



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Date: 4/27/00

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THE ATTACHED MATERIAL IS BEING ADDED TO CLOSED MUR 2804

20.04.398.0583

FYI

Ifshin & Friedman, PLLC.
ATTORNEYS AT LAW

888 16th Street, N.W., Suite 400
Washington, D.C. 20006
(202) 293-4175 Fax (202) 296-8791

DEC 24 1 11 PM '98

December 22, 1998

Larry Noble
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

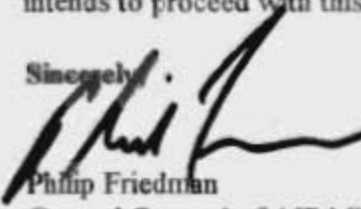
Re: Akins v. FEC No. 92-1864

Dear Mr. Noble:

On September 11, 1998 I received an order from the United States Court of Appeals for the District of Columbia in which the above referenced case was remanded to the FEC for further proceedings.

I would appreciate any information you may have on how and when the Commission intends to proceed with this matter.

Sincerely,



Philip Friedman
General Counsel of AIPAC

cc: Howard Kohr

20.04.398.0584



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Philip Friedman
General Counsel, AIPAC
Ifshin & Friedman, P.L.L.C.
888 16th Street, NW
Washington, DC 20006

January 7, 1999

RE: Akins v. FEC

Dear Mr. Friedman:

This letter is in response to your letter of December 22, 1998, in which you asked for the status of the remand from the U.S. Court of Appeals for the District of Columbia in the above-cited case.

The remand has been assigned to a staff attorney in the Office of the General Counsel and a report to the Commission is being prepared. We will inform you immediately once the Commission makes a determination as to how to proceed.

If you have any questions, please contact Anne A. Weissenborn, the senior attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in dark ink, appearing to read "Lawrence M. Noble", is written over the typed name.

Lawrence M. Noble
General Counsel

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BEFORE THE FEDERAL ELECTION COMMISSION

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

FEB 26 9 38 AM '99

In the Matter of

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MUR 2804

SENSITIVE

American Israel Public Affairs Committee

GENERAL COUNSEL'S REPORT

I. BACKGROUND

A. Purpose of Report

This report is in response to the decision of the United States Supreme Court in FEC v. Akins, et al., 118 S.Ct. 1777 (1998), in which the Court vacated the decision of the Court of Appeals in Akins, et al. v. FEC, 101 F.3d 731 (D.C. Cir., 1996) and remanded the case for purposes of having the Commission "determine whether or not AIPAC's expenditures," in light of new revisions to the Commission's regulations defining "membership organization," "qualify as 'membership communications,' and thereby fall outside the scope of " 'expenditures' that could qualify it as a 'political committee.'" 118 S.Ct. at 1788. The Court of Appeals, on August 7, 1998, vacated the order of the district court in Akins, et al. v. FEC, No. 92-1864 (D.D.C., Mar. 30, 1994), which had granted summary judgment to the Commission in a suit filed pursuant to 2 U.S.C. § 437g(a)(8), and ordered that the district court in turn remand the case to the Commission for further proceedings. Akins, et al. v. FEC, No. 94-5088 (D.C. Cir., 1998).

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B. History of the Case

This matter began in 1989 when James E. Akins, George Ball, Richard Curtiss, Robert J. Hanks, Andrew I. Killgore and Orin Parker (collectively referred to herein as "Akins") filed an administrative complaint with the Commission which was designated MUR 2804. The complaint contained numerous allegations that the American Israel Public Affairs Committee ("AIPAC") and other organizations had violated the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"). In the complaint Akins alleged, *inter alia*, that AIPAC had failed to register and report as a political committee in violation of 2 U.S.C. §§ 431(4), 433, and 434, and that it had made illegal corporate contributions in violation of 2 U.S.C. § 441b.

The investigation in MUR 2804 lasted more than three years, involved hundreds of interrogatories, letters and affidavits, and created an administrative record of nearly 4,000 pages. The Commission, on June 16, 1992, found probable cause to believe that AIPAC had made corporate contributions or expenditures in violation of 2 U.S.C. § 441b because some of its campaign-related communications and activities were directed toward persons who did not qualify as "members" of AIPAC under the Act. The Commission also decided, however, to exercise its prosecutorial discretion by taking no further action regarding this finding. The Statement of Reasons signed by four Commissioners and dated July 27, 1992 stated:

[T]he General Counsel concluded that the group of persons AIPAC claimed as its members lacked a sufficient right to participate in the governance of the organization to meet the Commission's membership criteria. The General Counsel principally cited the fact that group members at issue here had no right to vote for the governing body (the Executive Committee) of AIPAC. The General Counsel acknowledged that those members of AIPAC

who attended the annual Policy Conference, only a small percentage of the total "members," could vote on the Policy Statement. He concluded, however, that this right without more did not meet the Commission's criteria for voting rights or organizational attachment.

We agreed with the General Counsel's conclusion that AIPAC did not meet the Commission's membership criteria as provided in a series of advisory opinions following the NRWC decision.¹ Thus, we found probable cause to believe AIPAC violated 2 U.S.C. § 441b. We also agreed with the General Counsel that the AIPAC situation presented a close question, and that the Commission should clarify its membership definition before imposing penalties in close cases such as this, where the organization came close to meeting the "spirit" of the Commission's membership criteria, but failed on a specific point.

Statement of Reasons, pages 1-2.

The Commission also concluded on June 16, 1992, that AIPAC's campaign-related expenditures, while likely to have exceeded \$1,000 in some years, were only an adjunct to its lobbying efforts, not its major purpose. The test applied by the Commission examined the major purposes of the organization as a whole, not the major purpose of particular AIPAC expenditures. The Commission unanimously found that there was no probable cause to believe that AIPAC had violated the Act by failing to register and report as a political committee. The file in MUR 2804 was closed.

On August 12, 1992, Akins filed a complaint in the U.S. District Court for the District of Columbia, pursuant to 2 U.S.C. § 437g(a)(8). This complaint focused solely upon the Commission's decision to find no probable cause to believe that AIPAC had

¹ FEC v. National Right to Work Committee, 459 U.S. 196 (1982).

failed to register and report as a political committee. The complaint did not challenge the Commission's decision to find probable cause to believe that AIPAC had violated 2 U.S.C. § 441b, but to take no further action in this regard, and thus did not challenge the Commission's position on the "membership" issue.

The District Court, on March 30, 1994, ruled in an unreported opinion on the parties' cross motions for summary judgment. The court granted the Commission's motion. The court found that "[t]he major dispute between the parties relates to the definition of political committee and the application of the major purpose standard." FEC v. Akins, et al., No. 92-1864, at 11. According to the court, "[t]he 'major purpose' test as first articulated by the Second Circuit and endorsed by the Supreme Court in Buckley was interpreted properly by the defendant FEC. [Akins'] assertion that the case law requires the Court to examine the major purpose of an organization's expenditure to determine if that organization is a political committee is erroneous." Id. at 15. The court also found that the Commission's application of the major purpose test in this case had been reasonable. Id. at 16.

In 1994 Akins filed an appeal with the U.S. Court of Appeals for the District of Columbia. After a remand to the district court for clarification, the Court of Appeals, sitting en banc, reversed the lower court's decision, finding that the Commission's interpretation of "political committee" at 2 U.S.C. § 431(4)(A) was "mistaken," and remanding the case to the Commission for further action. Akins et al. v. FEC, 101 F.3d 731, 744 (1996). Because the Commission had found evidence of coordination by AIPAC with candidate committees, the appeals court addressed the AIPAC expenditures at issue as in-kind contributions. The court examined the relevant portions of the two

Supreme Court decisions principally relied upon by the Commission when formulating its "major purpose" test, namely Buckley v. Valeo, 424 U.S. 1 (1976) (*per curiam*) and FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986), and found that the Court in each had addressed only independent expenditures, not coordinated expenditures, and thus had been concerned with a constitutional issue different from that involved in the AIPAC situation. "There is no constitutional problem with applying § 431(4)(A) to AIPAC or to other organizations making *contributions* (or coordinated expenditures) exceeding the statutory limits." 101 F.3d at 742. (Emphasis in original.) Later in this opinion the court stated: "There is no contention that AIPAC's disbursements were independent expenditures, so there is no constitutional barrier to application of § 431(4)(A). The FEC found that AIPAC likely made campaign contributions in excess of \$1,000. Its decision that no probable cause existed to believe AIPAC was a political committee, and its consequent dismissal of appellants' complaint, were therefore based on its mistaken interpretation of § 431(4)(A)." 101 F.3d at 744.

