

The ACLU and the Tobacco Companies

By Morton Mintz

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The American Civil Liberties Union has defended the Bill of Rights since its founding in 1920. This proud record does not necessarily mean that the ACLU welcomes an exercise of the First Amendment right of freedom of speech concerning its own affairs. I found this out when I inquired about the Union's ties to the tobacco industry, basing some of my questions on internal documents.

The reply was astonishing: My questions embodied charges that not only lacked "any basis in fact," but were "false and misleading." So wrote Ira Glasser, the ACLU's strong-willed Executive Director and de facto boss since 1978. For this grave allegation he offered no evidence. Nevertheless, he warned that were I to repeat the charges in an article, "we will appropriately respond at that time." If this was not an outright threat to sue for libel, it was, lawyers tell me, crafted to be read like one.

The reply was also bizarre. I cannot recall so much as an implicit threat of a libel action during the half-century that I've reported, extensively and often, on sensitive subjects, particularly misconduct and criminal conduct by deep-pocket corporations—including tobacco companies. Yet such an apparent threat now has come from the organization that has prided itself, for more than 75 years, on defeating efforts to weaken or circumvent the Bill of Rights.

Glasser's response is rooted in "Allies: The ACLU and the Tobacco Industry," a report I had released in July 1993. "Allies" drew press coverage focusing on the Union's solicitation and acceptance of \$500,000 from Philip Morris, the leading cigarette maker, in the six years 1987 through 1992. But the report raised other significant issues, starting with the ACLU's conflict-of-interest troika: The Union was at once seeking and taking tobacco money, allying itself with the tobacco industry to oppose (with testimony, press releases and "Dear Senator" letters) legislation intended to ban or restrict tobacco advertising and promotion, and—crucially—failing to mention either activity in the endless stream of "emergency" and "urgent" fundraising letters it sends to its approximately 300,000 members, its quarterly newsletter, *Civil Liberties*, and its annual reports.

I began thinking about revisiting the ACLU/tobacco alliance on the spring day in 1994 when the top guns of the tobacco industry raised their right arms at a congressional hearing and swore that they did not believe nicotine to be addictive. There followed a series of developments that convulsed the industry, including Liggett Group's admissions that it had long known that nicotine *is* addictive and that cigarette smoking *does* cause disease; the Food and Drug Administration's classification of nicotine as a drug and of cigarettes as drug-delivery devices, and the outpouring of internal documents demonstrating that the industry targeted children. But

what finally made me decide to follow up on “Allies” was the publication, in late 1996, of a book in which former Union employee John Fahs exposed a bundle of highly embarrassing internal documents, only to be all but ignored by the media and reviewed nowhere.

In “Allies” I had concluded that the ACLU was untainted by “financial impropriety” and that its integrity was “not the issue.” Glasser used these very quotes to enhance the credibility of statements like these, made to inquiring reporters and complaining ACLU members: “There is no quid pro quo;” “none of the grants is for issues directly related to tobacco company interests;” the ACLU “seek[s] support to carry out *our* agenda and advance *our* principles; we do not accept money with any condition on it that would require us to bend our principles or carry out an agenda not our own.”

The Fahs book—“Cigarette Confidential: The Unfiltered Truth About the Ultimate American Addiction”—persuaded me that I had inadvertently misled my readers. The documents demonstrate, author Fahs declared, that the ACLU undertook work “on behalf of cigarette manufacturers...in *direct exchange for funding—a quid pro quo arrangement in direct conflict with the institution’s status as a government-subsidized, tax-exempt, nonprofit institution* [emphasis added].” In addition, he alleged, the National Task Force on Civil Liberties in the Workplace, the ACLU unit that advocates “smokers’ rights,” “owes more than 90 percent of its annual budget and 100 percent of its continued existence” to grants to the ACLU Foundation by Philip Morris and R. J. Reynolds Tobacco Company (Glasser had declined, in a 1992 interview for “Allies,” to disclose the amount of the contribution made by the RJR Nabisco unit).

