FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 4766
DATE COMPLAINT FILED: 6/29/98
DATE OF NOTIFICATION: 7/2/98
DATE ACTIVATED: 9/1/99

EXPIRATION OF STATUE OF
LIMITATIONS: 6/18/03
STAFF MEMBER: Anne A. Weissenborn

COMPLAINANT: National Center for Tobacco-Free Kids

RESPONDENTS: Philip Morris Companies, Inc.
Brown & Williamson Tobacco Corp.
Lorillard Tobacco Company
R.J. Reynolds Tobacco Company
United States Tobacco
U.S. Senator Mitch McConnell
National Republican Senatorial Committee
J. Stanley Huckaby, as treasurer

RELEVANT STATUTE: 2 U.S.C. § 431(17)
2 U.S.C. § 441b(a)
2 U.S.C. § 441b(b)(2)

INTERNAL REPORTS CHECKED: FEC Contributor Indices

FEDERAL AGENCIES CHECKED: None

I. ACTION RECOMMENDED

That the Commission find no reason to believe the respondents in this matter violated the Federal Election Campaign Act of 1971, as amended, ("the Act"), and close the file.

II. GENERATION OF MATTER

On June 29, 1998, the National Center for Tobacco-Free Kids filed a complaint with the Commission alleging that Philip Morris Companies, Inc., Brown & Williamson Tobacco Corp.,

Lorillard Tobacco Company, R.J. Reynolds Tobacco Company and United States Tobacco ("tobacco companies") had violated the Act by "promising [through Senator Mitch McConnell, chair of the National Republican Senatorial Committee ('NRSC'),] to mount a television ad campaign to support those [United States Senators] who voted against" S. 1415, "The National Tobacco Policy and Youth Smoking Reduction Act," in 1998. All respondents were sent notifications of the complaint on July 20, 1998. On September 23, 1998, and March 9, 1999, the Commission received responses filed on behalf of Senator McConnell. A joint response from the five tobacco companies was received on September 24, 1998. More recently it was determined that the NRSC had not received its notification and a copy was faxed to counsel. A response from the NRSC was received on November 19, 1999.

III. FACTUAL AND LEGAL ANALYSIS

A. *The Law*

2 U.S.C. § 441b prohibits corporations from making "a contribution or an expenditure in connection with any election" for federal office; the same provision prohibits "any candidate, political committee or other person knowingly to accept or receive any contribution prohibited by this section." 2 U.S.C. § 441b(b)(2) defines "contribution or expenditure" as including "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election" to federal office. 2 U.S.C. § 431(17) defines "independent expenditure" as "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in

concert with, or at the request or suggestion of, any candidate, or any authorized committee agent of such candidate." 2 U.S.C. § 431(18) defines "clearly identified" as "(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identify of the candidate is apparent by unambiguous reference."

In Massachusetts Citizens For Life v. FEC, 479 U.S. 238 (1986) ("MCFL"), the Supreme Court confirmed the applicability of 2 U.S.C. § 441b to certain expenditures, not just direct contributions, made by incorporated entities on behalf of candidates. The Court determined that, in instances in which a corporation's communications constitute express advocacy of the election or defeat of a federal candidate, the expenditures for those communications are subject to the prohibitions of Section 441b, even if the expenditures are independent of involvement by the candidate or party committee benefited. 479 U.S. at 248-249, citing Buckley v. Valeo, 424 U.S. 1, 80 (1976). [1]

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[1] The Supreme Court in Buckley listed "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," and "reject" as examples of express advocacy. 424 U.S. at 44, n. 52. Later, in MCFL, the Court found the "marginally less direct" language at issue in that case, namely a combination of an exhortation to "VOTE PRO-LIFE" and pictures and names of thirteen candidates who had supported MCFL's position on three issues, to constitute "express advocacy." 479 U.S. at 249-250. In FEC v. Furgatch, the U.S. Court of Appeals for the Ninth Circuit broadened the definition of express advocacy, finding that "context is relevant to a determination of express advocacy." 807 F.2d 857, 863 (1987), cert. denied, 484 U.S. 850 (1987). Employing language taken from the Furgatch decision, the Commission promulgated new regulations at 11 C.F.R. §§ 100.22 and 109.1 which became final on July 6, 1995. These amended regulations define "expressly advocating" to include communications which "[w]hen taken as a whole and with limited reference to external events . . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) . . . ." 11 C.F.R. § 100.22(b).

Just before the new regulations became final, on June 28, 1995 the U.S. District Court for the Western District of Virginia dismissed a case brought by the Commission involving media advertisements paid for by an incorporated entity which did not contain the words set out in Buckley as "express advocacy," but which the Commission argued constituted express advocacy as a result of their timing, imagery, music, editing and the colors used. FEC v. Christian Action Network, 894 F. Supp. 946 (W.D. Va. 1995), aff. per curiam, 92 F. 3d 1178 (4th Cir., 1996). The district court found that the advertisements constituted "issue advocacy" and were thus exempt from government regulation.

Expenditures made by corporations at the request of, or in coordination with, a candidate or party committee are also potentially subject to the Section 441b prohibitions, whether or not they contain express advocacy. In Buckley, the Supreme Court stated: "[C]ontrolled or coordinated expenditures are treated as contributions rather than expenditures under the Act." 424 U.S. at 46. Citing this statement in Buckley, the district court in FEC v. Christian Coalition explicitly rejected the argument that the term "expenditure" must always be limited by the "express advocacy" standard, holding that

> importing the 'express advocacy' standard into § 441b's contribution prohibition would misread *Buckley* and collapse the distinction between contributions and independent expenditures in such a way as to give short shrift to the government's compelling interest in preventing real and perceived corruption that can flow from large campaign contributions. Were this standard adopted, it would open the door to unrestricted corporate or union underwriting of numerous campaign-related communications that do not expressly advocate a candidate's election or defeat.

