

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
JAMES E. AKINS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civ. A. No. 92-1864 (RJL)
)	Civ. A. No. 00-1478 (RJL)
FEDERAL ELECTION COMMISSION,)	Civ. A. No. 03-2431 (RJL)
)	
Defendant.)	
_____)	

PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT

Plaintiffs move the Court for summary judgment

(a) holding unlawful and setting aside the Federal Election Commission’s dismissals of plaintiffs’ administrative complaints in MUR 2804 and MUR 5272, on the ground that the dismissals are “arbitrary, capricious, an abuse of discretion, . . . otherwise not in accordance with law,” and “without observance of procedure required by law,” 5 U.S.C. § 706(2);

(b) remanding the case to the Commission; and

(c) ordering the Commission

(1) to explain its interpretation of “organized primarily” as that phrase is used in 2 U.S.C. § 431(9)(B)(iii);

(2) to investigate and find whether lobbying by the American Israel Public Affairs Committee (AIPAC) is based “primarily” on AIPAC’s influencing of federal elections;

(3) if the Commission finds that AIPAC’s lobbying is based primarily on influencing elections, to find that AIPAC is “organized primarily for the purpose of influencing” them, within the meaning of § 431(9)(B)(iii);

(4) if the Commission finds that AIPAC is not organized primarily for the purpose of influencing elections, to decide whether AIPAC's membership communication is disentitled to the § 431(9)(B)(iii) exemption because it solicits campaign contributions and is coordinated with candidates and therefore is not "by" AIPAC, within the meaning of the statute;

(5) if the Commission finds that AIPAC is organized primarily for the purpose of influencing federal elections or that its membership communication is disentitled to the § 431(9)(B)(iii) exemption, to investigate and find whether AIPAC is a "political committee," within the meaning of § 431(4), due to its election communication to its members;

(6) if the Commission finds that AIPAC is not a political committee due to its election communication to its members, to investigate and find whether AIPAC is a political committee due to other expenditures;

(7) if the Commission finds that AIPAC is a political committee, to require AIPAC to comply with the applicable disclosure requirements;

(8) if the Commission finds that AIPAC is not a political committee and not organized primarily for the purpose of influencing federal elections, to investigate and find whether AIPAC's membership communication includes "communication expressly advocating the election or defeat of . . . clearly identified candidate[s]," within the meaning of § 431(9)(B)(iii), irrespective of whether communication that expressly advocates election or defeat is separate from communication that identifies candidates and their political views; and

(9) if the Commission finds that AIPAC is not a political committee and not organized primarily for the purpose of influencing federal elections, but that AIPAC's membership communication includes communication expressly advocating the election or defeat of a clearly identified candidate, to investigate and find whether the cost of the communication requires AIPAC to report it under § 431(9)(B)(iii), and, if so, to require AIPAC to comply with the applicable reporting requirements.

In support of this motion, plaintiffs rely on the accompanying Statement of Material Facts Not Subject to Genuine Dispute, and the accompanying Memorandum.

Respectfully submitted,

/s/ Daniel M. Sember

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**PLAINTIFFS’ STATEMENT OF MATERIAL
FACTS NOT SUBJECT TO GENUINE DISPUTE**

AIPAC--Nature, Organization, and Budget

1. The American Israel Public Affairs Committee (AIPAC) is an incorporated tax exempt organization. AIPAC lobbies the Congress and Executive Branch for military and economic aid to the State of Israel, against aid to Arab nations, and for other policies desired by the Israeli government. AIPAC is a nation-wide organization claiming more than 50,000 dues-paying supporters. It has several regional offices in addition to its New York headquarters. (Certified Administrative Record [CAR] 1467-1470, 3749.)¹ The actual number of AIPAC dues payers is closer to 37,000. (CAR 2771.) AIPAC's membership solicitation mailings in the fall of 1989 said:

AIPAC members are the key to our effectiveness--they distinguish the pro-Israel lobby from every other lobby in Washington. Members of Congress know that our membership--50,000 strong--represents a nationwide pro-Israel constituency who know the issues, demand action, and monitor the results. . . . AIPAC members invite you to join us. An AIPAC membership begins at just \$50 per year. Frankly, we don't think you could get more "bang for your buck" anywhere else.

¹ “CAR” refers to the 1992 administrative record in MUR 2804 and 2804R. Facts stated in the present tense with citation to the CAR were found by the Commission to be true as of the time the CAR was created.

(CAR 3749.)

2. AIPAC's annual revenues in 1989 exceeded \$9,987,000, more than double the revenues received by the organization in 1983. (CAR 3751, 3774.)

3. AIPAC's staff is organized into a Legislative Department, a Foreign Policy Issues Department, a Development Department, a Finance Department, and a Political Department. (CAR 1474-1476.) The Legislative Department lobbies Members of Congress and disseminates to AIPAC supporters voting records, statements, and position papers by Members of Congress. (CAR 14774-1475.) The Foreign Policy Issues Department lobbies the Executive branch and writes materials used to lobby the Executive and Legislative branches. (CAR 1475.) The Development Department conducts fundraising for AIPAC. The Finance Department supports AIPAC's management and coordinates communications with regional offices. (CAR 1476.)

The “Central Mission” of AIPAC’s Political Department

4. Though AIPAC describes the “central mission” of its Political Department as “educating AIPAC members about the electoral process and its impact on U.S.-Israel relations,” (CAR 1727-1728, 3700), AIPAC admits and the Commission found that the department's routine, ongoing pursuit of this mission includes:

a. researching and investigating the views of House and Senate candidates on AIPAC's issues, to determine which candidates favor AIPAC positions, (CAR 1727, 3678, 3697, 3724);

b. investigating candidates' campaign financial and other needs, and their probability of electoral success, (CAR 3693-3694, 3697, 3702);

c. arranging, preparing for, traveling to, and attending meetings with candidates and their campaign staffs to (i) receive candidates' position papers; (ii) deliver literature on AIPAC's issues; and (iii) discuss the issues, candidates' views on the issues, candidates' campaign needs and probability of success, and whether candidates should speak with local AIPAC supporters about the candidates' campaigns, (CAR 3693-3694, 3700, 3702, 3721-3722);²

d. preparing annual "Campaign Update" reports (i) identifying candidates who favor AIPAC views, (ii) noting the views of the candidates' opponents, and (iii) stating whether races involving pro-AIPAC candidates are close, (CAR 3678, 3683-3684, 3699-3700);³

² The Commission found:

AIPAC's statement regarding its meetings with candidates demonstrates the depth of its interest in their campaigns and the extent to which AIPAC gathers political intelligence regarding the campaigns of federal candidates and where they stand on issues relevant to AIPAC. AIPAC then uses this information in making a variety of communications to persons it considers its "members."

(CAR 3697.) AIPAC's communications stemming from its candidate meetings and other political intelligence gathering are described in ¶¶ d., e., g., and h.

³ The Commission found:

This update identifies the incumbent and challengers, provides poll results, rates the incumbent's re-election prospects, reviews the candidates' fundraising, rates the candidates on their positions on issues of concern to AIPAC, and provides a narrative analysis of the campaign. It is derived in part from the political intelligence AIPAC gathers from its meetings with candidates and makes it clear to AIPAC's most politically active supporters which candidates rate best on the issues relevant to AIPAC and, thus, are deserving of support, financial or otherwise.

(CAR 3700.)

e. distributing the “Campaign Update” reports, literature on AIPAC’s issues, and candidate position papers to AIPAC supporters, at AIPAC’s annual Policy Conference and breakfast meetings, and in individual communications, (CAR 1728, 1730, 3678, 3699-3701, 3703, 3753);

f. monitoring the extent of Jewish participation in federal election campaigns, (CAR 1728, 3701-3702, 3707);⁴

g. urging AIPAC supporters “to build relationships with candidates that support strong U.S.-Israel relations,” (CAR 1727), and to become active in the political process, (CAR 1727, 3683-3686, 3687, 3700);

h. apprising AIPAC supporters “of races in which their involvement would promote a strong understanding by a candidate of the concerns of the American Jewish community, . . . [t]owards this goal . . . introduc[ing] AIPAC members to [either] candidates for Federal office” or their campaign staffs, (CAR 1727-1728, 3695, 3702, 3706, 3715), and similar urging of AIPAC supporters to become active in federal election campaigns, (CAR 3683-3686, 3687, 3700, 3702, 3715).

The 1992 Commission Decision

Commission Finding of “Contributions” by AIPAC

5. On June 16, 1992 the Commission decided “to find probable cause to believe that the American Israel Public Affairs Committee violated 2 U.S.C. § 441b,” which prohibits corporate campaign contributions and expenditures. (CAR 3871.) The

⁴ To accomplish this part of her job, AIPAC Political Director Elizabeth Shroyer compiled a list of Jewish PACs. (CAR 1728.) AIPAC claims, however, that in 1988 it stopped maintaining the list to “avoid even the appearance that such a list was indicative of a relationship between AIPAC and pro-Israel PACs.” (CAR 3701.) The Commission did not determine which information sources Ms. Shroyer has used since 1988 to monitor Jewish participation in federal election campaigns.