On June 1, 1998, the Supreme Court issued an opinion addressing the decision of the Court of Appeals. The Court focused upon two issues: 1) the standing of the complainants in the enforcement action to challenge the Commission's decisions, with regard to which the Court found in favor of the complainants, 118 S.Ct. at 1787; and 2) "[w]hether an organization that otherwise satisfies the Act's definition of a 'political committee,' . . . nonetheless falls outside that definition because 'its major purpose' is not the nomination or election of candidates." Id. In the latter regard, and as stated above, the Court vacated the appeals court's decision and remanded the case for further proceedings, citing the Commission's proposed "new rules defining 'membership

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organization” which the Court found “could significantly affect the interpretive issue presented by [the major purpose/political committee] question.” 118 S.Ct at 1788. The Court stated:

In our view, the FEC should proceed to determine whether or not AIPAC’s expenditures qualify as ‘membership communications,’ and thereby fall outside the scope of ‘expenditures’ that could qualify it as a ‘political committee.’ If the FEC decides that despite its new rules, the communications here do not qualify for this exception, then the lower courts, in reconsidering respondents’ arguments, can still evaluate the significance of the communicative context in which the case arises. If, on the other hand, the FEC decides that AIPAC’s activities fall within the ‘membership communications’ exception, the matter will become moot.

Id.

II. STATUORY AND REGULATORY PROVISIONS AND PROPOSED REVISIONS

2 U.S.C. § 431(A)(4) defines “political committee” as “any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000 during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year” 2 U.S.C. § 441b(a) prohibits corporations, including incorporated membership organizations, from making contributions or expenditures “in connection with any election” for a Federal office. Membership organizations and corporations may, however, make communications, including communications containing express advocacy, to their stockholders and executive or administrative personnel and their families (their “restricted class”) without related costs being considered “contributions” or “expenditures,” so long as “such membership organization or corporation is not organized primarily for the purpose of influencing” federal elections. 2 U.S.C. § 431(b)(9)(iii). See also 2 U.S.C. § 441b(b). Pursuant to the Commission’s

regulations, an incorporated membership organization's restricted class includes its members and its executive and administrative personnel, and their families. 11 C.F.R. § 114.1(j). See also 11 C.F.R. § 114.7(a).

The complaint in MUR 2804 was filed in January, 1989. At that time the Commission's regulations, which had been adopted in 1977, defined "members" as "all persons who are currently satisfying the requirements for membership in a membership organization, trade association, cooperative, or corporation without capital stock A person is not considered a member under this definition if the only requirement for membership is a contribution to a separate segregated fund." 11 C.F.R. §§ 100.8(b)(4)(iv) and 114.1(e) (1988). The regulations did not define "membership organization" or "members."

In 1982 the U.S. Supreme Court addressed the Commission's definition of "members" in the context of a case involving the solicitation of contributions to a separate segregated fund, FEC v. National Right to Work Committee, 459 U.S. 196 (1982) ("NRWC"). The Court cited the legislative history of 2 U.S.C. § 441b(b)(4)(C), and found that its analogy of membership in nonstock corporations to stockholders of business corporations and to members of labor unions "suggests that some relatively enduring and independently significant financial or organizational attachment is required to be a 'member' under [this provision]." 459 U.S. at 204. The Court rejected the lower court's determination that a response "to one of the corporation's essentially random mass mailings" could result in membership. Id. The Court stated:

Although membership cards are ultimately sent to those who either contribute or respond in some other way to respondent's mailings, the NRWC's solicitation letters themselves make no

reference to members. . . . There is no indication that NRWC's asserted members exercise any control over the expenditures of their contributions. Moreover, . . . NRWC's own articles of incorporation and other publicly filed documents explicitly disclaimed the existence of members. We think that under these circumstances, those solicited were insufficiently attached to the corporate structure of NRWC to qualify as "members" under the statutory proviso.

459 U.S. at 206.

In 1993 the Commission revised its regulations to add a definition of "membership association" and to elaborate upon the definition of "members." The first of these then-new provisions reads:

[M]embership association means a membership organization, trade association, cooperative, corporation without capital stock, or a local, national, or international labor organization that:

- 1) Expressly provides for "members" in its articles and by-laws;
- 2) Expressly solicits members; and
- 3) Expressly acknowledges the acceptance of membership, such as by sending a membership card or inclusion on a membership newsletter list.

11 C.F.R. § 100.8(b)(4)(iv)(A).

The definition of "members" at 11 C.F.R. § 100.8(b)(4)(iv)(B) was also amended to read:

(M)embers means all persons who are currently satisfying the requirements for membership in a membership association, affirmatively accept the membership association's invitation to become a member, and either:

- 1) Have some significant financial attachment to the membership association, such as a significant investment or ownership stake (but *not* merely the payment of dues);

- 2) Are required to pay on a regular basis a specific amount of dues that is predetermined by the association and are entitled to vote directly either for at least one member who has full participatory and voting rights on the highest governing body of the membership association, or for those who select at least one member of those on the highest governing body of the membership association; or
- 3) Are entitled to vote directly for all of those on the highest governing body of the membership association.

See also 11 C.F.R. § 114.1(c)(2).

This expanded definition of "members" was addressed in 1995 and 1996 by the U.S. Court of Appeals for the District of Columbia in Chamber of Commerce v. FEC, 69 F.3d 600 (D.C. Cir. 1995), amended on denial of rehearing, 76 F.3d 1234 (D.C. Cir. 1996), following denial of relief by the U.S. District Court for the District of Columbia, 1994 WL 615786. The Chamber of Commerce ("Chamber") and the American Medical Association ("AMA") had brought suit against the Commission for declaratory and injunctive relief to prevent enforcement of the Commission's revised definition of "members." Plaintiffs argued that neither of these organizations provide for voting rights sufficient to meet the regulation's definition of "members," thereby leaving out persons who, the organizations asserted, should be included within any such definition. Citing constitutional concerns, the Court of Appeals found the Commission's new definition "too restrictive" and not in accord with the Supreme Court's decision in NRWC; reversed the lower court's decision upholding the regulation; and remanded the case with instructions that declaratory relief be granted. The appeals court did not attempt to define "members," but found that the Supreme Court's requirement of a "significant financial or organizational attachment" would imply "something similar to dues" and that an

organizational attachment could include binding oneself to the ethical standards of an organization, as with the AMA, or serving on policy formulating committees, as with the Chamber. 69 F.3d at 605.

On December 22, 1997, the Commission, in response to a Petition for Rulemaking submitted by James Bopp, Jr., on behalf of the National Right to Life Committee, Inc., published a Notice of Proposed Rulemaking in the Federal Register. 62 Fed. Reg. 66833 (1997). In this Notice the Commission retained the present definition of "membership association" and focused upon the definition of "members," stating that the effect of the revised membership rules "should be to expand the class of persons considered as 'members.'" The Notice proposed three alternative combinations of financial and organizational attachments. All three alternatives retained the current provisions which recognize as members persons who have a stronger financial interest in an association than the payment of annual dues.

Following receipt of written comments and a public hearing held on April 19, 1998, the Commission on October 22, 1998, determined to reconsider the proposed rules with another emphasis. On December 17, 1998, the Commission published a second Notice of Proposed Rulemaking which focused upon the required characteristics of a membership organization. The proposed revisions of Section 100.8(b)(4)(iv)(A) would change the present reference to "membership association" to "membership organization" and would set out seven attributes of such an organization as follows:

- 1) Is composed of members;
- 2) Expressly states the rights, qualifications, obligations and requirements for membership in its articles, bylaws and other formal organizational documents;

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- 3) Is self-governing, such that the power and authority to direct and control the association is vested in some or all members, pursuant to its articles, bylaws and other formal organizational documents;
- 4) Makes its articles, bylaws and other formal organizational documents freely available to its members;
- 5) Expressly solicits members;
- 6) Expressly acknowledges the acceptance of membership, such as by sending a membership card or inclusion on a membership newsletter list; and
- 7) Is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual for Federal office.

(Emphasis added.)

Section 100.8(b)(4)(iv)(B) of the revised proposed rules sets out a definition of

"members" for purposes of this section.