“Philip Morris provides no general contributions to the ACLU, only earmarked money for workplace rights,” task force director Lewis L. Maltby told Glasser in a September 1991 memo. But neither in the 1992 interview for “Allies” nor in subsequent damage-control efforts did Glasser so much as hint at earmarking. Rather, he deflected attention from it by emphasizing my own calculation that Philip Morris’s grants amounted to less than one-half of one percent of ACLU revenues. “Tobacco companies are not a major source of support for the ACLU,” he said.

Tobacco Paying ACLU Piper

Fahs’s case is that the cigarette companies paying the ACLU piper call its tunes. The Union got the money “for advocating smokers rights,” he alleged. What other explanation could there be, he asked, for the ACLU’s failure “to defend a *nonsmoker’s* civil right not to breathe in toxins from secondhand smoke?” This question resonates with the advice to smokers given in 1993 by the American Smokers Alliance, which is partially funded by the tobacco industry: If you believe you have been discriminated against, the ACLU “wants to come to your defense [at] no cost to you.”

On November 13, 1996, the Berkley Publishing Group joined with New York antismoking activist Joseph Cherner, founder and president of SmokeFree Educational Services, Inc., in launching Cigarette Confidential with a news conference in front of ACLU headquarters in Manhattan. By then, according to Fahs, the Union and/or its tax-exempt ACLU Foundation had taken more than \$900,000 in tobacco money; ACLU affiliates had taken hundreds of thousands of dollars more.

Basic Integrity at Stake

The press kit contained a devastating declaration by Melvin Wulf, who was the ACLU's own legal director from 1962 to 1977, who had argued 10 cases for the ACLU in the Supreme Court and who remains "deeply attached" to its principles. "The information in Cigarette Confidential...threatens the basic integrity of the ACLU," he said. He went on to say, in "the first critical word I've had to say publicly about the Union:"

"The justification that the money is used to support workplace rights is a sham. There is no constitutional right to pollute the atmosphere and threaten the health of others. The revelations...support the conclusion that the ACLU's mission is being corrupted by the attraction of easy money from an industry whose ethical values are themselves notoriously corrupt and which is responsible for the death annually of 350,000 to 400,000 persons in the U.S. alone."

Also in the press kit were internal documents "proving the ACLU's quid pro quo—direct work for funding—relationship with Philip Morris and R. J. Reynolds," as Fahs described them, and a Cherner statement contrasting the positions on tobacco taken by the ACLU before and after it began to solicit and accept industry money. For example, he said, the Union did not oppose banning cigarette advertising from the airwaves, health warnings on cigarette packs and ads and laws to create smoke-free workplaces; but in 1987 the ACLU began to oppose legislation to curb tobacco advertising and its tax deductibility, to require new, large warning labels on cigarette packs, to require smoke-free public places and workplaces and to denigrate evidence that cigarette advertising increases the incidence of smoking.

The book launching flopped; only some local radio stations covered it. ACLU spokesperson Emily Whitfield may have chilled news coverage by dismissing the author as "a disgruntled employee who had been fired for incompetence." This was a cheap shot, as the ACLU's Washington spokesman, Phil Gutis, indirectly conceded months after the damage was done. Fahs, he told me, had "resigned." This squared with the account of Fahs, not Whitfield. "I challenge the ACLU to produce one shred of evidence that I was fired," Fahs told me. "The fact is, I simply quit...of my own volition." He had performed clerical duties as a secretary/assistant in media relations from July 1993 to January 1995. He went on to become, his publisher said, "an investigative reporter who has written extensively for Spy and other publications."

Last year, I sent Nadine Strossen, the elected President of the ACLU's Board of Directors since 1991 and a professor at New York Law School, a four-page letter summarizing the post-"Allies" developments and asking questions reflecting them. Later, I offered to interview her; she didn't reply.