Commission held, based on AIPAC's admission of the routine, ongoing activities stated in ¶ 4, "that AIPAC has made, in cooperation, consultation, or coordination with federal candidates, communications to persons urging support, financial or otherwise, for such federal candidates or providing assistance to federal candidates in their campaigns." (CAR 3672.) Because of the "cooperation, consultation, or coordination with federal candidates," the Commission held that AIPAC's campaign activities were not merely "independent expenditures," but "contributions" to the favored candidates.⁵

Commission Finding that AIPAC's Campaign Contributions "Likely Crossed the \$1,000 Threshold" Set by the Definition of "Political Committee"

6. The Commission also found that AIPAC's election contributions "likely . . . crossed the \$1,000 threshold" set by 2 U.S.C. § 431(4), the statute which defines "political committee."⁶

Commission Conclusion, Nonetheless, that the Statutory Definition of "Political Committee" Cannot be Applied to AIPAC Because Campaign-Related Activities Are Not the "Major Purpose" of the Organization

7. Nonetheless, the Commission decided that AIPAC is not a political committee.

The Commission based this decision solely on its conclusion that "AIPAC's political

⁵ Evidence, factual findings, and reasons upon which the FEC based its decisions are stated in the General Counsel's Brief dated January 30, 1992, (CAR 3671-3778), the General Counsel's Report dated May 29, 1992, (CAR 3842-3869), and the Commission's July 27, 1992 Statement of Reasons, (CAR 3924-3926.) These parts of the record are incorporated here.

⁶ The extent of AIPAC's expenditures for campaign communications coordinated with candidates shows there can be doubt that AIPAC's annual expenditures for them exceed the statutory \$1,000 threshold. These communications involve meetings with nearly every candidate for federal office, (CAR 136, 3692-3693); systematic dissemination of the literature identified in ¶ 4d. and e.; and regular meetings and phone calls with AIPAC supporters--all carried out by several paid, full-time AIPAC staff members whose "central mission" is to conduct these activities, and who comprise a major department of AIPAC, an organization with an annual budget of nearly ten million dollars.

activities [do] not rise to such a level as to make them a major purpose of the organization.” (CAR 3672.) The Commission said

AIPAC has not become a political committee under the Act because AIPAC’s campaign-related activities, while likely to have crossed the \$1,000 threshold, constitute only a small portion of its overall activities and does [sic] not appear to be its major purpose. The evidence shows that AIPAC is primarily and fundamentally a lobbying organization interested in U.S.-Israel relations and in legislation affecting Israel. Its campaign-related activities and communications are undertaken as an adjunct to, and in support of, its lobbying efforts.

(CAR 3772.)⁷

Failure to Address Whether Designating AIPAC a “Political Committee” Would Serve the Fundamental Purpose of the Act, Given the Amount of AIPAC's Campaign Contributions and its *Quid Pro Quo* Lobbying

8. As noted above, the Commission found that AIPAC’s primary purpose is lobbying on legislation affecting Israel and that AIPAC’s “campaign-related activities” are “undertaken as an adjunct to, and in support of its lobbying efforts.” In deeming this a reason not to designate AIPAC a “political committee,” however, the Commission addressed neither the amount of AIPAC's campaign spending nor AIPAC’s use of campaign contributions for *quid pro quo* lobbying. By overlooking these factors the Commission overlooked the fundamental purpose of the campaign Act—to prevent both corruption and the appearance of corruption, which result when “large contributions are given to secure a political *quid pro quo* from current and potential office holders.”

Buckley v. Valeo, 424 U.S. 1, 26 (1976).

9. Instead of addressing the amount and impact of AIPAC’s campaign spending, the Commission considered only whether this spending was a large or small “portion” of

⁷ Accordingly, the Commission decided “to find no probable cause to believe that the American Israel Public Affairs Committee violated 2 U.S.C. §§ 433 and 434,” which require “political committees” to register with the Commission and file reports. (CAR 3871.)

AIPAC's overall budget. The Commission, however, did not explain why an organization using election expenditures as an effective means of buying influence in Congress (thus presenting precisely the danger Congress sought to address in the campaign Act) should escape designation as a political committee (and the attendant recordkeeping and disclosure requirements which Congress enacted to combat the danger) simply because the organization is so large, wealthy, and powerful as to be able to control Congress on issues of interest to the organization merely by spending on elections only a "small portion" of its overall budget.

10. As a result of its focus on "portion," to the exclusion of amount and impact, the Commission made no finding as to the actual amount of AIPAC's "political" or "campaign-related" spending. Nor did the Commission determine whether this amount is large enough to have a significant impact on election campaigns.

11. The Commission also failed to clarify, justify, and elaborate the legal standard it announced. The Commission never clarified whether the legal standard is "*a* major purpose" or "*the* major purpose," and why. In announcing that AIPAC's "political" or "campaign-related" activities "constitute only a small portion of its overall activities," the Commission neither defined the term "political" or "campaign-related" nor clarified which of AIPAC's activities are embraced by these terms. Although the Commission held that AIPAC's campaign communications coordinated with candidates constitute "political" or "campaign-related" spending, (CAR 3672), the Commission did not state whether any of the following activities—which are essential, or relate directly, to AIPAC's coordinated campaign communications, and which serve the "central

mission” of the Political Department—are part of AIPAC’s “political” or “campaign-related” activities:

a. research and investigation of House and Senate candidates’ views on issues of concern to AIPAC, in order to decide whom AIPAC will support;

b. investigation of candidates’ campaign financial and other needs, and probability of success, to determine the extent to which AIPAC will support them;

c. arrangement of, preparation for, travel to, and attendance at meetings with candidates and their campaign staffs to exchange information and to discuss (i) AIPAC’s issues, (ii) candidates’ views on those issues, (iii) candidates’ campaign needs and probability of success, and (iv) whether candidates should seek campaign assistance from AIPAC supporters in their states or districts—all as part of the activities stated in a. and b. above, and as part of coordination of AIPAC’s political activities with candidates;

d. preparation of reports (i) identifying candidates who favor AIPAC views, (ii) noting the views of the candidates’ opponents, and (iii) stating whether races between pro-AIPAC candidates and their opponents are close—with intent to send these reports to AIPAC supporters, along with literature on AIPAC’s issues, candidate position papers, and appeals for involvement in campaigns of pro-AIPAC candidates;

e. monitoring the extent of Jewish and Jewish PAC participation in federal election campaigns;

f. meetings with or other communications to Members of Congress demanding that they vote for legislation and appropriations favored by AIPAC, where these demands are linked to (i) AIPAC’s support in past election campaigns, and (ii) promises to support, or threats to oppose, Members’ future re-election.

12. The Commission also never determined the extent to which AIPAC's lobbying is *quid pro quo* lobbying--consisting of demands that Members of Congress vote for legislation and appropriations favored by AIPAC *because of* AIPAC's support for them in past election campaigns, or AIPAC's promises to support, or threats to oppose, their future re-election. There is evidence, however, that AIPAC's lobbying success is rooted in election activities, not persuasion of Members on the merits of issues. Regarding Senator Percy's defeat in 1984, AIPAC Executive Director Thomas Dine said, "All the Jews in America, coast to coast, gathered to oust Percy and the American politicians—those who hold public positions now and those who aspire—got the message." (CAR 145.) An attendee at AIPAC's 1983 Policy Conference wrote that

AIPAC members are supposed to report all contributions to the organization so that, although AIPAC itself never contributes, its lobbyists can say later to the politician "We were responsible for you receiving X amount of dollars" in the last campaign.

(CAR 103.)⁸ *See also*, (CAR 3688) (affidavit of AIPAC Executive Director Thomas Dine saying "modern lobbying techniques" include "candidate support practices" and "other volunteer political activities such as political action committees, . . . to maximize . . . impact on the political process"); (CAR 94) (newspaper article reporting former AIPAC employee Barbara Amouyal as having said that AIPAC mixed lobbying with political fundraising, that legislators perceived that AIPAC was deeply involved in the political fundraising process, that this fostered resentment, and that she had "heard from congressional staffers and from members about this resentment"); CAR 145 (reporting AIPAC member Michael Goland to have lobbied two Senators against arms for Saudi

⁸ AIPAC's response to plaintiffs' administrative complaint contained no denial that these points were made at the conference. (CAR 1496-1497.) *See n. 12, infra.*

Arabia by threatening to subject them to “negative advertisements similar to those that had brought Percy down”). The Commission did not further investigate, nor did it issue any findings on, the *quid pro quo* connection between AIPAC’s campaign spending and its lobbying.

The March 21, 2000 Commission Decision

13. The Commission’s March 21, 2000 decision, found that AIPAC “was a membership organization during the period addressed in MUR 2804” and found “no probable cause to believe that American Israel Public Affairs Committee violated 2 U.S.C. §§ 433 and 434.” (CAR 3986.)