[T]he term members includes all persons who are currently satisfying the requirements for membership in a membership organization, affirmatively accept the membership organization's invitation to become a member, affirm their membership on at least an annual basis and either:

- 1) Have some significant financial attachment to the membership organization, such as a significant investment or ownership stake;
- 2) Are required to pay on a regular basis a specific amount of annual dues of an amount predetermined by the organization, or
- 3) Have a significant organizational attachment to the membership organization which includes direct and enforceable participatory and governing rights. For example, such rights could include the right to vote directly or indirectly for at least one individual on the membership organization's highest governing board; the right to vote directly for organization officers; the right to vote on policy questions where the highest governing body of the membership organization is obligated to abide by the results; or the right to participate directly in similar aspects of the organization's governance.

(Emphasis added.)

The deadline for receipt of comments on these proposed rules was February 1, 1999. Numerous comments have been received.

III. RECOMMENDED COMMISSION ACTION

In light of the Commission's ongoing rulemaking involving the membership organization regulations at issue in MUR 2804, this Office recommends that the Commission hold any reopening of this matter in abeyance pending the conclusion of the subject rulemaking and the promulgation of new regulations. A report recommending appropriate action regarding this matter will be submitted shortly after the new regulations are finalized.

If the Commission approves this recommendation, both the complainants and AIPAC will be notified of the determination.

IV. RECOMMENDATION

Hold any reopening of MUR 2804 in abeyance pending promulgation of final revised regulations pertaining to "membership organizations."

2/25/99
Date


Lawrence M. Noble
General Counsel

Staff Assigned: Anne A. Weissenborn

20.04.398.0597

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
American Israel Public Affairs) MUR 2804
Committee.)

CERTIFICATION

I, Marjorie W. Emmons, Secretary of the Federal Election Commission, do hereby certify that on March 3, 1999 the Commission decided by a vote of 6-0 to take the following actions in MUR 2804:

1. Hold any reopening of MUR 2804 in abeyance pending promulgation of final revised regulations pertaining to "membership organizations."

Commissioners Elliott, Mason, McDonald, Sandstrom, Thomas, and Wold voted affirmatively for the decision.

Attest:

March 3, 1999
Date

for Marjorie W. Emmons
Secretary of the Commission

Received in the Secretariat: Fri., Feb. 26, 1999 9:00 a.m.
Circulated to the Commission: Fri., Feb. 26, 1999 12:00 p.m.
Deadline for vote: Wed., Mar. 03, 1999 4:00 p.m.

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 8, 1999

Philip Friedman, General Counsel
American Israel Public Affairs Committee
Ifshin & Friedman, PLLC
Suite 400
888 Sixteenth Street, NW
Washington, DC 20006

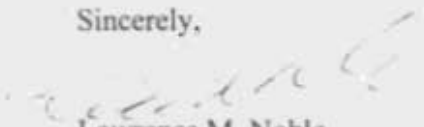
RE: MUR 2804

Dear Mr. Friedman:

This purpose of this letter is to inform you and your client, the American Israel Public Affairs Committee ("AIPAC"), of the recent determination of the Federal Election Commission taken in response to the decision of the United States Supreme Court in FEC v. Akins, et al., 118 St.Ct. 1777 (1998). Following the subsequent remand from the United States District Court for the District of Columbia, the Commission, on March 3, 1999, voted to hold any reopening of MUR 2804 in abeyance pending promulgation of final revised regulations pertaining to "membership organizations." Should the Commission take any additional steps with regard to MUR 2804 in the future, you will be notified immediately.

If you have any questions, please contact Anne A. Weissenborn, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,


Lawrence M. Noble
General Counsel

20.04.398.0599



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 8, 1999

Daniel M. Schember, Esquire
Gaffney & Schember, P.C.
Suite 225
1666 Connecticut Avenue, NW
Washington, DC 20009

RE: MUR 2804

Dear Mr. Schember:

This purpose of this letter is to inform you and your clients, the complainants in MUR 2804, of the recent determination of the Federal Election Commission taken in response to the decision of the United States Supreme Court in FEC v. Akins, et al., 118 St.Ct. 1777 (1998). Following the subsequent remand from the United States District Court for the District of Columbia, the Commission, on March 3, 1999, voted to hold any reopening of MUR 2804 in abeyance pending promulgation of final revised regulations pertaining to "membership organizations."

We ask that you inform your clients of this Commission determination. Should the Commission take any additional steps with regard to MUR 2804 in the future, you will be notified immediately.

If you have any questions, please contact Anne A. Weissenborn, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,


Lawrence M. Noble
General Counsel

20.04.398.0600

Ifshin & Friedman, P.L.L.C.
ATTORNEYS AT LAW

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

MAR 19 3 06 PM '99

March 18, 1999

Larry Noble
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 2804

Dear Mr. Noble:

Thank you for your letter of March 8, 1999 in which you advised that the Commission has voted to place in abeyance any reopening of MUR 2804 pending promulgation of final revised regulations pertaining to membership organizations. AIPAC objects to this determination and formally requests that the Commission promptly make a final resolution of a matter that has been pending for nearly 10 years.

As AIPAC has consistently maintained, the Commission made a gross error when, on the grounds that AIPAC is not a membership organization, it found AIPAC in violation of the Act. Indeed, the simple fact that the Commission is now engaged in final revised regulations to clarify ambiguities in its membership regulations -- that the Commission itself acknowledged were ambiguous when it initially found AIPAC in violation of the Act -- underscores the fact that the only legal determination the Commission could possibly reach on AIPAC's membership status under the facts of MUR 2804 is that AIPAC is, and always has been, a constitutionally protected membership group.

The Commission's consideration of revised membership regulations, although probative to underscoring the Commission's initial error in finding AIPAC in violation of the Act, is wholly irrelevant to any determination of AIPAC's purported violation of the Act in 1989. After several years of being portrayed in a false light precisely because of the Commission's erroneous legal conclusion (one presumably recognized by the Supreme Court), AIPAC and its members are entitled to the Commission's prompt determination that AIPAC and its members have fully complied with the law and have -- at all times -- lawfully exercised their rights to participate in the political process.

Accordingly, AIPAC requests that the Commission expeditiously conclude the decade-long mistake known as MUR 2804. In fulfilling this request, AIPAC urges the Commission to specifically determine that AIPAC never made a single impermissible

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Lawrence M. Noble, Esq.

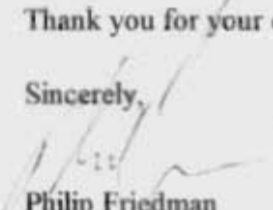
March 18, 1999

Page 2

corporate contribution on the unambiguous grounds that every one of the communications allegedly involving express advocacy was an internal communication among AIPAC's members.

Thank you for your consideration of this matter.

Sincerely,


Philip Friedman
General Counsel of AIPAC

cc: Howard Kohr

20.04.398.0602

Ifshin & Friedman, P.L.L.C.
ATTORNEYS AT LAW

888 16th Street, N.W., Suite 400
Washington, D.C. 20006
(202) 295-4175 Fax (202) 296-8791

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

APR 27 3 03 PM '99

April 26, 1999

Larry Noble
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

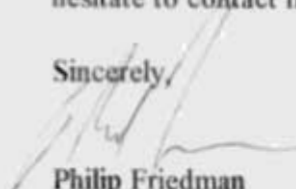
Re: MUR 2804

Dear Mr. Noble:

Enclosed please find a copy of a letter I sent to you several weeks ago in which AIPAC requested the Commission take immediate action on resolving what remains of the above referenced action.

Thank you for your consideration of this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,


Philip Friedman
General Counsel of AIPAC

cc: Commissioner Thomas
Commissioner Wold
Commissioner McDonald
Commissioner Sandstrom
Commissioner Elliott
Commissioner Mason
Howard Kohr

20-04-398-0603

Ifshin & Friedman, P.L.L.C.

ATTORNEYS AT LAW

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OFFICE OF GENERAL
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APR 27 3 03 PM '99

March 18, 1999

Larry Noble
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 2804

Dear Mr. Noble:

Thank you for your letter of March 8, 1999 in which you advised that the Commission has voted to place in abeyance any reopening of MUR 2804 pending promulgation of final revised regulations pertaining to membership organizations. AIPAC objects to this determination and formally requests that the Commission promptly make a final resolution of a matter that has been pending for nearly 10 years.

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Lawrence M. Noble, V

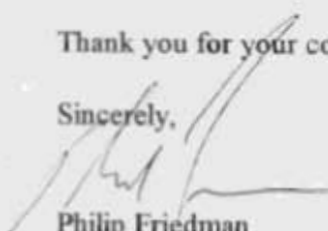
March 18, 1999

Page 2

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Thank you for your consideration of this matter.

