lawyers drawn mostly from the Civil Division, who were charged with developing and, if a case were approved, with pursuing the litigation. Simultaneously, we organized a distinct working group of about 15 to 20 attorneys drawn from across the Department with expertise in relevant areas, again, career lawyers, to evaluate the merits of the lawsuit. This group included career attorneys from other parts of the Civil Division, from the Criminal Division, the Antitrust Division, the Environment and Natural Resources Division, and the Office of Legal Counsel.

These teams developed and evaluated the potential case through the spring and summer of 1999. Ultimately, they recommended that a lawsuit containing three counts be filed against the tobacco companies, and the nature of those counts has been described—one under the Medical Care Recovery Act, one under the Medicare Secondary Payer Act, and the last under the RICO statute, and specifically under the equitable portions of that statute which are available only to the Attorney General of the United States.

I received those recommendations, and critical to my personal evaluation of those career lawyers' recommendations, I asked the Criminal Division to consider both the proposed RICO suit, because they have special expertise with that statute and the legal responsibility to approve any filing, and to look at the underlying fraud theory. The Criminal Division endorsed the filing. I recommended

filing suit. And on September 21, 1999, the Attorney General directed us to do so. We filed the case the following day.

I would note that in addition to the fine career lawyers in the Civil Division who have been litigating this case since that time, equally capable career lawyers in the Criminal Division have also been critical members of the litigation team.

Before recommending to the Attorney General that we file suit, I had concluded that the Government had a strong case. I am particularly confident, and was then, about the strength of the claim under RICO. The evidence the litigation team had gathered demonstrated that over four and a half decades the cigarette manufacturers had engaged in a campaign of deception that both harmed the public health and cost American taxpayers billions of dollars. Given this evidence, I believed that the United States should sue to reverse, to the extent possible, the consequences of the cigarette manufacturers' long-standing conspiracy to defraud the American public, as well as to recover the health care costs that American taxpayers had shouldered.

About a year ago, the court dismissed the counts for recovery of health care costs, but made clear that the Government had a right to proceed under RICO. And under that statute, the Government has the opportunity to recover the profits that the manufacturers have reaped as a result of their unlawful conduct, to obtain injunctive relief to put an end to the conduct that violated the Act, and to ameliorate its continuing effects.

Now, in undertaking the case, we knew the task was large and that to succeed, the litigation team needed to be confident that it would have sufficient resources. Knowing that if we decided to file suit it would require substantial funding, in February 1999 the administration's budget for fiscal year 2000 included a request for \$20 million to fund the lawsuit, including 50 positions. After Congress declined to provide specific funding but also declined to bar the administration from spending funds from other sources to support the suit, the administration made more than \$13 million available during that fiscal year, using funds from the Justice Department and the client agencies, an approach that is not dissimilar from the way other expensive litigation is funded by the Justice Department.

Our planning for fiscal year 2001 began late in 1999. The litigation team and the budget experts in the Department determined that the team would need about \$26 million. Based on our experience with funding the case in fiscal year 2000, instead of sending a specific budget request for that amount up, we put together a similar kind of plan to fund it from other sources and made clear to Congress, both through statements of the Justice Department and statements of the client agencies, that that was the intention of the Department. There was subsequently an effort in Congress to deprive the Department of the authority to use funds from those other sources, an effort that did not succeed, and ultimately we funded the case with \$23.2 million for this fiscal year.

We also addressed the number of employees that would be needed to litigate the case. We had envisioned from the first that eventually we would need about 50 people to do so. In the early years, in the first phases, we didn't need that many, but by late 2000, I believe that the team had approximately 25 lawyers and 10 non-

attorney staff. And the budget plan at that time, which was, of course, my last contact with the case, the budget plan was for the staff to reach 44 during the current fiscal year. And when I left the Department, the litigation team was actively hiring to reach that goal.

Just as in the year before, the budgeting process for this fiscal year began late in 2000. By that time, I had been advised by Civil Division staff that the budget would need to be significantly higher than in 2001 because full-blown document discovery would have begun. Of course, pursuant to the normal budget timetable, the completion of that budget was left to the incoming administration when we left in January.

It is important to note, Mr. Chairman, that while funding for the case was controversial on Capitol Hill throughout the period that I was there, we always began our budget planning early and the litigation team always understood the funding level that the administration would support. Obviously, the team also always knew that the administration supported the suit. That kind of certainty is important for long-term planning in any case, but it is particularly important in a case of this magnitude.

With my time expired, I will stop now and would welcome any questions.

[The prepared statement of Mr. Ogden follows:]

STATEMENT OF DAVID W. OGDEN, WILMER, CUTLER & PICKERING, WASHINGTON, D.C., AND FORMER ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman and Members of the Committee, I am pleased to respond to the Committee's request that I testify about how the Department of Justice managed *United States v. Philip Morris* during my tenure at DOJ.

