

SENSITIVE



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the Matter of

American Israel Public Affairs Committee)
)
)

MUR 5272

STATEMENT OF REASONS

**CHAIR ELLEN L. WEINTRAUB, VICE-CHAIRMAN BRADLEY A. SMITH,
COMMISSIONERS DAVID M. MASON, DANNY L. McDONALD, SCOTT E. THOMAS,
AND MICHAEL E. TONER**

On September 30, 2003, the Commission rejected the General Counsel's recommendation to find reason to believe that the American Israel Public Affairs Committee ("AIPAC") violated 2 U.S.C. § 431(9)(b)(iii) and to take no further action. This Statement of Reasons discusses the Commission's 6-0 vote to dismiss MUR 5272 as a matter of prosecutorial discretion.

BACKGROUND

The complaint in this matter alleges that American Israel Public Affairs Committee ("AIPAC") failed to report the costs of membership communications as required by the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"). See 2 U.S.C. § 431(9)(B)(iii). The complaint was signed and sworn to by the attorney representing James E. Akins, Richard Curtiss, Paul Findley, Robert J. Hanks, Andrew Killgore, and Orin Parker who, along with a seventh person, were the complainants in MUR 2804 and MUR 2804R (hereinafter, the "Akins complainants").

The complaint in MUR 5272 follows a Commission determination in MUR 2804R. There the Commission found AIPAC's communications to its contributors and supporters qualified as "membership communications" under the "membership" criteria set forth in 11 C.F.R. § 114.1(e) and, therefore, were excluded from the definition of "expenditure." According to the Akins complainants, if AIPAC's communications to its contributors and supporters constituted membership communications, as the Commission found previously, AIPAC, nevertheless, violated the Act by failing to report the costs of such communications, which allegedly contained express advocacy, in accordance with 2 U.S.C. § 431(9)(B)(iii).

The history of proceedings involving the Akins complainants and AIPAC is long and complex. This Statement briefly summarizes the relevant history herein.

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A. MUR 2804

On January 12, 1989, the Akins complainants filed a complaint with the Commission against AIPAC and twenty-seven (27) pro-Israel political action committees, which was designated as MUR 2804. The principal allegations in MUR 2804 were AIPAC qualified as a political committee and failed to register and report as such pursuant to 2 U.S.C. §§ 433 and 434. The complaint also alleged AIPAC made prohibited corporate contributions in violation of 2 U.S.C. § 441b by directing a substantial portion of its resources to federal campaign activity.

In response to the complaint, AIPAC argued that it qualified as a "membership organization" under the Act, not as a political committee, and, that by qualifying as a "membership organization," its communications to its members were excluded from the definition of "contribution or expenditure."

On December 19, 1989, the Commission found reason to believe AIPAC violated 2 U.S.C. § 433, 434, and 441b. The First General Counsel's Report concluded AIPAC's response to the complaint provided an insufficient basis for concluding AIPAC qualified as a "membership organization," and, that the persons to whom AIPAC directed its campaign-related activity qualified as "members" within the meaning of the Act. *See* 11 C.F.R. § 114.3.¹

After an extensive investigation, on June 16, 1992, the Commission found probable cause to believe AIPAC violated 2 U.S.C. § 441b. At the same time, the Commission took no further action, reasoning, the case presented a close question and that the Commission should clarify its "membership" criteria before imposing penalties in "close cases" where the organization came close to meeting the "spirit" of the criteria, but failed on a specific point. *See* MUR 2804 (Statement of Reasons dated July 27, 1992).² With respect to campaign-related activities directed to individuals outside the organization and, therefore, not dependent on the membership issue, the Commission concluded the record did not reflect that these activities were sufficiently significant to warrant further action. *See id.* In addition, because AIPAC's campaign-related activities did not rise to such a level as to make them a "major purpose" of the organization, the

¹ The Akins complainants also alleged AIPAC and the respondent PACs were affiliated committees and made excessive contributions in violation of 2 U.S.C. § 441a. The respondents denied AIPAC established, financed, maintained or controlled the respondent PACs and provided information tending to show the respondent PACs made independent decisions regarding which candidates to support. Based upon this information, the Commission found no reason to believe AIPAC and the respondent PACs violated the Act by virtue of being affiliated as alleged. *See* 2 U.S.C. § 441a (a)(5).