Sincerely,


Philip Friedman
General Counsel of AIPAC

cc: Howard Kohr

20.04.398.0605

BEFORE THE FEDERAL ELECTION COMMISSION

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In the Matter of

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MUR 2804

American Israel Public Affairs Committee

SENSITIVE

GENERAL COUNSEL'S REPORT

I. BACKGROUND

On March 3, 1999, the Commission voted to hold any reopening of MUR 2804 in abeyance pending promulgation of final revised regulations pertaining to "membership organizations." On March 8, 1999, counsel for the American Israel Public Affairs Committee ("AIPAC") was informed of this Commission determination.

The issue of whether or not to reopen MUR 2804 is before the Commission as a result of the decision of the United States Supreme Court in FEC v. Akins, 118 S.Ct. 1777 (1998). This decision and its history are discussed in some detail in the General Counsel's Report of February 25, 1999, which contained the recommendation for the Commission's March 3, 1999 determination. For purposes of the present report the Commission's attention is directed to the fact that the Supreme Court remanded the case for particular purposes, expressly citing the Commission's proposed "new rules defining 'membership organization'," and stating that "[i]n our view, the FEC should proceed to determine whether or not AIPAC's expenditures qualify as 'membership communications,' and thereby fall outside the scope of 'expenditure' that could qualify it as a 'political committee'." 118 S.Ct. at 1788.

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On March 18, 1999, and later on April 26, 1999, counsel for AIPAC responded to the March 8, 1999 letter from this Office, requesting "that the Commission expeditiously conclude the decade-long mistake known as MUR 2804." Counsel "urges" further that the Commission "specifically determine that AIPAC never made a single impermissible corporate contribution on the unambiguous grounds that every one of the communications allegedly involving express advocacy was an internal communication among AIPAC's members." In support of these requests, counsel points to the Commission's ongoing revisions of the regulations governing membership organizations "to clarify ambiguities," and asserts that the only legal determination the Commission could possibly reach on AIPAC's membership status under the facts of MUR 2804 is that AIPAC is, and always has been, a constitutionally protected membership group." (Attachment 1). Counsel also asserts that "the Commission's consideration of revised membership regulations . . . is wholly irrelevant to any determination of AIPAC's purported violation of the Act in 1989." (*Id.*)

II. ANALYSIS

As stated above, the issue of whether to reopen MUR 2804 matter is before the Commission as the result of a remand from the United States Supreme Court. The Commission cannot make a determination with regard to reopening this matter, or to bringing it to a close as desired by AIPAC, without complying with the Court's instructions and without having adequate bases for such compliance. A principal and necessary basis will be any promulgation of new rules governing the definition of "membership organization." Without such bases the Commission would undoubtedly be subject to a new suit filed pursuant to 2 U.S.C. § 437g(a)(8).

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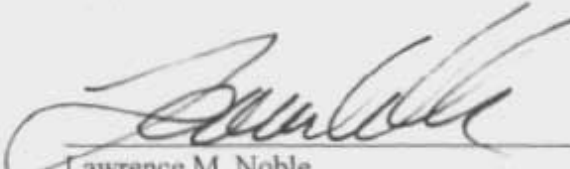
III. RECOMMENDED COMMISSION ACTION

This Office recommends that the Commission deny AIPAC's request that MUR 2804 be addressed immediately and closed, and authorize this Office to send the attached letter to counsel for AIPAC notifying him of this determination and citing the Supreme Court's decision as its basis.

IV. RECOMMENDATIONS

1. Deny the request of the American Israel Political Action Committee that the Commission immediately address and close MUR 2804.
2. Authorize the Office of General Counsel to send the attached letter.

5/11/99
Date


Lawrence M. Noble
General Counsel

Attachments

Letter from counsel for AIPAC
Proposed letter to counsel for AIPAC

20-04-398-0608

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
American Israel Public Affairs) MUR 2804
Committee.)
)

CERTIFICATION

I, Marjorie W. Emmons, Secretary of the Federal Election Commission, do hereby certify that on May 17, 1999, the Commission decided by a vote of 6-0 to take the following actions in MUR 2804:

1. Deny the request of the American Israel Political Action Committee that the Commission immediately address and close MUR 2804.
2. Authorize the Office of General Counsel to send the letter, as recommended in the General Counsel's Report dated May 11, 1999.

Commissioners Elliott, Mason, McDonald, Sandstrom, Thomas, and Wold voted affirmatively for the decision.

Attest:

5-18-99

Date

Marjorie W. Emmons
Marjorie W. Emmons
Secretary of the Commission

Received in the Secretariat: Tues., May 11, 1999 4:19 a.m.
Circulated to the Commission: Wed., May 12, 1999 11:00 a.m.
Deadline for vote: Mon., May 17, 1999 4:00 p.m.

vfv

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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

May 21, 1999

Philip Friedman
General Counsel
American Israel Public Affairs Committee
Ifshin & Friedman, P.L.L.C.
888 16th Street, NW, Suite 400
Washington, DC 20006

RE: MUR 2804

Dear Mr. Friedman:

The Federal Election Commission has received your letters of March 18, 1999, and April 26, 1999, in which you request that the Commission take immediate action to resolve any remaining issues in MUR 2804 and to make a final determination in that matter.

The Commission has considered and denied this request. MUR 2804 is again before the Commission as the result of the decision of the United States Supreme Court to remand the civil action designated FEC v. Akins for purposes of having the Commission "determine whether or not AIPAC's expenditures," in light of new revisions to the Commission's regulations defining "membership organization," "qualify as 'membership communications,' and thereby fall outside the scope of " 'expenditures' that could qualify it as a 'political committee'." 118 S.Ct. 1777, 1788 (1998). The Commission cannot bring MUR 2804 to a close without complying with the Supreme Court's instructions and without having adequate bases for such compliance. A principal and necessary basis will be any promulgation by the Commission of new rules governing the definition of "membership organization." As you are undoubtedly aware, the Commission is presently in the midst of such a rulemaking.

Once any new rules governing "membership organizations" are promulgated, the Commission will immediately address MUR 2804 and take any appropriate actions.

Sincerely,

A handwritten signature in dark ink, appearing to read "Lawrence M. Noble", is written over the word "Sincerely,".

Lawrence M. Noble
General Counsel

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MAR 08 2000

BEFORE THE FEDERAL ELECTION COMMISSION

SENSITIVE

In the Matter of)

)

)

MUR 2804R¹

)

American Israel Public Affairs Committee)

GENERAL COUNSEL'S REPORT

I. ACTIONS RECOMMENDED

Reevaluate the Commission's findings in MUR 2804, pursuant to the United States Supreme Court's remand in FEC v. Akins, et al., 524 U.S. 11, 118 S.Ct. 1777 (1998); find, pursuant to revised 11 C.F.R. § 114.1(e)(1), that the American Israel Public Affairs Committee ("AIPAC") was a membership organization during the period covered by MUR 2804; adhere to the Commission's earlier determination that there was no probable cause to believe AIPAC violated 2 U.S.C. §§ 433 and 434; and close the file in MUR 2804R.

II. BACKGROUND

A. Purpose of Report

This report is in response to the decision of the United States Supreme Court in FEC v. Akins, et al., in which the Court vacated the decision of the Court of Appeals in Akins, et al. v. FEC, 101 F. 3d 731 (D.C. Cir. 1996), and remanded the case for purposes

¹ MUR 2804 was closed in the Enforcement Prioritization System ("EPS") when the Commission originally closed the file in that enforcement action. After the U.S. Supreme Court remanded FEC v. Akins, et al. to the Commission, the resulting matter was denominated 2804R to distinguish it from the original enforcement matter.

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of having the Commission "determine whether or not AIPAC's expenditures," in light of new revisions to the Commission's regulations defining "membership organization," would "qualify as 'membership communications,' and thereby fall outside of the scope of 'expenditures' that could qualify it as a 'political committee.'" 524 U.S. at 29.² On March 3, 1999, the Commission approved the recommendation of this Office that it hold any reopening of MUR 2804 in abeyance pending promulgation of final revised regulations pertaining to membership organizations. The Commission's revised regulations addressing "membership organizations" and the definition of "members" became final on November 2, 1999. Therefore, it is now an appropriate time for the Commission to address the issue that was the subject of the Supreme Court's remand.