52 F. Supp. 2d at 88.

The court in Christian Coalition also differentiated between what it termed "expressive coordinated expenditures" and coordinated expenditures for "non-communicative materials,"

Fn. 1 continued.

In 1996 the Maine Right to Life Committee filed suit challenging the Commission's regulation at 11 C.F.R. § 100.22(b). The District Court found this subsection of the regulation to be "invalid. . . because it extends beyond express advocacy." Maine Right to Life, Committee, Inc. v. FEC, 914 F. Supp. 8, 13 (D.Me., 1996), affd, 98 F. 3d 1 (1st Cir. 1996), citing MCFL and Faucher v. FEC, 743 F. Supp.64 (D.Me. 1990), affd, 928 F. 2d 468 (1st Cir.), cert. denied, 502 U.S. 820. More recently, in FEC v. Christian Coalition, 52 F. Supp. 2d 45, 61-62 (D.D.C., Aug. 2, 1999), the court set out three "attributes" of express advocacy: (1) "the communication must in effect contain an explicit directive," with emphasis upon the use of an active verb; (2) the verb must "unmistakably exhort the reader/viewer to take electoral action to support the election or defeat of a clearly identified candidate"; and (3) there is no other reasonable interpretation of the language used. On January 4, 2000, in Virginia Society for Human Life, Inc. v. FEC, CN 3:99CV559 (E.D Va), a case addressing voter guides distributed by a non-profit, incorporated organization, the court granted plaintiff's motion for summary judgment and issued a nationwide injunction against enforcement of 11 C.F.R. § 100.22(b).

defining the former as being "for a communication made for the purpose of influencing a federal election in which the spender is responsible for a substantial portion of the speech and for which the spender's choice of speech has been arrived at after coordination with the campaign." 52 F. Supp. 2d at 85, n. 45. The court gave as an example of an expressive coordinated expenditure "a television advertisement favorably profiling a candidate's stand on certain issues which is paid for and written by the contributor, in which the advertisement does 'express the underlying basis for his support,' and does discuss candidates and issues, but for which the expenditure is done in coordination with, or with the authorization of, the candidate." Id. at 85, quoting Buckley, 479 U.S. at 21.

The activities of the Christian Coalition at issue in this litigation included the production and distribution of voter guides which identified candidates and set out their positions on specific issues. The court in Christian Coalition found that "the Act by its terms applies to the Coalition's expenditures on voter guides . . . ." Id. at 86. The court also found that "expressive coordinated expenditures are not limited to 'express advocacy'." Id. at 86-87. The court held, however, that "the standard for coordination must be restrictive, limiting the universe of cases triggering potential enforcement actions to those situations in which the coordination is extensive enough to make the potential for corruption through legislative quid pro quo palpable without chilling protected contact between candidates and corporations and unions." Id. at 88-89. Addressing only corporate expressive coordinated expenditures, and, after rejecting an "insider trading" standard, id. at 89-90, the court stated: "An expressive expenditure becomes 'coordinated; [sic]' where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode or intended audience . . .; or (4)

'volume'. . . . Id. at 92. The court further stated that "[t]his standard limits § 441b's contribution prohibition on expressive coordinated expenditures to those in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants." The court also stated: "A corporation's mere announcement to the campaign that it plans to distribute thousands of voter guides in select churches on the Sunday before election day, even if that information is not yet public, is not enough to be coordination. Coordination requires some to-and-fro between corporation and campaign on these subjects." Id. at 93.[2]

B. The Complaint

The complaint in MUR 4766 is based upon news reports aired or published at the time of the Senate's June 17, 1998 vote on cloture on a bill, S.1415, which addressed tobacco policy and youth smoking. According to the complaint, Senator Mitch McConnell "informed his colleagues in a closed door meeting that if they voted to kill the tobacco bill, the major tobacco manufactures were promising to mount a television ad campaign to support those who voted

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[2] On June 22, 1999, and thus prior to the Christian Coalition decision, the Commission in MUR 4378 addressed a situation in which the National Republican Senatorial Committee ("NRSC") and a representative of Dennis Rehberg, a candidate for the U.S. Senate from Montana, had discussed in general terms future television advertising by the party committee in opposition to the candidate's opponent, with the candidate's committee later making general inquiries as to whether the ads were going to run. Both the candidate and his agent, and a representative of the NRSC, testified during their depositions that there were no prior discussions about the actual content, placement, or timing of the NRSC advertisements. The Commission failed by votes of 2-3 and 3-3 to find probable cause to believe violations of the Act had resulted. In their Statement of Reasons, the Commissioners who voted against such determinations found there to have been insufficient evidence of "coordination with respect to the advertising campaign at issue. . . . In our view, the fact that there was 'no prior coordination' is a key factual determination. . . . Like the [Supreme] Court in Colorado Republicans [v. FEC, 116 S.Ct. 2309, (1996)], we also reach the conclusion that the more general pattern of contacts between the campaign and the party committee do not constitute coordination sufficient to transform the NRSC's ad disbursements into in-kind contributions to the Rehberg campaign." Statement of Reasons, page 8. "We do not interpret . . . general knowledge *about* a potential ad campaign to amount to an understanding *with* the NRSC." Id., page 9. (Emphasis in original.) The Statement of Reasons then cited to the court's language in Christian Coalition at page 92 which is quoted above.

against the bill." (Emphasis in original.) The Senate voted 57-42 on the cloture petition, in effect ending consideration of S.1415, with all but two of the Democratic Senators and fourteen Republican Senators voting in favor, and forty Republican Senators voting against. (The two Democratic Senators who voted against cloture, Wendell Ford of Kentucky and Charles Robb of Virginia, were not candidates for reelection in 1998.) (See further discussion of the cloture vote below).