False Charges Alleged

Three weeks later, however, Glasser sent the letter alleging that I had made baseless and "false" charges. Notably, he didn't say who made them. Nor did he identify the putative defendant. Me? Not necessarily. To my knowledge, Glasser has nowhere alleged that I made charges in "Allies" that were inaccurate or unfair, let alone false. Although Fahs, Wulf and Cherner all had made statements at the heart of my query, Glasser has threatened none of them with a libel action. I sent each a copy of Glasser's letter to me. None flinched; all counterattacked—in writing.

"I am particularly struck by Ira's accusation in his letter that you persist in repeating false charges, but he never says what they are," Wulf wrote. He also said:

“Although the record seems to be perfectly clear that the ACLU...has tailored its tobacco-related positions to fit the industry’s interests, Ira persists in ducking embarrassing questions about the uses to which the money has been put, and about the objectivity of the ACLU’s public positions on tobacco-related issues.... His entire letter, in my opinion, is an evasion of troubling questions about the ACLU’s integrity.”

Fahs stood by his allegations as “accurate and true” and defied the ACLU to “prove them wrong by opening up...any and all of their records...pertaining to their relationship with cigarette manufacturers.” Cherner recalled inquiring of Glasser whether his before-and-after statement “accurately reflected your positions,” but had no response.

“Allies,” according to “Cigarette Confidential,” moved only one ACLU leader to complain to Glasser. In “lengthy correspondence,” Fahs wrote, Ramona Ripston, Executive Director of the Southern California affiliate, protested “the internal conflict of interest in accepting money from cigarette companies and then aggressively advocating on their behalf.” She also likened the situation to one in which the ACLU would take money from a marketer of harmful children’s toys and then defend its “right to publicize the products.” Six months later, the author said, Glasser sent Ripston “a six-page, typed, single-spaced missive that...reiterated his line about no strings being attached to the money received and repeats that the ACLU would never undertake work for money...he vehemently defend[ed] the virtue of association with cigarette companies, saying, ‘I am disturbed about the demonization of companies like Philip Morris.’”

Interview Declined

Ripston declined to be interviewed. “My letters to Ira Glasser re: the tobacco industry were private correspondence,” she told me. “I never released them to anyone, including John Fahs. My understanding is that they were stolen from ACLU files. They were never to be released, and I do not want them to be released now.”

“I didn’t steal any documents or letters,” Fahs responded. “I did make Xerox copies of many files that I had daily access to through my work in the ACLU’s Media Relations office. After making copies, I returned all the files to their rightful place. The reason I made copies of the cigarette files is because I found in them evidence that the ACLU had routinely and knowingly lied to its members and the national press in responding to your 1993 report ‘Allies.’”

Fahs named two Food and Drug Administration investigators, Gary D. Light and Thomas P. Doyle, who met with him. They saw tax “implications” in the Philip Morris and RJR donations to the tax-exempt ACLU Foundation and copied his files for the Department of Justice, he said. The FDA and Justice declined to comment.

Antismoking Bias Charged

The soaring rate of increase in alleged discrimination against smokers moved an ACLU executive to liken their plight to that of people victimized by the color of their skin or their sex. If the trend continues, he said in a 1990 document, “smokers will soon encounter discrimination comparable to that experienced by racial minorities and women.” Fahs told me the official was Lewis Maltby. In the book, Fahs identified the task force director as “the driving force in the push to add a Smokers Rights Amendment to the United States Constitution.”

If Maltby was hallucinating about a constitutional amendment, he was insightful about why cigarette companies funded his task force. “The only interest these people [Philip Morris] have in the ACLU is our role in fighting lifestyle discrimination,” he said in his September 1991 memo to Glasser. Of course, “lifestyle discrimination,” “workplace privacy” and the like are primarily ACLU and cigarette-industry code phrases for the imputed right of smokers to light up off the job where and when they wish.

On Christmas Eve 1991, Maltby thanked Philip Morris official Lance Pressl “for your commitment to contribute \$85,000 to our efforts to increase workplace privacy,” and Maltby aide Jonathan Anderson asked Pressl to cut a \$25,000 check “to the ACLU to cover the expenses in connection with the Vermont privacy campaign,” as agreed in “your conversation with Lewis Maltby.” The check arrived a few days later.