² At the time of the investigation and the Commission's findings in MUR 2804, the Commission's "member" criteria required that the individual have an "enduring and independently significant financial or organizational attachment" to the organization. *See FEC v. National Right to Work Committee*, 459 U.S. 197 (1982). In applying this criterion to AIPAC, the Commission concluded that most of the contributors and supporters AIPAC claimed as "members" lacked a sufficient right to participate in the governance of the organization. Because these individuals did not qualify as "members," AIPAC's communications were deemed made to the general public, resulting in AIPAC making in-kind contributions to the respective federal candidates.

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Commission found no probable cause to believe AIPAC violated 2 U.S.C. §§ 433 and 434 by failing to register and report as a "political committee." *See id.*

B. The Litigation

On August 12, 1992, the Akins complainants filed suit in the U.S. District Court for the District of Columbia seeking judicial review of the Commission's determination in MUR 2804. *See Akins v. FEC*, No. 92-cv01864 (D.D.C. August 12, 1992). Notably, plaintiffs sought judicial review of only one Commission finding, i.e., AIPAC did not qualify as a "political committee" and, therefore, was not subject to the registration and reporting requirements set forth in 2 U.S.C. §§ 433 and 434. Plaintiffs argued the Commission's investigation into AIPAC's political activities was inadequate, and, that its application of the "major purpose" test, derived from the Supreme Court's opinion in *Buckley v. Valeo*, 424 U.S. 1 (1976), was arbitrary, capricious and contrary to law.

The district court granted summary judgment in favor of the Commission and held that the Commission's reliance upon the "major purpose" test in concluding AIPAC was not a "political committee" was not contrary to law. The court also found the Commission's application of the "major purpose" test was proper and that the Commission conducted an "extensive" investigation and developed an adequate administrative record to support its findings. *See Memorandum and Order in Akins v. FEC*, No. 92-cv01864, dated March 30, 1994.

Complainants appealed the district court's ruling to the U.S. Court of Appeals for the District of Columbia Circuit, and the court affirmed. *See Akins v. FEC*, 66 F.3d 348 (D.C.Cir. 1995). On rehearing, the court of appeals, sitting *en banc*, reversed and remanded the district court ruling, holding that the courts are not required to give deference to agency interpretations of judicial opinions, and, that organizations could be deemed "political committees" even if their major purpose is not federal campaign activity. *See Akins v. FEC*, 101 F.3d 731 (D.C.Cir. 1997).³

The Solicitor General appealed the *en banc* ruling to the U.S. Supreme Court on behalf of the Commission, and certiorari was granted. *See FEC v. Akins*, 524 U.S. 11 (1998). After finding the Akins complainants, as voters, satisfied both prudential and constitutional standing requirements, the Supreme Court declined to decide the case on the merits. *See id.* at 28-29. Instead, the Court vacated the D.C. Circuit's *en banc* decision and remanded the case to the Commission for a determination of whether AIPAC's activities qualify as "membership

³ The court reasoned that the "major purpose" test derived from *Buckley* applied only to organizations that make independent expenditures, the most protected form of political speech, not coordinated expenditures or contributions. *See id.* at 742. Since there was no contention AIPAC's activities were independent expenditures, the court concluded that the Commission's reliance upon the "major purpose" test was "mistaken." *See id.* at 744.

