

DRAFT
04/25/90

The Honorable Thomas A. Luken
Chairman
Subcommittee on Transportation
and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

In letters dated April 18, 1990, you invited representatives of the parents of three of our member companies, The American Tobacco Company, Lorillard, Inc., and Philip Morris U.S.A., to present their views on four industry issues in connection with a hearing by your Subcommittee scheduled for April 30. We have been asked to present the industry's views on three of these issues.^{1/}

1. The suggestion that the media should donate additional air time to antismoking messages. This issue was a subject of the hearing by your Subcommittee held on March 1, 1990. As we testified at that hearing, such suggestions appear to be based on the mistaken premise that Americans are unaware of the claimed health risks of smoking.

Former Surgeon General Koop himself stated in 1985: "The smoker today is well-educated about the health hazards of smoking."^{2/} Indeed, as one authority told a House subcommittee not long ago, "the level of public awareness on smoking and health issues is virtually unprecedented in our national experience."^{3/} More Americans are aware of of the allegations with respect to smoking and health than

^{1/} The fourth issue concerns stockholder proposals to be offered at the annual meetings of these companies.

^{2/} *New York Times*, Dec. 13, 1985, at B10, col. 4.

^{3/} See *Cigarettes -- Advertising, Testing and Liability: Hearings on H.R. 4543 before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce, 100th Cong., 2d Sess. 443 (1988)* (statement of Gerald M. Goldhaber, Chairman, Department of Communications, State University of New York (Buffalo)).

can identify George Washington or know when our Nation declared its Independence. Nearly every American believes smoking is harmful but only 1 of 3 Americans knows who delivered the Sermon on the Mount.^{4/}

Young people, especially, are aware of the risks attributed to smoking. As the Surgeon General stated in 1979, "[b]y the time they reach seventh grade, the vast majority of children believe smoking is dangerous to one's health."^{5/} Young people start to smoke not because they are unaware of the claimed health risks of smoking or because of cigarette advertising. The most forceful influences on smoking by young people are family and peers, and these influences have been shown to be both powerful and direct.^{6/}

In short, devoting more air time to antismoking messages would simply repeat a message that Americans already understand and that is reinforced continually and pervasively by the media. Donating additional air time to such messages would serve no apparent purpose.

2. The antismoking advertisements currently being run by the State of California. In recent weeks, the California Department of Health Services has run a number of antismoking advertisements in the broadcast and print media in California. Some of these advertisements purport to depict the asserted hazards of smoking. Others attack the cigarette manufacturers in the style of negative political commercials. \$28.6 million has been earmarked for this advertising campaign. Bills introduced by Representative Bates (H.R. 3943) and Senator Kennedy (S. 1883), which we oppose, would put the federal government in the business of funding similar antismoking advertising campaigns.

^{4/} Id. at 442-43.

^{5/} *Smoking and Health: A Report of the Surgeon General*, p. 17-10 (1979).

^{6/} See, e.g., *Smoking Prevention Act: Hearings on H.R. 1824 before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 53 (1983) (statement of Mortimer B. Lipsett, M.D., Director, National Institute of Child Health and Human Development).*

For the reasons discussed above, the ads concerning the asserted hazards of smoking convey a message with which Californians already are familiar, to say the least, and on that ground alone those ads are a waste of tax dollars. However, the "attack ads" go well beyond anything authorized by the voters in Prop 99 or by the legislature in implementing Prop 99 and represent a dangerous foray by government into the arena of partisan political speech. Major television stations in California have refused to run the most inflammatory of the ads.

The legislation implementing Prop 99 authorizes an "information campaign" for "an ongoing public awareness of tobacco-related diseases." Cal. Health & Safety Code § 24164(g). The legislation specifies that the media campaign is to "stress the importance of both preventing the initiation of tobacco use and quitting smoking." *Ibid.* Plainly the ads attacking the cigarette companies do not disseminate information concerning smoking and health. Neither do those ads either urge people not to start smoking or urge them to stop. The ads simply attempt to vilify the companies that manufacture cigarettes -- "ashcanning the opposition," as one network executive put it.^{7/} The advertising executive whose agency prepared the spots candidly stated: "We're not going after smokers; we're going after the industry."^{8/}

We believe that the attack ads are an improper form of advocacy by government. Simply put, they are domestic political propaganda, intended not to reduce smoking but to discredit the cigarette manufacturers among the public in order to muster additional support for antitobacco legislation. Such partisan speech by government threatens the integrity of the political process and, ultimately, the underlying principles of our system of democratic self-government. As one scholar has stated:

"[P]articipation by the government in the dissemination of political ideas poses a threat to open public debate that is

7/ Johnson, "Anti-Smoke Torch Flickers -- California's Ad Attack on Tobacco Marketers Draws Fire from Stations," *Advertising Age*, April 16, 1990, p. 1.

8/ *Ibid.*

Hon. Thomas A. Luken

April
Page 4

distinct from government impairment of individual expression. Programs of direct government dissemination and private dissemination that is government subsidized not only inform but also persuade. The government has the potential to use its unmatched arsenal of media resources and legislative prerogatives to obtain political ends, to nullify the effectiveness of criticism, and, thus, to undermine the principle of self-government. The free exercise of political rights, therefore, depends as much on a guarantee against political establishment as it does on the guarantee against interference with free speech."9/

For these reasons, among others, Congress has prohibited the United States Information Agency and the Voice of America from disseminating their propaganda domestically. See 22 U.S.C. §§ 1461, 1461-1a.

The precedent established by the California advertising campaign (and inherent in H.R. 3943 and S. 1883) is especially dangerous. Government attacks on corporations need not be limited to cigarette companies -- or even to corporations. Following California's lead, for example, a right-to-work state might undertake a multimillion-dollar advertising campaign proclaiming the evils of unionism and the perfidy of unions. Similar possibilities, no less alarming, can easily be imagined -- for example, state-financed media campaigns attacking the "pro-life" or "pro-choice" point of view.

Finally, as Floyd Abrams told the Senate Committee on Labor and Human Resources at its hearing on February 20, 1990, devoting public moneys to antismoking advocacy on television and radio at a time when tobacco manufacturers are precluded from advertising in the same media is difficult to square with the First Amendment, let alone with basic principles of fairness.

3. Alleged Circumvention of the Federal Cigarette Labeling and Advertising Act. Your letter refers to

9/ Kamenshine, "The First Amendment's Implied Political Establishment Clause," 67 Calif. L. Rev. 1104 (1979).

Hon. Thomas A. Luken

April

Page 5

the suggestion that televising sports events sponsored by cigarette companies violates the Federal Cigarette Labeling and Advertising Act. Sec. 6 of the Act makes it unlawful "to advertise cigarettes on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." 15 U.S.C. § 1335. As we testified before your Subcommittee on March 1, 1990, the prohibition of Sec. 6 is aimed at television commercials, not incidental displays of cigarette advertisements at broadcast events.

Sincerely,

Samuel D. Chilcote, Jr.
President
The Tobacco Institute