I served in the Department of Justice from August 1995 until January 2001, first in the Deputy Attorney General's office, then as Counselor and Chief of Staff to the Attorney General, and finally from February 1999 through January 2001 as Acting Assistant Attorney General and then Assistant Attorney General in charge of the Civil Division.

While on the Attorney General's staff, I represented the Department in the Administration's efforts to work with the Congress on the enactment of comprehensive tobacco legislation in 1998. During the consideration of legislation, the Department put on hold its consideration of a Justice Department lawsuit against the cigarette manufacturers. When the legislative effort collapsed in the summer of 1998, the Department began more seriously evaluating the merits of such a lawsuit. Attorney General Reno had previously indicated that she did not believe the United States could recover from cigarette manufacturers for *Medicaid* expenditures (as the states had in their \$240 billion settlement), but she was interested in whether the United States could recover expenditures under Medicare and other federal healthcare programs and obtain meaningful injunctive relief. In December 1998, the Attorney General concluded that there were substantial legal theories upon which a lawsuit by the United States against the major cigarette manufacturers could be based, but that much work needed to be done to decide the specific shape of any lawsuit that would be filed.

I was appointed Acting Assistant Attorney General for the Civil Division on February 1, 1999. One of my tasks was to establish a process to ensure a full evaluation of such a lawsuit and to make a recommendation to the Attorney General. Soon after I arrived, we completed the process begun by my predecessor to establish the Tobacco Litigation Team, comprised of career lawyers mostly drawn from the Civil Division, who were charged with developing and, if a case were approved, with litigating the case. Simultaneously, we organized a distinct working group of about 15 to 20 attorneys to evaluate the merits of such a lawsuit. This group included career attorneys from other parts of the Civil Division, the Criminal Division, the Anti-Trust Division, the Environment and Natural Resources Division, and the Office of Legal Counsel.

These teams developed and evaluated the potential case through the spring and summer of 1999. Ultimately, they recommended that a lawsuit containing three counts be filed against the tobacco industry. The first count was under the Medical Care Recovery Act, which permits the United States to recover medical costs under circumstances creating tort liability. The second count was under the Medicare Secondary Payer Act, which gives the United States a right to recover healthcare costs paid under the Medicare Program from insurers and self-insurers. The third count was under the civil, equitable provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which gives the Attorney General the express authority to seek equitable relief to remedy certain persistent patterns of unlawful conduct, including fraud.

Critical to my personal evaluation of the career lawyers' recommendations, I asked the Criminal Division to consider both the proposed equitable RICO count (with respect to which that Division has particular expertise, as well as the legal responsibility to approve any filing) and the fraud theory underlying the entire suit. The Criminal Division endorsed filing suit on those theories; I recommended filing suit; and on September 21, 1999, the Attorney General directed us to do so. We filed the case the following day. I would note that in addition to the fine career lawyers in the Civil Division who have been litigating the case since that time, equally capable career lawyers in the Criminal Division have also been critical members of the litigation team.

Before recommending to the Attorney General that we file suit, I had concluded that the government had a strong case. I was particularly confident about the strength of the government's claim under RICO. The evidence the Litigation Team had gathered demonstrated that over four and a half decades the cigarette manufacturers had engaged in a campaign of deception that both harmed the public health and cost American taxpayers billions of dollars. Given this evidence, I believed that the United States should sue to ask the court to reverse, to the extent possible, the consequences of the cigarette manufacturers' long-standing conspiracy to defraud the American public, as well as to recover the healthcare costs that taxpayers had incurred due to the companies' misconduct. Under RICO, the government has the opportunity to recover the profits that the manufacturers have reaped as a result of their unlawful conduct. In addition, RICO permits the government to obtain injunctive relief to put an end to the conduct that violated the Act and ameliorate its continuing effects. In this case, this could include requiring the dedication of funds for public education and smoking cessation treatment programs, requiring effective measures to halt advertising of tobacco products to children, and imposing other appropriate management controls to ensure an end to the unlawful patterns of the past.

The case was filed in the United States District Court for the District of Columbia. The cigarette manufacturers filed a motion arguing that the Justice Department had no legal basis to bring the case. As to the RICO count, the Court denied the companies' motion, upholding the government's legal theories under that statute. The Court granted the motion to dismiss the counts under the Medical Care Recovery Act and the Secondary Payer Act, however, and has now denied the government's motions for reconsideration of those rulings. The parties are in the discovery phase of the case on the RICO counts and the Court has scheduled trial for July 2003. As the Court said in ruling on the cigarette manufacturers' motions, under the RICO counts the defendants continue to face billions of dollars of potential liability for their ill-gotten profits. All of the injunctive relief sought by the government also still may issue.