The complaint continues: "When Senator McConnell reported that the *goal* of the tobacco industry's ads to be run in the Fall *after* the critical vote was to *support* and *defend* those Senators who voted to kill the bill, he clearly demonstrated that these potential ads were not issue ads, but ads intended to influence the outcome of the upcoming election." (Emphasis in original.) The complaint alleges that such communications, especially if made in cooperation or coordination with a candidate, would "confer something of 'value' that constitutes an illegal 'contribution' by the tobacco industry." According to the complaint: "It is the combination of the stated goal of the ads (to support and defend senators who voted with it in the upcoming election) and the coordination and/or cooperation between the tobacco industry and the senators regarding the expenditures reflected in the promised ad campaign during the upcoming election that constitutes a serious violation of the election laws."

The complaint does not estimate the cost of such an ad campaign, nor does it name the members of the U.S. Senate who would have benefited. The complaint concludes as follows:

> [W]e request that the FEC fully and promptly investigate this matter and put an end to the illegal "expenditures" by the tobacco industry on behalf of those senators who voted against cloture on S.1415.

C. Responses to the Complaint

1. Tobacco Companies

On August 20, 1998, counsel submitted a joint response to the complaint on behalf of the five respondent tobacco companies. The response is divided into three parts: (1) a factual background; (2) a discussion of the complaint; and (3) the respondents' argument. Attached to this response as numbered exhibits are 13 print advertisements (Exhibits 1-13); scripts for seven radio advertisements (Exhibits 14-20); and scripts for 19 television advertisements (Exhibits 21-39).

a. Factual Background

The response states that the respondents began in March 1998 to publish a series of "print, radio, and television advertisements that address the issues surrounding federal tobacco legislation." (Response, page 3). These ads were assertedly designed to discuss and support the "Proposed Resolution" which had been negotiated in 1997 by the respondent companies, states attorneys general, attorneys representing individuals who had sued the tobacco industry, and public health community representatives. According to the response, "the focus [of the ads] is exclusively on the public policy issues surrounding legislation before Congress." (Response, page 4).

The tobacco companies' response goes on to state that on April 1, 1998, S. 1415 ("the McCain Bill") was favorably reported out of the Senate Commerce Committee. "The McCain bill bore little resemblance to the terms of the Proposed Settlement." (Response, page 4). "[T]he respondents' ads continued to focus exclusively on the merits of the legislation." (Response, page 5). The response sets out, as an example, the text of one of the television advertisements

which began to run on June 11, 1998 and which was entitled "Christmas in Washington." (Response, page 5 and Exhibit 33).

The joint response then argues that, even though, on June 17, 1998, the McCain Bill was "rejected on a cloture vote," the threat of similar legislation continued, and was still continuing as of the date of the response. The response cites as support for this assertion two Senate votes on amendments to unrelated legislation on June 18, 1998 and July 14, 1998. "Accordingly, the respondents have continued to address the public about proposals for federal tobacco legislation." (Response, page 6).

The joint response quotes at page 6 the full text of a post-cloture vote television advertisement which was "broadcast in anticipation of a House bill." The script for this advertisement, titled "'November' Man & Woman versions: 30" and attached as Exhibit 37 to the response, reads:

> Man/Woman (OC):
>
> At election time, the politicians are always telling us they're against taxes and for working people.
>
> Well now they have a chance to prove it before the election.
>
> This tobacco tax bill some in Congress are talking about doesn't make any sense. How is a more than half a trillion dollar tax increase on working people going to stop kids from smoking?
>
> It's just more taxes for more government.
>
> I'm going to remember this fall what politicians do this summer.
>
> **ANNCR(V/0):** Contact your Member of Congress. Tell them to oppose a new tobacco taxes [sic].
>
> TITLECARD: Call 1-800-343-3222

(Emphasis in original). The response argues that the "subject of this ad . . . is comprehensive tobacco legislation," and that "the ad is designed to influence, through grassroots effort, Members of Congress as they consider tobacco legislation, and not to influence how individuals vote during elections. Like the other ads, this ad does not refer to or depict any candidate; it does not urge a vote for or against any candidate or party; and its focus is purely legislative in nature, not electoral." (Response, pages 6-7).

The joint response also discusses two additional, post-cloture vote advertisements, a radio ad titled "Man on the Street 2," (attached to the response as Exhibit 20), which assertedly began running on July 2, 1998; and a television advertisement the response titles "Surplus" (attached as Exhibit 39) which, according to the transcript, ran beginning July 22, 1998. ("Surplus" is the same advertisement as that titled "The Real Hero's" which is discussed below.) The response then states:

> Respondents have made decisions about the timing, content and placement of each particular advertisement in direct response to events surrounding the issue of tobacco legislation. . . . Accordingly, no decisions have been made regarding the content or placement of advertisements to be made in the fall, or even whether such advertisements will be made at all. . . . Respondents currently anticipate, however, that federal tobacco legislation will still be a legislative issue in the fall and on into 1999, and thus the respondents continue to contemplate the possibility of additional advertisements."