14. The Commission based its decision on a report by the General Counsel, (CAR 3964, tab 12 of the Commission’s October 2 filing). The General Counsel based his report on no investigation other than that which had been conducted prior to the Commission’s 1992 decision. (CAR 3964-85.) The General Counsel determined that AIPAC’s candidate-coordinated communications to AIPAC supporters were not campaign contributions because they were communications to members of a membership organization, within the meaning of the Commission’s new regulation, 11 C.F.R. § 114.(e)(1). The General Counsel based his determination that AIPAC was not “organized primarily for the purpose of influencing” federal elections solely on the Commission’s 1992 determination that AIPAC’s campaign contributions are not a major purpose, or not the major purpose, of AIPAC. (CAR 3782.) The General Counsel did not consider that, because AIPAC’s communications were coordinated with candidates, the communications were by the candidates, as well as by AIPAC, and therefore not exempt

from being campaign expenditures under 2 U.S.C. § 431(9)(B)(iii).⁹ Neither the General Counsel nor the Commission determined whether AIPAC was required by 2 U.S.C. § 431(9)(B)(iii) to report to the Commission its election communications to its supporters.

Id.

15. Neither the General Counsel nor the Commission determined whether AIPAC activities other than AIPAC's communications to its supporters were campaign contributions that required AIPAC to comply with political committee disclosure obligations.

Campaign Expenditures Admitted by AIPAC but Claimed to be “Unusual”

16. Apart from AIPAC's candidate-coordinated communications with its supporters, the Commission in 1992 found that AIPAC made additional campaign expenditures, described in ¶¶ 17-18 below, which AIPAC affidavits claimed to be “unusual.” The Commission made no finding whether these AIPAC activities were unusual or whether, instead, they were typical. Other than receiving AIPAC's affidavits and answers to interrogatories, the Commission conducted no investigation to determine whether these expenditures were “unusual.”

Solicitation of PAC Contributions by Political Department in 1986

17. In 1986 AIPAC officers told Elizabeth Shroyer, director of AIPAC's Political Department, that several Senate candidates merited support from the Jewish community. (CAR 3709.) In response, Ms. Shroyer on September 30, 1986 wrote a memorandum to

⁹ The post-remand portion of the record was filed by the Commission October 2, 2000. The Commission's March 21, 2000 decision is found at tab 13 of that filing.

her subordinate Karen Kaufman stating that several named PACs¹⁰ had not contributed, or not contributed the maximum amounts, to five Senate candidates.¹¹ The memorandum directed Ms. Kaufman to make telephone calls to try to get the PACs to make contributions to the candidates' campaigns. (CAR 55.) Ms. Shroyer's affidavit, however, said she "did not follow up or take any other action on this memorandum," (CAR 1731), and Ms. Kaufman's affidavit stated the memorandum was the only one of its kind that she recalled having received and that this instance was the only one she remembered in which she suggested to AIPAC members that PACs make contributions. (CAR 3709.) AIPAC told the Commission that the memorandum "was an unusual instance in which Ms. Kaufman was asked to call AIPAC members . . . [to suggest that] certain Jewish PACs . . . make contributions to identified candidates." But AIPAC also told the Commission that Ms. Kaufman "*acted under standing instructions* to contact only AIPAC members about communications that might be partisan." (CAR 1500, 3707-3708) (emphasis added). The Commission's review of campaign contribution records found "substantial contribution activity by pro-Israel PACs after the time of the memorandum, thus raising the inference that AIPAC's contacts with pro-Israel PACs may have been more extensive than those listed in the Shroyer memorandum." (CAR 3714.) The Commission, however, did not seek to discover other "communications that might be partisan" to which AIPAC's "standing instructions" applied. The Commission did not depose Ms. Shroyer, Ms. Kaufman, or the AIPAC officers who told Ms. Shroyer the names of the Senate candidates who merited support.

¹⁰ ICEPAC, CT PAC, YAP, Georgia, Congressional Action of Texas, Gold Coast, Southern Florida Caucus, Five Towns, and Kings PAC.

¹¹ Bond, Moore, Evans, Daschle, and Reid.

Fundraising Assistance in the 1986 Idaho Senate Race

18. In 1985 AIPAC member Morten Friedman informed Ms. Shroyer that he was raising funds for the Senate campaign of Idaho Governor John Evans. He asked her for materials including a sample solicitation letter and a list of Jewish PACs. She provided them. (CAR 3704.) Ms. Shroyer's affidavit said that the dissemination of the PAC list was "a rare occasion," and that she and the AIPAC staff could recall specifically no other occasion on which any AIPAC employee had sent a sample solicitation letter to an AIPAC member. (CAR 3705.) Mr. Friedman's affidavit, however, stated that "[a]s a member of AIPAC, I fully expected that such information could be provided to me." (CAR 3704.) In its memorandum to the FEC, AIPAC argued that provision of this information to Mr. Friedman was not illegal. (CAR 3703-3705.) The Commission conducted no further investigation. It did not determine the authorship of the sample solicitation letter; the reason why AIPAC maintained such letters; why, if AIPAC believed dissemination of such letters and PAC lists not to be prohibited, its doing so was "rare"; or, if such dissemination was rare, the basis for Mr. Friedman's expectation that "as an AIPAC member," he could obtain such information from AIPAC.

Evidence of Other AIPAC Campaign Contributions and Expenditures

Reports of AIPAC Policy Conferences

19. Plaintiffs presented to the Commission additional evidence of AIPAC's campaign activities—reports of proceedings at AIPAC's 1983, 1984, and 1988 Policy Conferences, by persons who attended those events. (CAR 102-104; 110-125.) Plaintiffs did not state in writing the names of the reports' authors, but informed the Commission that the authors were available for interview by Commission investigators. (CAR 46.)

Commission regulations state that complaints to the Commission “should conform” to provisions including 11 C.F.R. § 111.4(d)(2), which says, “[s]tatements which are not based upon personal knowledge [of the complainants] should be accompanied by an identification of the source of information which gives rise to the complainants’ belief in the truth of such statements.” The Commission held “that the use of the word ‘should’ indicates that this provision urges complainants to include such information but does not require them to do so in order to file a valid complaint.” (CAR 3677-3678, n.3.) The Commission never asked plaintiffs to make the authors of the reports available for interview. Without further communication with plaintiffs, the Commission held “there is no evidence verifying the author or the source of these documents or their authenticity or credibility.” (CAR 3680.) The Commission then held that allegations in the reports “can be given little weight,” (CAR 3690), and are not “credible evidence.” (CAR 3730.) In announcing this credibility determination, the Commission did not discuss all allegations in the reports. Nor did the Commission discuss the extent to which allegations in the reports were corroborated by other evidence, or not denied by AIPAC (except in one instance, see ¶ 27, where the Commission erroneously stated that AIPAC denied an allegation that, in fact, AIPAC had not denied).

AIPAC Expenditures to Defeat Plaintiff Findley in 1982

20. The report of the 1983 AIPAC Policy Conference said, “AIPAC officials took at least partial credit for . . . the electoral defeats of Adlai Stevenson and Paul Findley.” (CAR 102.) The report said, “In addition to funds and campaign workers, AIPAC provided Durbin with 200 student volunteers bussed into Findley’s district 2 weeks before the election.” (CAR 104.) A November 17, 1988, *Washington Jewish*

Week article by Larry Cohler reported, “Even AIPAC officials have privately acknowledged the lobby's heavy active involvement in that race.” (CAR 97.) When the Commission asked the Treasurer of the Durbin for Congress Committee “whether students or other volunteers” worked in the district on the campaign “prior to the 1982 election,” (CAR 3643), the Treasurer said, “Yes.” He also said that he had no records showing “the number of such persons, the dates they performed campaign work in the district, [or] a description of the work they performed.” (CAR 3645, 3643.) The Treasurer added that “on election day” approximately 80 students from the University of Illinois traveled to the district and performed campaign tasks. (CAR 3645.) The Treasurer produced check registers recording checks dated November 5, 1982 paying these students' travel expenses. The Treasurer said he had “no knowledge of any role played by AIPAC in relation to this volunteer effort.” (CAR 3645.) The Commission conducted no further investigation. The Commission then held “there is a lack of credible evidence regarding AIPAC's alleged involvement in providing campaign workers to the Durbin campaign” because

the complainants have presented only a bare allegation contained in a document that lacks authenticity. AIPAC has denied providing any such assistance. The Durbin campaign has also denied knowledge of any AIPAC involvement. The evidence shows that the Durbin campaign made the payments for out-of-pocket expenses.

(CAR 3730.) AIPAC's submissions to the Commission, however, contained no denial of the allegation at issue. AIPAC's response asserted that the allegation stated no violation, not that it was untrue. (CAR 1486-1488, 1550, 3729.) Further, the Commission did not investigate the authenticity of the document containing the allegation, despite plaintiffs' representation that the report's author was available for interview. Nor did the

Commission investigate to determine whether other attendees at the conference heard the statement alleged in the report submitted by plaintiffs. That students worked in the district before the election, moreover, was not a 'bare' allegation of the report. It was corroborated by the Durbin Committee Treasurer. AIPAC's general involvement in the election was corroborated by Mr. Cohler's article. The Commission, however, sought no further information from Mr. Cohler. As for payment of the students, the Durbin Committee Treasurer said his records showed only payment of travel expenses incurred by students "on election day." The allegation at issue concerned AIPAC students in the district "2 weeks before the election," not "on election day." (CAR 3728.) The Durbin Committee Treasurer acknowledged that students worked in the district "prior to" the election, but that, as to these students, he had no records at all.

