

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 4313
DATE COMPLAINT FILED: 2/23/96
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STAFF MEMBER: Anne A. Weissenborn

COMPLAINANT: United States Sugar Corporation

RESPONDENTS: Lugar for President, Inc.
Patrick J. Kiely, as treasurer
The Hon. Richard Lugar
Paul Tudor Jones, II
Coalition for Good Government, Inc.
Tudor Investment Corporation

RELEVANT STATUTES: 2 U.S.C. § 431(17) and (18)
2 U.S.C. § 433(a)
2 U.S.C. § 434(a) and (b)
2 U.S.C. § 441a(a)
2 U.S.C. § 441a(f)
2 U.S.C. § 441b
2 U.S.C. § 441d
2 U.S.C. § 441f
11 C.F.R. § 100.17
11 C.F.R. § 100.22
11 C.F.R. § 109.1
11 C.F.R. § 109.3
11 C.F.R. § 110.11
11 C.F.R. § 114.10(e)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

EXHIBIT 07

23-04-406-1751

I. GENERATION OF MATTER

This matter was generated by a complaint filed by the United States Sugar Corporation on February 23, 1996. The complaint alleges that Paul Tudor Jones, II, the Coalition for Good Government, Inc. ("the Coalition"), and "perhaps others unknown" violated the Federal Election Campaign Act ("the Act" or "FECA") in November, 1995, as a result of expenditures made on behalf of the campaign of U.S. Senator Richard Lugar for nomination to the office of President of the United States.

The above-cited respondents, plus the Lugar for President Committee and Patrick J. Kiely, as treasurer, ("the Committee"), the Hon. Richard Lugar, and the Tudor Investment Corporation, were notified of this complaint on March 4, 1996. Written responses have been received from Mr. Jones and the Coalition and from the Committee. Counsel for the Committee has stated orally that Senator Lugar has been consulted on the Committee's response, has submitted an accompanying affidavit, and may be considered to be covered by the Committee's response.

On May 13, 1996, a "First Amended and Supplemented Complaint" was filed, providing additional information in support of the earlier complaint.

II. FACTUAL AND LEGAL ANALYSIS

A. The Law

The Federal Election Campaign Act defines "contribution" and "expenditure" to include payments, loans, advances and "anything of value" provided by a person "for purposes of influencing a federal election." 2 U.S.C. § 431(8)(A)(i) and 2 U.S.C. § 431(9)(A)(i).

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11 C.F.R. § 100.7(a)(1)(iii) and 11 C.F.R. § 100.8(a)(1)(iv)(A) define “anything of value” as including in-kind contributions. 2 U.S.C. § 431(11) defines “person” as including, *inter alia*, an individual, a committee and an association.

2 U.S.C. § 441a(a)(1)(A) limits to \$1,000 the amount which any person may contribute to a candidate and his or her authorized political committee per election. 2 U.S.C. § 441a(a)(3) limits to \$25,000 per calendar year the total amount which any individual may contribute to candidates and political committees. 2 U.S.C. § 441a(f) prohibits the knowing acceptance by candidates and political committees of contributions in excess of the limitations established at 2 U.S.C. § 441a(a).

Expenditures made with the knowledge, cooperation or encouragement of a candidate or campaign are contributions. 2 U.S.C. § 441a(a)(7)(B)(i) and 11 C.F.R. § 109.1(c). The Commission has stated: “[A] communication made in coordination with a candidate presumptively confers ‘something of value’ received by the candidate so as to constitute an attributable ‘contribution’.” Advisory Opinion 1988-22.

More recently, when considering whether particular activities had resulted in “contributions” or “expenditures” under the Act, the Commission stated that “financing . . . activities will result in a contribution to, or an expenditure on behalf of, a candidate if the activities involve (i) the solicitation, making or acceptance of contributions to the candidate’s campaign, or (ii) communications expressly advocating the nomination, election or defeat of any candidate.” Advisory Opinion 1992-6. The Commission also has stated that “the absence of solicitations for contributions or express advocacy regarding candidates will not preclude a

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determination that an activity is 'campaign-related.'" Id.; see also Advisory Opinions 1990-5, 1988-27, 1988-22, 1986-37, 1986-26, 1984-13 and 1983-12.

2 U.S.C. § 431(17) defines an "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 an authorized committee or agent of such candidate.

"Clearly identified" is defined at 2 U.S.C. § 431(18) as "(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference." In July, 1995 the definition of "clearly identified" at 11 C.F.R. § 100.17 was expanded to include an "unambiguous reference" to a person's "status as a candidate." A definition of "expressly advocating" was also added in July, 1995 at 11 C.F.R. § 100.22.¹ This latter definition includes communications which contain phrases such as "Bill McKay in '94" or "Smith for Congress."

¹ This new regulation expands upon and replaces the definition of "expressly advocating" previously found at 11 C.F.R. § 109.1(b)(2).

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2 U.S.C. § 441b(a) makes it "unlawful . . . for any corporation whatever to make a contribution or expenditure in connection with any election at which presidential or vice presidential electors or a Senator or Representative in . . . Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . . "; for "any officer or any director of any corporation . . . to consent to any contribution or expenditure by the corporation"; and for any candidate or political committee to knowingly accept such contributions. 2 U.S.C. § 441b(b)(2) defines "contribution or expenditure" as including "any direct or indirect payment, distribution, loan . . . or anything of value . . . to any candidate, campaign committee or political party or organization, in connection with any election to federal office."