The present report summarizes the enforcement and litigation histories of MUR 2804, particularly with regard to the membership issue, sets out the new regulations, and applies these regulations to the facts developed during the Commission's investigation in this matter. Based upon this analysis, the report recommends that the Commission reopen MUR 2804; find that, in light of revised 11 C.F.R. § 114.1(e)(1), AIPAC was a membership organization during the time period covered by MUR 2804; adhere accordingly to its determination of no probable cause to believe AIPAC violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee; adhere to its determinations to find probable cause to believe AIPAC violated 2 U.S.C. § 441b but to take no further action in that regard; and close the file.

² The Court of Appeals subsequently vacated the order of the district court in Akins, et al. v. FEC, No. 92-1864 (D.D.C. Mar. 30, 1994), which had granted summary judgment to the Commission in a suit filed pursuant to §437g(a)(8), and ordered the district court in turn to remand the case to the Commission for further proceedings. Akins, et al. v. FEC, No. 94-5088 (D.C. Cir. 1998).

B. Statutory and Procedural Background

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The Act requires that all political committees register with the Commission and file periodic reports of receipts and expenditures. 2 U.S.C. §§ 433 and 434. The Act defines "political committee" as including groups of persons that make expenditures aggregating in excess of \$1,000 during a calendar year. 2 U.S.C. § 431(4)(A). Although incorporated entities are prohibited from making expenditures in connection with federal elections, 2 U.S.C. § 441b(a), communications by an incorporated membership organization to its members and executive or administrative personnel on any subject are not prohibited by Section 441b because they are excluded from the Act's overall definition of "expenditure," provided the organization "is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office" 2 U.S.C. § 431(9)(B)(iii). See also 11 C.F.R. §§ 114.3(a)(2) and 114.7(h). Such communications would not count toward the \$1,000 in "expenditures" that qualify a membership organization as a "political committee."

The 1989 complaint in MUR 2804 alleged, *inter alia*, that AIPAC had made more than \$1,000 in corporate "expenditures" per year in the form of partisan communications to individuals, and should have registered and reported as a "political committee."

AIPAC's position was that it was an issues-oriented organization, and that the spending in question fell within the exception to the prohibitions of 2 U.S.C. § 441b granted to a membership organization's communications to its members, which the Act exempts from the definition of "expenditure." As noted by the Supreme Court, if AIPAC's analysis of its communications were correct, "those expenditures would not count toward the \$1,000

ceiling on 'expenditures' that might transform an ordinary issue-related group into a 'political committee'." 524 U.S. at 17.

At the time of the investigation and Commission determinations in MUR 2804, the Commission's regulations at 11 C.F.R. § 114.3(a)(2) stated that incorporated membership organizations could make partisan communications to their restricted class, i.e., their members and executive and administrative personnel. Former 11 C.F.R. § 114.1(e)(1) defined "members" for purposes of Part 114 as "all persons who are currently satisfying the requirements for membership in a membership organization . . . or corporation without capital stock."

Earlier, in FEC v. National Right to Work Committee, 459 U.S. 197 (1982), the Supreme Court had considered whether a nonprofit corporation without capital stock could, pursuant to 2 U.S.C. § 441b(b)(4)(C), solicit funds beyond its "members," and had stated that Section 441b limits solicitation by nonprofit corporations to "those persons attached in some way to [the corporation] by its corporate structure." 459 U.S. at 202. The Court found that members of a non-stock corporation should "be defined, at least in part, by analogy to stockholders and union members of labor unions." Id. at 204. The Court further stated that the analogy to stockholders and union members "suggests that some relatively enduring and independently significant financial or organizational attachment is required to be a 'member' under § 441b(b)(4)(C)." Id. The Court also found it permissible for the Commission to look to an organization's corporate charter and bylaws for information about the role of asserted "members" in an organization. Id. at 205.

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The General Counsel's Brief ("GC Brief") in MUR 2804, and later the General Counsel's Report dated May 29, 1992 ("GC Report"), argued that certain individuals whom AIPAC considered "members" did not qualify as such under the Act and that the organization's communications to them were therefore not exempt from the prohibitions of 2 U.S.C. § 441b. Most individuals who "belonged" to AIPAC, and who on this basis received partisan communications, had made a predetermined financial commitment in the form of annual dues, and had taken affirmative steps to join; however, this Office argued that they lacked sufficient rights to participate in the governance of the organization. (G.C. Brief pages 99-101). This Office acknowledged that members of the Executive Committee, which served as the board of directors, would qualify as "members" because they possessed the right to elect other members of that Committee as well as the officers of AIPAC. (GC Report, page 21). Nonetheless, the much larger group of persons not on the Committee had no such voting opportunities. In addition, while these latter individuals could vote for the adoption of the AIPAC Policy Statement at each annual Policy Conference, only a small percentage were present at such conferences to do so. (GC Brief, page 101). (See further discussion of AIPAC's structure at Section IV below.)

With respect to particular communications directed outside its restricted class, this Office cited AIPAC's role as a contact between its purported members and candidates or their fund raisers; AIPAC's yearly "campaign update" which covered the voting records and positions of incumbents, rated their election prospects and fundraising status and clearly indicated who should or should not be supported; and AIPAC's briefings on candidates provided to non-Executive Committee members at the annual Policy

Conference. This Office also cited contacts made with non-members who were potential donors to specific candidates, and AIPAC's distribution of candidate position papers. (G.C. Report, pages 25-26).

On the basis of this information, this Office recommended that the Commission find probable cause to believe AIPAC had violated 2 U.S.C. § 441b. Although this Office's position, that many of the persons who belonged to AIPAC were not "members," could have foreclosed AIPAC's contention that its communications did not count as expenditures for purposes of finding that it was a "political committee," this Office recommended that the Commission find no probable cause to believe that AIPAC had violated 2 U.S.C. §§ 433 and 434 premised on the fact that AIPAC's "major purpose" was lobbying, not campaign-related activities. See Buckley v. Valeo, 424 U.S. at 79.

On June 16, 1992, the Commission found probable cause to believe that AIPAC had violated 2 U.S.C. § 441b; however, the Commission voted to take no further action in this regard. On the same date, the Commission also found no probable cause to believe that AIPAC had failed to register and report as a political committee, and closed the file in MUR 2804.

The Statement of Reasons issued by the four Commissioners who had voted in favor of finding probable cause to believe that AIPAC had violated 2 U.S.C. § 441b, but also to take no further action, stated:

We agreed with the General Counsel's conclusion that AIPAC did not meet the Commission's membership criteria as provided in a series of advisory opinions following the NRW decision. Thus, we found probable cause to believe AIPAC violated 2 U.S.C. § 441b. We also agreed with the General Counsel that the AIPAC situation presented a close question, and that the Commission should clarify its membership definition before

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imposing penalties in close cases such as this, where the organization came close to meeting the "spirit" of the Commission's membership criteria, but failed on a specific point.

In a footnote, the same Statement of Reasons also addressed in general terms potential violations of Section 441b by AIPAC based on communications with individuals other than those it claimed as members. The footnote read:

To the extent that any of the violations of Section 441b outlined by the General Counsel in his brief and report are not dependent on the membership issue, we concluded that such instances, i.e., distributing candidate position papers or suggesting to candidate fundraisers who to contact, did not warrant further pursuit since the record did not reflect that these were significant violations.

Statement of Reasons, page 3, fn. 1. These instances were not pursued in depth during the enforcement process because they were deemed a part of the more general issue of communications made to recipients beyond the Executive Committee. Thus, any violations of 2 U.S.C. § 441b arising from these other contacts were not assigned monetary values.

The civil complaint filed on August 12, 1992, in U.S. District Court by the complainants in MUR 2804, pursuant to 2 U.S.C. § 437g(a)(8), focused solely upon the Commission's decision to find no probable cause to believe that AIPAC had failed to register and report as a political committee. This complaint did not challenge the Commission's decision to find probable cause to believe that AIPAC had violated 2 U.S.C. § 441b, but to take no further action in this regard, and thus did not address the issue of "membership."

In March 1994, the District Court ruled on the parties' cross motions for summary judgment. The court granted the Commission's motion, after finding that "[t]he major

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dispute between the parties relates to the definition of political committee and the application of the major purpose standard." Akins, et al., v. FEC, No. 92-1864 (JLG), (D.D.C. Mar. 30, 1994) at 11.³ The complainants in MUR 2804 appealed the district court's decision to the U.S. Court of Appeals for the District of Columbia. A divided panel affirmed the lower court's decision. Akins et al. v. FEC, 66 F.3d 348 (D.C. Cir. 1995). However, on December 6, 1996, the Court of Appeals sitting *en banc* reversed the lower court's decision, finding that the Commission's interpretation of "political committee" at 2 U.S.C. §431(4)(A) had been "mistaken," and remanding the case to the Commission for further action. Akins et al. v. FEC, 101 F.3d 731, 744 (D.C. Cir. 1996).⁴ The United States Supreme Court granted certiorari on June 16, 1997.