AIPAC Supporters' Campaign Contributions and AIPAC Lobbying

21. The report of the 1983 AIPAC Policy Conference said

It is assumed members will contribute to congressional races in their district and state, with special emphasis on contributing early. "If money talks, early money shouts", they were reminded again and again. Another message was to make sure their contributions would ensure access later to the officeholder. AIPAC members are supposed to report all contributions to the organization so that, although AIPAC itself never contributes, its lobbyists can say later to the politician "We were responsible for you receiving X amount of dollars" in the last campaign.

(CAR 103.) AIPAC's response contained no denial that these points were made at the conference. (CAR 1496-1497.)¹² The affidavit of AIPAC Political Department employee

¹² The cited pages are AIPAC's response to allegations made by plaintiffs in the first full paragraph of page 16 of their administrative complaint. (CAR 18.) AIPAC's response denied only the part of that paragraph which alleged that AIPAC coordinates distribution of campaign contributions by finding local constituents to present contributions from out-of-state PACs. It did not deny the part which alleged that AIPAC supporters were urged

Karen Kaufman acknowledged that “from time to time [AIPAC] members did tell me of [campaign contribution] decisions their PACs had made.” (CAR 1737.) The affidavit of AIPAC Executive Director Thomas Dine also acknowledged that “modern lobbying techniques” include “candidate support practices” and “other volunteer political activities such as political action committees, . . . to maximize . . . impact on the political process.” (CAR 3688.) The Commission made no finding and conducted no investigation whether AIPAC officials urged AIPAC supporters to contribute early to election campaigns and to report contributions to AIPAC so that AIPAC lobbyists could use the information to influence the politicians to whom the contributions were made.

Criteria for AIPAC's Rating and Endorsement of Candidates

22. The report of the 1983 AIPAC Policy Conference said

In 1982, 300 candidates solicited campaign support from AIPAC. Staffers said they are most interested in helping candidates who are:

Incumbents on key committees,

Incumbents with influence on other elected officials (former Sen. Case of New Jersey was the example of someone who could add other votes for Israel to his own through persuasion),

Representatives headed for the Senate,

State officials with Congressional ambitions.

When evaluating which candidate is more pro-Israel, AIPAC does not use a 1-10 scale but considers which is more likely to continue to side with Israel even when it is going through periods of reduced popularity and support in the States. “Absolutely key” for AIPAC is the candidate’s travel record to Israel and his behavior and comments there. Staffers told members to avoid supporting even avowedly pro-Israel candidates if they hadn’t actually been to Israel.

to report their campaign contributions to AIPAC so that AIPAC lobbyists could use this information to influence politicians to whom the contributions were made.

(CAR 103-103a.)¹³ AIPAC's response did not deny that the conference included statements by AIPAC staff making these points. The Commission made no finding and did not investigate whether AIPAC staff made these statements at the conference.

Defeat of Senator Percy in 1984

23. The report of the 1983 AIPAC Policy Conference said, "Staffers were bellicose about Percy's fate, promising the same treatment against him as Findley received." (CAR 104.) The report of the 1984 AIPAC Policy Conference said:

One of the workshops, Campaign '84, featured nationally renowned specialists in campaign polling and media. Emphasis was placed on the importance of increased funding to pro-Israel contenders, particularly those running against Senators Charles Percy (R-IL) and Jesse Helms (R-NC).

(CAR 114.) The report also said that at the "college campus panel, . . . all students attending the panel from Illinois were pulled out for a separate urgent briefing by Illinois state legislators on the election strategies in that state." (CAR 115.) AIPAC's response did not dispute these parts of the reports. The Commission made no finding and did not investigate whether AIPAC staff members made the conference statements attributed to them or whether the briefing for Illinois students occurred. Regarding Senator Percy's defeat in 1984, AIPAC Executive Director Dine said, "All the Jews in America, coast to coast, gathered to oust Percy and the American politicians—those who hold public positions now and those who aspire—got the message." (CAR 145.) The March 1988 issue of *Regardies* reported: "More than \$1 million of Simon's out-of-state help reportedly came from Michael Goland, an AIPAC member in Los Angeles." (CAR 145.)

¹³ In filing the record, the Commission omitted the page which should have followed 103. We include it as Exhibit 11 and refer to it as 103a.

The Commission made no finding and did not investigate whether AIPAC contributed to Simon's 1984 election campaign against Percy.

California Senate Race, 1986

24. The Commission also received evidence, detailed in ¶ 25, that AIPAC unlawfully contributed to the 1986 California U.S. Senate campaign of Libertarian Party candidate Breck McKinley. The Commission, however, made no finding whether the violation occurred. The Commission received Mr. McKinley's letter reporting his personal knowledge of facts showing the violation and received affidavits from the accused AIPAC officials denying Mr. McKinley's allegations. The Commission declared the evidence was "inconclusive," (CAR 3728), but conducted no further investigation. The Commission failed to contact an eyewitness to the disputed event. The Commission did not address evidence bearing on the credibility of the AIPAC denial.

25. In a letter to the Commission dated June 27, 1991, Breck McKinley, the 1986 California Libertarian Party candidate for the U.S. Senate, wrote that AIPAC offered him assistance in his 1986 campaign:

The proposed plan was to support me as part of a "spoiler" campaign to draw enough votes from Tschau to get Cranston elected. "Better Cranston for six more years than Tschau for twenty", was the point of view presented. I was told that, since I did not have one, they would provide me with a campaign manager. I was told that they would pay for a mail campaign into Orange County on my behalf just before the election. Since the meeting was in AIPAC's offices and Murray Wood had been introduced as the Regional Director of the organization, I assumed that when I was told that "we" will do this it meant AIPAC. The meeting was conducted by Dan Cohen. Murray Wood was in attendance for most of the meeting, but had little to say and was called out of the room briefly during the meeting.

(CAR 3727.) AIPAC submitted affidavits from Mr. Cohen and Mr. McKinley admitting that they met Mr. McKinley but denying that they offered him assistance with his

campaign. Mr. Cohen, an AIPAC lobbyist based in AIPAC's Washington, D.C. office, (CAR 1719), stated that the purpose of the meeting, which took place in Los Angeles, (CAR 1720), was to discuss Mr. McKinley's "views on a number of foreign and national security policy issues, as well as his impressions of the race and his own campaign strategy." (CAR 3726.) In a memorandum to the Commission, AIPAC argued that even if Mr. Cohen and AIPAC Regional Director Wood offered to assist McKinley's campaign, this was not a violation of law since no assistance actually was provided.

(CAR 3726.) The Commission rejected AIPAC's legal position:

[W]hen an incorporated entity dispatches its personnel to meet with a candidate for federal office, discusses the campaign, and offers such candidate campaign assistance, such as providing the candidate with a campaign manager, a violation of the prohibition on corporate contributions occurs, even if the candidate should refuse the offer.

(CAR 3727-3728.) The Commission, however, made no finding whether Mr. Cohen and Mr. Wood said at the meeting what Mr. McKinley claimed. The Commission deemed the evidence "inconclusive" and took no further action. (CAR 3728.) Other evidentiary leads were in the Commission's hands. Michael Tuchin attended the meeting. (CAR 3724, 3665.) The Cohen and Wood affidavits did not mention his presence. (CAR 1716-1721.) The Commission sought no evidence from Mr. Tuchin. A *Wall Street Journal* article concerning the meeting identified Mr. Tuchin as an AIPAC "intern." (CAR 69, 3724.) Mr. McKinley, however, saved the business cards Cohen, Wood, and Tuchin gave him at the meeting; he provided them to the Commission. (CAR 3666.) Mr. Tuchin's business card identified him not as an "AIPAC intern," but as Legislative Executive Director of the Student Activism Network Political Action Committee (STANPAC). (CAR 3666.) The Commission did not address this evidence or

investigate its implications. AIPAC's interrogatory answers, moreover, asserted "that its employees did not meet with Senator Alan Cranston, Edward Vallen, or Paul Kangas in connection with the 1986 California Senate election." (CAR 3725, n.23.) Attached to Mr. Wood's affidavit, however, was a copy of a letter dated October 6, 1986, that he wrote to the *Los Angeles Times* about his meeting with Mr. McKinley. The letter said

[T]o put this into perspective, members of the *AIPAC staff have also met this year with 53* other candidates for the United States Senate and 197 candidates for the House of Representatives. We met too, with incumbent Senators and House Members, including both *Senator Alan Cranston* and Representative Ed Zschau.

The purpose of candidate meetings is to discuss issues of concern to the pro-Israel community, and gather information about the races. Our meeting with Mr. McKinley was no exception.