The financing by a corporation of communications to the general public that mention "a candidate in an election-related contest" and are "undertaken in coordination with the candidate or his campaign" would constitute coordinated expenditures and thus prohibited in-kind contributions to the candidate. Advisory Opinion 1988-22.² See also 11 C.F.R. § 114.10(d)(2).

² In Advisory Opinion 1988-22, the Commission addressed the activities of a non-profit incorporated organization. With regard to a newsletter which the organization proposed to publish, the Commission wrote:

If statements, comments or references regarding clearly identified candidates appear in the newsletter and are made with the cooperation, consultation or prior consent of, or at the request or suggestion of the candidates or their agents, regardless of whether such references contain 'express advocacy' or solicitations for contributions, then the payment for allocable costs incurred in making the communications will constitute 'expenditures' and 'in-kind contributions' to the identified candidates.

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Pursuant to 26 U.S.C. § 1361, et al., a small incorporated business may avoid double taxation, i.e., of the corporation and then again of any shareholders, by organizing itself as an "S Corporation." Such a small business corporation may elect to have its income passed through and taxed to its shareholders as ordinary income rather than pay corporate income tax.

26 U.S.C. § 1366. This election does not, however, alter the fact that any corporation acquires, by the act of incorporation, a legal identity separate from its investors, and is subject to regulation as such. See United States v. Richardson, 469 F.2d 349, 350 (10th Cir. 1972) (“[T]he legislative history of Subchapter S negates any inference that Congress intended” corporations to lose their corporate character); Johnson v. U.S., 386 F. Supp. 374, 377 (E.D. Kentucky, 1974) (“The congressional desire to provide an alternative form of doing business [as Subchapter S corporations] does not suggest an intention to treat electing corporations as partnerships or proprietorships for tax purposes.”)

2 U.S.C. § 441f prohibits any person from making “a contribution in the name of another person or knowingly permit[ting] his name to be used to effect such a contribution.” In addition, this statutory provision prohibits any person from “knowingly accept[ing] a contribution made by one person in the name of another person.”

B. The Complaint and Supplement

On November 18, 1995, a convention and straw poll known as “Presidency III” or “P-3” were held by the Florida Republican Party in Orlando, Florida. According to the complaint and

supplement, during the week prior to the party convention and straw poll \$1,000,000 was spent to run television advertisements allegedly in support of the presidential candidacy of U.S.

Senator Richard Lugar. "An organization formed for this purpose, funded by [Paul Tudor] Jones, financed advertising supporting Lugar's presidential candidacy on the basis - - clearly and specifically - - of his support for the sugar tax." (Complaint, page 5).⁴ Earlier, on November 1, 1995, Senator Lugar had introduced a bill in the United States Senate "to provide authority for the assessment of a tax on cane sugar produced in the Everglades Agricultural Area of Florida." (Supplement to Complaint, page 2).

The organization cited in the complaint is the Coalition for Good Government, Inc., which, based upon documents submitted with the supplement to the complaint, was registered as a Subchapter S corporation in the State of Delaware on November 6, 1995, and as a "foreign corporation" in the State of Florida on November 21, 1995. According to the Coalition's Certificate of Incorporation, which is attached to the supplement to the complaint, the Coalition registered as a profit, stock-issuing corporation; it could not issue stock as a non-profit corporation under Delaware law.⁵ On the Coalition's "Application by Foreign Corporation for

⁴ A presidential preference primary was held in Florida on March 12, 1996. This was a direct, closed primary. The Florida Republican national convention delegation is selected by caucus after the presidential preference primary. Allocation of delegates to winning candidates is based upon a "winner-take-all-method," with the winning candidate in a congressional district taking all the district's delegates. "The winning candidate statewide takes all of the at-large delegates." Nomination and Election of the President and Vice-President of the United States, 1992, Congressional Research Service for the Committee on Rules and Administration, United States Senate, 1992, pp. 203-204.

⁵ Pursuant to the Delaware Code, Title 8, §§ 101 and 102, this state has one law covering both profit and nonprofit corporations. Corporations not organized for profit are not authorized to issue stock. A nonprofit corporation's certificate of incorporation must state the fact that it cannot issue capital stock. Phelan Nonprofit Enterprises § 1.19.

Authorization to Transact Business in Florida,” also attached to the supplement to the complaint, Paul Tudor Jones, II is named as the chairman of the corporate directors and as president.

The complaint asserts that the Coalition “served as the front for the organization of Jones’ own personal resources to influence the so-called Florida ‘P-3’ . . . in favor of Lugar and to otherwise expressly advocate his election.” (Complaint, page 1). The complaint alleges that Mr. Jones and the Coalition did not “comply with the contribution limitations, source restrictions, or disclosure requirements of [the Act],” that Mr. Jones “funneled almost \$1 million of his own money through the Coalition advertising campaign to support Lugar’s candidacy,” and that other individuals may have made “similar contributions.” (Complaint, pages 1-2).

According to the complaint, Mr. Jones and his “allies” had met earlier with Senator Lugar on an unspecified date and had “pressed their case” for a sugar tax. (Complaint, page 3). “It appears from the circumstances of that meeting, and the action taken by both sides immediately thereafter, that Lugar offered support for Jones’ sugar tax. In return, it appears that Jones offered Lugar a commitment of support at ‘P-3’ and with the Florida Republican primary electorate.” *Id.* Again according to the complaint,

[t]he context in which Lugar introduced this bill was apparent to all concerned within the state of Florida. P-3 was approaching, and the Lugar campaign . . . would benefit from the support that Jones and his allies in the pro-tax movement would be willing to provide in return for Lugar’s adoption of the tax. “GOP Candidate Endorses Sugar Tax” read one headline. The electoral context and significance of the Lugar move was plain for all to see.