In its decision in FEC v. Akins, the Supreme Court framed the relevant issue as "[w]hether an organization that otherwise satisfies the Act's definition of a 'political committee,' . . . nonetheless falls outside that definition because 'its major purpose' is not the nomination or election of candidates." 524 U.S. at 26. The Court did not, however, rule on the criteria for an organization to be deemed to be a "political committee;" rather, it remanded the case to permit the Commission to determine whether the election-related

³ According to the court, "[t]he 'major purpose' test as first articulated by the Second Circuit and endorsed by the Supreme Court in Buckley was interpreted properly by the defendant FEC. [Akins'] assertion that the case law requires the Court to examine the major purpose of an organization's expenditure to determine if that organization is a political committee is erroneous." *Id.* at 15. (Emphasis added.) The court also found that the Commission's application of the major purpose test in MUR 2804 had been reasonable. *Id.* at 16.

⁴ Because the Commission had found evidence of coordination by AIPAC with candidate committees, the appeals court addressed the AIPAC expenditures at issue as in-kind contributions, not as independent expenditures, and determined that the Commission's decision that no probable cause existed to believe AIPAC was a political committee, and the Commission's consequent dismissal of appellants' complaint, were based on a mis-interpretation of 2 U.S.C. § 431(4)(A). 101 F.3d at 744.

activities of AIPAC were communications by a membership organization to its members and thus were exempt from the Act's definition of "expenditure." The Court cited the Commission's proposed "new rules defining 'membership organization'" which the Court found "could significantly affect the interpretive issue presented by [the major purpose/political committee] question." *Id.* at 28. In the Court's view, by remanding the case, it could "take advantage of the relevant agency's expertise, by allowing it to develop a more precise rule that may dispose of this case, or at a minimum, will aid the Court in reaching a more informed conclusion." Therefore, the Court stated:

[T]he FEC should proceed to determine whether or not AIPAC's expenditures qualify as "membership communications," and thereby fall outside the scope of "expenditures" that could qualify it as a "political committee." If the FEC decides that despite its new rules, the communications here do not qualify for this exception, then the lower courts, in reconsidering respondents' arguments, can still evaluate the significance of the communicative context in which the case arises. If, on the other hand, the FEC decides that AIPAC's activities fall within the "membership communications" exception, the matter will become moot.

Id. at 29.

III. REVISED MEMBERSHIP REGULATIONS

On July 23, 1999, the Commission transmitted to Congress final revised rules governing who qualifies as a "member" of a membership organization, and defining for this purpose both incorporated and non-incorporated membership organizations. These rules became effective on November 2, 1999.

With regard to incorporated entities, the new regulations at 11 C.F.R. § 114.1(e)(1) define "membership organization" to mean "a trade association, cooperative, corporation without capital stock, or a local, national or international labor organization that:

- (i) Is composed of members, some or all of whom are vested with the power and authority to operate or administer the organization, pursuant to the organization's articles, bylaws, constitution or other formal organizational documents;
- (ii) Expressly states the qualifications and requirements for membership in its articles, bylaws, constitution or other formal organizational documents;
- (iii) Makes its articles, bylaws, constitution, or other formal organizational documents available to its members upon request;
- (iv) Expressly solicits persons to become members;
- (v) Expressly acknowledges the acceptance of membership, such as by sending a membership card or including the member's name on a membership newsletter list; and
- (vi) Is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office.

(Emphasis added.)

"Members" are defined in the revised regulations at 11 C.F.R. § 114.1(e)(2) as including "all persons who are currently satisfying the requirements for membership in a membership organization, affirmatively accept the membership organization's invitation to become a member, and either:

- (i) Have some significant financial attachment to the membership organization, such as a significant investment or ownership stake; or
- (ii) Pay membership dues at least annually, of a specific amount

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predetermined by the organization; or

(iii) Have a significant organizational attachment to the membership organization which includes:

(1) affirmation of membership on at least an annual basis and

(2) direct participatory rights in the governance of the organization. For example, such rights could include

the right to vote directly or indirectly for at least one individual on the membership organization's highest governing board;

the right to vote directly for organization officers;

the right to vote on policy questions where the highest governing body of the membership organization is obligated to abide by the results;

the right to approve the organization's annual budget; or

the right to participate directly in similar aspects of the organization's governance.

(Emphases added)

IV. ANALYSIS OF AIPAC AS A "MEMBERSHIP ORGANIZATION" PURSUANT TO THE NEW REGULATIONS

According to the response submitted on March 16, 1989 to the complaint in MUR 2804, AIPAC was incorporated as a non-profit organization in 1963, and later received status as a Section 501(c)(4) organization. The response also asserted: "While AIPAC always has had members in some form, it officially became a membership organization open to individual participants in 1969." Response, page 9.⁵

⁵ The response cited an attached affidavit signed by Bernard White in support of AIPAC's claim to have been a membership organization since 1969. In his affidavit Mr. White stated that he was then serving as treasurer of AIPAC, that he was "familiar with AIPAC's operations since its founding" and that he had "witnessed the evolution of the organization from its inception to the present day." Mr. White also stated: "In 1969, AIPAC's became a membership organization. Members were required to pay dues. Members received a copy of Near East Report. An initial

AIPAC's response to the complaint included a copy of the organization's By-Laws as amended and approved on December 6, 1988. Later, AIPAC submitted, as part of its answers to Commission interrogatories, an amended set of By-Laws which had been approved on November 14, 1989. The following is a summary of the "membership requirements" and structure of AIPAC as provided in the 1988 and 1989 By-Laws.⁶

A. Members

Section 1 of the AIPAC By-Laws addressed membership requirements, renewal requirements, and the rights of members to participate in the organization. According to both the 1988 and the 1989 version, AIPAC members were:

- 1) Individuals for whom a membership application, form or card has been completed and who pay annual dues as set by the Executive Committee (as described in Section 2). In setting dues the Executive Committee may create different categories of membership depending upon the amount of dues paid; and
- 2) The chief lay officer of each organization that is a member of the Conference of Presidents of Major American Jewish Organizations may become a member without payment of dues.

Section 1(a). Membership was renewable on a yearly basis by paying dues. Section 1(b).

Section 1(c) of both versions addressed members' rights to participate in the organization:

- 1) All members of the Executive Committee (as described in Section 2), the National Council (as described in Section 6),

organizational framework was established to raise funds for AIPAC and permit members to have a voice in AIPAC's policy."

⁶ Since this Report focuses upon the application of the Commission's revised regulations on the conduct that was the subject of MUR 2804, no attempt has been made to ascertain if AIPAC's By-Laws have been further amended since 1989. To reflect the possibility of such changes, this report discusses the 1988-89 By-Laws in the past tense.

and all other Committees (as described in Section 7), as well as all Officers (as described in Section 3), and all State Chairs (as described in Section 5), shall be chosen from AIPAC members (as described in Section 1).

- 2) All members shall receive AIPAC publications and are entitled to receive information regarding voting records of Members of Congress.
- 3) Each member shall receive notice of the Annual Policy Conference. Each member may attend the Annual Policy Conference. Members attending the Annual Policy Conference may vote on the Annual Policy Statement.

B. Structure and Decision Making

As indicated above, in 1988-89 the highest decision-making body in AIPAC was the Executive Committee which functioned as the board of directors. 1988 and 1989 By-Laws, Section 2.⁷ The members of the Executive Committee included the chief lay officers of other organizations that were members of the Conference of Presidents of Major American Jewish Organizations. For each such chief lay officer, there were to be no more than five other members of the Executive Committee, including up to six individuals appointed by the President.⁸ Members of the Executive Committee were nominated by the Nominating Committee for terms of one year and were voted in by a majority of the members of the Executive Committee present and voting. Members of the Executive Committee were limited to five year terms, although they could return to the Committee after a year's absence; the five year terms did not include periods during

⁷ The 1988 Bylaws limited membership on the Executive Committee to 150. The 1989 amendments dropped this limitation. By 1992 the number had risen to 250. (See the brief dated April 6, 1992, submitted on behalf of AIPAC in MUR 2804, page 30.)