(Response, page 7).

b. Discussion of Complaint

In its discussion of the complaint, the joint response stresses the future nature of the allegations, i.e., the fact that the complainant was concerned with advertisements to be run after the date of the response. The response also argues that the complaint relied upon "press reports about a statement that was allegedly made by Senator Mitch McConnell in a private meeting with

other Republican Senators prior to the final cloture vote on the McCain bill," and quotes, inter alia, from the statement by an NRSC spokesperson contained in a Bureau of National Affairs report dated July 1, 1998, that Mr. McConnell "was merely 'offering analysis' of the political consequences, not promising anything." (Response, page 8).

c. Argument

The joint response begins its argument as follows:

> [A]ll of the advertisements run by the respondents are issue advertisements and are clearly designed to allow the respondents to participate in an ongoing federal legislative debate regarding comprehensive tobacco legislation. Nothing about these ads even suggests an effort to affect the outcome of any federal election. Accordingly, the advertisements are not 'expenditures' and cannot, *under any theory*, be transformed into 'in-kind contributions' made in connection with federal elections or otherwise treated as contributions or expenditures subject to FECA.

(Response, page 9).

The joint response then addresses both "express advocacy" and "electioneering message" as standards for determining whether corporate speech comes within the prohibitions of 2 U.S.C. § 441b, and asserts that none of the advertisements at issue met either of these standards. In the context of the discussion of "electioneering message," the response states:

> None of the ads even obliquely refers to any candidate, either in words or pictures; the focus of every ad has been on legislative issues, not candidates or parties; and, finally, none of the ads has urged the public to do anything beyond communicating with their representatives about the issue of federal tobacco legislation.

(Response, page 13).

Finally, the response returns to, and elaborates upon, its earlier argument that the complaint alleges only possible, future violations by the respondent corporations, i.e., what are termed "speculative and hypothetical claims of future violations." (Response, page 14). The

response argues that this would require the Commission "to prevent respondents' future speech based on speculation that the contents of that future speech will violate the Act," and that the complainant was seeking an "unconstitutional prior restraint" upon respondents' future communications. (Response, pages 15-16.)

2. Senator Mitch McConnell

On September 23, 1998, the Commission received the first of two responses to the complaint from counsel for Senator Mitch McConnell. This first response, dated August 10, 1998, asks the Commission to dismiss Senator McConnell from the complaint on five bases: (1) the Speech or Debate Clause of the United States Constitution; (2) the asserted fact that "the issue advertisements allegedly planned by the tobacco industry are outside the scope of the Federal Election Campaign Act of 1971, as amended ("FECA")"; (3) the facts that Senator McConnell was not a candidate for office in 1998 and therefore had "received no in-kind contribution," and that he would not pay for any advertisement at issue and therefore "has made no in-kind contribution"; (4) the assertion that "the Senator did not engage in coordination regarding the advertisements with any tobacco company representative or with any campaign"; and (5) the assertion that "the complaint is otherwise deficient." (Emphases added.) The response also argues that the advertisements at issue had not yet run.

With regard to the Speech and Debate Clause, counsel argues in the August response that "[T]he immunity aspect of the [Speech or Debate] Clause extends not only to speech on the Senate floor but also to a Senator's conversations with his Senate colleagues about pending legislation." The response also asserts that the Clause "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," and that notification by Commission staff of

Senator McConnell regarding the complaint in this matter violated the Clause. (August response, pages 2-3) (Emphasis in original). "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." (August response, page 3). In an attached affidavit, Senator McConnell, citing the Speech or Debate Clause, declines "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."

The August response next asserts that the advertisements addressed in the complaint constituted "issue advocacy" and were thus not subject to regulation by the Commission as either contributions or expenditures. The response stresses the absence of allegations that the ads contained express advocacy, notes the statement of Senator McConnell to this effect in his affidavit, and cites the Supreme Court's decisions in First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) and in Buckley v. Valeo in support of an express advocacy standard for such communications. "The Supreme Court adopted the express advocacy standard precisely to protect issue advocacy such as that allegedly contemplated by the tobacco companies." (August response, page 5). Citing Orloski v. FEC, 785 F.2d 156 (D.C. Cir. 1986), the response states: "Nor would alleged coordination transform otherwise protected issue advocacy into speech that the Commission may regulate." Id.[3]

Quoting from Senator McConnell's sworn affidavit, the August response goes on to deny that he had "'arranged, coordinated, or directed any aspect of the tobacco industry's' publication

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[3] The court in Christian Coalition found the decision in Orloski to have involved only corporate funding of legislative events sponsored by a congressman and thus "unrelated" to the Coalition's distribution of voter guides. 52 F. Supp. 2d at 83.

or broadcast of their issue advertisements," and emphasizes the references to involvement "by the candidate" in the definition of "coordination" at 11 C.F.R. § 109.1(b)(4)(i),[4] (August response, pages 6-7). The affidavit itself reads in part as follows:

> 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 any information about any Senatorial candidate's campaign plans. Nor has any industry representative provided to me any 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.

(McConnell Affidavit, pages 3-4) (Emphasis in original).

The response argues further that the complaint contains "no basis . . . for inferring that Senator McConnell gave or accepted any contribution or made any expenditure." It notes that his term in the Senate would not expire until 2003, and that there was no "way in which the complaint could be construed as alleging that Senator McConnell will 'make' the hypothetical future communications by the tobacco companies." Finally, the response argues that the Senator should not have been notified about the complaint because the complaint "alleges, at most, a potential future violation," because complaints are required to "clearly identify" a respondent,

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[4] 11 C.F.R. § 109.1(b)(4)(i) reads:

> *With the cooperation, or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of any candidate -*
>
> Means any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication.

which the present one assertedly did not, and because the complaint "intimates" a violation of 2 U.S.C. § 441b which would not apply to the Senator. (Id. at 8-9).

Later, on March 9, 1999, counsel for Senator McConnell filed a second response to the complaint. After reiterating the arguments set out in the initial response, counsel argues that the complaint should be dismissed "for the additional reason that the potential violations cited by the complaint simply did not occur." (March response, page 2).