(Complaint, page 4).

The complaint also alleges that “Mr. Jones and his allies have run their political activities thorough a corporation - - the Coalition for Good Government” which has “operat[ed] as a

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'political committee',” but which has not registered or reported with the Commission.

(Complaint, page 2).

The amendment and supplement to the complaint enclosed a videotape of the television spot at issue. The audio and video portions of the tape are as follows:

VIDEO:

CHYRON: Paid for by the Coalition for Good Government Inc.

Picture of sunrise or sunset on water and land areas; reeds in forefront. (Color)

Picture of dead fish in water (Black and white) (Superimposed): - Newspaper story headline: “Mercury taints 3 fish species in Florida Bay”

Picture of U.S. Capitol dome (Superimposed): - Newspaper story headline: “Sugar Contributes over \$550,000 in '95 to Congress” (Black and white)

Picture of four campaign bumper stickers:

“LUGAR for President DOLE for President

Arlen SPECTOR GRAMM President
... '96” (Color)

Photos of candidates added above bumper stickers as names spoken.

AUDIO:

ANNCR: “The issue is simple.

Our Everglades are dying and big sugar is to blame.

Big sugar and big sugar's campaign contributions to Washington politicians.

Now four Senators, Lugar, Dole, Spector and Gramm can make a difference for Florida

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Enlargement of Lugar photo and bumper sticker; others fade out. (Color)

But only Senator Lugar stands with Florida against big sugar's money and for the Everglades.

Upper right - "Standing up to Big Sugar"

"Fighting to Save Our Everglades"

CALL NOW

So call Senators Dole, Spector and Gramm

Photos of Dole, Spector and Gramm with last names below (Color)

"1-800-274-4117"

Photos and last names remain.

Tell them you support two cents a pound to save our Everglades.

(Superimposed): - "CALL NOW Tell Them to Support 2 [cents] a Pound To Save Our Everglades."

And don't sugarcoat it."

"1-800-274-4117"

The complaint asserts that this spot constituted "express advocacy," both as a result of proximity in time of its running to the Florida straw poll and in terms of its content. In the latter respect the complaint cites in particular the use of the Lugar campaign logo, the voice-over narration which commends Senator Lugar's stand on the sugar tax, and the inclusion of only Senator Lugar's competitors for the presidential nomination as those whose positions differed from his on this issue. (Complaint, page 7).

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C. Responses

1. Paul Tudor Jones, II and the Coalition for Good Government

The response filed on behalf of Mr. Jones and the Coalition ("Coalition Response") asserts that the television spot at issue was "pure issue advocacy;" that the campaign bumper stickers included in the advertisement were "included solely as a result of the professional judgment of the media firm that they improved the visual quality of the advertisements"; that "there was absolutely no coordination" between the Lugar campaign and "those responsible for the advertisements;" and that the Florida Republican straw poll was "purely a state party-building event." (Coalition Response, pages 1-3). Attached to the response are sworn affidavits signed by Paul Tudor Jones, II, Mary Barley, G. John O'Hanlon, and Steve McMahon. These statements address the Everglades conservation issue, the intent and content of the advertisement at issue, and contacts with Senator Lugar. Mr. Jones' statement also discusses his creation of the Coalition for Good Government and the funding thereof.

i. Issue Advocacy

The response on behalf of Mr. Jones and the Coalition presents background information on the involvement of Mr. Jones in undertakings aimed at addressing ecological damage being

done to the Everglades, assertedly by the sugar industry in Florida. According to the response, Mr. Jones has worked with several organizations, including the Everglades Trust and Save the Everglades which were formed by George and Mary Barley, close friends of Mr. Jones. He has also assertedly been directly involved in legislative efforts and ballot initiatives at the state level and in attempts to influence national policy by meeting with members of the United States Congress.

In his sworn statement attached to the Coalition response, Mr. Jones details his efforts during 1995 in Washington, D.C. on behalf of Everglades conservation, beginning with the Florida Congressional delegation and later involving Senator Richard Lugar. According to Mr. Jones, these efforts were in connection with the pending "re-authoriz[ation of] the Farm Bill" which included subsidization of the Florida sugar industry. Mr. Jones and Ms. Barley were seeking to include in the re-authorization bill a 2 cents per pound assessment on Florida sugar production, with the proceeds to be earmarked for Everglades restoration. (Jones Statement, pages 2-3).

With regard to the television spot here at issue, Mr. Jones argues that "[t]he ad was always viewed as a part of an issue-oriented lobbying and advocacy effort to change federal policy towards sugar and the Everglades." According to Mr. Jones, the script

told people about what was happening in the Everglades, the role of Big Sugar in this disaster, the fact that several specific United States Senators were in a position to influence Congressional action on the Everglades, the fact that Senator Lugar had already announced his support for our proposal, and that the others should be contacted to encourage them to support saving the Everglades. Most importantly, the ad was tied in with a telephone bank program that could connect viewers

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directly with the Senate offices. . . . Nothing in the script talked about the Presidential campaign or mentioned any of the Senators were running for President.

(Jones Statement, pages 7-8).

Also attached to the Coalition response is an affidavit signed by Steve McMahon, a partner in the firm of Trippi, McMahon and Squier which produced and placed the advertisement in question. Mr. McMahon states that the spot had as its purpose "to increase pressure on Congress to enact a program to reduce the land used for sugar production in the Everglades Agricultural Area, and to restore the national water flow from the Everglades to the rest of South Florida." Known as "Standing Up," this advertisement was assertedly intended to counter attempts to "soften" Senator Lugar's support for the 2 cents a pound assessment, to "put pressure" on Senator Robert Dole who would be "one of the Senate conferees on any Farm bill," to address Senators Phil Gramm and Arlen Specter who "were influential Senators who were also interested in Florida issues at that point and had not taken a position on this issue," and "to demonstrate that 2 [cents] a pound was in fact a responsible, mainstream idea supported by respected, solid, responsible individuals -- like Senator Lugar." (McMahon Statement, page 2).