⁸ The provision of five other members per each lay officer was added via the 1989 amendments.

which the individual was on the Committee by virtue of being a chief lay officer of another organization or an officer of AIPAC.

Section 3 of the 1989 By-Laws limited the number of officers to twenty-three individuals who met ten times a year. They included the President, the Chairman of the Board, the Vice-Presidents, Secretary and Treasurer, the Regional Vice-Presidents, and the Honorary Presidents who were former presidents of the organization and officers for life with full voting privileges. The numbers of Vice-Presidents and Regional Vice-Presidents were set by the Committee of Officers with the consent of the Executive Committee. The officers were selected by the Executive Committee acting upon the Nominating Committee's recommendations. The President could also designate a State Chair in each state; such State Chairs could in turn attend Executive Committee meetings but were not deemed members of the Committee and were not entitled to vote.

According to the 1989 By-Laws, Section 4, the National Council was made up of the same number of members as those who were eligible to be members of the Executive Committee. The Council acted as an advisory body. Its members were nominated by the Nominating Committee and elected by a majority of the Executive Committee present and voting. Members of the Council served no more than five one-year terms, but could be re-elected after a one-year absence.

Pursuant to both versions of the By-Laws at Section 9, the Nominating Committee consisted of seven members. The President of AIPAC appointed the chair of the Committee, three additional members and two alternates; according to the 1989 amendments two of this group were to be members of the Executive Committee. The Committee of Officers appointed an additional three members, with one coming from the

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Executive Committee as of the 1989 amendments. Members of the Executive Committee could submit additional nominations if such a submission contained the signatures of no less than 20% of the Executive Committee. No nominations from the floor were permitted. Members of the Nominating Committee served for one year.

Amendments to the By-Laws could be voted at any regular meeting of the Executive Committee by a majority of those present and voting.

As stated above, the GC Brief and the subsequent GC Report in MUR 2804 recommended that the Commission find probable cause to believe that AIPAC had violated 2 U.S.C. § 441b in large part by directing partisan communications to persons who were not "members" and thus outside the organization's restricted class. In support of this recommendation, the Brief and Report applied the NRWC criteria to AIPAC's structure and particularly to the rights and obligations of those whom it deemed "members." The Brief and Report concluded that individuals who belonged to AIPAC, with the exception of those on the Executive Committee, did not have sufficient rights to participate in its governance to qualify as "members." Even though these individuals had paid a predetermined amount of dues, it was deemed significant that they could not vote for the Executive Committee, the National Council's members or the officers; rather, the Executive Committee elected itself and the National Council, as well as the officers. Further, the Brief and Report noted that, while those who belonged to the organization could attend the yearly Policy Conference and vote on the Policy Statement, only a small portion of these individuals attended the Conference. Acknowledging that "it is a close question whether persons who belong to AIPAC qualify as members for purposes of the Act," and that there were a number of ways in which persons not on the Executive

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Committee could participate in the organization, (GC Report, pages 19-21), this Office emphasized the role of the Executive Committee as the governing body, the fact that the Committee elected its own members as well as the officers of the organization, and its small numbers compared to the total number of AIPAC "members" (37,104 in 1989). With these factors before it, the Commission found probable cause to believe that AIPAC had violated 2 U.S.C. § 441b, although it also voted to take no further action in this regard.

C. Comparison of New Membership Regulations with AIPAC By-Laws

As stated above, the new regulation at 11 C.F.R. § 114 (e)(1) defines "membership organization" as being an organization "composed of members, some or all of whom are vested with the power and authority to operate or administer the organization" pursuant to a organizational document. This regulation also requires that the organizational document set out the qualifications and requirements for membership.

Therefore, the first issue now before the Commission in determining whether AIPAC would be deemed a "membership organization" pursuant to new 11 C.F.R. § 114.1(e)(1) is to establish whether the individuals who were considered "members" by AIPAC in 1988 and 1989, but not by the Commission in MUR 2804, would have met the definition of "member" now set out at 11 C.F.R. § 114.1(e)(2). In summary, this definition requires that the individual

1. meet the requirements for membership established by the organization,
2. affirmatively accept the organization's invitation,
and either
3. have a significant financial attachment to the organization,
or
pay dues at least annually in a specific amount,
or

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have "a significant organizational attachment" by means of an annual affirmation of membership and "direct participatory rights in the governance of the organization."

AIPAC's 1988 and 1989 By-Laws at Section 1 both defined membership as including individuals who had completed an application, form or card (thereby affirmatively responding to the organization's invitation to join), and who had paid dues "as set by the Executive Committee." According to the information provided by AIPAC during discovery in MUR 2804, membership dues during the time covered by the enforcement matter were required on an annual basis and were set at a minimum of \$50. (Answers to interrogatories dated January 31, 1990.)⁹ Given these details, AIPAC "members" apparently met all of the requirements of the new 11 C.F.R. § 114(e)(2). Because, pursuant to the new regulations, the payment of annual dues at a set amount is an alternative to finding "a significant organizational attachment" of the individual to the organization, it is no longer necessary to pursue the issue of decision-making roles within the organization in order to establish that AIPAC had "members" in 1988 and 1989 beyond those individuals who served on the Executive Committee.

The next step in determining AIPAC's status as a membership organization under new 11 C.F.R. § 114.1(e)(1) for purposes of MUR 2804 is to ascertain whether at least some of these "members" were in the late 1980's "vested with the power and authority to operate or administer the organization" According to Section 2(a) of the 1988 and

⁹ The various application/pledge forms submitted on January 31, 1990 with these answers differed with regard to the descriptions of payments being sought. One was designated a "Membership Form" and contained the words "basis membership dues," while others used "membership contribution." Still others stated: "To support the vital work of the American Israel Public Affairs Committee . . . I am attaching a check for \$ 5,000," [or another figure] with no reference to "dues." Some did not expressly cite \$50 as a required minimum amount.

1989 By-Laws, the AIPAC Executive Committee "controlled" the "policy, affairs and property" of the organization. All members of the Executive Committee and of the National Council and the officers had to be members of the organization. (1988 and 1989 By-Laws, Section 1(c)). Thus, some of the "members" of the organization were "vested with . . . power and authority."

Three additional criteria for a membership organization in the new regulations are that the organization "expressly states the qualifications and requirements for membership" in its organizational documents; that it "expressly solicits" members; and that it "expressly acknowledges the acceptance of membership" with a card or by putting the individual's name on a newsletter list. AIPAC's 1988 and 1989 By-Laws, as stated above, expressly set out requirements for membership at Section 1. Regarding solicitation of new members, information submitted with AIPAC's January 30, 1990 response to the Commission's request for documents included copies of solicitation letters sent out in 1988 and 1989. (See Exhibit 5 attached to January 30, 1990 submission). These letters invited the recipient to join the organization and stated, in some form, that "AIPAC membership" began at \$50. While no actual membership cards were produced in connection with the 1988 and 1989 solicitation letters, AIPAC's January 30, 1990 answer to interrogatories included a listing of publications made available to those who joined, including the weekly Near East Report sent to all who paid the \$50 minimum contribution; the answer also listed meetings, conferences and other activities available only to members. Thus, new members were informed of the acceptance of their membership through the receipt of publications and other information.

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Another requirement of membership organizations set out at new 11 C.F.R. § 114.(e)(1) is that a potential membership organization "not be organized primarily for the purpose of influencing" federal elections. This was the conclusion reached in MUR 2804 with regard to AIPAC, with the result that the Commission found no probable cause to believe that the organization had violated 2 U.S.C. §§ 433 and 434.

The remaining criteria for a "membership organization" at 11 C.F.R. § 114.1(e)(1) is that it make "its articles, bylaws, constitution, or other formal organizational documents available to its members upon request." While AIPAC, in the context of MUR 2804, was apparently never asked about its policy regarding the provision of organizational documents to its members, there is no indication in the record that these documents were not available upon request.

Given the information outlined above, it appears that AIPAC in its 1988 and 1989 manifestations would have met the criteria for a "membership organization" as set out in the new 11 C.F.R. § 114.(e)(1). It had "members," some of whom had the power and authority to run the organization; its organizational documents "expressly state[d] the qualifications and requirements for membership" and were apparently made available to its members; it "expressly solicit[ed] persons to become members"; it kept membership lists for the purpose of providing members with publications and other information on a regular basis; and it did not have as its primary purpose the influencing of elections.