In undertaking the case, we knew the task was large, and that to succeed, the Litigation Team needed to be confident that it would have sufficient resources. Knowing that if we decided to file suit it would require substantial funding, in February 1999, the Administration's budget for FY 2000 included a request for \$20 million to fund the lawsuit, including 50 positions (40 attorneys). After Congress declined to provide explicit funding but also declined to bar the Administration from funding a tobacco lawsuit from other sources, the Administration made more than \$13 million available for FY 2000, using funds from the Justice Department and the client agencies. This approach was not dissimilar to the manner in which other expensive litigation of the United States has been funded.

Our planning for the FY 2001 budget began in late 1999. The Litigation Team and the budget experts in the Department determined that the Team would need approximately \$26 million to litigate the case during FY 2001. Based on our experience with funding the case in FY 2000, the Administration did not include a specific line item for the tobacco lawsuit in the budget for FY 2001. Instead, by the spring of 2000, the Administration determined to fund the lawsuit in FY 2001 in a manner similar to the way it had been funded in FY 2000. In May 2000, senior officials at

the Departments of Defense, Health and Human Services, and Veterans Affairs wrote Congress endorsing the lawsuit and indicating that these departments expected to participate in funding the case in the coming fiscal year. Ultimately, the \$23.2 million package that was put together included substantial amounts from those client agencies and the Health Care Fraud and Abuse Control Program, as well as \$1.8 million from the Civil Division's base budget.

We also addressed the number of employees that would be needed to litigate this case. We had envisioned that about 50 people would be required to litigate the case, as the Administration had provided in its 1999 budget. We did not need that many in the first phases of the case, but by late 2000 I believe that the team had approximately 25 attorneys and 10 non-attorney staff, and the budget plan provided for the Team to reach a total of 44 staff during the balance of FY 2001. When I left the Department, the Litigation Team was actively hiring toward that goal so that it would have sufficient staff to meet the mounting demands of the litigation.

Just as in the year before, the Division's budgeting process for the upcoming fiscal year—FY 2002—began in late 2000. By that time, I had been advised by Civil Division staff that the budget for FY 2002 would have to be substantially higher than the previous year's because by then full blown document discovery would have begun. Of course, pursuant to the normal budget timetable, its completion was left to the incoming administration.

It is important to note that while funding for the case was controversial on Capitol Hill throughout this period, we began our annual budget planning early, and the Litigation Team always understood the funding level that the Administration would support. Obviously, the Team also always knew that the Administration supported the suit. That kind of certainty is important for long-term planning and strategy in any case, and particularly in a case of this magnitude.

Mr. Chairman, in closing I would like to say that I consider this to be a very important lawsuit. Proceeding under established legal principles, it calls upon the federal courts to send the message that businesses may not operate by defrauding the public about deadly and addictive products and expect to profit from it. It also calls upon the courts to fashion injunctive relief to address a national health crisis born of decades of fraud, and to stop the cigarette companies from continuing to market cigarettes—and their cycle of addiction, disease and death—to America's youth.

If you have any questions, I would be pleased to respond to them.

Senator DURBIN. Mr. Ogden, in the time that you were with the Department of Justice working on this lawsuit, there was never any question in your mind of the commitment of the Attorney General to pursuing the lawsuit.

Mr. OGDEN. Absolutely not, Mr. Chairman. In fact, the Attorney General made that clear to me from the very beginning. She was the one who urged us to look at this and to analyze the opportunities for a lawsuit, and she personally met on at least two occasions with the litigation team to tell them how much she appreciated what they were doing.

Senator DURBIN. In contrast in this case, we are still waiting for Attorney General Ashcroft to make a definitive statement on this lawsuit. He has said repeatedly it is under review, whatever that means, while we find the deadline is approaching. And with the deadline approaching of July next year for the close of discovery, the next 9 or 10 months are going to be extraordinarily busy, are they not, for the Department of Justice in preparing for this deadline?

Mr. OGDEN. As I think Mr. Schiffer made clear, this is a very busy time in the lawsuit. He knows better than I exactly what the current exigencies are, but it is clearly, if not the most demanding, one of the most demanding periods for the suit.

Senator DURBIN. And it sounds unusual that at this point in time, 25 days before the end of the fiscal year, it is still not clear where the \$44 million will come from for the next fiscal year.

Mr. OGDEN. Well, I will say in that regard that it is not a simple task to put together the funding involved, and it took us some time

to finalize where exactly the money would come from. What was always clear was how much money we were attempting to get and what the effort would be to do that, and that I think is absolutely what the litigation team needs to know.

Senator DURBIN. And to some extent, your efforts were complicated because your friends on Capitol Hill, some of them, had a different view about what agencies would contribute to this effort. Is that not true?

Mr. OGDEN. I would not disagree with that, Senator.

Senator DURBIN. General Blumenthal, you made a very, I think, important point about not only needing the resources but also the resolve. I was struck when I heard about the settlement conference that the Department of Justice was walking into the room with these tobacco companies in positively the weakest possible position. I am not putting words in your mouth, but what was your impression?