Mr. McMahon goes on to state:

Because four Senators who could affect the fate of 2 [cents] a pound bill in the Senate would be campaigning in Florida in connection with the state party's straw poll event, and because at least two of them -- Lugar and Dole -- would be Senate conferees on the upcoming budget bill, we believed there was a window of opportunity for us to advance our client's legislative strategy. We further believed that we could get the attention of the national media and these Senators, and that Floridians would respond to the advertisement by using a toll-free "800" number to contact the Senators directly.

(McMahon Statement, page 3).

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ii. Use of Photographs and Bumper Stickers

With regard to the video portion of the advertisement, Mr. Jones asserts that "the combination of music, pictures, and color made the advertisement interesting to watch." (Jones Statement, page 8). Mr. McMahon states, "[W]e used color, contrast, imagery and movement to communicate our messages."

Regarding the point in the advertisement at which the four Senators' photographs and bumper stickers appear, Mr. McMahon states: "To hold the viewers' attention [while the voiceover names the Senators], as each candidate's name is spoken his photograph appears over his bumper sticker. Moreover, linking the picture to the bumper sticker makes the Senator's identity clear to the viewer." (McMahon Statement, pages 4-5). Mr. McMahon goes on:

We wanted the message and tone to be positive. We specifically did not want it to look like an "attack" ad, which has the potential to alienate viewers. For this reason we wanted to use color (rather than black and white, which is the traditional attack ad tone) and we also decided to use the four multi-colored presidential campaign bumper stickers to identify the Senators. We did so for three reasons. First, in our professional judgment, simple typeface name identification under their pictures ("Senator Smith") would look too much like a negative, rogues-gallery, attack-ad image. Second, the addition of the graphically varied and colorful bumper stickers made the advertisement more visually interesting. Third, the use of the campaign paraphernalia signaled "government" and "political leader" to the viewer far more effectively than a simple black printed "Senator Smith" would have.

(McMahon Statement, page 5).

McMahon further asserts that, during the process of editing the advertisement, he was told that the "For President" line on the Lugar bumper sticker "might not appear on smaller television screens" He states:

Because Senator Lugar's candidacy for the Republican Presidential nomination was not relevant to our message, that fact was unimportant

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and we did not edit the advertisement to try to protect the 'For President' portion of the material. His name and status as a Senator were the important information we were trying to convey, and the colors and graphic variety of the bumper sticker were the important visuals.

(McMahon Statement, page 6).

iii. Lack of Coordination

The Coalition response also argues that "there was absolutely no coordination between Senator Richard Lugar's campaign and the activities of those responsible for the advertisement." According to this response, Mary Barley met with Senator Lugar's Chief of Staff, Marty Morris, in August of 1995. "Mrs. Barley presented the case for their proposed assessment on sugar, without any discussion of campaigns or the presidential race." (Coalition Response, page 8).

With regard to Mr. Jones, the response states:

Mr. Jones met with Senator Lugar on only one occasion in the fall of 1995, and the only topic of conversation . . . was the damage sugar production has done to the Everglades and the need for the Florida sugar industry to bear their fair portion of the cleanup costs. On neither that occasion nor during a subsequent short telephone call . . . was the Lugar presidential campaign or the Republican nomination contest in general even mentioned. These were the only two discussions Mr. Jones has ever had with Senator Lugar. Senator Lugar and his staff were not informed that this advertisement about the Everglades would be aired, and they made no contribution whatsoever to its content.

(Coalition Response, pages 2-3).

According to the Coalition, Mr. Jones' meeting with Senator Lugar took place on October 25, 1995. The affidavit attached to its response which is signed by G. John O'Hanlon, an attorney for Mr. Jones, states that this meeting was arranged "because of Senator Lugar's long-standing opposition to the sugar subsidy program. . . . Finally, he is of course Chairman of

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the Senate Agriculture Committee, which was writing the Farm bill, which would govern the sugar program." (O'Hanlon Statement, page 2).

The Coalition response states that those present at the October 25 meeting with Senator Lugar, in addition to Mr. Jones and Mr. O'Hanlon, were members of Mr. Lugar's Senate staff and of the staff of Agriculture Committee. Assertedly no one from the Senator's campaign staff attended. (Coalition Response, page 8; see also Jones Statement, page 4, and O'Hanlon Statement, page 2).

The telephone conversation between Senator Lugar and Mr. Jones cited above assertedly took place "a few days later" when Senator Lugar called to inform Mr. Jones "that he agreed with the need for action on the Everglades and would soon introduce a bill to impose a two cents per pound assessment on Florida sugar producers to be used for Everglades restoration." (Coalition Response, page 9; see also Jones Statement, page 4). According to Mr. Jones, "This conversation lasted about three minutes; essentially just long enough for me to say 'Senator, thank you on behalf of the people of Florida and George Barley'." (Jones Statement, page 4).

Mr. Jones' statement continues:

At no time during either of these conversations did Senator Lugar, or I, or anyone else present, ever mention his candidacy for President, or his campaign. . . . I can state categorically that I know of no discussions by anyone with Senator Lugar or any agent of his about the television advertisements that are the subject of the complaint in this matter.

(Jones Statement, page 4).