(CAR 1718) (emphasis added). The Commission did not address the apparent contradiction between AIPAC's interrogatory answers and the October 6, 1986 letter by Mr. Wood. The FEC also did not investigate why a purportedly "routine," unexceptional meeting with a minor party candidate in California, (CAR 69), was conducted by an AIPAC lobbyist based in Washington, D.C. (Mr. Cohen). The Commission did not investigate whether Mr. Cohen's other candidate meetings in 1986 included minor party candidates far away from Washington, D.C.¹⁴

¹⁴ In addition to the evidentiary leads identified in the administrative record, other public information showed the illegal efforts of pro-Israel activists, including major AIPAC contributor Michael Goland, to influence the 1986 California Senate campaign. Mr. Goland was indicted and convicted of contributing illegally to the campaign of the American Independent Party's candidate, Edward Vallen. (*Los Angeles Times*, May 4, 1990, at Part A, p. 3. Exhibit 7.) Funneling \$12,000 through a large group of other individuals, Mr. Goland paid for an advertising campaign portraying Mr. Vallen as a better conservative than Senator Cranston's Republican opponent, Ed Zschau. The purpose of the ad was to draw votes away from Zschau in order to increase the likelihood of Cranston's re-election. (The ad may have been successful. Vallen received about 5,000 more votes than the margin by which Cranston defeated Zschau.) The Commission

Ohio and New Jersey Senate Races, 1988

26. The report of the 1988 AIPAC Policy Conference said Jill Buckley, President of Jill Buckley and Associates identified Howard Metzenbaum (D-OH) and Frank Lautenberg (D-NJ) as “vulnerable Senate incumbents AIPAC will help reelect.” (CAR 125.) AIPAC submitted an affidavit from AIPAC employee David Gillette saying that Ms. Buckley never said that AIPAC would help re-elect certain Senate candidates. (CAR 2378.) The Commission made no finding whether Ms. Buckley said what the report attributed to her. The Commission did not ask Ms. Buckley what she said. Doug Bailey of Bailey, Deardourff and Sipple was present at Ms. Buckley's presentation. (CAR 2378.) The Commission sought no information from Mr. Bailey. The Commission conducted no further investigation of what Ms. Buckley said, and it made no finding and did not investigate further whether AIPAC contributed to the 1988 election campaigns of Senators Metzenbaum or Lautenberg.

Rhode Island Senate Race, 1988

27. The Commission received evidence, detailed in ¶ 28, “rais[ing] the inference that AIPAC employees may have . . . contacted persons associated with . . . PACs to suggest support for the [1988] Licht campaign” for U.S. Senator from Rhode Island. The Commission, however, made no finding whether these violations occurred. The Commission's investigation of this matter was limited to receiving an internal AIPAC

did not investigate the extent, if any, of Cohen's or Woods relationship to Goland, or the likelihood that Cohen and Wood knew about the illegal Goland scheme, involving, as it did, a large group of pro-Israel activists. The Commission did not seek to learn the identities of the large group involved in the illegal plot, to determine whether any of them were AIPAC members, or to determine the extent of their relationship, if any, with Cohen or Wood. Nor did the Commission investigate whether Goland's indictment or conviction impacted his relations with AIPAC leaders.

memorandum proposing the prohibited activities, receiving an affidavit from a Licht campaign fundraiser saying she did not know of any such activities by AIPAC, and reviewing records of PAC contributions, which indicated to the FEC that the violations may have occurred.

28. On November 3, 1987, AIPAC employee Brenda Pearson wrote a memorandum to AIPAC's chief spokeswoman, with a copy to Ms. Shroyer, saying in part

Lt. Governor Richard Licht (D) of Rhode Island is running against incumbent Senator John Chafee (R). Licht, who is Jewish, has a very good chance. Our problem is that the pro-Israel community is not excited and is not forthcoming as they should be. We need to put the word out on this race, emphasizing Chafee's poor record. The focus should be to generate interest for a terrific candidate to replace a poor supporter of our issue.

(CAR 3714.) On several occasions AIPAC staff members introduced AIPAC supporters to Licht fundraiser Cheryl Kagan and suggested particular persons in response Ms. Kagan's requests for names of AIPAC supporters who might be willing to contribute time or money to the Licht campaign. (CAR 3715.) The report of the 1988 AIPAC Policy Conference stated that consultant Jill Buckley said AIPAC had targeted for defeat incumbent Senator John Chafee of Rhode Island. (CAR 125.) An AIPAC affidavit denied Buckley said this. (CAR 2378.) The Commission, however, found that the pattern of pro-Israel PAC contributions to the Licht campaign, "raises the inference that AIPAC employees may have also contacted persons associated with some or all of these PACs to suggest support for the Licht campaign, as suggested in the Amouyal memorandum." (CAR 3717.) An article in the October 6, 1988 issue of *Washington Jewish Week* reported Ms. Amouyal as having asserted that AIPAC mixed lobbying with political fundraising, that legislators perceived that AIPAC was deeply involved in the

political fundraising process, that this fostered resentment, and that she had “heard from congressional staffers and from members about this resentment.” (CAR 94.) In its arguments to the Commission, AIPAC denied that Ms. Pearsons memorandum was written to further the Licht campaign. AIPAC said the memorandum was written by a low-level staffer to a junior employee whom AIPAC eventually dismissed. (CAR 3714-3715.) AIPAC said the memorandum reflected “nothing more than an internal office memo between staff regarding thoughts on the race.” (CAR 3715.) The Commission conducted no investigation to determine whether Ms. Pearson’s memorandum was unauthorized, not condoned by AIPAC officials, or the reason for Ms. Amouyal’s dismissal. The Commission conducted no investigation of Ms. Amouyal’s assertions reported in *Washington Jewish Week*. The Commission did not ask Jill Buckley what she said at the 1988 Policy Conference and did not seek information from others who heard her comments. The Commission conducted no further investigation of AIPAC support to the Licht campaign, and made no finding whether AIPAC expended other funds for this purpose.

Minnesota and Connecticut Senate Races, 1988

29. The Commission received evidence, a newspaper article, stating that in 1988

AIPAC officers and staffers aggressively discouraged activists in the Jewish community from raising funds on behalf of two pro-Israel Senate . . . challengers, Joseph Lieberman of Connecticut and Hubert H. “Skip” Humphrey III of Minnesota, [who] were running against incumbents widely viewed as friendly to the pro-Israel cause. . . . [A] senior official in Humphrey's losing campaign who spoke on condition of anonymity [said], “People who were willing to raise money for us later told us they couldn't ‘because we've been told by AIPAC we could not.’”

(CAR 96.) AIPAC's response did not deny that AIPAC staffers sought to discourage AIPAC supporters from making campaign contributions to Lieberman and Humphrey. Instead, AIPAC argued that such communications were constitutionally protected. (CAR 2354-2356, 3696.) The report of the 1988 AIPAC Policy Conference stated that consultant Jill Buckley said AIPAC would support incumbent Minnesota Senator David Durenberger. (CAR 125.) An AIPAC affidavit denied Buckley said this. (CAR 2378.) The Commission made no finding and did not further investigate whether AIPAC contributed to Durenberger's campaign or discouraged campaign contributions to Lieberman and Humphrey.

Failure to Find Facts Not Admitted by AIPAC, Failure to take Depositions, and Failure to Pursue Investigatory Leads

30. As ¶¶ 4 and 16-29 show, the only facts found by the Commission were those either admitted by AIPAC or established by the Commission's review of campaign contribution reports. Except for review of campaign contribution reports, the Commission's investigation of matters not admitted by AIPAC was limited to single sets of interrogatories to some witnesses. The Commission took no depositions. The Commission did not pursue investigatory leads obtained through initial interrogatory answers or AIPAC submissions. The Commission did not further investigate disputed or uncertain matters in an effort to make factual findings on those matters.

Failure to Consider Campaign Fundraising by AIPAC Officers Acting in their Personal Capacities; AIPAC Officer Selection; Support and Facilitation of Personal Fundraising

31. The Commission did not address whether election contributions and fundraising by AIPAC's high officers, board members, or major contributors, in

combination with AIPAC activities supporting or facilitating these efforts, was evidence that influencing elections is a major purpose of AIPAC.

AIPAC Board Chair Robert Asher in 1986

32. In 1986 AIPAC Board Chair Robert Asher, acting in his personal capacity, “sent letters to major Jewish political donors to urge them to support certain candidates for federal office.” (CAR 3731, 3732.) In letters seeking \$1,000 contributions to the campaign of North Dakota Senator Mark Andrews, Mr. Asher added handwritten notes saying, “I look forward to greeting you personally at the AIPAC Policy Conference.” (CAR 3731.) The Commission did not investigate the extent of AIPAC officers’, Board members’, and major contributors’ personal involvement in campaign fundraising. The Commission did not seek to determine whether this personal involvement is so widespread and significant as to warrant further inquiry whether, or to support an inference that, it is a criterion for selection to AIPAC high office or Board membership, or for involvement in the AIPAC activities of Board members and high officers. The Commission also did not investigate the extent to which AIPAC activities support or facilitate the personal election campaign activities of its high officers, Board members, and major contributors. The Commission did not seek to determine whether this support or facilitation is so pervasive as to warrant further inquiry whether, or to support an inference that, a major purpose of AIPAC’s activities is to support the personal campaign activities of its high officers, Board members, and major contributors.