In support of this assertion, the March response includes a "Declaration" dated March 8, 1999 and signed by Evan Tracey, President of Campaign Media Analysis Group ("CMAG") of Alexandria, VA, "a Virginia corporation that specializes in tracking the nature, quantity, location, and cost of political advertising in the United States." (March response, page 2. See also Exhibit A.) In his Declaration ("Tracey Declaration") (March response, Exhibit A), Mr. Tracey makes, inter alia, the following points:

> a. CMAG tracks advertising "in the top 75 media markets in the United States (which comprise 80% of television viewer households)."
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> b. CMAG's survey of political advertisements paid for by the tobacco company respondents in this matter after the June 17 cloture vote "concluded that the tobacco company respondents spent an estimated $6,669,337 in July, $1,138,669 in August, and $203,127 during the first three weeks of September to purchase air time on cable and spot market television across the United States for political advertisements opposing national tobacco legislation. The tobacco company respondents ran no political advertisements in the top 75 media markets from September 21, 1998, to November 3 1998."
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> c. "[O]f the estimated $6,669,337 in television broadcast time purchased . . . in July 1998, about two thirds ($4,208,073) was spent in states in which no Republican incumbent was running for reelection . . . or in which the Republican incumbent running for reelection actually had voted for cloture . . . . Only about one third ($2,461,264) was spent in states with a Republican incumbent Senator running for reelection who had voted against cloture."

> d. "[I]n August 1998, about two thirds . . . was spent in states in which no Republican incumbent was running for reelection . . . or in which the Republican incumbent running for reelection actually had voted for cloture . . . . Only about one third ($380,115) was spent in states with a Republican incumbent Senator running for reelection who had voted against cloture."
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> e. "In the first three weeks of September 1998, the tobacco company respondents ran four different advertisements discussing national tobacco legislation on cable and broadcast television stations in the top 75 media markets. Three of the advertisements did not air after September 8, 1998. These advertisements were aired on just four separate occasions in the following markets: Birmingham, Alabama; Chicago, Illinois; and Las Vegas, Nevada. . . . I estimate that the tobacco company respondents spent only $1,347 in broadcasting these three advertisements. An additional advertisement was broadcast on CNN and CNN Headline News to a nation-wide audience between September 12 and September 20, 1998. . . . I estimate that the tobacco company respondents spent $201,780 in broadcasting this advertisement."

Tracy Declaration, pages 1-3.

Attached to the Tracey Declaration are tables showing, by state, the numbers of television spots placed by the respondent tobacco companies between July 1 and August 31, 1998, their costs, the presence of incumbent Republican Senators in particular states, and those Senators' votes on cloture. The tables do not include this information for the three week period in September, 1998 cited by Mr. Tracey. Also attached are scripts of the advertisements cited in the Tracey Declaration, including those broadcast in September.

Both the March response and the Tracey Declaration argue that none of the advertisements broadcast after the cloture vote either contain express advocacy or mention a federal candidate by name. The response states:

> In sum, the speculation of the Campaign for Tobacco Free Kids [sic] that certain tobacco companies would publish advertisements supporting Senators who voted against cloture is completely refuted because (1) advertisements opposing tobacco legislation that were aired in July and August were aired with no apparent purpose of aiding Republican

> *Senators who voted against cloture; (2) during the first week of* September only three spots were aired, again, with no apparent purpose of aiding incumbent Republican Senators who voted against cloture; (3) between September 12 and September 20, 1998, the sole advertisement aired was directed to a nationwide audience and not targeted to a specific state or media market; (4) no such advertisements were broadcast from September 21, 1998, through November 3, 1998; and (5) none of the advertisements that were broadcast as much as mentioned a federal candidate by name, let along expressly advocated his or her election or defeat.

(March response, page 4). The March response then asserts that "there can be no 'contribution' without an actual conveyance of something of value," and that, "[b]ecause the tobacco company respondents never ran the advertisements that the complaint speculated they would," nothing of value was given to any candidate. (March response, page 5). "Further, even assuming (contrary to fact) that the tobacco company respondents made an unwritten promise to run such advertisements in exchange for votes against cloture, the definition of contribution was specifically revised by Congress in 1980 to remove 'promises,' whether enforceable or not, from the definition." Id.[5] This response also argues that in order to be an "in-kind contribution" under the Act a political advertisement must "expressly advocate the election or defeat of a clearly identified federal candidate." Id.

3. NRSC

On November 19, 1999, counsel for the NRSC responded to the complaint which had been re-sent to that committee after it appeared that the complaint had not been received in 1998. Counsel argues that "[t]he NRSC is not a respondent in this matter," that the complaint did not contain allegations against the NRSC, and that the only related reference was to Senator

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[5] As of 1976 the definition of "contribution" at 2 U.S.C. § 431(e) included a subsection (2) which read: "means a written contract, promise, or agreement, whether or not legally enforceable, to make a contribution for such purposes . . . ." Section 441b did not contain this language. This portion of the definition at Section 431(e) was later omitted.

McConnell, described as "the Chairman of the National Republican Senatorial Committee." (NRSC Response, pages 1-2). Counsel then stated: "If, despite these arguments, any response by the NRSC is necessary, the NRSC responds by incorporating in full the original and supplemental responses of Senator McConnell." (NRSC Response, page 3).

D. Discussion

1. Overview of Tobacco Companies' Advertising Campaign

The fourteen incumbent Republican Senators who were candidates for reelection in 1998 were Richard C. Shelby of Alabama, Frank Murkowski of Alaska, John McCain of Arizona, Ben Nighthorse Campbell of Colorado, Paul D. Coverdell of Georgia, Charles E. Grassley of Iowa, Samuel Brownback of Kansas, Christopher S. Bond of Missouri, Judd Gregg of New Hampshire, Alphonse D'Amato of New York, Lauch Faircloth of North Carolina, Don Nickles of Oklahoma, Arlen Specter of Pennsylvania, and Robert F. Bennett of Utah. Of these incumbents, Senators Bennett, D'Amato, Grassley, Gregg and McCain voted for cloture on S. 1415 on June 17, 1998, while Senators Bond, Brownback, Campbell, Coverdell, Faircloth, Murkowski, Nickles, and Shelby voted against. Senator Specter was absent and thus did not vote.

