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August 10, 1998

BY HAND

Lawrence M. Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Matter Under Review 4766

Dear Mr. Noble:

As counsel for Senator Mitch McConnell, I respectfully request that the Commission promptly dismiss Senator McConnell as a respondent from Matter Under Review 4766. Senator McConnell was notified of his alleged status as a respondent by the Commission's letter of July 2, 1998, from F. Andrew Turley to Senator Mitch McConnell. By letter dated July 24, 1998, the Commission extended the time for the Senator to respond until August 10, 1998.

Apparently by oversight or design, the Commission staff has added Senator McConnell to MUR No. 4766 as a Respondent. Senator McConnell should be dismissed from this matter forthwith for any of the following reasons: (i) the Speech or Debate Clause in Article 1, Section 6 of the Constitution of the United States prohibits the Commission from questioning -- much less sanctioning -- the Senator in connection with legislative activity, including the legislative discussions alleged in the complaint; (ii) the issue advertisements allegedly planned by the tobacco industry are outside the scope of the Federal Election Campaign Act of 1971, as amended ("FECA"); (iii) because the Senator is not and will not be a candidate for federal office in 1998, he has received no in-kind contribution; because he has not and will not pay for any of the advertisements at issue, he has made no in-kind contribution; (iv) the Senator did not engage in coordination regarding the advertisements with any tobacco company representative or with any campaign; and (v) the complaint is otherwise deficient.

Before addressing each of these points, we note that the advertisements purportedly at issue here have not yet run; rather the claim is that they are planned "to be run in the fall after the critical vote" on the legislation. (National Center for Tobacco-Free Kids letter 6/29/98 at p.1.) Thus, this purported claim is at best merely hypothetical, or at worst an effort to intimidate the industry Respondents out of exercising their First Amendment rights. But even if it were appropriate for the Commission to consider such hypothetical claims, the claims against Senator McConnell are completely meritless.

1. The Speech or Debate Clause Prohibits Questioning the Senator with Respect to the Legislative Discussion Referred in the Complaint.

Senator McConnell is mentioned in the complaint for one and only one reason: his alleged remarks to Senate colleagues regarding legislation pending before the Senate. That speech is absolutely privileged under the Speech or Debate Clause of the Constitution: "For any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. Art. I, Section 6, cl. 2: *Eastland v. United States Serviceman's Fund*, 421 U.S. 491, 503 (1975). The Supreme Court has read the clause "broadly to effectuate its purposes." *United States v. Johnson*, 383 U.S. 169, 180 (1966). The Clause applies to communications that are "an integral part of the deliberative and communicative processes" by which Congressmen participate in legislative activity. *Gravel v. United States*, 408 U.S. 606, 625 (1972).

The immunity aspect of the Clause extends not only to speech on the Senate floor but also to a Senator's conversations with his Senate colleagues about pending legislation. *See Eastland*, 421 U.S. at 583 (privilege protects committee subpoenas); *Doe v. McMillan*, 412 U.S. 306, 313 (1973) (privilege protects statements in committee reports); *Gravel*, 408 U.S. at 615-16 (privilege protects conduct at subcommittee meetings). Accordingly, Senator McConnell's alleged remarks cannot be the basis for any sanction by any body (including this Commission) under any law (including the Federal Election Campaign Act).

Moreover, the Speech or Debate Clause also prohibits any inquiry by the Commission or anyone else concerning statements made by Senators, Representatives, and their staffs in connection with the consideration of legislation. *Gravel*,

408 U.S. at 616-17. The broad language of the clause, prohibiting "question[ing]" of Senators and Representatives "in any place" regarding any "Speech or Debate in either House" confirms this preclusion. *See Eastland*, 421 U.S. at 503; *Gravel*, 408 U.S. at 616. Indeed, the Commission staff's decision to seek a response from Senator McConnell in this MUR violates the Speech or Debate Clause.