Steiner, Buchwald, Schnur, Friedkin

33. Paragraphs 34-42 present evidence, obtained after close of the Commission investigation, indicating that further Commission investigation would have shown the

extent and depth of the involvement of AIPAC Board members, high officers, and major contributors in campaign fundraising, as well as facilitation and support of those activities by AIPAC.

34. On October 22, 1992, Harry Katz made a telephone call to David Steiner, who then was President of AIPAC. Mr. Katz recorded the conversation on an audiotape. (Exhibit 8.) A transcript of relevant portions of the tape recording is attached as Exhibit 9.

35. Though Mr. Katz previously had communicated his interest in making contributions to federal election campaigns, he and Mr. Steiner were barely acquainted. Mr. Steiner asked Mr. Katz where he got his name and phone number. Mr. Katz said that he reached Mr. Steiner by calling AIPAC and that he knew Mr. Steiner was President of AIPAC. Mr. Steiner said that the political information and choices he would give Mr. Katz were personal choices and that "AIPAC does not rate or endorse candidates, doesn't solicit money." Mr. Steiner said that he wanted to get together with Mr. Katz next week and said "[b]ut in the meantime, I wonder if I can have one of my people get together with you and talk to you about it. . . . I can have Seth Buchwald call you, my New York director . . . [a]nd we have a guy out there, Joel Schnur." At the end of the conversation Mr. Steiner said that he and Mr. Katz would "get together next week." Mr. Steiner added, "I hope you'll have your checkbook ready."

36. Mr. Katz asked Mr. Steiner's personal opinion regarding "Abrams against D'Amato." Mr. Steiner said his "personal position" was that he "believe[d] in political loyalty." He said, "if someone has been good for Israel, no matter who, if my brother

would run against them, I would support them because they'd been good to Israel-- because that's an important message to people.” Mr. Steiner said,

I'm going to have Seth call you because in the meantime I'm going to be preparing this list. What I'm doing is, I've asked my friends in the various campaigns. I've made about 30 calls. What I'm trying to put together [is] who needs it the most, you know? Because you could dissipate a million dollars, but the point is to put it where it's going to do the most.

Mr. Steiner said that Bob Kasten and Les Aspin were “in big trouble.” Mr. Katz said, “I can't believe it. I mean . . . I don't follow. . . .” Interrupting, Mr. Steiner said, “when you get to know me I'll put you on my list and I'll be sending all these things.” Mr. Steiner said that to meet an unexpected need to raise money for Les Aspin, Mr. Steiner, Daniel Inouye, Bob Kasten, and Senator Leahy had guaranteed a bank loan for Aspin.

37. Mr. Steiner said there was “a problem with another good friend . . . Daniel Inouye.” Mr. Steiner said, “We commissioned a poll and . . . I've got to raise \$27,000 to pay for the poll. . . . So what I'm trying to do is make a priority list, because I don't know how far you want to go. . . . How old are your kids . . . do they have their own checking accounts?” Mr. Katz said they did.

38. Mr. Steiner said he “met with Jim Baker and I cut a deal with him. . . . [Y]ou know they're looking for the Jewish votes, and I'll tell him whatever he wants to hear.”

Mr. Steiner said,

Besides the \$10 billion in loan guarantees, which was a fabulous thing, \$3 billion in . . . military aid, and I got almost a billion dollars in other goodies that people don't even know about. . . . Seven hundred million dollars in military drawdown, from equipment that the United States Army's going to give to Israel; \$200 million the U.S. Government is going to preposition . . . in Israel . . . I've got a whole shopping list of things . . . from Baker and from the Pentagon.

Mr. Steiner said,

This year I said, "Look, Jim, we're going to fight on the F-15s. Israel doesn't want to fight," I said, "but some people on it are going to come up on the floor of the Senate and the House and they're going to fight. If you'll do this, I think I can hold them back. But you've got to do it right away." They didn't want to fight. I said, "You don't want a fight before the election. It's going to hurt Bush. We don't want a fight before the election, we don't want to fight at all. Why can't we work something out?" So we cut a deal. You can't repeat this.

39. Mr. Steiner said,

We'll have to get you involved, I like you, we have a lot to talk about, about real estate, you know. . . . So many great activities going on at AIPAC. You ought to think about coming to some of these things. I'll have a dinner this Fall. I'll have 18-20 Senators there. I run programs in Washington. We just had a, I had at Ted Kennedy's house last month kosher dinner. I brought foremost caterers down. I had 60 people on the couch for dinner. Last year, I did it in Al Gore's house . . . Those are the things you should be getting involved in and knowing what's going on.

40. Mr. Steiner said he was "a trustee of the Democratic National Committee"

and that the Committee and the Clinton Campaign "collected \$63 million" for Clinton and didn't need more money. He said, "we got a guy, . . . Dorgan in North Dakota, who's going to be very good for us and we need money to make sure that he gets in. . . . [W]hen you give \$5,000 or \$10,000 to Bob Kasten, that's very meaningful." He said, "I personally am not allowed, as President of AIPAC, to get involved in Presidential campaigns because I have to deal with whoever wins, . . . but we raised over \$1,000,000 for [Clinton] in New Jersey." He said, "We've also raised for other guys . . . because they're friends, Harkin, the Senator."

41. Mr. Steiner said,

I've known Bill [Clinton] for seven, eight years. . . . I know him on a personal basis. I have friends. One of my friends is Hillary Clinton's scheduler. One of my officer's daughters works there. We gave two employees from AIPAC leave of absences to work on the campaign. I mean, we have a dozen people in that campaign . . . and they're all going to get big jobs. We have friends. . . . [T]his is my business. It's very

complicated and the more you get into it, you'll love it. You sound like a smart guy.

Mr. Steiner added,

[W]e have Bill Clinton's ear. I talked to Bill Clinton. . . . He's going to be very good for us. . . . He's got Jewish friends. A girl who worked for me at AIPAC stood up for them at their wedding. Hillary lived with her. I mean we have those relationships. We have never had that with Bush. Susan Thomases who's in there worked with me on the Bradley campaign; we worked together for 13 years. She's in there with the family. They stay with her when they come to New York. One of my officers, Monte Friedkin is one of the biggest fundraisers for them. I mean, I have people like that all over the country.

42. Publication of the tape-recorded conversation caused Mr. Steiner to resign as President of AIPAC. R. Friedman, "AIPAC of Lies—The Secret Tapes that Brought AIPAC's President Down," *The Village Voice* (November 17, 1992), p. 30. Exhibit 10. According to the *Village Voice* article, Mr. Steiner "said in his resignation statement . . . that many of his assertions to Katz 'went beyond overzealousness and exaggeration and were simply and totally untrue.'"

43. Pursuant to the Campaign Act, as amended, 2 U.S.C. § 437g(a)(1), the plaintiffs on May 20, 2002, filed with the FEC an administrative complaint, designated MUR 5272, against AIPAC. (MUR 5272 Certified Administrative Record [CAR II] at Tab 1.)¹⁵ The complaint stated as follows:

Introduction

1. Complainants assert that if communications by the American Israel Public Affairs Committee (AIPAC) to its supporters urging them to support the federal election campaigns of particular candidates were exempt from being expenditures under the 2 U.S.C. § 431(9)(B)(iii) membership communication exception, as the Federal Election Commission (FEC) previously has found, §

¹⁵ As indicated, CAR II refers to the administrative record generated by plaintiffs' May 20, 2002, administrative complaint, designated MUR 5272. References below to "CAR" refer to the administrative record in MUR 2804 and 2804R.

431(9)(B)(iii) nonetheless required that these communications “be reported to the Commission in accordance with section 434(a)(4)(A)(i) of this title, and in accordance with section 434(a)(4)(A)(ii) of this title with respect to any general election,” because, according to FEC findings, they were communications “expressly advocating the election . . . of . . . clearly identified candidate[s]” and, on information and belief, their cost “exceed[ed] \$2,000 for any election.” On information and belief, AIPAC has failed to comply with this reporting obligation.

* * *

Facts

Prior FEC Findings

7. Pursuant to the Campaign Act, as amended, 2 U.S.C. § 437g(a)(1), the complainants previously filed with the FEC an administrative complaint against AIPAC. The case was designated MUR No. 2804 and, on remand after judicial review, 2804R. In that case, the FEC found “that AIPAC has made, in cooperation, consultation, or coordination with federal candidates, communications to persons urging support, financial or otherwise, for such federal candidates or providing assistance to federal candidates in their campaigns.” Certified Administrative Record (CAR) 3672. [Footnote omitted.] The FEC also found that these AIPAC campaign activities “likely . . . crossed the \$1,000 threshold” set by § 431(4). CAR 3772.