Fahs provided numerous examples of close cooperation and coordination between the ACLU task force and the two leading cigarette makers. Philip Morris’s “in-house advertising and graphic arts department designed, wrote copy for, produced and sent out an entire direct-mail campaign concerning smokers’ rights that used the ACLU name and logo,” Fahs disclosed. In 1991, he wrote, “Maltby traveled to North Carolina for extensive meetings with five top executives from RJR to ascertain what the firm’s priorities were with regard to lobbying for smokers’ rights and how the ACLU could best coordinate its efforts to address those priorities.”

Philip Morris officials Derek Crawford and Jack Nelson gave Maltby “oral approval” to his request for \$125,000 annually for his task force. “For internal PM reasons, Jack prefers that we make our initial request for \$100K and submit a second request for the balance later,” Maltby wrote to Glasser on June 4, 1992. In July, Philip Morris sent a check for \$25,000 to the ACLU Foundation; the receipt shows it was earmarked for Maltby’s task force. Crawford and Nelson had lunch with Maltby three weeks later and gave him a \$100,000 check. In December, Fahs said, Maltby “requested \$22,750 [more for] the Michigan affiliate in order to keep that office’s smokers’ rights lobbying efforts going.”

Funding in Doubt

In August 1993—a few weeks after the release of “Allies”—Maltby emerged from “a long budget meeting with PM” worrying that the outlook for further Philip Morris funding was bleak because its “budgets are being slashed,” he said in a memo to ACLU development director Sandra Sedacca and Glasser. He worried needlessly. Only eight days later, he wrote to Alan R. Miller, Philip Morris’s public affairs manager: “I appreciate your offer to help us restructure our proposal in the most advantageous form [and] to help us resolve the \$25,000 of last year’s funding which we never received.”

In December, Crawford sent Maltby a letter enclosing a check “in support of [the] ACLU Foundation’s 1994 research activities in the area of workplace discrimination (\$100,000) and to close out previously recommended support for 1993 activities (\$25,000).” Maltby thanked Crawford for Philip Morris’s “generous contribution to eradicate workplace discrimination” during a “difficult time.”

Six Secret Polls

In 1966, faced with mounting scientific evidence incriminating environmental tobacco smoke (ETS) as harmful and even lethal, the tobacco industry commissioned the Roper Organization to

do six secret biennial polls. At the end, Roper concluded that rising public concern over ETS was “the most dangerous development to the viability of the tobacco industry that has yet occurred.” The industry reacted with fierce campaigns—some of them covert—to block laws banning indoor smoking. The efforts included the launching of a nominally independent international magazine for which Philip Morris, as I reported in March 1996 in *The Washington Post Magazine*, passed more than \$1 million through Covington & Burling, a prestigious Washington law firm, to Healthy Buildings International, a small indoor-air-quality firm in nearby Virginia. The magazine’s central, recurring and false argument was that banning indoor smoking was unnecessary because the concentrations of ETS were so low as to be harmless.

Philip Morris “would clearly love to have us take a position that people should be able to smoke at work and in public buildings where they can do so without subjecting others to sidestream smoke,” Maltby said in the memo to Sedacca and Glasser. But caving in to Philip Morris on this issue, Maltby understood, could be highly embarrassing. The ACLU’s position on “employer control of off-duty conduct,” he pointed out, is “a corollary of [its] fundamental position...that each of us has a right to personal autonomy which entitles us to live as we choose *so long as we do not infringe the rights of others*” (emphasis supplied).

The ACLU admitted that it was ignorant about ETS and its implications and that this created problems. “[W]e have not thought through...essential questions for which we currently have no answers,” Maltby wrote. For example, “Do non-smokers have a right to be protected against all sidestream smoke, or only to levels which create health risks? If the latter, what concentrations of smoke do we believe create risks? Is it acceptable to use engineering controls [which conform with the industry strategy] to achieve a smoke-free atmosphere?”

