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DATE: June 9, 2000

TO:

Attached are talking points and background materials on the tobacco litigation provision of the VA, HUD appropriations bill. The bill prohibits the VA from transferring funds to the Justice Department for the tobacco lawsuit. It is expected that an amendment to strike this provision will be offered on the floor, and we urge opposition to this motion to strike.

Please call me at 202-637-1548 if you have any questions. Thanks for your help.

FROM: Shuanise Washington

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OPPOSE THE AMENDMENT TO FUND THE FEDERAL LAWSUIT

Last year (FY00), the Congress denied the Justice Department's request for \$20 million to pursue their political lawsuit against the tobacco industry. Congress froze DOJ spending in the relevant account. Consequently, DOJ was either limited to spending \$1.8 million or requesting a reprogramming.

DOJ, however, refused to adhere to this congressional dictate and took money for the tobacco lawsuit during this fiscal year from other agencies, including HHS, the Defense Department, and Veterans' Administration. The Attorney General used a provision in the 1995 Commerce, Justice, State appropriations bill ("Section 109") that allows agencies to transfer funding to DOJ for "complex litigation." Section 109 has been used primarily where DOJ had to defend the actions of another agency.

It is clear that DOJ's action violated congressional intent and priorities. If DOJ is allowed to do this, the congressional power of the purse will become meaningless. Congress—not the Attorney General—should determine how VA, DOD, and HHS spend their funds.

Last year, DOJ used taxpayer dollars to hire prominent plaintiffs' lawyers to pursue this political lawsuit. They have not foreclosed doing so again. Congress should not allow funds designated for VA or other agencies to be used to hire trial lawyers.

To reassert congressional prerogatives, the VA, HUD bill prohibits the VA from transferring funds to DOJ for tobacco litigation. It is likely that someone will offer an amendment to strike this provision on the floor. This amendment should be opposed. This is not about the tobacco lawsuit but whether Congress—or the Administration—will determine funding priorities.

The provision in the VA, HUD bill will NOT block the lawsuit. DOJ is NOT prohibited from using funds in its own budget. DOJ is free to request a reprogramming and explain why this lawsuit should be a priority over other cases—exactly what every other agency is required to show.

This Justice Department is the most politicized in history. No one can believe that this decision to sue the tobacco industry was based on anything more than a desire to get money from the industry. But, in any event, this blatant violation of congressional dictates cannot be ignored—no matter how "justified" some might believe the cause.

If this is allowed to continue unchallenged, this Administration and future Administrations will feel free to ignore congressional decisions on spending priorities and spend scarce resources on their own priorities.

THE CAMPAIGN FOR TOBACCO FREE KIDS: BLOWING SMOKE AGAIN

Campaign for Tobacco Free Kids (CTFK) claims that repealing Section 109 of the 1995 Commerce, Justice, State appropriations bill will "block the lawsuit against big tobacco." This simply is not true. Section 109 allows the Justice Department to seek reimbursement from other agencies "being represented in the litigation." DOJ has used this provision to secure funding for the lawsuit from HHS, VA, and DOD.

The Defense Department is in desperate need of resources. The VA and HHS consistently claim they are underfunded. Yet they manage to find the resources to send to the Justice Department to fight a legally indefensible, political lawsuit.

Repealing Section 109 will not block the lawsuit. DOJ was never prohibited from using funds in the tort account for the lawsuit. Moreover, DOJ was free to request a reprogramming for additional funding.

Instead, the Justice Department, knowing that its lawsuit against the tobacco industry is completely without merit, chose a back-door way to fund the litigation knowing that its actions violated congressional intent. If the Justice Department really believed the lawsuit had merit, it would request a reprogramming and explain why this lawsuit should be a priority over other cases—exactly what every other agency has to show.

CTFK claims that repealing Section 109 would be "special protection" for the tobacco industry and that DOJ has been reimbursed under Section 109 to litigate other cases. But most of these cases involved DOJ defending the actions of other agencies in court. In none of these cases did DOJ use Section 109 after Congress had explicitly denied requested funding.

By repealing Section 109, the Congress is simply attempting to restore accountability to agencies' spending. Requiring the Justice Department to adhere to congressional intent does not constitute "special protection" for an industry. In fact, what the Justice Department is attempting to do is create an "Office of Special Prosecutor" for the tobacco industry.

Finally, CTFK claims that DOJ has a statutory right to pursue this claim. DOJ bases this lawsuit on three statutes. But the first statute, the Medical Care Recovery Act, does not allow the government to recover Medicare expenses. The second statute, the Medicare Secondary Payer Act, does allow the government to recover Medicare expenses but only against insurers. Finally, the relief the government seeks under the third statute, RICO, has already been granted by the tobacco industry's agreement with the states. DOJ's RICO assertions are yet another misuse of this statute.

This Justice Department is the most politicized in history. No one can believe that this decision to sue the tobacco industry was based on anything more than a desire to get money from the industry for more government spending. But, in any event, this blatant violation of congressional dictates cannot be ignored--no matter how "justified" some might believe the cause.

If we allow this to continue unchallenged, this Administration and future Administrations will feel free to ignore congressional decisions on spending priorities and spend scarce resources on their own priorities.

FEDERAL LAWSUIT TALKING POINTS

In his 1999 State of the Union message, the President announced that he had directed the Justice Department to develop a lawsuit against the tobacco industry. The lawsuit was filed in September 1999. This unprecedented action must be opposed for the following reasons:

Just three years ago, the Department of Justice apparently determined that no independent cause of action exists against the industry for recovery of Medicare and Medicaid costs claimed to be attributable to smoking.

Only after the plaintiffs' bar concocted a legal argument in conjunction with political pressure from the White House and anti-tobacco forces did the Justice Department lay the groundwork for reversing the apparent findings of the professional lawyers in the Civil Division to assert that a cause of action exists after all.

Clinton sought in FY 2000 an appropriation of \$20 million to fund this unprecedented assault on an industry. The Congress rejected this request. Nevertheless, the Justice Department ignored congressional direction and took money from other agencies to fund the lawsuit. The Justice Department has now indicated that it may hire outside trial lawyers. The trial bar, working for the Justice Department and paid with taxpayer dollars, should not be allowed to usurp the authority of Congress and further enrich themselves.

Former Clinton Labor Secretary Robert Reich summarized it this way:

[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 secrecy. ("Don't Democrats Believe in Democracy?", *Wall Street Journal*, January 12, 2000)

The plaintiffs' bar should not be allowed to take over the Clinton Justice Department to try to accomplish through litigation what the Congress rejected in legislation. Attempts to use litigation to impose policies that could not be achieved through the democratic process should be condemned.

Former VA secretary Brown called it a "borderline absurdity" to compensate veterans for their "personal choice to engage in conduct damaging to their health." Notably, until 1974, the federal government gave FREE cigarettes to those in the military. This policy was pursued even though federal warning labels have been on packages since 1966. Moreover, the federal government, through excise taxes, makes money on every pack even when alleged healthcare costs are factored in.

When the federal government becomes the tool of the trial bar, who will be next? The firearms industry faces gun control through the threat of civil litigation. Then there will be other targets such as alcohol, beef, fast food and auto industries.