In his statement attached to the Coalition's response, Mr. McMahon anticipates questions regarding possible coordination with the Lugar Committee through his media firm by stating:

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I am a partner in Trippi, McMahon and Squier, a firm that historically has provided print and electronic media services exclusively to Democratic candidates for elective office as well as for statewide initiative or referendum campaigns. . . . This firm has never worked for a Republican candidate for any office. For the record, this of course means that the firm has not worked for, been consulted by, or produced any advertisements for the Lugar Presidential campaign.

(McMahon Statement, page 1).

iv. Corporate Status and Financing of the Coalition

In his statement, Mr. Jones explains the origins and corporate status of the Coalition for

Good Government as follows:

The advice I received was that the advertisements should be run by a subchapter S corporation created for this purpose. The subchapter S (which I named the Coalition for Good Government) could be funded solely by me from my personal funds, and its only purpose would be to engage in discussion of the threat to the Everglades. I was advised that the advantage of the subchapter S form was that it was effectively my alter ego in that I funded and controlled it, but it would also provide limited liability from suit by vendors and others that would not be present without the corporate form.

(Jones Statement, page 7).

Mr. Jones also addresses the sources of funds used for the Coalition's activities as

follows:

As with the rest of my efforts in the Everglades, I have ensured that the financing for this advertisement came from my own personal funds. Because my efforts to save the Everglades are undertaken in my personal capacity, only those funds in my own personal account are used to finance those efforts. . . . No Tudor Investment Corporation funds were ever used for this purpose.

(Jones Statement, page 7).

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v. Florida Republican Straw Poll

As stated above, the Florida Republican Party held a convention and presidential straw poll on November 18, 1995, in which Senator Lugar participated as a candidate. The Coalition response asserts that this straw poll was not an "election" because it "did not determine the Florida Republican Party's choice for nominee for President or select any delegates to the Republican National Convention." (Coalition Response, page 18). Rather, the response argues that the Florida Republican Party selected all of its delegates to the Republican National Convention through a primary election held on March 12, 1996. The straw poll and the selection process assertedly "were entirely separate events." Therefore, the response argues, "the corporate contribution prohibition and registration, reporting and contribution rules of the FECA simply would not apply to the advertisement which is the subject of the complaint in this matter." (Coalition Response, page 19). In a footnote, the response also asserts:

[T]he advertisement was clearly not to influence the March 1996 Florida Republican primary. The primary was four months away, and no mention was made of the primary in the advertisement. Further, Senator Lugar was not a candidate in the March 1996 Florida primary election, having already withdrawn from the race by that point.

(Coalition Response, page 18, fn. 5).

2. Lugar for President Committee

The response filed on behalf of the Committee emphasizes the long-standing and on-going efforts by Senator Lugar to "reduce or eliminate the [federal] subsidy on sugar"; the campaign's asserted efforts to downplay both its efforts in Florida in general and the P-3 straw poll in particular; the position that the P-3 straw poll was not an "election"; the text of the subject advertisement as being issue-oriented; and the asserted lack of coordination between the

Lugar campaign and Paul Tudor Jones, II. Attached to this response are three affidavits signed by R. Mark Lubbers, campaign manager of the Committee; Senator Richard Lugar; and Andrew J. Fisher, a staff member of the Senate Agriculture Committee.

i. Issue Advocacy

The Committee's response begins by reviewing in some detail Senator Lugar's history of opposition to the federal subsidization of sugar production. According to the response,

[i]t cannot be asserted that the introduction of [S. 1377] was so inconsistent with the Senator's prior legislative record as to lead to the conclusion that it was introduced in a calculated effort to curry favor with Paul Tudor Jones relative to the so-called P-3 event in Florida.

(Committee Response, page 4).

In his affidavit, Senator Lugar stresses that during his candidacy for nomination to the Office of President he was also serving as chairman of the Senate Agriculture Committee, and that in the latter capacity one of his responsibilities "was the development and adoption of the 1996 Farm Bill." Senator Lugar states:

Since at least 1977, I have been an outspoken opponent, in Congress, of the federal sugar program. . . . During the formulation of the 1996 Farm Bill I again attempted, unsuccessfully, to have the Senate Agriculture Committee address this issue. At that time, while the Senate Agriculture Committee voted not to amend the sugar program, I, nevertheless, determined to renew my efforts to eliminate the sugar program on the floor of the Senate.

(Lugar Affidavit, page 2).

Senator Lugar then goes on to describe his meeting with Mr. Jones on October 25, 1995 "to discuss the federal sugar program and the plight of the Everglades." He states that Mr. Jones provided him with a detailed environmental study of the Everglades and suggested that he consider a proposal

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which would authorize a federal tax levy of one or two cents per pound of raw sugar, to be paid by sugar producers, with the money generated by the levy being dedicated to the purchase of agricultural land north of the Everglades. . . . On its face, this approach seemed to make some sense and I asked my staff to review the environmental assessment provided by Mr. Jones and to work toward developing legislative language to implement such a proposal.

(Lugar Affidavit, page 4).

Later, in the same affidavit, Senator Lugar states: "On October 27, 1995, I held a press conference in the Capitol to announce that I would renew my efforts to reform the federal sugar program and that I would shortly be introducing a free standing bill on this issue and that it would be tied to an effort to clean-up the Everglades." (Lugar Affidavit, page 4). Still later, Senator Lugar states: "My legislative interest in eliminating or reforming the federal sugar program had nothing to do with my candidacy for the Republican Presidential nomination or with the Florida P-3 straw poll or with the Florida Republican primary." (Lugar Affidavit, page 5).