“The crucial question is whether the benefits of taking an expanded position are worth the costs,” Maltby continued. “We have taken a great deal of heat over our present position. The reaction to an expanded position would be far worse.”

Indoor smoke pollution in the ACLU’s offices provoked chronic complaints from its employees. At least two presented doctors’ letters saying that for health reasons they needed a smoke-free workplace. In July 1992, office administrator Linda Gustafson was moved to seek “the most recent information [on] the effects of smoking on non-smokers and the causal relationship between ETS and cancer and other serious health effects in nonsmokers.” She did not turn to the Environmental Protection Agency; the source she chose was Thomas Lauria, a Tobacco Institute spokesman.

The ACLU has pressed hard for enactment of state laws prohibiting employers from controlling behavior away from the workplace. *Choice* magazine put a noble face on this in a September 1991 article. The ACLU was standing up to “a threat to the privacy of all Americans,” the writer said. *Choice* was a self-described “service of R.J. Reynolds Tobacco Company;” the writer was Maltby. Still, there’s a truly troublesome issue. For example, some employers say smokers who enter a building merely smelling of tobacco cause health problems for a subset of workers, particularly asthmatics; ACLU officials say that forbidding employees to smoke, certainly in their own homes, is as indefensible as forbidding them to eat too much fat.

In several states, nevertheless, no trace of nobility marked the Union’s activities. Nor did these activities reflect the modest distancing from the tobacco industry implied by the ACLU

Foundation in an unsigned “executive summary” of a circa 1990-1991 request to RJR Nabisco. The request was “for a three-year grant of \$450,000 to support the creation of an in-house public opinion research and analysis unit [that would] conduct a series of public opinion surveys about fundamental civil liberties questions,” the summary said. “We will begin by examining the issue of personal privacy.”

State Lobbying Effort

The ACLU did not create the in-house unit, deciding instead to tighten its embrace of the tobacco industry, Fahs says. “As a routine practice,” he reported in his book, “many of the surveys and telephone interviews conducted as part of the ACLU’s state lobbying efforts for smokers’ rights used questions scripted by R. J. Reynolds and were conducted with the tobacco firm’s money. Using this technique, RJR has been able to generate favorable public opinion results that can be used to lobby state legislators who are unaware of the survey’s true origins.”

The financial dependence of the ACLU affiliate in North Carolina on R. J. Reynolds, which is headquartered in Winston-Salem, was underscored by a request for money its executive director made to the company in late 1991. Without “additional support” from Reynolds, James Shields warned Glasser, the affiliate “will end up \$30K in the red this year...” If the top Reynolds lobbyist who responded to Shields came off as smug, it was understandable. “Clearly,” Executive Vice President Thomas G. Griscom wrote, “we have seen renewed interest in the issue of personal freedom and individual choice.”

(Tangled-web note: Early this year, The Wall Street Journal reported that Griscom, a former Reagan White House communications director, was becoming the overseer of public relations and corporate affairs for Rupert Murdoch’s News Corp. Murdoch sits on the boards of Philip Morris and of the “libertarian” Cato Institute in Washington.

(A Cato senior fellow, Robert A. Levy, has denounced the proposed \$368.5 billion “settlement” reached last year by the tobacco companies and most state attorneys general, calling it “a shameful document, extorted by public officials who have perverted the rule of law to tap the deep pockets of a feckless and friendless industry,” and “a bald transfer of wealth from a disfavored to a favored group.” Levy “has consistently received respectful media coverage—without reference to the links between the tobacco industry he defends and the think-tank that employs him,” Norman Solomon wrote in the January/February 1998 “Extra!”)

In Oklahoma, the ACLU commissioned a poll “on public attitudes toward employer policies regulating employees’ off duty conduct.” Requesting reimbursement from Philip Morris, Maltby said in a June 1991 memo, “Cost of poll—\$11,000.” In a March 1992 memo, Maltby aide Jonathan Anderson asked Philip Morris to reimburse “\$1,500 to cover the bill [it had] agreed to pay” for “one radio news release for targeted distribution to New York state stations” in the previous year. A month later, Maltby told Glasser in a memo that Philip Morris “provided the funding for our Mississippi affiliate’s recent conference on free speech.”