Mr. BLUMENTHAL. My impression was that the Department was about to surrender, that this was a prelude to retreat and defeat, an admission by the Department of Justice that it was about to throw in the towel. And the effect is not just on the Department itself, but on the individuals, the professional staff, working day and night very hard on litigation where morale is tremendously important, and also on the court itself. The Department of Justice sends very important signals by the public statements it makes.

So that kind of statement could not help but be a self-fulfilling prophecy in a way, and as you put it at the beginning, as a trial lawyer there is no way that I would say anything like that about a potential failing or weakness in a lawsuit that I was prosecuting without having first very thoroughly evaluated the merits with my staff and without a court decision that made defeat inevitable. And we have no such situation here.

Indeed, you know, in hearing some of the other witnesses, I couldn't help but go back to the time when Connecticut, as one of the first States to go to court, began its lawsuit against the industry, and we were given not a prayer, not a chance, not a nickel by our State legislature to begin this action. The prospects for victory here are momentous and tremendously promising compared to what the States encountered when they took those first steps. And, indeed, the lack of resources from our State legislature was one of the reasons why we were obliged to go to outside counsel to prosecute this case.

Senator DURBIN. Well, I think that is one of the things that strikes me. This does strike me as a lawsuit, as Professor Blakey and others have said, that has great potential, not only in terms of the settlement but possible recovery if it goes to trial, and the kinds of efforts that you can make against the tobacco companies. And yet the response from this new administration, from the Department of Justice, has been noncommittal, lukewarm. I don't understand that. The only explanation, unfortunately, is a bad one politically, that there for some reason is no political will in the Department of Justice to aggressively pursue a lawsuit against the tobacco companies. I hope that is not the case, but I am waiting for strong evidence otherwise.

What kind of preparations were made by the State Attorneys General to finally bring this to a settlement? We have talked about the amount of money that the Department of Justice might have to put together to prepare for this lawsuit. Can you recall the kind of dollars that had to be spent by the States that were involved in your effort?

Mr. BLUMENTHAL. Well, we spent certainly more than the \$23 or \$24 million that was spent last year and the next \$23 or \$24 million that is contemplated for the coming year. We had to deal literally with warehouses of documents that were in the end, many of them, worthless to our lawsuit. We had to go after the documents that were, in fact, valuable to our lawsuit and which eventually won us the settlement that we achieved because the industry resisted disclosing them, tremendous preparation in working against the motions to disqualify, to dismiss, to remove Federal court, to delay, to obfuscate.

This battle is really trench warfare, hand-to-hand combat in terms of litigation of the most demanding kind, and that kind of preparation is what we did in our lawsuit at various stages. Minnesota actually tried its lawsuit. Connecticut had a trial date and was prepared to go to trial. Some States were not as far along, which is why our individual costs differed. But the point is that there has to be no doubt or question in the minds of the people working on this case, as well as the opponent defendants, that the Department of Justice will spare no effort or no resources to pursue it.

Senator DURBIN. Well, I have to say that that is lacking at this point. I really had hoped the Attorney General could come today, as he was invited, and that he could state unequivocally that they were going forward with the lawsuit and they would gather the resources as needed to put together the most favorable case on behalf of taxpayers, the people of this country. The Attorney General could not attend, and we are still waiting for a statement from him, despite repeated requests along those lines. We will continue to make those requests because I think that that is essential if this is going to be a successful effort.

Professor Blakey, could you address Mr. Adelman's observations on RICO so that we have the record complete on that as far as your point of view?

Mr. BLAKEY. He has made a number of comments, and I don't want to be uncharitable, but, of course, I am now going to be uncharitable. If I were to grade him as an analyst, I don't know how to grade him. If I were to grade him as a law student, he flunks. His whole analysis is premised, for example, is on the validity of the *Carson* decision, which says disgorgement must be forward-looking and not backward-looking. *Carson* is wrongly decided for technical reasons that I need not go into. They are fully laid out in my statement.

In April, the phrase "prevent and restrain" in 18 U.S.C. § 1964(a) is a common law couplet that is designed to tell the court that it has all of the powers of a common law court, and the Supreme Court—I don't care about the D.C. Circuit—said in *Porter Wagoner* that if you are going to withhold from a court the power of disgorgement, you have to be express about it.

Mr. Adelman makes the remark that, oh, but it is not listed. He didn't read it the statute. It says "including, but not limited to," and the legislative history says "this list is not exhaustive."

Disgorgement is a standard equity remedy, it is done in securities fraud; it is done in commodities fraud; it is done in RICO cases. And it makes good sense. Industry stole money, and it now says, "We won't do it again. Let us keep the money?"

The courts have said again and again and again—and I am quoting now, *Janigan v. Taylor*—"It is simple equity that a wrongdoer should disgorge his fraudulent enrichment." That makes sense to me. You steal it, you have to give it back.

Now I am reading from *Securities and Exchange Commission v. Blatt*: The purpose of disgorgement is to "deprive the wrongdoer of his ill-gotten gains and deter" other people. The decision doesn't say anything about forward-looking.