Gravel is illustrative. Senator Gravel had improperly received copies of the "Pentagon Papers," a document classified as "Top Secret Sensitive." As Chairman of the Subcommittee on Building and Grounds of the Senate Public Works Committee -- which had no apparent jurisdiction over the Pentagon -- Senator Gravel unilaterally convened a meeting the evening of June 29, 1971, at which he read excerpts from the papers and placed all 47 volumes in the public record. A grand jury investigating possible criminal conduct relating to the release of the documents subpoenaed Dr. Leonard S. Rodberg, who had been added to Senator Gravel's staff on June 29, 1971, and Senator Gravel moved to quash the subpoenas. The Court deemed "incontrovertible" Senator Gravel's argument that the Speech or Debate clause gave him immunity from subpoena "for the events that occurred at the subcommittee meeting." 406 U.S. at 615-16. Further, the Court held that the immunity extended to Dr. Rodberg. *Id.* at 617. The immunity extends to "'things generally done in a session of the House by one of its members in relation to the business before it.'" *Id.* (citation omitted). Without question, discussion with other Senators in the Capitol about the merits of, the lack of popular support for, and industry opposition to a bill coming to a vote falls squarely within the Speech or Debate clause.

Because Senator McConnell's speech in the Senate regarding legislation is absolutely privileged, and because Senator McConnell values the separation of powers principle that underlies the clause, he declines to comment on the numerous inaccurate news reports about his discussions with colleagues regarding the Senate's vote on a cloture petition involving tobacco legislation. Affidavit of Senator Mitch McConnell, ¶ 6 (attached as Exhibit A).

2. The Commission Has No Jurisdiction to Regulate the Issue Advocacy Addressed in the Complaint.

For all its liberties with the facts, the Complaint does not contend that the hypothetical future advertisements at issue will "expressly advocate the election or defeat of a clearly identified federal candidate." More than 20 years of

judicial precedent make clear that the First Amendment proscribes any effort by this Commission or any other entity to regulate the issue advocacy contained in these advertisements. *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (applying express advocacy standard to prohibition on corporate "expenditures"); *Buckley v. Valeo*, 424 U.S. 1, 44 (1976) (announcing express advocacy standard); *Clifton v. FEC*, 114 F.3d 1309, 1312 (1st Cir. 1997) (invalidating Commission regulation of issue advocacy voter guides), *cert. denied*, 118 S. Ct. 1036 (1998); *Maine Right to Life Comm. v. FEC*, 98 F.3d 1, 1 (1st Cir. 1996) (rejecting "electioneering message" standard), *cert. denied*, 118 S. Ct. 52 (1997); *FEC v. Christian Action Network, Inc.*, 92 F.3d 1178 (4th Cir. 1996) (rejecting "electioneering message" standard); *Faucher v. FEC*, 928 F.2d 468, 471 (1st Cir.) (invalidating Commission regulation of corporate voter guides), *cert. denied*, 502 U.S. 820 (1991); *FEC v. Furgatch*, 807 F.2d 857, 864 (9th Cir.) (applying "express advocacy" standard with little, if any, weight accorded external contextual factors), *cert. denied*, 484 U.S. 850 (1987); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45, 53 (2d Cir. 1980) (en banc) (rejecting Commission's effort to restrict issue advertisements); *Right to Life of Dutchess County v. FEC*, No. 97 Civ. 2614 (SHS), 1998 WL 186905, at *5 (S.D.N.Y. June 1, 1998) (rejecting "electioneering message" standard); *FEC v. Survival Education Fund, Inc.*, No. 89 Civ. 0347 (TPG), 1994 WL 9658, at *3 (S.D.N.Y. Jan. 12, 1994) (FECA reaches "only communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office"), *aff'd in part, rev'd in part*, 65 F.3d 285 (2d Cir. 1995); *FEC v. National Org. for Women*, 713 F. Supp. 428, 435 (D.D.C. 1989) (granting summary judgment to organization that used exclusively corporate funds for issue advocacy); *FEC v. American Fed'n of State County and Mun. Employees*, 471 F. Supp. 315, 316-17 (D.D.C. 1979) (holding that a poster depicting then-President Ford, wearing a button reading "Pardon Me" and embracing President Nixon, did not "expressly advocate," and was "the type of political speech which is protected from regulation under 2 U.S.C. § 431, *et seq.*"). Thus, such issue advertisements can constitute neither a regulable "expenditure" nor a regulable "contribution."