8. AIPAC is an incorporated tax exempt organization which lobbies the Congress and Executive Branch for military and economic aid to the State of Israel, against aid to Arab nations, and for other policies desired by the Israeli government. A nation-wide organization claiming more than 50,000 dues-paying supporters, AIPAC has several regional offices in addition to its New York headquarters. AIPAC's staff is organized into a Legislative Department, a Foreign Policy Issues Department, a Development Department, a Finance Department, and a Political Department. (CAR) 1474-1476. [Footnote omitted.] AIPAC's annual revenues in 1989 exceeded \$9,987,000, more than double the revenues received by the organization in 1983. CAR 3678, 3751, 3774. AIPAC's membership solicitation mailings in the fall of 1989 said:

AIPAC members are the key to our effectiveness—they distinguish the pro-Israel lobby from every other lobby in Washington. Members of Congress know that our membership—50,000 strong—represents a nationwide pro-Israel constituency who know the issues, demand action, and monitor the results. . . . Frankly, we don't think you could get more “bang for your buck” anywhere else.

CAR 3749.

9. AIPAC describes the “central mission” of its Political Department as “educating AIPAC members about the electoral process and its impact on U.S.-Israel relations.” CAR 1727-1728, 3700. AIPAC admits, however, and the FEC found, that the department's routine, ongoing pursuit of this mission includes:

a. researching and investigating the views of House and Senate candidates on AIPAC's issues, to determine which candidates favor AIPAC positions, CAR 1727, 3678, 3697, 3724;

b. investigating candidates’ campaign financial and other needs, and their probability of electoral success, CAR 3693-3694, 3697, 3702;

c. arranging, preparing for, traveling to, and attending meetings with candidates and their campaign staffs to (i) receive candidates' position papers; (ii) deliver literature on AIPAC's issues; and (iii) discuss the issues, candidates' views on the issues, candidates' campaign needs and probability of success, and whether candidates should speak with local AIPAC supporters about the candidates' campaigns, CAR 3693-3694, 3700, 3702, 3721-3722;

[Footnote]

The FEC found:

AIPAC's statement regarding its meetings with candidates demonstrates the depth of its interest in their campaigns and the extent to which AIPAC gathers political intelligence regarding the campaigns of federal candidates and where they stand on issues relevant to AIPAC. AIPAC then uses this information in making a variety of communications to persons it considers its “members.”

CAR 3697. AIPAC's communications stemming from its candidate meetings and other political intelligence gathering are described in ¶¶ d., e., g., and h.

[End of Footnote]

d. preparing annual “Campaign Update” reports (i) identifying candidates who favor AIPAC views, (ii) noting the views of the candidates' opponents, and (iii) stating whether races involving pro-AIPAC candidates are close, CAR 3678, 3683-3684, 3699-3700;

[Footnote]

The FEC found, CAR 3700:

This update identifies the incumbent and challengers, provides poll results, rates the incumbent's re-election prospects, reviews the candidates' fundraising, rates the candidates on their positions on issues of concern to AIPAC, and provides a narrative analysis of the campaign. It is derived in part from the political intelligence AIPAC gathers from its meetings with candidates and makes it clear to AIPAC's most politically active supporters which candidates rate best on the issues relevant to AIPAC and, thus, are deserving of support, financial or otherwise.

[End of Footnote]

e. distributing the "Campaign Update" reports, literature on AIPAC's issues, and candidate position papers to AIPAC supporters, at AIPAC's annual Policy Conference and breakfast meetings, and in individual communications, CAR 1728, 1730, 3678, 3699-3701, 3703, 3753;

f. monitoring the extent of Jewish participation in federal election campaigns, CAR 1728, 3701-3702, 3707;

[Footnote]

To accomplish this part of her job, AIPAC Political Director Elizabeth Shroyer compiled a list of Jewish "political committees," also known as PACs. CAR 1728. AIPAC claims, however, that in 1988 it stopped maintaining the list to "avoid even the appearance that such a list was indicative of a relationship between AIPAC and pro-Israel PACs." CAR 3701. The FEC did not determine which information sources Ms. Shroyer has used since 1988 to monitor Jewish participation in federal election campaigns.

[End of Footnote]

g. urging AIPAC supporters "to build relationships with candidates that support strong U.S.-Israel relations," CAR 1727, and to become active in the political process, CAR 1727, 3683-3686, 3687, 3700;

h. apprising AIPAC supporters "of races in which their involvement would promote a strong understanding by a candidate of the concerns of the American Jewish community, . . . [t]owards this goal . . . introduc[ing] AIPAC members to [either] candidates for Federal office" or their campaign staffs, CAR 1727-1728, 3695, 3702, 3706, 3715, and similar urging of

AIPAC supporters to become active in federal election campaigns. CAR 3683-3686, 3687, 3700, 3702, 3715.

10. On March 21, 2000 the FEC found that “American Israel Public Affairs Committee [AIPAC] was a membership organization during the period addressed in MUR 2804.” The FEC determined that AIPAC's candidate-coordinated communications to AIPAC supporters “urging support, financial or otherwise, for such federal candidates,” CAR 3672, were not campaign contributions because they were communications to members of a membership organization, within the meaning of the FEC's new regulation, 11 C.F.R. § 114.1(e)(1).

11. The Commission also did not determine whether the cost of AIPAC's communications to its supporters “urging support, financial or otherwise, for [the] federal candidates,” CAR 3672, “exceed[ed] \$2,000 for any election,” which would require that they be reported to the Commission. 2 U.S.C. § 431(9)(B)(iii).

Cost of AIPAC's Communications

12. Given the extent of AIPAC's involvement in federal election campaigns, indicated by the facts found in MUR No. 2804—and, on information and belief, by facts which would be found by additional appropriate investigation, including pursuit of evidentiary leads not pursued in MUR No. 2804 (*see Akins v. FEC*, Civ. A. Nos. 92-1864 and 00-1478 (JGP) (U.S. Dist. Ct. D.C.), Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 9-27)—the cost of AIPAC's communications to its supporters “urging support, financial or otherwise, for [the] federal candidates,” CAR 3672, on information and belief, must have “exceed[ed] \$2,000 for any election.” As the FEC's findings show, AIPAC's election activities involve meetings with nearly every candidate for federal office, CAR 136, 3692-3693; systematic dissemination of the Campaign Update reports and other literature identified above; and regular meetings and phone calls with AIPAC supporters—all carried out by several paid, full-time AIPAC staff members whose “central mission” is to conduct these activities, and who comprise a major department of an organization with an annual budget of nearly ten million dollars.

Continuation of AIPAC Communications Urging Support of Candidates

13. On information and belief, AIPAC, since the time of the communications to supporters found in MUR No. 2804, has continued and is still continuing to communicate to its supporters, urging support of specific candidates for federal election, constituting express advocacy of these candidates' elections, and costing more than \$2,000 for an election. *See also, Akins v. FEC*, Civ. A. Nos. 92-1864 and 00-1478 (JLG) (U.S. Dist. Ct. D.C.), Memorandum in Support of Plaintiffs' Motion for Summary Judgment, at 25-27.

AIPAC's Failure to Report

14. On information and belief, AIPAC has not “reported to the Commission in accordance with” 2 U.S.C. § 434(a)(4)(A)(i), “and in accordance with section 434(a)(4)(A)(ii) . . . with respect to any general election,” any of its communications to its supporters “urging support, financial or otherwise, for . . . federal candidates,” CAR 3672.

Claim

15. Complainants assert that AIPAC's failure to report in accordance with 2 U.S.C. § 434(a)(4)(A) its communications to its supporters “urging support, financial or otherwise, for . . . federal candidates,” CAR 3672, thus “expressly advocating the election . . . of . . . [those] candidate[s],” has violated 2 U.S.C. § 431(9)(B)(iii), in instances where the cost of the communications “exceed[ed] \$2,000 for any election”—given that the FEC has found these supporters to be members of AIPAC and found AIPAC to be a membership organization, within the meaning of 11 C.F.R. § 114.1(e)(1).

Relief

16. Complainants maintain that the FEC by proper investigation should determine in which instances the cost of AIPAC's communications to its supporters “urging support, financial or otherwise, for . . . federal candidates,” CAR 3672, “exceed[ed] \$2,000 for any election,” 2 U.S.C. § 431(9)(B)(iii), and order AIPAC, with respect to those instances, to “report[] to the Commission in accordance with” 2 U.S.C. § 434(a)(4)(A)(i) “and in accordance with section 434(a)(4)(A)(ii) . . . with respect to any general election.”

44. The information identified in paragraph 12 of plaintiffs' administrative complaint as “evidentiary leads not pursued in MUR No. 2804,” and which paragraph 12 said could be found, and is found, on pages 9-27 of plaintiffs' summary judgment memorandum filed in the related consolidated cases, included the information stated above in paragraphs 17, 18, 20-23, 26-29, 31, and 32.