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communications” under the Commission’s revised definition of “member.” *See id.*⁴ The Supreme Court reasoned that if AIPAC’s activities constituted “membership communications” under the new rules and, thus, fell outside the scope of “expenditures” (a prerequisite for qualifying as a “political committee”), the Commission’s finding could be upheld on a ground independent of the “major purpose” test, rendering that issue moot. *See* 524 U.S. at 29.⁵

After the Supreme Court issued its opinion, the court of appeals vacated the district court ruling granting summary judgment in favor of the Commission and ordered the district court to remand the case to the Commission for further proceedings. *See Akins v. FEC*, 146 F.3d 1049 (D.C.Cir. 1998). On remand, the Commission held the reopening of MUR 2804 in abeyance until the promulgation of its final revised membership organizations’ regulations. These revised regulations became final on November 2, 1999, after which the Commission reopened MUR 2804 as MUR 2804R.

C. MUR 2804R

In reconsidering the scope of AIPAC members, the Commission applied its new regulation at 11 C.F.R. § 114.1(e)(1), which defines “membership organization,” in pertinent part, as 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 an organizational document. The new regulation at 11 C.F.R. § 114.1(e)(2) defines “member” as an individual that meets the requirements for membership established by the organization, affirmatively accepts the organization’s invitation, and either has a significant financial attachment to the organization, pays dues at least annually in a specific amount, or has a significant attachment to the organization. Thus, the new regulations no longer required that *all* members have sufficient rights to participate in the governance of the organization or otherwise have significant organizational attachment to the organization.

Based upon revised 11 C.F.R. § 114.1(e)(1), on or about March 21, 2000, the Commission found AIPAC was a membership organization during the time-period addressed in MUR 2804. In addition, the Commission adhered to its prior determination to find no probable cause to believe AIPAC violated 2 U.S.C. §§ 433 and 434 and closed the file.

⁴ Before the appeal, the Commission initiated proposed rulemaking to revise the definition of “member” in an effort to eliminate confusion about its membership criteria. *See* 62 Fed. Reg. 66832 (1997).

⁵ The Commission’s definitions of “member” and “membership organization” were not issues raised on appeal. The complaint filed in district court focused solely upon the Commission’s application of the “major purpose” test and did not challenge the Commission’s decision to take no further action on the § 441b violation because of the confusion over the Commission’s membership criteria. The Supreme Court learned the proposed rules may provide an alternative rationale for declining to deem AIPAC a “political committee” through an *amicus* brief filed by AIPAC. *See Akins v. FEC*, 146 F.3d 1049 (D.C.Cir. 1998).

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D. Continued Litigation on MUR 2804R

On or about May 19, 2000, the Akins complainants filed suit in U.S. District Court for the District of Columbia seeking judicial review of the Commission's March 21, 2000 decision. *See Akins v. FEC*, No. 00-cv01478 (D.D.C. May 19, 2000). In addition to challenging the Commission's decision, the complaint presented an alternative claim that was not presented to the Commission, namely that if AIPAC's communications to its contributors and supporters constituted membership communications and were, therefore, excluded from the definition of "expenditure," AIPAC, nevertheless, violated the Act by failing to report the costs of these communications in accordance with 2 U.S.C. § 431(9)(B)(iii).

On or about January 31, 2001, the Commission filed a motion for summary judgment as to all claims set forth in the complaint. The motion, still pending before the court, argues, in part, that complainants have no right of judicial review for their alternative claim because 2 U.S.C. § 437g(a)(8)(A) does not provide for judicial review of determinations neither requested from, nor made by, the Commission.

E. The Present Complaint and Response

On May 20, 2002, the Commission received the present administrative complaint, which alleges AIPAC violated the Act by failing to report the cost of membership communications containing express advocacy in accordance with 2 U.S.C. § 431(9)(B)(iii). The complaint does not cite any specific instances of communications by AIPAC to its members falling within the purview of § 431(9)(B)(iii); rather, it relies, generally, upon evidence of AIPAC's membership communications obtained by the Commission in connection with MUR 2804. *See Complaint*, at ¶ 12. The membership communications investigated in MUR 2804 occurred at various times between 1983 and 1990. The present complaint alleges, upon information and belief, that since the time-frame at issue in MUR 2804, AIPAC has continued and is continuing to engage in membership communications subject to the reporting requirements of 2 U.S.C. § 431(9)(B)(iii). The complaint does not cite any specific communications to support this allegation.