Most adult smokers were hooked as kids; a person who starts to smoke at age 19 or older is highly unlikely to become addicted. So it was striking that Ira Glasser, in an essay on mind-altering drugs six years ago, called cigarettes “highly addictive.” I asked him about this during an interview in late 1992. Considerately, he had chosen a day when president Nadine Strossen and

Morton H. Halperin, who was leaving the ACLU's Washington office after heading it for 10 years, could participate.

“So long as nicotine is a legal product which is not a prescription drug, the government cannot restrict speech about products containing it,” Glasser told me. But if the government should classify the addictive substance as a prescription drug, the ACLU “would not oppose” all regulation of it. The ACLU’s “basic position” on advertising and promotion of tobacco to youngsters, he said, is that government “can’t restrict speech to a level that only children can hear. It can’t bring the whole adult population down to the level of children.”

A Valid Curb on Ads?

Since then, of course, the FDA has actually classified nicotine as a drug and cigarettes as drug-delivery devices and acted to prevent the advertising, promotion and marketing of tobacco products to children. Under an ACLU policy statement formulated in 1975 there are “occasions when public interest in health and safety permit valid restrictions on commercial advertising.” The administrative and court proceedings in which the industry tried to block the agency were such an occasion. The ACLU chose not to support the FDA. One of my unanswered questions to Strossen was, why?

The ACLU did not report its silence on the FDA action to its members, just as it did not tell them of its solicitation and acceptance of tobacco money. As “a matter of editorial judgment,” Strossen doubted that news of the grants would “trump” the editorial matter in the ACLU’s quarterly newsletter. Really? In the winter 1992-1993 “Civil Liberties,” most of page three was occupied by the text of 14 amendments to the Constitution; a photo of the Union’s new development director consumed 25 square inches on page eight.

The ACLU leadership has also been unforthcoming with the membership about its one-size-fits-all contributions guideline, which had blipped in 1992, when New York Times columnist Anna Quindlen wrote that Ira Glasser had told her, “If John Gotti wanted to give \$10,000, we would take it.” In an interview for “Allies,” Burt Neuborne, a New York University law professor and a former ACLU legal director, summed up the guideline in nine words: “It’s self-destructive to turn away money for constructive projects.” Within limits, all sorts of organizations—civic, cultural, religious, sports—would concede that this is their guideline, too. Still, it’s fair to wonder, if Glasser would not spurn money from a Mafioso, how about Pol Pot? The Cali cartel? I asked Neuborne whether he would agree that the ACLU had erred in not disclosing that it was taking tobacco money. He cited “the special circumstances and emotion surrounding the tobacco issue,” but then broke ranks. “You’re probably right,” he said. “Sure, they should disclose it.”

In the late 1980’s I was struck by the near-congruence of the tobacco industry and ACLU bottom lines on issues such as the hazards of second-hand smoke and addiction. Other than the ACLU and certain First Amendment lawyers who often represent both the Union and tobacco interests, Melvin Wulf wrote in a 1986 Washington Post op-ed piece, “only the Tobacco Institute...and the occasional representative of advertising agencies that seem to profit from the industry seem capable of denying the overwhelming evidence of harm inflicted by smoking tobacco.”

In 1991, a startling example of ACLU zealotry emerged in a conversation between Morton Halperin and Pamela Gilbert, then director of Public Citizen’s Congress Watch. At one point, Gilbert told me, Halperin hypothesized a bill legalizing the sale of poisoned meat but containing

an unrelated provision sought by the Union. Trade in poisoned meat being a form of commerce on which the Union takes no stand, she recalled him saying, the ACLU would be right to support the bill. Halperin did not respond to a written request for comment.