Nothing in the complaint suggests that the advertisements allegedly contemplated by the tobacco companies would contain express advocacy. Indeed, to the best of the knowledge, information, and belief of Senator McConnell, none of the advertisements that the tobacco companies have run to date expressly advocate the election or defeat of a clearly identified candidate. McConnell Affidavit, ¶ 4. The Supreme

Court has expressly held that speech paid for by corporations addressing important issues in the political arena -- and no issue in the political arena appears more important to the tobacco industry than the one addressed in these advertisements -- is completely protected from regulation by the First Amendment. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (striking state law prohibiting corporations from airing their views on ballot measures). Indeed, the Supreme Court has struck down even the most rudimentary restrictions on issue advocacy. *McIntyre v. Ohio Election Comm'n*, 514 U.S. 334, 356 (1995) (striking state requirement that issue oriented pamphlets identify the author); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 297 (1981) (striking city ordinance limiting contributions to committee formed to oppose a ballot measure).

The Supreme Court adopted the express advocacy standard precisely to protect issue advocacy such as that allegedly contemplated by the tobacco companies. "[T]he distinction between discussion of issues and candidates and advocacy of the election or defeat of candidates may often dissolve in practical application." *Buckley*, 424 U.S. at 42. Accordingly, the Court held, only the bright-line express advocacy standard provides speakers with the constitutionally required degree of security concerning what speech will and will not be regulated. Anything less would compel speakers to "hedge and trim" their political discourse. *Id.*

Nor would alleged coordination transform otherwise protected issue advocacy into speech that the Commission may regulate. The United States Court of Appeals for the District of Columbia Circuit has recognized that coordinated spending constitutes an in-kind contribution to a candidate only if the spending expressly advocates the election or defeat of a clearly identified federal candidate. *Orloski v. FEC*, 795 F.2d 156 (D.C. Cir. 1986). In *Orloski*, a corporation sponsored a picnic for 1,000 senior citizens in coordination with a candidate shortly before an election. The candidate, who had been criticized for not supporting senior citizens' issues, addressed issues of concern to seniors at the picnic, but studiously avoided appealing for votes. The Commission dismissed a complaint alleging that the costs of the picnic were illegal in-kind contributions to the candidate, and the Court of Appeals agreed:

> "Under the Act this type of 'donation' is only a 'contribution' if it first qualifies as an 'expenditure' and, under the FEC's interpretation, such a donation is not an

> expenditure unless someone at the funded event expressly advocates the reelection of the incumbent or the defeat of an opponent or solicits or accepts money to support the incumbent's reelection." *Id.* at 163.

Similarly, the Attorney General of the United States has rejected the argument that coordination transforms issue advocacy into unprotected speech. Notwithstanding credible evidence that President Clinton drafted the text of numerous issue advertisements that the Democratic National Committee funded entirely with so-called "soft money," Attorney General Janet Reno declined to appoint an independent counsel to investigate. She explained:

> "With respect to coordinated media advertisements by political parties (an area that has received much attention as of late), the proper characterization of a particular expenditure depends not on the degree of coordination, but rather on the content of the message." Letter of Attorney General Reno to Chairman Orrin Hatch, April 14, 1997, at 7 (Exhibit B) (emphasis added).

The Commission simply has no jurisdiction over the potential future advertisements alleged in the complaint. As the United States Court of Appeals for the Fourth Circuit recently explained: "[I]t is indisputable that the Supreme Court limited the FEC's regulatory authority to expenditures which, through explicit words, advocate the election or defeat of a specifically identified federal candidate." *FEC v. Christian Action Network, Inc.*, 110 F.3d 1049, 1064 (4th Cir. 1997). Pursuing an investigation against Senator McConnell in the instant MUR would be without substantial basis under the Equal Access to Justice Act.

3. Senator McConnell Did Not Coordinate the Tobacco Companies' Issue Advertisements with Any Campaign.

Senator McConnell has unequivocally denied in his affidavit attached to this letter that he "arranged, coordinated, or directed any aspect of the tobacco industry's publication or broadcast of their issue advertisements." McConnell Affidavit, ¶ 7.