AIPAC's response to the present complaint asserted the Commission is barred from imposing any civil penalty by the applicable five-year statute of limitations, and, that as a not-for-profit organization formed to advance the political views of its members, AIPAC is exempted from the requirements of the Act and the Commission's regulations in their entirety under *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("MCFL").⁶ Finally, to the extent the Act

⁶ The respondent's reliance upon *MCFL* in this context is misplaced. The Court in *MCFL* made clear that non-profit corporations exempted from § 441b are subject to the Act's disclosure provisions. *See id.* at 262. Further, AIPAC can be a qualified nonprofit corporation exempted from § 441b and still be subject to the requirements of a "membership organization" under the Commission's regulations. Whether an entity is a non-profit corporation or a membership organization is not mutually exclusive. *See, e.g., Advisory Opinion 1997-16.*

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and regulations apply to AIPAC, it denies that any communications made to its members contained express advocacy and, therefore, required disclosure under § 431(9)(B)(iii).

ANALYSIS

Although the complaint generally identifies three categories of AIPAC's membership communications, it does not cite any specific instances of communications containing express advocacy made by AIPAC, either during the time-period at issue in MUR 2804 or since that time. Further, the complaint provides no information to substantiate its claim AIPAC "has continued and is continuing" to engage in membership communications subject to the reporting requirements of 2 U.S.C. § 431(9)(B)(iii). The only information available to the Commission concerning AIPAC's activities is the information obtained during the Commission's investigation in MUR 2804 and limited new information provided by AIPAC in its response to the complaint in MUR 5272.

Based upon a review of this information, there does not appear to be a sufficient basis for reason to believe AIPAC's membership communications, as a general matter, met the conditions necessary to trigger the reporting requirements set forth in 2 U.S.C. § 431(9)(B)(iii) because they did not contain express advocacy. *See FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); *FEC v. Christian Coalition*, 52 F. Supp.2d 45 (D.D.C. 1999). The evidence obtained in MUR 2804 revealed only isolated occasions where AIPAC's communications with its members may have extended beyond issue advocacy to expressly advocating the election or defeat of clearly identifiable candidates. As to these isolated communications, there is no indication the costs associated with the communications exceeded the \$2,000 reporting threshold, *see* 2 U.S.C. § 431(9)(B)(iii), or, more importantly, no information AIPAC continued these communications after 1990.

Because the communications at issue in MUR 2804 occurred between 1983 and 1990, any further investigation and/or enforcement of this activity would be frustrated by problems of proof as well as expiration of the applicable statute of limitations. The membership communications claim, under 2 U.S.C. § 421(9)(B)(iii), was not raised by the complainants in MUR 2804, and, the Commission concludes that further investigation into AIPAC's activities based upon the information presented would not be an appropriate use of the Commission's limited resources.

Accordingly, as an exercise of prosecutorial discretion, the Commission determined by a 6-0 vote that MUR 5272 should be dismissed and closed the file in this matter. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

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Ellen L. Weintraub

Ellen L. Weintraub
Chair

11/13/03
Date

Bradley A. Smith

Bradley A. Smith
Vice Chairman

11/12/03
Date

Scott E. Thomas

Scott E. Thomas
Commissioner

11/12/03
Date

Michael E. Toner

Michael E. Toner
Commissioner

11/12/03
Date

Danny L. McDonald

Danny L. McDonald
Commissioner

by F&D

11-12-03
Date

David M. Mason

David M. Mason
Commissioner

11/12/03
Date

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