Censorship ‘Contagious’

Glasser warned in his 1987 article in *The Nation* that banning tobacco ads is censorship, and “censorship is a contagious disease.” On Capitol Hill, similarly, Union spokesmen have warned that a ban on tobacco ads for tobacco is a “slippery slope” that could lead to bans on ads of other necessities susceptible to abuse, including automobiles. At the bottom of the slope the First Amendment would lie eviscerated.

“We are not interested in tobacco,” Glasser insisted in the 1992 interview. “We are interested in the First Amendment.” But why did an ACLU that constantly agonizes about limited resources feel compelled to spend a penny to war on legislation to restrict tobacco advertising while tobacco interests control Congress? As a matter of principle, he replied, the government cannot be allowed “to start picking and choosing targets for exceptions to the First Amendment.”

Yet the Union’s own 1975 policy statement affirmatively validates consumer-protection laws—never overturned by the Supreme Court—that authorize government agencies effectively to *censor* advertising by recognizing “the need for the regulation of selling practices to minimize fraud, deception and misrepresentations.” Thus the Securities and Exchange Commission demands a “tombstone” format for ads for securities offerings—no photos, and a text saying “no more” than SEC regulations allow. The FDA actually effectively *dictates* the text of ads for prescription drugs, which a manufacturer cannot legally sell without agency-approved labeling; the advertising must faithfully reflect the labeling.

Such ACLU absolutism has been ridiculed by two of its own former high officials, Aryeh Neier, who was Executive Director from 1970 to 1978, when Glasser succeeded him, and Melvin Wulf. “There is no First Amendment problem in any form of regulation of tobacco advertising,” Neier told me. Wulf brushed off the “slippery slope” argument. As it relates to ideational speech, he said, “it is often right and often effective,” but as it relates to tobacco advertising it “*is* wrong and ineffective; it has no merit. To believe it you must also believe that our legislators and judges do not know how to exercise judgment...don’t know the difference between a substance which has been proven to be harmful in and of itself, and a substance which is enormously useful but which may have some injurious effect. I think Congress can tell the difference between an egg and a cigarette.”

The seedbed of the ACLU’s zealously advocated defense of corporate tobacco speech is the Supreme Court’s startling usurpation of the legislative function more than a century ago. The case involved the Fourteenth Amendment’s command that no “person” shall be denied “the equal protection of the laws.” The framers’ clear intent was to protect the newly freed slaves; there is no evidence that they imagined a corporation—an artificial entity given life by the state—to be a “person.” Nothing in the legislative history argues the contrary. But in 1886—only 18 years after ratification—the Chief Justice of the United States, Morrison R. Waite, made a stunning announcement at the outset of oral argument in *Santa Clara County v. Southern Pacific Railroad*: “The Court does not wish to hear argument on whether the provision in the Fourteenth Amendment to the Constitution, which forbids a state to deny any person the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.”

The ACLU's leaders do not call the members' attention either to Waite's thunderbolt or to the Court's insistence for over a century on distinguishing between the commercial speech of paper persons and the speech—political speech, particularly—of individuals and groups of individual human beings. At the same time, however, the leaders tirelessly remind the members of the Union's resoluteness in protecting the rights of people. For example, in "The ACLU Commitment," a charter-like document celebrated in its annual reports, the Union says that it has always been "the country's leading champion of *individual* rights" and declares, "Our mission is to realize the promise of the Bill of Rights for all *people* in the United States [emphasis supplied]." The Commitment does not acknowledge that the ACLU's dedication to the Bill of Rights has significantly benefited corporations—mostly tobacco corporations.

'Alive With Pleasure'

Most courts that have struck down ad bans have done so because the information the ads sought to convey was "truthful and verifiable," Public Citizen's Alan B. Morrison, an expert on commercial speech, reminded a House panel in 1990. By contrast, he pointed out, most cigarette ads "have no information at all, but simply present visual images, with a few catchy phrases like 'Alive with Pleasure.'" (Morrison suggested "a more appropriate caption... 'Dead with Cancer.'")