On the Democratic side, the fifteen Senators up for reelection in 1998 were Barbara Boxer of California, Christopher J. Dodd of Connecticut, Bob Graham of Florida, Daniel K. Inouye of Hawaii, Carol Moseley-Braun of Illinois, John Breaux of Louisiana, Barbara A. Mikulski of Maryland, Harry Reid of Nevada, Byron L. Dorgan of North Dakota, Ron Wyden of Oregon, Ernest F. Hollings of South Carolina, Tom Daschle of South Dakota, Patrick J. Leahy of Vermont, Patty Murray of Washington, and Russell Feingold of Wisconsin. All of these Senators voted for cloture on S. 1415.

According to the information attached to the Tracey Declaration, the tobacco company respondents ran television and cable advertisements after the cloture vote in nine states which had incumbent Republican Senators up for reelection. These states were Alabama ($239,324 in expenditures for such advertisements in July and August), Colorado ($325,498 in July), Georgia ($531,379 in July and August), Iowa ($4,959 in July), Missouri ($339,383 in July and August), New York ($801,645 in July and August), North Carolina ($191,131 in July), Pennsylvania ($1,286,664 in July and August), and Utah ($14,628 in July). The companies also ran advertisements in six states in which incumbent Democratic Senators were running for reelection, including California ($443,608 in July and August), Connecticut ($803 in July and August), Illinois ($1,200,805 in July and August), Nevada ($195,316 in July), Louisiana ($152,282 in July and August), and Washington State ($790,826 in July and August). Additional advertisements were run in Ohio (open Senate seat) ($749,589 in July and August), Kentucky (open seat) ($48 in July), Massachusetts (no Senate election) ($6,788 in July), Michigan (no Senate election) ($297,877 in July),[6] Minnesota (no Senate election) ($292,033 in July), and Tennessee (no Senate election) ($15,420 in July). They were not broadcast in seventeen states with Senate elections: Alaska, Arkansas, Arizona, Florida, Hawaii, Idaho, Indiana, Kansas, Maryland, New Hampshire, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Vermont, and Wisconsin.

A closer comparison of the July and August television and cable advertisement placements with the cloture votes by incumbent Senators seeking reelection shows that the tobacco company advertisements ran in five states represented by Republican Senators who had

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[6] According to the information accompanying the Tracey Declaration, Michigan was the only state in which the advertisement designated "GOP against taxes" was run.

voted against cloture and who were up for reelection (Alabama, Colorado, Georgia, Missouri, and North Carolina), but not in Alaska, Kansas and Oklahoma which were represented by Senators up for reelection who had also voted against cloture. They were broadcast in Pennsylvania, represented by Senator Specter who did not vote on cloture and was up for reelection, and in Iowa, Utah and New York which were represented by Senators up for reelection who had voted for cloture. The advertisements were not run in two other states, Arizona and New Hampshire, with Republican Senators up for reelection who had voted for cloture. And again, as noted above, the tobacco company advertisements were placed in six states with incumbent Democratic candidates who had all voted for cloture.

Looking at the states which were targeted with the most tobacco company advertising in July and August, and at the eventual election results in those states, three had Republican Senate *incumbents running for reelection* -- Pennsylvania ($1,286,664)(Republican incumbent won with 61% of the vote), New York ($801,645)(Republican incumbent lost with 45% of vote) and Georgia ($531,379)(Republican incumbent won with 52% of vote). Two others had Democratic Senate incumbents running for reelection -- Illinois ($1,200,805)(Democratic incumbent lost with 47% of vote) and Washington ($790,826)(Democratic incumbent won with 58% of vote). Of the two states with open Senate seats which received tobacco company expenditures (Ohio and Kentucky), Ohio was one of the top six targeted ($749,589)(Republican candidate won with 56% of vote). Virtually nothing ($48) was expended in Kentucky despite the closeness of the race there (Republican candidate won with 50% of the vote or by 5060 votes). The highest

amount spent in any of the other targeted states was the $443,608 expended in California (Democratic incumbent won with 53% of vote).[7]

In his Declaration, Mr. Tracey goes on to cite the small amount of additional expenditures for television or cable advertisements made by the respondent tobacco companies in September 1998. He states that the tobacco companies ran three different television advertisements in Birmingham, Alabama, Chicago, Illinois, and Las Vegas, Nevada, between September 1 and September 8 for an estimated total cost of $1,347, plus an additional, nationwide advertisement on CNN and CNN Headline News between September 12 and September 20, 1998 at a cost of $201,780. (Tracey Declaration, page 3). "The tobacco company respondents ran no political advertisements in the top 75 media markets from September 21, 1998 to November 3, 1998." (Id., page 2).