He suggests that in other civil cases the government always preceded after a criminal conviction, and here none is present. The Supreme Court in *Sedima* decided you don't need a criminal conviction before you bring a civil RICO. And stop and think about it. It is modeled on antitrust. They can sue first. They don't have to indict first. It is modeled on securities. In securities you can sue first. You don't have to indict. It is modeled on the EPA. In EPA actions, you can sue first. You don't to indict. RICO has two tracks. No preference is given to the criminal as opposed to the civil track.

I don't want to go through his statement point by point, but based on his recommendations, I would be willing to bet—I don't bet on litigation—but based on his recommendations. . . .

I cannot say that this suit lacks merit. Let me put it to you this way: We got a decision in the State case in Texas that we could bifurcate the litigation, do RICO liability first, then the other parts. That course would have led to disgorgement. The tobacco industry sought a mandamus in the Fifth Circuit. It told the court that if we had the chance to show RICO liability apart from the common law claims, it would have no choice but to settle. The Fifth Circuit turned them down and they settled.

I cannot give you a complete mind-read of the industry, Nor can I give you a complete mind-read of the negotiators. But I was involved in the litigation when we got to disgorgement in Florida, and it settled. When we got to disgorgement in Texas, we got its attention.

You want to get a litigator's attention? It is like a mule. You got to get a two-by-four. Once you get his attention, then you can sit down and do the right thing.

Senator this case is not about money. It is about conduct. We can't do anything with the 40 million people that are already addicted. We probably have to give them their cigarettes until they die and take care of them. But we can prevent the 3,000 children becoming addicted each year by simply shutting down advertisement. And we can shut down the advertisement through a negotiated settlement in a way in which under prevailing Supreme Court jurisprudence we can't do through legislation. We can tailor that State by State, jurisdiction by jurisdiction. This is something that is peculiarly apt for an equity resolution, particularly when

they understand that it is either clean up your act or cough up your profits.

Senator the people are not moral people. They are economists. Every time we dealt with them, they were economists. They added up what it was going to cost either way, and they took the cheapest way. If we can explain to them that it is more expensive for them to continue to addict children than it is not to, they will stop.

Senator DURBIN. Thank you very much.

Professor Turley, let me just note, I listened to your reference to James Madison and Clausewitz *On War*, or whatever the reference was. I know the book but I have not read it. I think it should be said for the record, the tobacco companies are more than big companies. They are big political players in America. The tobacco companies, because of their political clout, stopped us from legislating, literally stopped us, although the American people were solidly behind us. Because of our campaign finance system, because of connections on Capitol Hill, we were unable to pass even the most basic legislation to protect children and families across this country. That is just a fact.

I hope that that is not the force that is at work now in the Department of Justice. I hope instead that the statement made earlier by Mr. Schiffer is an indication that they are determined, that they will go forward. I don't know how James Madison would view it. I don't care. Frankly, if at the end of the day we save some lives, Ms. DeNardo and others who have been afflicted by this product have a better chance to live, let me tell you, I am prepared to use the courts, the legislature, even a courageous President, if we could find one on this issue, to take them on in any way we can. And I have to say I agree with Professor Blakey. Accepting your premise, I don't know how you could ever rationalize *Brown v. Board of Education*. But thank God the Supreme Court did, and we are better country for it.

Mr. TURLEY. Could I respond, Senator?

Senator DURBIN. Of course.

Mr. TURLEY. Thank you, sir. First of all, I don't disagree with you necessarily about the lobbying ability and authority of this industry in Congress. I know that you have done herculean efforts to try to get things through. But in terms of the comparison between principles of the Madisonian system and the particular dangers of smoking, every generation as a scourge. At one time, it was liquor. At one time, it was racism. But every generation has a scourge. And every scourge demands immediate response.

I have two sons and a third one coming. I would love them to grow up in a world without tobacco. I truly would. But I am less concerned about the danger of this addictive product to them than I am about the Government that they inherit. In my view, the road to constitutional perdition is paved with good intentions.

I should note, Senator, I don't agree entirely with my friend Bob Blakey in terms of disgorgement and some of the rules of RICO. I am loath to disagree with him about anything dealing with RICO. But, for example, I don't agree that the Supreme Court said you had to be express in order to eliminate disgorgement as a remedy. It said that it has to be a necessary and inescapable inference. You don't have to be express.

I agree with Robert that that is still a high standard and that that is still a question of some doubt. The problem that I have with this use of RICO is that this is a case of first impression because they are not suing a single company but an industry. In my view, something of that magnitude belongs to you. Quite frankly, as a Chicagoan, I am happy to give that issue to you and to the rest of your colleagues. I just have a problem with the means, and I don't think we can lose sight of the means because the ends are meritorious.