In requesting the 1992 interview, I had told Glasser, in good faith, that I was preparing an article for a magazine. Subsequently, several magazines turned me down; and the only one to express interest insisted on unacceptable brevity. In the end, my work was rescued from samizdat status by an ad hoc cluster of anti-tobacco activists—the Center for Science in the Public Interest, the Coalition on Smoking OR Health, Ralph Nader, Public Citizen, Inc. and the Trauma Foundation, which became sponsors—and the Advocacy Institute, which agreed to publish "Allies...." In his letter to me, however, Glasser challenged my integrity by asserting that "Allies" had been "commissioned by an organization apparently not very interested in objective reporting." In fact, the sponsors had not "commissioned" the report; they took it off the shelf, so to speak, and exercised no editorial control. Moreover, they neither paid me a cent nor reimbursed my expenses. No matter: I should have notified Glasser of my failure to interest a magazine.

"Now you want us to go through the same sham process" as in 1992-1993, Glasser continued in his letter. Likening my questions to "interrogatories in an adversarial proceeding," he wrote: "We decline.... If we were asked for an interview by a disinterested journalist we would, of course, grant it.... But, under the circumstances, we do not feel any obligation to cooperate with what we believe is a hostile attempt to spread false and misleading charges about the ACLU, in order to support a conspiratorial view of our positions, to which you and your sources of support seem committed regardless of the facts." I have never concealed my sources of support. I would add only that my wife and I were ACLU members for approximately 40 years; we stopped paying dues because of the tobacco connection.

Sexual Abuse Cases

The ACLU is seeking \$25 million in its first-ever endowment campaign. In June 1996, a few weeks after the campaign began, columnist Nat Hentoff cited "an epidemic of civil liberties disasters" in which, solely on the basis of "testimony of very young children who have been coached by therapists and police investigators," workers in day-care centers have been charged with, and sometimes imprisoned for, sexual abuse. Yet, he wrote, the Union and its more than

300 chapters stayed aloof. “It is indeed a hard time for the ACLU—as well as for those other civil libertarians who do not regard it as the mother church,” he went on to say. “However, it has internal civil liberties problems that money cannot solve. There is an increasing ideological rigidity within the organization.”

Glasser’s ideological rigidity was on display in 1987, the year in which he began—without, he told me, the knowledge of his board—to solicit and accept money from Philip Morris. “In a fair contest between medical facts and the industry’s self-serving propaganda, the facts will win,” he wrote in *The Nation*. “That is the premise of the First Amendment. And that is what the past 20 years demonstrate.”

“*A fair contest?*” The industry that former U.S. District Judge H. Lee Sarokin once said “may be the king of concealment and disinformation” systematically squelched the facts. Tobacco Institute Vice President Frederick R. Panzer boasted of this in a 1972 confidential memo revealing the “holding strategy” that the industry had “brilliantly conceived and executed” for nearly 20 years to obscure and defeat the most conclusively documented medical fact of all: Smoking induces disease. Panzer also disclosed the strategy’s three components: “Creating doubts about the health charge without actually denying it;” “advocating the public’s right to smoke, without actually encouraging them to take up the practice,” and “encouraging objective scientific research as the only way to resolve the question of health hazard.” Each year, meanwhile, the medical facts were fogged by billions of dollars of tobacco advertising and promotion—much of it designed to addict children; buried or suppressed by publications dependent on that same advertising, and brushed aside by a Congress significantly bought by the industry.

“*The facts will win?*” During the 20 years to which Glasser referred, millions of people died of tobacco-induced diseases, more millions were harmed, and yet more millions were hooked and doomed. Tobacco-induced mortality and morbidity on this scale will continue to win worldwide for decades to come, no matter whether Congress approves, disapproves or amends the \$368.5 billion so-called “settlement” reached last year by the tobacco companies and most state attorneys general.

The ACLU’s alliance with the tobacco industry was not among Nat Hentoff’s examples of the Union’s ideological rigidity. Had it been, might the headline on his column in *The Washington Post*, “Two Cheers for the ACLU,” have been arguably generous?

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