2. Standard for Finding Advertisements to be Corporate Contributions

As stated above, 2 U.S.C. § 441b defines "contribution or expenditure" as a payment or service or anything else of value made "in connection with" any federal election. As is also stated above, the District Court in Christian Coalition addressed corporate communications containing express advocacy, which would by definition become prohibited independent expenditures if directed beyond a corporation's restricted class, and "expressive coordinated

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[7] By way of comparison, the election results in other targeted states were:

Alabama - Republican incumbent won with 63%
Colorado - Republican incumbent won with 63%
Connecticut - Democratic incumbent won with 65%
Iowa - Republican incumbent won with 68%
Louisiana - Democratic Incumbent won with 64%
Missouri - Republican incumbent won with 53%
Nevada - Democratic incumbent won with 48% or by 459 votes
N. Carolina - Republican incumbent lost with 47%
Utah - Republican incumbent won with 68%

expenditures" made by corporations in cooperation with candidates for communications such as voter guides and television advertisements. The court defined the latter category of expenditures as ones "made for the purpose of influencing a federal election" where the "spendor's choice of speech has been arrived at after coordination with the campaign." 52 F. Supp. 2d at 85, n. 45. The court set out standards to be applied in determining when certain corporate expenditures become expenditures prohibited by 2 U.S.C. § 441b, finding that communications purchased through such expenditures are prohibited only if they contain language expressly advocating the election or defeat of a candidate, or if they have been substantially coordinated with, or authorized by, a candidate or a candidate's authorized committee as to content, timing, location, or volume, to the point "that the expenditure is perceived as valuable for meeting the campaign's needs or wants." Id. at 92.

3. Application of Standards

The application of the above definitions and standards for prohibited corporate expenditures to the media advertisements paid for by the tobacco company respondents in the present matter means that these advertisements would have become corporate expenditures prohibited by Section 441b only if their contents expressly advocated the election or defeat of a candidate, or if it is clear that they were "made for the purpose of influencing an election" and were designed and/or placed after substantial coordination with a candidate.

a. Express Advocacy

The first step in applying the standards for corporate contributions outlined above is to determine whether any of the advertisements at issue contained language which could be deemed to expressly advocate the election or defeat of a clearly identified candidate. Looking first at the states with incumbent Republican Senators who were candidates for reelection and who voted

against cloture on S. 1415, and in which the respondent tobacco companies spent the most for advertising, the contents of the advertisements broadcast in Alabama, Missouri, Colorado, Georgia, and North Carolina would be of the greatest significance. The next levels of significance would involve the advertisements placed in states with incumbent Republican candidates who had voted for cloture or who had not voted, then those placed with Democratic Senators up for reelection, and then those with open Senate seats. California, Illinois, Iowa, Louisiana, New York, Nevada, Ohio, Pennsylvania, Utah, and Washington are the states in these later three categories at which the largest amounts of expenditures were directed.[8]

According to the charts attached to the Tracey Declaration, in July 1998, there were five separate television and cable advertisements broadcast by the tobacco company respondents in the nine states with incumbent Republican Senators up for re-election, including the five whose Republican Senators had voted against cloture: "At Election Time" (two versions), "Person on the Street," "The Real Hero's,"[9] "The Tax Tree Fell?," and "Right Back At It." One or more of same five advertisements were run in the states cited above with incumbent Democratic Senators or with open seats. Of these five advertisements, only the two versions of "At Election Time," used in thirteen of the fifteen states involved, contained any reference to upcoming elections. (These versions are of the same advertisement as the one titled " 'November' Man and Woman" quoted at pages 8-9 and cited at page 22 above.) Although there are references to "election time," "Congress" and "politicians" in both versions of this particular advertisement, there is no mention of particular elected offices, of "the Senate," of "a clearly identified candidate," or of

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[8] This analysis addresses only those states targeted by more than $10,000 in advertising expenditures.

[9] This is the same advertisement, titled "Surplus," which is attached as Exhibit 39 to the joint response from the respondent tobacco companies and cited at page 9 above.

election-related activity asked of the viewer. Thus, neither version of "At Election Time" contains express advocacy.

During August 1998, the respondent tobacco companies broadcast two of the same television and cable advertisements in ten of the same states. "The Real Hero's" was used in New York, Georgia, Alabama, Illinois, Ohio, Louisiana, Pennsylvania, California, Washington State and Missouri, while "At Election Time" was placed in Alabama, Ohio, New York, and California. The only new advertisement placed in one of these states during this month was "million against"; this ad ran only in Illinois and addressed only new taxes and an increase in the cost of cigarettes, with no reference to an election, the Senate, a candidate or a political party.

In summary, of the five advertisements placed by the respondent companies in July and August, 1998, only the two versions of the advertisement titled variously " 'November' Man & Woman" and "At Election Time" mention "elections." This advertisement contains no references to particular candidates, the Senate or voting, thus taking the two versions outside any definition of "express advocacy."

According to the Tracey Declaration, the three television and cable advertisements that ran between September 1 and 8 in Alabama, Illinois and Nevada were "Person on the Street," "The Real Hero's," and "million against," while a new, fourth one, "When Will Working People," apparently ran nationally on CNN and CNN Headline News between September 12 and 20. This new advertisement addressed taxes and "members of Congress," but contained no reference to an election, the Senate, a candidate or a political party.

According to the information attached to the tobacco companies joint response, the respondent companies may also have paid for two radio advertisements after the cloture vote in the Senate. Transcripts of these particular ads are found at Exhibits 19 and 20 of the response.

The first one, dated June 19, 1998, discusses possible new legislation in the House of Representatives and cites "the McCain Bill defeated in the Senate," the only use of the name of a candidate but one used in the context of his status as sponsor of the legislation in question. Otherwise there is no reference to an election, a candidate, or a political party. The second of the two radio advertisements contains no such references at all.

B. For Purposes of Influencing Federal Elections

The complainant in this matter alleges in effect that in June 1998 the respondent tobacco companies, through Senator McConnell, promised Republican Senators up for reelection that year that, if they voted against S. 1415, the companies would support them in their bids for reelection in November by running a television advertisement campaign.[10]

As stated above, the tobacco companies ran advertisements during July, August and early September, 1998, in nine states with incumbent Republican Senators up for reelection and also in six states with incumbent Democratic Senators running for reelection. The advertisements were not run in seventeen states with Senate elections, but were placed in two states with open Senate seats and in four states where there was no Senate election scheduled. In only one instance, involving two versions of the same advertisement, did the content of the advertisements use the word "election."