With regard to the text of the advertisement at issue, the Committee's response argues:

The Commission's review of the text employed . . . will demonstrate that the clear purpose of the advertisement was to motivate public pressure on four named Members of the United States Senate to take a legislative stand on the sugar subsidy issue and for three of those Senators, Dole, Gramm and Specter, to actively support the legislative initiative undertaken by Senator Lugar. The advertisement named certain individuals who would play a role in a legislative effort in the Senate to restructure the sugar subsidy and did not name others, such as former Governor Alexander and media commentator Pat Buchanan, who could not play a role in that legislative effort in the Senate.

(Committee Response, page 7; emphasis in original).

ii. Lack of Coordination

The Committee's response asserts that there was no coordination by the Lugar campaign with Mr. Jones and the Coalition concerning the television spot at issue. The response acknowledges the meeting between Mr. Jones and Senator Lugar on October 25, 1995, but states:

This meeting was limited to a discussion of the issues [related to the Everglades and the sugar industry] and at no time did Mr. Jones or the Senator discuss the pending P-3 straw poll, the Republican Presidential primary in Florida, the status of the Lugar campaign effort in Florida, or any plans for either a coordinated or independent effort by Mr. Jones, or anyone else, to develop and place television or print advertising related to the Senator's legislative initiative on sugar.

(Committee Response, page 8).

The Committee's response also acknowledges a later telephone conversation between Senator Lugar and Mr. Jones, and a November 29, 1995 meeting between Senator Lugar and Mrs. Barley. The response states that "[s]ubsequent to the press conference [on October 28], Senator Lugar telephoned Mr. Jones to thank him for his support for the Senator's position on the sugar subsidy issue and to inform Mr. Jones that the Senator intended to introduce a free-standing bill shortly." (Committee Response, page 9). With regard to Mrs. Barley, the response asserts:

The Senator had one follow-up meeting on S. 1377 with a Floridian who had earlier joined Mr. Jones in advocating the policy position that Florida sugar cane producers had to share in the costs associated with cleaning-up the Everglades. On November 29, 1995, the Senator met with Mrs. Mary Barley. The sole purpose of this brief meeting was to enable Mrs. Barley to inform Senator Lugar that she and others in Florida were actively working with the Florida Congressional delegation to secure support, in the House, for the Senator's initiative. . . . At no time during this meeting did either Mrs. Barley or Senator Lugar discuss the P-3 straw poll, the Republican Presidential primary in Florida or any effort to mount either a coordinated or independent effort to bolster

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Senator Lugar's legislative initiative on sugar through public advertising in newspapers or on television.

(Committee Response, page 9).

The affidavits signed by Senator Lugar and by Andrew Fisher also address these contacts with Mr. Jones and Mrs. Barley. Senator Lugar states:

These three contacts with Mr. Jones and with Mrs. Barley, were the only contacts I had, during my candidacy for the Presidential nomination of my party, with them or with anyone representing the Florida environmental community on the issue of the federal sugar program generally or on S. 1377 specifically. At no time during my meeting with Mr. Jones on October 25, 1995, or my telephone conversation with him on October 27, 1995, or during my meeting with Mrs. Barley on November 29, 1995, did we ever discuss the Florida P-3 straw poll, the Florida Republican Presidential primary, my candidacy for the Republican nomination, or any advertising campaign to be undertaken by them in Florida relative either to S. 1377 or to my on-going efforts to eliminate the federal sugar program.

The advertisements which ran in the Florida media came as a total and complete surprise to me and, I believe, to my campaign staff.

(Lugar Affidavit, page 5).

In his affidavit, Andrew Fisher states that he attended the meeting held on October 25, 1995 between Senator Lugar and Mr. Jones. According to Mr. Fisher, the only "topic of discussion at this meeting was the federal sugar program and its effect on the Everglades." He asserts that there was no discussion of "the Senator's candidacy for the Republican nomination for President, political issues in Florida, the Florida P-3 straw poll or the Florida Presidential primary." (Fisher Affidavit, pages 2-3).

The third affidavit submitted by the Committee, that signed by the campaign manager, R. Mark Lubbers, also emphasizes the lack of coordination with Mr. Jones or the Coalition.

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Mr. Lubbers states that he had no prior knowledge of the advertisement. "[I]n fact I did not learn of the existence of the advertisements until at least ten (10) days after they began to appear in Florida." (Lubbers Affidavit, page 3).

iii. Electoral Value of the Advertisement

Not only does the Committee assert the issue orientation of the television spot, and deny coordination with Mr. Jones and the Coalition, but it argues that the Lugar campaign had sought to downplay the significance of the Florida straw poll. The Committee argues that Senator Lugar participated in the poll only as a "personal favor" to Jeb Bush, that the P-3 candidate debate and straw poll were not an "election" as defined by 2 U.S.C. § 431(1), and that the issue addressed in the advertisement is not one which the campaign would have chosen as a focus of its efforts in Florida. (Committee Response, pages 5-7). In the last regard, the Committee's response asserts that, had the campaign been approached by "Paul Tudor or his allies in the environmental movement in Florida" about a coordinated effort centered on the sugar subsidy issue, "Mr. Jones' suggestion would have been readily dismissed by the Lugar campaign as being contrary to law, counter-intuitive, counterproductive, potentially fatal to Senator Lugar's viability in Florida and, as a result, extremely harmful in Iowa and New Hampshire." (Committee Response, pages 6-7).