V. CONCLUSIONS

In light of the status of AIPAC as a membership organization during the period covered by MUR 2804, and of the fact that a high proportion of the activities at issue in MUR 2804 were directed at AIPAC members and thus constituted "membership

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communications" which were outside the definition of "expenditures," the issue of AIPAC's political committee status during the period covered by the complaint in MUR 2804 has, as anticipated by the U.S. Supreme Court, become effectively moot. Therefore, the Commission's determination that there was no probable cause to believe AIPAC had violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a political committee should remain undisturbed.

As noted previously, the Commission's determinations regarding alleged violations of 2 U.S.C. § 441b were not challenged in the lawsuit filed pursuant to 2 U.S.C. § 437g(a)(8), so that aspect of MUR 2804 is not addressed in the remands from the Supreme Court and the lower courts. The bases for the Commission's finding of probable cause to believe that AIPAC had violated 2 U.S.C. § 441b included the following:

- (1) The organization's acknowledged role of acting as a contact between its "members" and candidates or fundraisers working for candidates. This involved either putting members and candidates in touch with each other, or suggesting to representatives of candidates particular persons it would be potentially advantageous to contact.
- (2) The organization's acknowledged collection and distribution of candidate position papers, which constituted in effect the republication of campaign materials.

(See GC Report dated May 29, 1992, at pages 25-26.)¹⁰

¹⁰ An additional basis was the organization's preparation and distribution to members of yearly "campaign updates" that covered the voting records and positions of incumbents and that rated their election prospects and fundraising status, to the extent that the updates reflected what AIPAC had learned about the campaigns from its meetings with candidates. Given the discussion above concerning the application of the Commission's new membership regulations to AIPAC, this particular basis would no longer be appropriate for finding a violation of 2 U.S.C. § 441b. Another basis, the organization's efforts to contact "members" who were also

Even if the Commission's new membership regulations were applied to the Section 441b issue, and were found to have changed the original analysis with regard to AIPAC expenditures for communications to its members, information obtained during the investigation in MUR 2804 revealed that there were instances, particularly involving the distribution of candidate position papers and discussions with candidates or their fundraisers about potential contacts, in which the membership issue was not determinative. As stated above, the collection and distribution of candidate position papers is essentially the republication of campaign materials, which alone would have constituted prohibited corporate expenditures, pursuant to 11 C.F.R. § 114.3(c)(ii).

The AIPAC contacts with candidates and their committees, and the distribution of candidate position papers, were not quantified during the investigation in MUR 2804 because these activities were analyzed at that time as part of the overall issue of communications outside AIPAC's membership; however, these AIPAC activities provide continuing support for the Commission's finding of probable cause to believe that AIPAC violated 2 U.S.C. § 441b. The lack of valuation in turn supports the Commission's determination to take no further action in this regard.

VI. RECOMMENDATIONS

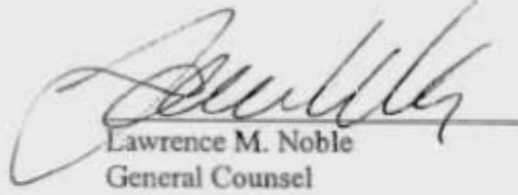
1. Find, in light of revised 11 C.F.R. § 114.1(e)(1), that AIPAC was a membership organization during the period addressed in MUR 2804.

associated with one of the Jewish PAC's to urge financial support for specific candidates, is also problematic in light of the new regulations.

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2. Adhere to the Commission's determinations of no probable cause to believe that AIPAC violated 2 U.S.C. §§ 433 and 434.
3. Close the file in MUR 2804R.
4. Approve the appropriate letters.

3/6/01
Date


Lawrence M. Noble
General Counsel

Staff Assigned: Anne A. Weissenborn

20.04.398.0632



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARY W. DOVE/VENESHE FEREBEE-VINES
COMMISSION SECRETARY

DATE: MARCH 14, 2000

SUBJECT: MUR 2804R - General Counsel's Report
dated March 8, 2000

VAV

The above-captioned document was circulated to the Commission
on Thursday, March 9, 2000.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Elliott	—
Commissioner Mason	—
Commissioner McDonald	—
Commissioner Sandstrom	—
Commissioner Thomas	<u>XXX</u>
Commissioner Wold	—

This matter will be placed on the meeting agenda for Tuesday,

March 21, 2000. Please notify us who will represent your Division before the
Commission on this matter.

20.04.398.0633

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
)
) MUR 2804R
American Israel Public)
Affairs Committee)

CERTIFICATION

I, Darlene Harris, recording secretary for the Federal Election Commission executive session on March 21, 2000, do hereby certify that the Commission decided by a vote of 6-0 to take the following actions with respect to MUR 2804R:

1. Find, in light of revised 11 CFR § 114.1(e)(1), that American Israel Public Affairs Committee was a membership organization during the period addressed in MUR 2804.
2. Adhere to the Commission's determinations of no probable cause to believe that American Israel Public Affairs Committee violated 2 U.S.C. §§ 433 and 434.
3. Close the file in MUR 2804R.
4. Approve the appropriate letters.

Commissioners Elliott, Mason, McDonald, Sandstrom, Thomas, and Wold voted affirmatively for the decision.

Attest:

March 22, 2000
Date

Darlene Harris
Darlene Harris
Acting Deputy Secretary
of the Commission

20.04.398.0634



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

MAR 29 2000

Philip Friedman, General Counsel
American Israel Public Affairs Committee
Ifshin & Friedman, PLLC
Suite 400
888 Sixteenth Street, NW
Washington, DC 20006

RE: MUR 2804R

Dear Mr. Friedman:

On March 21, 2000, the Federal Election Commission reevaluated its findings in MUR 2804, pursuant to the United States Supreme Court's remand of FEC v. Akins, et al., 524 U.S. 11 (1998), and in light of the Commission's revised regulations addressing "membership organizations" and the definition of "members" which became final on November 2, 1999. The Commission found, in light of revised 11 C.F.R. § 114.1(e)(1), that the American Israel Public Affairs Committee ("AIPAC") was a membership organization during the period addressed in MUR 2804. The Commission also voted to adhere to its determinations of no probable cause to believe that AIPAC violated 2 U.S.C. §§ 433 and 434, and to close the file in MUR 2804R.

If you have any questions, please contact Anne A. Weissenborn, the senior attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in dark ink, appearing to read "Lawrence M. Noble".

Lawrence M. Noble
General Counsel

20.04.398.0635



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

MAR 29 2000

Daniel M. Schember, Esquire
Gaffney & Schember, P.C.
Suite 225
1666 Connecticut Avenue, NW
Washington, DC 20009

RE: MUR 2804R
American Israel Public Affairs Committee

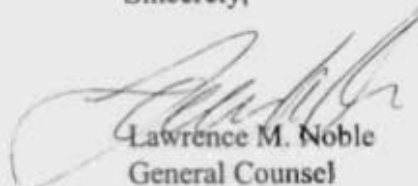
Dear Mr. Schember:

On March 21, 2000, the Federal Election Commission reevaluated its findings in MUR 2804, pursuant to the United States Supreme Court's remand in FEC v. Akins, et al., 524 U.S. 11 (1998), and in light of the Commission's revised regulations addressing "membership organizations" and the definition of "members" which became final on November 2, 1999. The Commission found, in light of revised 11 C.F.R. § 114.1(e)(1), that the American Israel Public Affairs Committee ("AIPAC") was a membership organization during the period addressed in MUR 2804. The Commission also voted to adhere to its determinations of no probable cause to believe that AIPAC violated 2 U.S.C. §§ 433 and 434, and to close the file in MUR 2804R.

The Federal Election Campaign Act of 1971, as amended, allows complainants to seek judicial review of the Commission's determinations in this matter. See 2 U.S.C. § 437g(a)(8).

If you have any questions, please contact Anne A. Weissenborn, the senior attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Lawrence M. Noble
General Counsel

Enclosure
General Counsel's Report

20.04.398.0636



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

April 4, 2000

Philip Friedman, General Counsel
American Israel Public Affairs Committee
Ifshin & Friedman, PLLC
Suite 400
888 Sixteenth Street, NW
Washington, DC 20006

RE: MUR 2804R

Dear Mr. Friedman:

Enclosed please find a copy of the General Counsel's Report which was before the Commission at the time of its most recent decisions in MUR 2804R.

If you have further questions, please call me at (202) 1694-1650.

Sincerely,

A handwritten signature in cursive script, reading "Anne A. Weissenborn".

Anne. A. Weissenborn
Senior Attorney

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20.04.398.0638

THIS IS THE END OF MUR # 2804R