Even if the Commission were to use its independent expenditure regulations to define coordination, the complaint

does not allege any conduct by Senator McConnell that could conceivably satisfy such a high standard. The Commission's independent expenditure regulations define "coordination" to require some action "by the candidate" with respect to the content, form, or timing of the advertisement. 11 C.F.R. § 109.1(b)(4)(i) ("any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication); 11 C.F.R. § 109.1(b)(4)(i)(A) (coordination presumed if "[b]ased on information about the candidate's plans, projects, or needs provided to the expending person by the candidate") (emphasis added). Senator McConnell also denies that he has provided any information to any tobacco industry representatives about any Senatorial candidate's campaign plans. McConnell Aff. at ¶ 7. It is now clear that evidence, rather than Commission presumptions, is necessary to support any finding of coordinated activity -- even assuming (contrary to the law cited in Part II above) that coordination is relevant. *Colorado Republican Fed. Campaign Comm. v. FEC*, 116 S. Ct. 2309, 2319 (1996) ("An agency's simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one.").

Nor would the allegations in the complaint -- even if true -- warrant a different conclusion. Were the Senator to have expressed an expectation in June that the tobacco industry would continue to run issue advertisements in the summer and fall to counter continuing legislative proposals expected to be debated in the House and Senate, he would have been doing nothing more than repeating the widely reported statements of numerous tobacco company officials. *See, e.g.*, William Schneider, "Another Over-Reach, Maybe a New Ending," *The National Journal*, (June 27, 1998) ("'over the next several months leading to the election in November, we are going to have serious discussions with people in this country about the quality of debate in this town and the lack of leadership,' RJR Nabisco Inc. Chairman Steven Goldstone warned on April 8."). Indeed, in light of the unprecedented level of potential government regulation and taxation -- required industry payments would have exceeded $500 billion over 25 years -- it would be surprising if the tobacco companies did not launch sustained public discussion on the issues.

These statements are, of course, no more an indication of an FECA violation than statements by anti-tobacco advocates expressing an intention to run issue advertisements attacking, by name, Senators who voted to defeat the tobacco legislation. Bill Novelli, a signatory to

the complaint by Campaign for Tobacco Free Kids, has vowed to attack by name Senators who voted against the legislation:

> "Public health advocates . . . added that they plan to make the public aware of the 42 senators who helped bury the tobacco bill. 'We are going to go out there and name names,' said Bill Novelli, president of the Campaign for Tobacco Free Kids." *See* Bennett Roth, "Tobacco Defeat Has Democrats in Attack Mode." *The Houston Chronicle* (June 19, 1998).

Of course Mr. Novelli would like to attack Senators who opposed the legislation, while silencing all voices who might respond to his attacks. Neither fairness nor the First Amendment supports such tactics.

4. The Complaint Alleges No Violation by Senator McConnell.

The FECA restricts only contributions and expenditures as those terms are defined in the statute. 2 U.S.C. §§ 431(8) and (9). The complaint offers no basis, however, for inferring that Senator McConnell gave or accepted any contribution or made any expenditure. On the contrary, the complaint twice expressly limits the respondents to five tobacco companies. Complaint at 1 and 3. Even under the erroneous assumption that the FECA covers the non-express-advocacy issue advertisements allegedly contemplated by the tobacco industry, there is no basis for inferring that Senator McConnell, whose term will not expire until the year 2003, would receive a benefit to his non-existent campaign. Nor is there any way in which the complaint could be construed as alleging that Senator McConnell will "make" the hypothetical future communications by the tobacco companies. For this reason alone, he should be promptly dismissed from this matter.

5. The Notice to Senator McConnell Is Improper for Other Reasons.

The Commission should never have sent notice to Senator McConnell as a respondent in the MUR for several additional reasons.

First, the complaint alleges, at most, a potential future violation. Congress authorized citizens to file complaints only where a potential violation "has occurred."

2 U.S.C. § 437g(a)(1). Any Commission action on the basis of an individual complaint alleging prospective violations of the FECA is without a statutory basis.

Second, the Commission's regulations require a complaint to "clearly identify as a respondent each person or entity who is alleged to have committed a violation." 11 C.F.R. § 111.4(d). The Commission is authorized by the regulations to notify and seek a response from "each respondent" identified in the complaint. 11 C.F.R. § 111.5(a). The complaint attached to the Commission's letter, however, identifies as respondents only five tobacco companies. It does not allege that Senator McConnell committed any violation.

Third, consistent with its omission of Senator McConnell as a respondent, the complaint intimates that the statutory violation at issue is the prohibition on corporate contributions in 2 U.S.C. § 441b. Senator McConnell, of course, is not a corporation and could not have violated 2 U.S.C. § 441b.