Mr. Lubbers, the campaign manager, makes the following statement in his affidavit:

My view, prior to P-3 and subsequently confirmed by the results of the straw poll, was and remains that the subject of the advertisements, a legislative initiative in the Senate undertaken by Senator Lugar relative to the federal sugar program, was not the kind of policy issue upon which we would have chosen to focus a Florida effort for at least two reasons:

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the legislative initiative involved the imposition of a federal levy or tax and the "activist" Florida Republican party was generally considered anti-tax and pro-sugar.

(Lubbers Affidavit, pages 3-4).

With regard to the assertedly non-election character of the straw poll, the Committee argues that "[i]t was, in fact, an event designed solely to build public awareness of and national media interest in the subsequent Florida Republican Presidential primary election. The P-3 candidate debate and straw poll must not be confused with the March, 1996 Republican primary election. The former was a media event while the latter was a federal election." (Committee Response, page 6).

According to Mr. Lubbers, the Committee decided "not to focus any substantive effort in the State of Florida"; however,

Senator Lugar did participate in the P-3 event because he wanted to assist the efforts of the sponsor of P-3, Jeb Bush, and because the candidate debate of the preceding night and the speeches made just prior to the commencement of the actual straw poll were scheduled to be broadcast into Iowa and New Hampshire by CNN and by C-SPAN. Participation in the P-3 debate and straw poll did not reverse the earlier determination not to mount a substantive campaign effort in Florida.

(Lubbers Affidavit, page 2; see also Committee Response, pages 5-6).

The Committee states in its response that it made "only one effort" to contact participants in the P-3 event, that being "a four-page letter from Senator Lugar and six pages of attachments." (Emphasis in original). The Committee stresses that this letter did not reference the sugar subsidy issue or the bill which Senator Lugar had introduced in Congress. (Committee Response, page 6, and Exhibit 3 thereto). The letter read in part:

I invite you to help orchestrate a little surprise this week. On Saturday afternoon, you will be asked to invest your vote in one of nine candidates. According to media reports you are expected to vote for one

candidates. According to media reports you are expected to vote for one of the candidates who has spent a lot of time and money on the straw poll. With a small number of votes we could send a big signal.

Like Republicans across the country, you are looking for a candidate who can win, and a President you can be proud of. I will not disappoint you on either score. And I would be grateful for your consideration when the voting begins next Saturday.

(Committee Response, Exhibit 3).

D. Analysis

1. Straw Poll as an Election

As stated above, the respondents argue that the Republican straw poll in Florida in November, 1995 was not an "election." Pointing to the definition of "election" at 2 U.S.C. § 431(1), and citing two Advisory Opinions, the Coalition response states that the Commission has found an election to be an event which "can choose a party nominee for federal office," and that, because the Florida straw poll did not choose delegates to the Republican National Convention or bind those delegates to particular candidates, it did not meet the definition. "Thus, the corporate contribution prohibition and registration, reporting and contribution rules of FECA simply would not apply to the advertisement which is the subject of the complaint in this matter." (Coalition Response, page 19).

This argument ignores the definitions of "contribution" and "expenditure" in the Act and apparently misreads the Commission's intent in Advisory Opinions 1992-25⁵ and 1984-16. As stated above, 2 U.S.C. §§ 431(8)(A)(i) and 431(9)(A)(i) define "contribution" and "expenditure" as payments, loans, advances or anything of value made "for purposes of influencing a federal

⁵ The response cites Advisory Opinion 1992-23; however, this opinion has no apparent relevance to the issue of what constitutes an "election" while Advisory Opinion 1992-25 is directly on point.

election." Any activity representing a step in the primary election process would be deemed to have been undertaken "for purposes of influencing" that election. See Advisory Opinion 1981-29. Participation in a political party's straw poll, no matter how non-binding that poll might be, would represent such a step if it involved an attempt to generate support for nomination to a federal office. Financial support related to a candidate's participation in the poll would constitute a contribution or an expenditure under the Act.

With regard to the advisory opinions cited in the Coalition response, the Commission addressed in AO 1984-16 the issue of whether a particular event constituted an "election" for purposes of determining whether a contributor would have a separate contribution limit with regard to that event. AO 1992-25 involved a state party convention which the Commission stated would serve as an "election"; again, the issue was whether contributors would have a separate contribution limitation with regard to the convention. There is nothing in these opinions to indicate that, if the events involved were not "elections," expenditures made in connection with those events would not be "expenditures" or "contributions" under the Act.

In the present matter, Senator Lugar did participate in the Florida Republican straw poll. The letter he sent to participants in the state Republican convention, at which the poll was taken, sets out his arguments as to why he would be the best president and the best Republican candidate. The letter ends with the statement: "I would be grateful for your consideration when the voting begins next Saturday." The Lugar campaign manager cites the significance of the poll for the primaries in New Hampshire and Iowa.

It is clear that at the least the Lugar campaign viewed the Florida Republican straw poll as a step in the overall primary campaign process in his quest for nomination to the Office of

President. Therefore, any contributions or expenditures made for purposes of influencing the outcome of that straw poll would have been contributions or expenditures for purposes of influencing the nomination process as a whole.

The Committee response also argues in a footnote that "the advertisement was clearly not to influence the March 1996 Florida Republican primary" because the primary was "four months away," it was not mentioned in the advertisement, and Senator Lugar had already withdrawn by the date of the primary. None of these arguments is convincing. The primary election period for a candidate encompasses the entire period between the date he or she becomes a candidate and the date of the primary election, there is no requirement that advertisements cite a particular primary by party or date, and Senator Lugar was a candidate as of the dates the television advertisement was run.

2. Express Advocacy

As discussed above, expenditures made with regard to communications which expressly advocate the election or defeat of a candidate are "expenditures" under the Act and are subject to the Act's prohibitions on the use of corporate funds, whether or not the expenditures are coordinated with the candidate benefited. Therefore, the next step in the analysis in this matter is to determine whether the advertisement at issue constituted "express advocacy."

