

Bush's gift to big tobacco

By Joseph Kay and Jeff Lincoln
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As the US government civil racketeering suit against the tobacco industry came to an end last week, the Justice Department undercut its own case and gave a free gift to the giant cigarette makers. Under pressure from high-ranking Bush administration officials, government lawyers argued that the tobacco companies should pay a fine that is a fraction of the amount called for by the government's own witnesses.

On June 7, the government announced that it was requesting that the industry be forced to pay only \$10 billion over five years to fund a smoking cessation program. The program would be designed to help addicted smokers quit. A government witness had previously testified that a program to target all existing smokers in the US, estimated at about 45 million people, would require funding of \$130 billion over 25 years. It had been widely expected that the Justice Department would follow the testimony of its own witness in making its request before the court.

The government's decision this week was so obviously motivated by political considerations that it elicited a comment from Judge Gladys Kessler, of the US District Court for the District of Columbia, who suggested that perhaps "there are some additional influences being brought to bear on the government's position in this case." It is no secret that these "additional influences" were top officials of the Bush administration itself.

The move is the latest in a series of attempts by the Bush administration and the Republican right to scuttle a case that was begun in 1999, before Bush came to office. Whether the case is now decided by Judge Kessler, or there is a last-minute settlement between the two sides, the resulting cost to the tobacco giants will be minuscule compared to the amount the government had originally sought.

The government's case against the six largest American tobacco companies—including Philip Morris and RJ Reynolds—has been based on the Racketeering Influenced and Corrupt Organizations (RICO) Act. The 1970 law, which was originally created to prosecute mobsters, makes normal business a crime if it is part of an illegal conspiracy.

Documents filed by Justice Department lawyers contend that the companies agreed in 1953 to "a long-term public relations campaign to counter the growing evidence linking smoking as a cause of serious diseases." For the past 50 years, the companies have allegedly conspired to keep customers from realizing the full danger of smoking and have engaged in illegal activities designed to encourage young people to start smoking. Smoking-related diseases kill an estimated 400,000 people a year. (See "Government case alleges criminal conspiracy of US drug giants")

According to a *Los Angeles Times* article of June 10, "People

close to the situation, speaking on condition of anonymity, said [Sharon] Eubanks [head of the government's legal team] and others on the trial team had staunchly opposed the shift from a proposed 25-year cessation program...but were overruled."

The main source of the pressure has reportedly been Assistant Attorney General Robert McCallum, the third-ranking official in the Justice Department. McCallum's involvement in the case constitutes a direct conflict of interest. Before joining the Justice Department in 2001, he worked as a partner at Alston & Bird, an Atlanta-based law firm that has done some work for RJ Reynolds.

The *Times* cites an inside source as saying there has long been "this sense that the administration was never going to let the industry take the kind of hit that might result from an unfettered ability to prosecute the case. It think it's really clear from the circumstances that what happened here in the last few days is not based on the legal merits."

Separate reports have also indicated that Justice Department officials placed pressure on other government witnesses to moderate their testimony. The *Washington Post* wrote on June 9, "Matt Myers, president of the Campaign for Tobacco-Free Kids, said [Eubanks] called him May 9 to say her superiors wanted him to scale back the recommendations he had made in written testimony. They sought to remove his suggestions for a ban on tobacco company methods for marketing to young people before Myers took the stand. Myers said he refused to do so. A second witness, scientific expert Michael Eriksen, also departed from recommendations in his earlier written testimony, court documents show. Eriksen declined to comment, but four separate sources familiar with the case said Justice Department lawyers had asked him to do so."

The government witness who recommended a \$130 billion fine to fund cessation programs was Michael Fiore, a medical professor who once chaired the subcommittee on tobacco cessation at the Department of Health and Human Services' Interagency Committee on Smoking and Health. It is unclear whether or not Fiore was pressured to reduce his recommendation prior to his testimony to fall in line with what the government was preparing to request.

These revelations and the government decision are hardly surprising, as the Bush administration and the Republican Party have long viewed the tobacco case with hostility. Since the mid-1990s, the tobacco industry has given the overwhelming majority of its campaign contributions to Republicans. The industry has furiously opposed Clinton-era restrictions such as those regulating advertisements directed at minors.