In summary, it appears, according to the information accompanying the Tracy Declaration, that from July through mid-September, 1998 the respondent tobacco companies targeted a total of $7,881,353 in media advertising related to tobacco legislation at twenty-one states, and that during July and August $7,269,235 of this advertising was directed at seventeen

[10] The complaint does not expressly state that the companies' alleged promise was directed solely at Republican Senators up for reelection; however, as noted above, the only two Democratic Senators who voted against cloture on S. 1415 did not face elections in 1998.

states with Senate races. In five of these seventeen states the incumbent Republican candidates had voted against cloture on S. 1415, in three the incumbent Republican candidates had voted in favor of cloture, in six states the incumbent Democratic candidate had voted for cloture, and in one the incumbent Republican candidate had not voted on cloture. In Ohio, where there was a strongly contested open Senate seat, a considerable amount was spent on advertising, while in another, Kentucky, with another strongly contested open seat, the expenditures were minimal. In July and August a sub-group of six of these seventeen states, namely Georgia, Illinois, New York, Ohio, Pennsylvania, and Washington were the targets of $5,360,908 in expenditures, or 68% of the total. One of the incumbent Senate candidates from these six states had voted against cloture on S. 1415 (Georgia), one had been absent (Pennsylvania), and three had voted in favor (New York, Illinois and Washington).

This summary shows a strong bias toward states with Senate election campaigns, but does not comport with the complaint's assumption that the primary targets would be states with incumbent Senators who had voted against cloture on S. 1415. Nine of the states targeted were in this category; however, many others were not. The six states accounting for the largest advertising expenditures all had Senate elections, but the incumbents varied by party and by cloture vote. Thus, if there existed any intent on the part of the respondent companies to influence the Senate elections in the states targeted, it apparently was not directly linked to positions on S. 1415.

It is also possible to identify countervailing factors as regards the alleged intent to influence the Senate elections. Two such factors would be the absence, with one minor exception, of election-related language in the advertisements and their lack of close proximity in time to the 1998 November elections. Another would be the placement of the advertisements,

albeit relatively minor in scope, in states represented by Senators who were not running for re-election (Massachusetts, Michigan, Minnesota and Tennessee).

c. Coordination

Even if an intent to influence federal elections could be found in the tobacco companies' 1998 post-cloture vote advertising campaign, thus meeting one part of the Christian Coalition test for prohibited expressive coordinated expenditures, it would still be necessary to look for evidence of coordination between the companies and Senate candidates in the states targeted before a determination can be made as to whether the advertising campaign met all requirements of that test.

With regard to coordination between the companies and Senate candidates, there is, as is discussed above, evidence that the advertisements were placed in states with Senate races involving incumbent Republican Senators; there is also evidence that they were placed in states with incumbent Democratic Senators up for reelection or with open Senate seats. There is no evidence in hand of direct and "substantial" contacts between any candidate and the tobacco companies which could be used as a basis for finding the possibility of "coordination" of one or more of the advertisements with candidates. Together with the absence of references to specific candidates or elections in the advertisements themselves, this lack of evidence of coordination with candidates would, pursuant to Christian Coalition, appear to place the associated expenditures outside the scope of prohibited corporate expenditures.

d. Recommendation

Based upon the above discussions of the lack of express advocacy in the advertisements at issue, of the absence of any other discussion of individuals as candidates or of references to "elections" in any but two related instances, and of the lack of evidence of coordination between

the tobacco companies and Senate candidates, this Office recommends that the Commission find no reason to believe the respondent tobacco companies have violated 2 U.S.C. § 441b.

3. **Senator Mitch McConnell and the NRSC**

The only alleged link between the respondent companies and candidates in the complaint is Senator McConnell, who has denied any coordinating role in his sworn affidavit. Further, even if such a relationship between Senator McConnell and the respondent tobacco companies concerning the advertisements could be established, there is no evidence of the "substantial discussion or negotiation" between a candidate or candidate's agent and the respondent tobacco companies required for a finding of coordination of expenditures by the court in Christian Coalition. Senator McConnell himself was not a candidate in 1998, and there no evidence in hand that he served as an "agent" of the campaigns of any candidates vis a vis the respondent companies.

Thus, even if the allegation in the complaint could be proven with regard to a statement made by Senator Mitch McConnell to Republican Senators about respondent tobacco company promises to run television advertisements supporting those who voted to kill S. 1415, the content of the advertisements themselves and the lack of evidence of direct coordination between the candidates and the tobacco companies, would, pursuant to Christian Coalition, take the expenditures for the advertisements outside the prohibitions of 2 U.S.C. § 441b. There is

no basis for a finding that Senator McConnell, or, by extension, the NRSC acting through Senator McConnell as its chairman, violated this or any other provision of the Act in this matter.[12]

IV. RECOMMENDATIONS

1. Find no reason to believe that the Philip Morris Companies, Inc.; Brown & Williamson Tobacco Corporation; Lorillard Tobacco Company; R.J. Reynolds Tobacco Company; or United States Tobacco violated 2 U.S.C. § 441b.

2. Find no reason to believe that U.S. Senator Mitch McConnell and the National Republican Senatorial Committee and J. Stanley Huckaby, as treasurer, violated any provision of the Federal Election Campaign Act of 1971, as amended, in this matter.

3. Close the file in this matter.

4. Approve the appropriate letters.

2/4/00
Date

Lawrence M. Noble
General Counsel

Staff Assigned: Anne A. Weissenborn

[12] Given this recommendation, it is unnecessary to determine the relevance in this matter of the defense raised by counsel for Senator McConnell involving the "Speech and Debate Clause."