By the way, I do not agree with the testimony earlier that the chances of this litigation is momentous, and I have an explanation of why you have heard these statements coming from the Department of Justice. The fault, with all due respect to Mr. Ogden, lies with the Department of Justice. They had two counts that most of us immediately criticized as bordering on the frivolous. The MCRA and MSP counts certainly bordered on the frivolous and Judge Kessler spent little time to get rid of those counts. The reason there is this doubt about the strength of the Government's case is that two-thirds of the Government's case was so facially weak. I agree with you that RICO is the strongest part of that case but I think that the Department of Justice undermined its ability to settle. I also do litigation and you do not create a case with weaknesses like those and hope that you can flex your muscle in settlement. Not after two-thirds of their ship went down.

But I have taken too much of your time, but I appreciate the opportunity to respond.

Senator DURBIN. We could argue about RICO forever, and we won't. I can recall one of the most basic things I learned in law school about when the facts are on your side, beat on the facts. When the law is on your side, beat on the law. And when neither law nor facts are on your side, beat on the table.

At this point the United States Government has decided to proceed with this lawsuit. If it does it half-hearted without the resources and commitment, it will lose. The taxpayers will lose. We have a RICO cause of action which good legal minds happen to believe is a sound one. The question is whether we will dedicate the resources to try to make sure we win. And that was the purpose of this hearing.

I want to thank everyone who came to testify, and particularly Ms. DeNardo. Thank you so much for coming and putting a human face on an issue that is important for all of us to remember as we deliberate lawyer talk and all of the different legal theories.

We are going to put Senator Kennedy's statement in the record.

And I want to state that the record will remain open for one week, consistent with committee practices, for Senators who want to submit statements and questions to the witnesses. And the committee will stand adjourned.

[Whereupon, at 4:27 p.m., the committee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

Statement of Hon. Orrin G. Hatch, a U.S. Senator from the State of Utah

Mr. Chairman, let me start by saying that you and I share an antipathy to the use of tobacco. You may recall that beginning in 1997, in this Committee, I held 10 hearings on the state tobacco litigation settlement which I strongly supported.

Senator Feinstein and I developed a bipartisan, comprehensive tobacco bill that encompassed the major elements of the settlement agreed upon by the state attorneys' general, public health advocates, plaintiffs' attorneys and the tobacco industry. Unfortunately, the Senate was unable to come to consensus on any tobacco legislation. In my view, this happened because the Senate floor vehicle became way too expansive and extremely expensive because some of our friends could not exercise restraint.

Clearly, I am no friend of tobacco use nor an apologist for the tobacco industry. Indeed, I have never used tobacco products in my life. However, it is also no secret that I have been extremely skeptical of the federal lawsuit from its inception.

From a policy and Constitutional perspective, no administration should be able to circumvent the Constitution and Congress' sole authority to raise and spend revenue for the general welfare by suing for billions of dollars and then spending the money without congressional appropriation. If there is no legitimate lawsuit, the action by the Department of Justice would violate our necessary principles of separation of powers, a cornerstone of our Constitution's guarantee of liberty. Simply put, litigation should not replace legislation as the means to effect public policy in a democracy.

Granting the federal government the unfettered ability to sue any industry, which happens to fall into disfavor, in order to effectuate a social goal like reduction in tobacco-related illnesses, is a mistake. It would in essence allow the executive branch to bypass Congress and the law, and set unilaterally our nation's tobacco policy.

In 1999, when the Clinton Administration decided to file its own suit against the tobacco companies it based the claim on a distorted—at least in my opinion—interpretation of three federal statutes: the Medical Care Recovery Act (MCRA); the Medicare Secondary Payer (MSP) provisions; and the civil provisions of the Racketeering Influenced and Corrupt Organizations Act (RICO). As many will recall, I and others on this committee believed that there was no legal basis for the first two claims. Turns out we were right. In September of 2000, Judge Kessler dismissed both the MCRA and MSP claims, leaving only the RICO count standing. She resoundingly reaffirmed that dismissal in the face of the government's attempt to amend its complaint and re-plead the dismissed counts.

In my opinion the RICO claim was ill conceived as well. While Judge Kessler did allow the RICO claim to remain, she also clearly suggests that the government, at best, has a long way to go to prove its claim. She indicated discomfort with this novel application of the theory of disgorgement. As she noted, "whether disgorgement is appropriate in a particular case depends on whether there is a 'finding that the gains are being used to fund or promote the illegal conduct, or constitute capital available for that purpose.'" That being said, Judge Kessler also clearly indicated that she was not making any finding endorsing the substance of the government's RICO claim, that "this Court has not made such a finding, nor could it at this stage." I think we can make better use of the tax-payers' money.