Shortly after it was filed in 1999, the Republican-dominated

House of Representatives sought unsuccessfully to block funding for the case. When the Bush administration took over the White House there was broad speculation that it would drop the suit. In 2001, John Ashcroft, then the new attorney general, was forced to retreat from moves to settle the case amidst a public outcry. Previously, while a member of the Senate, Ashcroft was a public opponent of the case, stating in a letter to a constituent that he was “concerned that the DOJ lawsuit could set an unwise precedent leading to the federal government filing lawsuits against other legal industries.”

The case did not actually come to trial until five years after it was filed. Then in February 2005, the tobacco companies won a key appeal that had been filed in the District of Columbia District Court of Appeals. The Appeals Court overruled Judge Kessler, who had agreed with the government lawyers that the tobacco companies could be forced under RICO to forfeit, or “disgorge,” \$280 billion in past profits, profits that had been earned as a result of allegedly illegal activity.

Writing the majority decision for the Appeals Court was none other than Judge David Sentelle, a close ally of the Republican right. Sentelle ruled that under RICO, the prescribed punishment must be “forward-looking,” that is, it must be directed at preventing future abuse rather than enacting punishment for past crimes. According to the court’s opinion, giving up profits “is a quintessentially backward-looking remedy focused on remedying the effects of past conduct.”

Sentelle has long-standing ties with the Republican right and played a key role in the impeachment drive against Bill Clinton. He was chosen by Supreme Court Justice William Rehnquist to head a three-judge panel to select a new independent counsel for the Clinton investigation, despite Sentelle’s ties to those who were organizing the impeachment. Sentelle used his position to intervene in the Whitewater investigation by replacing special prosecutor Robert Fiske with a figure far more closely identified with the right wing of the Republican Party—Kenneth Starr. (See “Kenneth Starr and his accomplices: new aspects of the impeachment drive”)

The DC Appeals Court’s decision was a major blow to the government case. This meant that it was completely in line with the aims of the Bush administration, which was seeking to find a way to undermine the case without dropping it outright. The decision eliminated the largest threat to the tobacco industry. Unable to force the companies to relinquish past profits, the government lawyers focused on efforts to force them to pay for cessation programs.

Now the Bush administration has used the Sentelle decision to cut the amount it is asking to fund the cessation programs. According to the government, the Appeals Court opinion implies that the government cannot force the companies to pay for cessation programs targeting all smokers. It can only have them pay for programs that target new smokers, for otherwise the programs would be “backward-looking.” This explains the sudden drop from \$180 billion to cover all smokers to \$10 billion to cover only the estimated 1.3 million smokers who will become addicted during the year following the end of the case.

Thus, according to McCallum, “the judges ruled against us,” and

there is nothing the government can do in the matter. In fact, the Justice Department decision is an extraordinary concession of legal ground to the tobacco companies. The Appeals Court decision, itself highly suspect on legal grounds, said nothing about the funding of cessation programs designed to help people who were the victims of tobacco company fraud.

While there remains the possibility of a settlement between the government and the industry based on the very low government request, the tobacco companies have sensed the strength of their position and have responded accordingly. Not only are they aware that the government is fighting against its own case, they also know that any decision by Judge Kessler can be appealed to a very sympathetic DC District Court of Appeals, whose newest member is Janice Rogers Brown, an extreme right-wing opponent of all constraints on big business.

Ted Wells, a lawyer for Philip Morris, responded by declaring of the government’s decision: “It’s outrageous. It’s ridiculous. This was a \$280 billion case that became a \$130 billion case that became a \$10 billion case that will eventually become a zero billion dollar case.” That is, the tobacco companies hope that by maintaining pressure they can get away without paying a cent.

Throughout this whole sordid process, the Bush administration has revealed once again that it is a government completely beholden to big business. At no other time in American history has there been a government so openly contemptuous of public health and social interests.

While there have been calls from the Democratic Party for an investigation into the government’s handling of the case—calls that reflect certain regional and tactical divisions within the American ruling elite—one can say with certainty that they will not be pursued. The Democratic Party has been complicit in each of the flagrant handouts to corporate America implemented during Bush’s term—the tax breaks for the rich and for corporations, the class action reform bill, the bankruptcy reform bill and many others.

The administration can proceed in such an extraordinarily brazen manner only because of the absence of any real opposition from within the political establishment and the general silence of the media. Aside from a few articles in a handful of newspapers, the mass media has refused to provide any serious coverage of the tobacco case.

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