* * *

The complaint is nothing more than an attempt by an interest group to circumvent the legislative process. Neither the FECA nor the Commission's regulations were designed to permit interest groups that lose legislative battles to continue their fight before the Commission or in the courts. Still less are FECA and the Commission's regulations designed to permit a disgruntled interest group to enlist the aid of a federal bureaucracy to institute a punitive investigation against those who win legislative battles. The Commission should dismiss the complaint in its entirety, or, at the very least, cease the threatened Speech or Debate clause violation by promptly dismissing Senator McConnell as a respondent.

Sincerely,

Bobby R. Burchfield

Attachment

AFFIDAVIT OF SENATOR MITCH McCONNELL

SENATOR MITCH McCONNELL, after being duly sworn, deposes and says as follows:

1. My name is Addison Mitchell McConnell Jr. I am one of the two United States Senators from the Commonwealth of Kentucky. My office address is 361A Russell Senate Office Building, Washington, DC 20510-1702. I was re-elected in November 1996, and my current term expires in January 2003. I am not up for re-election this year.

2. I have reviewed the complaint filed with the Federal Election Commission by the Campaign for Tobacco-Free Kids. Although that complaint names five tobacco companies (but not me) as respondents, I understand that the Commission's staff has added me as a respondent.

3. Beginning last year, the United States Senate began to consider major legislation affecting the tobacco industry. There are approximately 60,000 tobacco growers in Kentucky, and tobacco is the largest cash crop in the state. Since the tobacco industry is important to the economy of Kentucky, and to many of my constituents, I have always paid close attention to any legislative matters that could have a significant effect on that industry. For that reason, I followed the tobacco legislation closely. As the proposed legislation proceeded through the legislative process and was reported out of the Commerce Committee, the bill became a major focus not only of

the Senate but of the news media as well. From approximately April 1998 through June 1998, hardly a day went by during which I was not involved in discussions or meetings concerning the legislation. I made no secret of my view that the legislation was bad public policy and would be seriously detrimental to the interests of my constituents and the public at large.

4. While the tobacco legislation was under consideration by the Senate, the five tobacco companies originally named as respondents in this matter began airing a series of non-candidate-specific, pure issue advertisements opposing the legislation. These advertisements advocated the rejection of the tobacco legislation, but to the best of my knowledge, information, and belief did not advocate the election or defeat of any named candidate. I had absolutely no role in the decision to air those advertisements, the content of those advertisements, or decisions on where to place those advertisements.

5. The industry's advertising campaign appeared to me to be successful in several respects. First, the advertising campaign revealed serious flaws in the legislation that had not been reported by the mainstream media. Second, it generated an enormous volume of mail and telephone calls opposing the legislation to my colleagues in the Senate. And finally, public opinion polls began to show a lack of public support for the extensive federal regulation of the tobacco industry proposed by

the bill. In part due to the industry advertising campaign, as well as closer scrutiny of the bill by the public and the Senate, many of my Senate colleagues began to have serious reservations about the bill.

6. Article 1, Section 6 of the Constitution of the United States contains the Speech or Debate Clause, which provides: "For any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." This provision and the Supreme Court decisions applying it reflect a clear policy that Senators and Representatives cannot and should not comment on their legislative activities in judicial, executive, or administrative investigations. For this reason, I decline to comment on the many inaccurate accounts in the media concerning discussions I allegedly had with my Senate colleagues, and the events at the Senate Republican Caucus on June 17, 1998.

7. At no time have I arranged, coordinated, or directed any aspect of the tobacco industry's publication or broadcast of their issue advertisements. Further, I have not provided any tobacco industry representative with <u>any</u> information about <u>any</u> Senatorial candidate's campaign plans. Nor has <u>any</u> industry representative provided to me <u>any</u> information about the specific locations where such advertisements were or are planned, or the specific content of those advertisements. To put it plainly, I have had absolutely no direct or indirect input into

the content, style, medium, publication, or targeting of the industry's advertisements, nor do I intend to have any such direct or indirect input.

Further affiant sayeth not.

Addison Mitchell McConnell Jr.

Subscribed and sworn to before me this 10th day of August, 1998.

Notary Public

LINDA L. JENNINGS
STATE OF WASHINGTON
NOTARY --•-- PUBLIC
MY COMMISSION EXPIRES 6-03-01