As we all know, in 1998, 46 states, the District of Columbia and five U.S. territories signed a contractual agreement—the Master Settlement Agreement. In addition to paying out large monetary settlements to the states, the Agreement imposed restrictions on tobacco advertising, marketing and promotion. It also addresses the allegations that tobacco companies had long concealed the dangerous health effects of smoking by prohibiting manufacturers from suppressing health research and requiring them to fund anti tobacco research and education. It is my understanding there is no credible evidence that the companies are not in compliance with the terms of the Master Agreement. If the Agreement is being violated—then shouldn't the state attorneys' general be taking action to ensure enforcement? If our goal is truly to address health issues related to tobacco use, then we should be seeking to ensure enforcement of the Agreement which already deals with those concerns. But, if the goal of federal litigation is to effectively take a legislative function and extort a huge monetary settlement that we can spend, then aren't we in effect addicting the federal government to nicotine?

Since the Executive Branch elected to pursue this litigation in the Clinton Administration (in my opinion without legal foundation), and the Legislative Branch declined to act, we should defer to the Executive Branch and its enforcement arm at

the DOJ on how the case is handled absent a clear indication of an overuse of taxpayer money. It is my understanding that the DOJ's budget request in relation to this litigation is identical to its budget request from last year and that they have obtained additional funding from other agencies to support the case. There is no lack of funding here. In fact, is everyone aware of just how expensive it has been for the federal government to pursue this case? The budget for this year was approximately \$23 million. If you ask me that is a lot of money to pursue a case that has a questionable return value given that the majority of its legal claims have been dismissed. Moreover, the Civil Division continues to add staff attorneys as needed to handle the litigation. Staffing needs are being met and funding request levels maintained—I do not see any clear indication of mismanagement here. I sincerely hope that we are not here today to cross examine the Department on the particulars of ongoing litigation.

I hope that we can resolve this in a way that is within the law, makes sense and saves taxpayer money.

Statement of Hon. Edward M. Kennedy, a U.S. Senator from the State of Massachusetts

I am deeply concerned about the lack of commitment which the Bush Administration has shown to date regarding the Department of Justice's lawsuit against the tobacco industry. For more than eight months, the Administration's official position has been only that they are "reviewing the case." At the same time, we have witnessed a steady stream of unofficial comments from within the Administration that the case is weak, that the DOJ litigation team "had done a poor job", and that the White House is preparing to abandon the case. Unfortunately, the Administration has not publicly repudiated these statements, even though they are clearly injurious to the government's position in this landmark case. The Committee invited Attorney General Ashcroft to personally address this important issue at today's hearing. He declined.

I had hoped that this hearing would produce a strong, unequivocal statement by the Administration that it would vigorously pursue the case against the tobacco industry on behalf of the American people. Those who we represent deserve their day in court against this industry whose product is the number one cause of preventable death in the nation. The major tobacco companies have engaged in a forty year conspiracy to conceal the lethality and addictiveness of smoking. They have engaged in the most massive consumer fraud in history. The industry has deliberately targeted children as "replacement smokers" in violation of the laws of nearly every state. Generations of children have been subjected to a marketing campaign of unprecedented size and duration, aimed at seducing them into smoking. These unlawful activities by the tobacco industry are the basis for the United States Government's RICO claim. The evidence of wrongdoing is overwhelming. The federal district court judge hearing the case has already considered and denied defendants' motions to dismiss the RICO claim. In essence, this ruling upholds the legal theory supporting the government's case. Justice requires that this case now go forward.

Those who oppose this litigation make much of the judge's decision to dismiss claims brought under the Medical Case Recovery Act and the

Medicare Secondary Payer Act. However, they conveniently ignore the decision of the judge permitting the RICO claim to proceed to trial. In their motions, the tobacco companies challenged the legal basis for the government's case. Their arguments were rejected by the court. The RICO claim goes to the heart of the case. It focuses directly on the fraudulent misconduct of the tobacco companies. Under RICO, the court can order both disgorgement of illegal profits—the profits which these companies made as a result of their fraudulent behavior—and injunctive relief prohibiting future misconduct.

Disgorgement of the industry's illegal profits will compensate American taxpayers for the more than \$20 billion annual cost of medical care provided to those suffering from tobacco induced disease. It is long past time that those costs were borne by the companies that cause them. The purpose of the suit goes beyond compensation. The case also seeks to invoke the equitable powers of the Court to force real change in the conduct of the tobacco industry—an end to marketing targeted at children, an end to the massive disinformation campaign which the industry has waged to mislead

the public about the health consequences of smoking, and an end to their efforts to use the addictiveness of their products to entrap new consumers.

The stakes are vast. Three thousand children begin smoking every day. A thousand of them will die prematurely from tobacco-induced diseases. Cigarettes kill well over four hundred thousand Americans each year. This is more lives lost each year than from automobile accidents, illegal drugs, AIDS, murder, suicide, and fires combined.

The tobacco industry currently spends five billion dollars a year to promote its products. Much of that money is spent in ways designed to tempt children to start smoking, before they are mature enough to appreciate the enormity of the health risk. The industry knows that more than 90% of smokers begin as children and are addicted by the time they reach adulthood. Documents obtained from tobacco companies prove, in the companies' own words, the magnitude of the industry's efforts to trap children into dependency on their deadly product.