The advertisement in question incorporates into its video portion the campaign bumper stickers of four candidates for nomination to the Office of President, these being U.S. Senator Richard Lugar, then U.S. Senator Robert Dole, U.S. Senator Arlen Specter, and U.S. Senator Philip Gramm. Two of these bumper stickers, including that of Senator Lugar, include the words "for President." The photos of the four candidates appear over their respective bumper stickers,

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then the photo and the bumper sticker of Senator Lugar are enlarged while the others disappear. The message accompanying Senator Lugar's enlarged photo and bumper sticker is that "only Senator Lugar stands with Florida against big sugar's money and for the Everglades."

The Coalition and Mr. Jones argue that the campaign bumper stickers were used in the advertisement only for color and identification purposes, and that the purpose of the advertisement was to call attention to the Everglades conservation issue and to Senator Lugar's support thereof, and to put pressure on the other three named Senators to support the Lugar sugar tax bill in the U.S. Senate. However, while the intent of those who financed the production and placement of the advertisement may have been non-election-related, the advertisement on its face contains express advocacy in the form of the language used in the campaign bumper stickers displayed, particularly the "for President" used on two of the four. The "for President" language on the Lugar campaign bumper sticker is then combined with positive statements about Senator Lugar's position on a given issue, while the lack of comparable positions on the parts of the other three named presidential candidates is stressed. Thus, the express advocacy of the Lugar bumper sticker is enhanced by the positive prominence given to Senator Lugar's stand on the sugar issue.⁶

3. Independence v. Coordination

Given the express advocacy contained in the advertisement's visual message, the expenditures made for its production and placement would constitute expenditures under the

⁶ Although the Dole bumper sticker which appears in the advertisement contains the words "for President" and the Gramm bumper sticker contains "President," the message of the advertisement as to these two candidates is negative, thus making a finding of express advocacy as to their candidacies more problematic.

Act. If there is evidence that those paying for the advertisement did so "in coordination, consultation or concert" with the Lugar Committee, or at the Committee's request or suggestion, the expenditures would be considered contributions received by the Committee.

2 U.S.C. §441a(a)(7)(B)(i). If there was no coordination, they would qualify as independent expenditures

Mr. Jones, the Coalition, Senator Lugar, the campaign manager of the Committee, Mark Lubber, and Senator Lugar's staff member, Andrew Fisher, all deny that there was any coordination between the Committee and the Coalition or Mr. Jones concerning the advertisement at issue. They admit that a meeting and a later telephone conversation took place between Senator Lugar and Mr. Jones, and that there was a subsequent meeting between Senator Lugar and Mr. Jones' colleague, Mary Barley; however, they consistently argue that the only subject matter of these contacts was the preservation of the Everglades and legislation in this regard. The complaint contains no contradictory information. Therefore, there is no evidence in hand which shows that the expenditures for the production and placement of the advertisement were anything other than independent expenditures.

4. Source of Expenditures

It is stated in the Coalition response and in Mr. Jones' sworn statement that the funds for the advertisement came from Mr. Jones' personal accounts. Rather than make the expenditures directly, however, he elected to establish a new organization called the Coalition for Good

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Government which registered as a Subchapter S Corporation, and to fund the advertisement through the Coalition. According to the response to the complaint filed on behalf of Mr. Jones and the Coalition,

[Mr. Jones] was advised that the Coalition would essentially be his 'alter ego', while at the same time the corporate form would provide limited liability for tort and contract purposes. . . . Mr. Jones was the only contributor to the Coalition for Good Government and maintained complete control over its actions. . . . He is identified by name in all public records of the Coalition, so there has been no attempt to hide his identity.

(Coalition Response, page 16; see also Jones Statement, pages 18-19).

In the present matter, Mr. Jones put his personal funds into the account of the Coalition for Good Government, a corporation which he assertedly created for purposes of making the television spot at issue in this matter. These funds were then used for the production and

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placement of the advertisement. The exact amount provided by Mr. Jones is not known; however, the complaint states that it may have been "as much as \$1 million." (Complaint, page 11).

i. Corporate Nature of Coalition

It has been the policy of the Commission that once a decision is made and carried out to conduct business using the corporate form, any funds taken from the corporation's accounts are to be deemed corporate in nature, whether or not they originated as, or could be converted into, the personal funds of a shareholder, and whether or not corporate income is taxable as personal income as a result of Subchapter S election. See, e.g., MUR 3191. In the present matter, when the Coalition was incorporated it took on a legal identity separate from that of Mr. Jones and was subject to regulation as such. The fact that Mr. Jones invested his personal property in the Coalition does not mean that its funds could still be viewed as his personal funds for purposes of the Act at the time the expenditures here at issue were made. Nor does the fact that he elected Subchapter S status for the Coalition change the corporate nature of the organization. Thus, given the Coalition's corporate status, and the fact that the funds for the television spot came from the Coalition's account, the expenditures made for the advertisement were made with corporate funds. See MUR 3119 and MUR 3191.

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E. Summary

Given the lack of evidence that the expenditures made by the Coalition were coordinated with the Lugar campaign or with Senator Richard Lugar, this Office recommends that the

Commission find no reason to believe that the Lugar for President Committee, Patrick J. Kiely, as treasurer, and Senator Lugar have violated the Act, and close the file as to these respondents.

This Office also recommends that the Commission find no reason to believe that the Tudor Investment Corporation has violated 2 U.S.C. § 441b and close the file as to this respondent.

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