Nicotine in cigarettes is a highly addictive drug. Medical experts say that it is as addictive as heroin or cocaine. Yet for decades, tobacco companies have vehemently denied the addictiveness of their products. No one can forget the parade of tobacco executives who testified under oath before Congress as recently as 1994 that smoking cigarettes is not addictive. Overwhelming evidence in industry documents obtained through the discovery process proves that the companies not only knew of this addictiveness for decades, but actually relied on it as the basis for their marketing strategy. As we now know, cigarette manufacturers chemically manipulated the nicotine in their products to make it even more addictive. Even today, the industry is still relying on this addictiveness to sell their product.

The tobacco industry has a long, dishonorable history of providing misleading information about the health consequences of smoking. These companies have repeatedly sought to characterize their products as far less hazardous than they are.

It would be a public health tragedy if the Bush Administration decides to abandon this case or to deny it the litigation resources which are essential to success. The federal court has ruled that the government's RICO claim against the tobacco industry should proceed to trial. Let the evidence be presented and let the court decide. The American people are entitled to their day in court.

Statement of Hon. Mitch McConnell, a U.S. Senator from the State of Kentucky

Mr Chairman, as you may well imagine, I am unable to say "thank you" for scheduling this hearing to determine whether the Department of Justice is effectively prosecuting and managing its case against the tobacco companies. I have been, and will continue to be, steadfastly opposed to this case. Therefore, I do not think this case should be prosecuted and managed at all.

My strong opposition to this case is not due just to the toll the tobacco litigation "free-for-all" has taken on my constituents, Kentucky's tobacco farm families, although this toll is certainly substantial. When the War on Tobacco began, I represented 60,000 tobacco farm families. Now, more than eight years later, I represent fewer than 45,000 tobacco farm families. Farmers who, for generations, have grown a legal product, a product which their elected representatives in the federal government-the United States Congress-said they could grow, harvest and sell.

My strong opposition to this case is not solely for parochial reasons, however. You see, the Congress still, to this day, has not told my constituents or tobacco farm families in other states that what they are growing is anything other than a perfectly legal commodity. Instead, a branch of the federal government which is not charged with making the nation's laws decided to do an end-run around the legislative process. The Clinton-Gore Administration did not like it that Congress had refused to legislate a legal commodity out of existence, so it decided to try to litigate tobacco out of existence by punishing those who grow tobacco and make tobacco products.

I object to this usurpation of Constitutional authority and to the sorry precedent it sets. As an example of the unhealthy fruit this case has borne, one need look no further than the similarly specious lawsuits some cities have filed against another perfectly legal American industry, the American firearms manufacturers. Thus, I oppose this litigation as a matter of principle, and I will continue to oppose the end-running of the legislative process through the filing of specious legal claims that are designed to punish American businesses for producing legal commodities. And I will do so regardless of who occupies the White House.

I am not the only one who believes this case has no merit. For starters, there is the judge who has thrown-out two-thirds of this case. Then there is not one, but

two, cabinet secretaries who agree with me, and interestingly, these were cabinet officers who served in the administration of President Clinton. In testifying before this body, then-Attorney General Janet Reno questioned the legal bases for a federal suit against the tobacco industry. And former Secretary of Labor Robert Reich noted that the tobacco litigation was a naked attempt to circumvent the authority of the Congress. Writing in *The Wall Street Journal*, Secretary Reich lamented that the Clinton Administration had “lost faith in democracy”, stating:

Fed up with trying to move legislation, the [Clinton] White House is launching lawsuits to succeed where legislation failed. The strategy may work, but at the cost of making our frail democracy even weaker. . . . [T]he biggest problem is that these lawsuits are end-runs around the democratic process. We used to be a nation of laws, but this new strategy presents novel means of legislating-within settlement negotiations of large civil lawsuits initiated by the executive branch. This is faux legislation which sacrifices democracy to the discretion of administration officials operating in secret. [*The Wall Street Journal*, January 12, 2000]

My hometown newspaper, the Louisville Courier-Journal, a media organ with which I am not often in agreement, has also spoken out against this case, saying that the federal government’s “lawsuit never should have been filed,” and that “The Bush Administration is right to look for a way to end it.” [*Courier Journal*, June 21, 2001] And after two-thirds of this suit was thrown-out, *The Washington Post* also questioned the continued maintenance of this case. It said:

We have our own reservations about what remains of the lawsuit; what seemed to us to be the strongest claims have been thrown out; and the two that are left rely on a civil racketeering statute whose use in cases such as this we don’t much like. So maybe the Administration is right to abandon the case, and certainly it is within its rights. [*Washington Post*, June 21, 2001]

Unfortunately, it appears the current Administration is going down the road paved by the past Administration. Regardless of who prevails, this lawsuit is a sorry precedent that compromises the role of the legislative branch in our Constitutional order.

Thank you.