45. The information identified in paragraph 13 of plaintiffs' administrative complaint as indicating that “since the time of the communications to supporters found in MUR No. 2804, [AIPAC] has continued and is still continuing to communicate to its

supporters, urging support of specific candidates for federal election, constituting express advocacy of these candidates' elections, and costing more than \$2,000 for an election,” which paragraph 13 said could be found, and is found, on pages 25-27 of plaintiffs’ summary judgment memorandum filed in the related consolidated cases, is stated above in paragraphs 33-41.

46. On October 27, 2003, a Commission Associate General Counsel wrote a letter to counsel for plaintiffs, (CAR II Tab 12), stating:

On September 30, 2003, the Commission determined that MUR 5272 should be dismissed as a matter of prosecutorial discretion. . . . A Statement of Reasons adopted by the Commission explaining its decision to dismiss this matter as a matter of prosecutorial discretion will be placed on the public record. . . . The Federal Election Campaign Act of 1971, as amended, allows a complainant to seek judicial review of the Commission's dismissal of this action. *See* 2 U.S.C. § 437g(a)(8).

47. On November 20, 2003, a Commission Associate General Counsel sent to counsel for plaintiffs by facsimile a copy of the Commission’s Statement of Reasons, which had been signed by the Commissioners on November 12 and 13, 2003. The Statement of Reasons, CAR II Tab 15, said:

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. [Citations omitted.] 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. § 431(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.

Respectfully submitted,

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Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES E. AKINS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civ. A. No. 92-1864 (RJL)
)	Civ. A. No. 00-1478 (RJL)
FEDERAL ELECTION COMMISSION,)	Civ. A. No. 03-2431 (RJL)
)	
Defendant.)	
)	

**MEMORANDUM IN SUPPORT OF
PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

The Fundamental Purpose of the Campaign Act

The fundamental purpose of the laws restricting and requiring disclosure of federal election campaign contributions is to prevent corruption and the appearance of corruption, which result when “large contributions are given to secure a political *quid pro quo* from current and potential office holders.” *Buckley v. Valeo*, 424 U.S. 1, 26 (1976).¹⁶

To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. . . .

Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

Id. at 26-27. Restrictions on contributions to candidates are justified to preserve “the integrity of our system of representative democracy.” *Id.* at 23, 26.

¹⁶ “Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.” *Buckley*, 424 U.S. at 27.

The Role of Disclosure Requirements

Recordkeeping and disclosure requirements directly serve the Campaign Act's fundamental purpose:

First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office.

* * *

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.

* * *

Third, and not least significant, recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations [established by other sections of the campaign finance law].

424 U.S. 67-68. (Footnotes omitted.)

Disclosure Statutes and Regulations

Under 2 U.S.C. § 431(4) a "political committee" is "any . . . group of persons . . . which makes expenditures aggregating in excess of \$1,000 during a calendar year."

Under 2 U.S.C. §§ 433 and 434(a) and (b), each "political committee" must regularly report its receipts and disbursements. Reports must identify each individual who in any calendar year gives to or receives from the committee more than \$200. § 434(b)(3)(A), (5)(A), and (6)(B).

An "expenditure" is, with exceptions, "any purchase, payment, distribution, loan, . . . or gift of money or anything of value, made by any person for the purpose of

influencing any election for Federal office.” 2 U.S.C. § 431(9)(A)(i). “Expenditures” include “contributions.” *See* § 431(8)(A)(i). An “expenditure” is a “contribution” if it is coordinated with a candidate. 11 C.F.R. §§ 109.20 and 109.21.

Section 431(9)(B)(iii) of title 2 exempts from the definition of expenditure “communication by any membership organization or corporation to its members,” if the organization is “not organized primarily for the purpose of influencing” federal elections.

This section, however, also states

that the costs incurred by a membership organization (including a labor organization) or by a corporation directly attributable to a communication expressly advocating the election or defeat of a clearly identified candidate (other than a communication primarily devoted to subjects other than the express advocacy of the election or defeat of a clearly identified candidate), shall, if such costs exceed \$2,000 for any election, be reported to the Commission in accordance with section 434(a)(4)(A)(i) of this title, and in accordance with section 434(a)(3)(A)(ii) of this title with respect to any general election.

The First Amendment concerns raised by prohibition or excessive burdening of election communications do not apply to disclosure obligations. *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986). *See* (CAR II 344 n. 6.) The Campaign Act’s disclosure obligations promote, rather than infringe, First Amendment values. *See FEC v. Furgatch*, 807 F.2d 857, 862 (9th Cir. 1987).¹⁷

Overview of AIPAC

The administrative record compiled in 1992 showed as follows. AIPAC is an incorporated tax exempt organization that lobbies the Congress and Executive Branch for military and economic aid to the State of Israel, against aid to Arab nations, and for other

¹⁷ Upon a showing of reasonable likelihood of government or private harassment, minor parties and their supporters may establish their right to exemption from disclosure provisions. *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1962).

policies desired by the Israeli government. A nation-wide organization claiming more than 50,000 dues-paying supporters, AIPAC has several regional offices in addition to its New York headquarters. AIPAC's staff is organized into a Legislative Department, a Foreign Policy Issues Department, a Development Department, a Finance Department, and a Political Department. (CAR 1474-1476.)¹⁸ AIPAC's annual revenues in 1989 exceeded \$9,987,000, more than double the revenues received by the organization in 1983. (CAR 3678, 3751, 3774.) AIPAC's membership solicitation mailings in the fall of 1989 said:

AIPAC members are the key to our effectiveness--they distinguish the pro-Israel lobby from every other lobby in Washington. Members of Congress know that our membership—50,000 strong—represents a nationwide pro-Israel constituency who know the issues, demand action, and monitor the results. . . . Frankly, we don't think you could get more “bang for your buck” anywhere else.

(CAR 3749.)

AIPAC describes the “central mission” of its Political Department as “educating AIPAC members about the electoral process and its impact on U.S.-Israel relations.”

(CAR 1727-1728, 3700.) AIPAC admits, however, and the Commission found, that the department's routine, ongoing pursuit of this mission includes:

a. researching and investigating the views of House and Senate candidates on AIPAC's issues, to determine which candidates favor AIPAC positions, (CAR 1727, 3678, 3697, 3724);

¹⁸ The Legislative Department lobbies Members of Congress and disseminates to AIPAC supporters voting records, statements, and position papers by Members of Congress. (CAR 14774-1475.) The Foreign Policy Issues Department lobbies the Executive branch and writes materials used to lobby the Executive and Legislative branches. CAR 1475. The Development Department conducts fundraising for AIPAC. The Finance Department supports AIPAC's management and coordinates communications with regional offices. (CAR 1476.)

b. investigating candidates' campaign financial and other needs, and their probability of electoral success, (CAR 3693-3694, 3697, 3702);

c. arranging, preparing for, traveling to, and attending meetings with candidates and their campaign staffs to (i) receive candidates' position papers; (ii) deliver literature on AIPAC's issues; and (iii) discuss the issues, candidates' views on the issues, candidates' campaign needs and probability of success, and whether candidates should speak with local AIPAC supporters about the candidates' campaigns, (CAR 3693-3694, 3700, 3702, 3721-3722);¹⁹

d. preparing annual "Campaign Update" reports (i) identifying candidates who favor AIPAC views, (ii) noting the views of the candidates' opponents, and (iii) stating whether races involving pro-AIPAC candidates are close, (CAR 3678, 3683-3684, 3699-3700);²⁰

¹⁹ The Commission found:

AIPAC's statement regarding its meetings with candidates demonstrates the depth of its interest in their campaigns and the extent to which AIPAC gathers political intelligence regarding the campaigns of federal candidates and where they stand on issues relevant to AIPAC. AIPAC then uses this information in making a variety of communications to persons it considers its "members."

(CAR 3697.) AIPAC's communications stemming from its candidate meetings and other political intelligence gathering are described in ¶¶ d., e., g., and h.

²⁰ The Commission found, CAR 3700:

This update identifies the incumbent and challengers, provides poll results, rates the incumbent's re-election prospects, reviews the candidates' fundraising, rates the candidates on their positions on issues of concern to AIPAC, and provides a narrative analysis of the campaign. It is derived in part from the political intelligence AIPAC gathers from its meetings with candidates and makes it clear to AIPAC's most politically active supporters which candidates rate best on the issues relevant to AIPAC and, thus, are deserving of support, financial or otherwise.

e. distributing the “Campaign Update” reports, literature on AIPAC’s issues, and candidate position papers to AIPAC supporters, at AIPAC’s annual Policy Conference and breakfast meetings, and in individual communications, (CAR 1728, 1730, 3678, 3699-3701, 3703, 3753);

f. monitoring the extent of Jewish participation in federal election campaigns, (CAR 1728, 3701-3702, 3707);²¹

g. urging AIPAC supporters “to build relationships with candidates that support strong U.S.-Israel relations,” (CAR 1727), and to become active in the political process, (CAR 1727, 3683-3686, 3687, 3700);

h. apprising AIPAC supporters “of races in which their involvement would promote a strong understanding by a candidate of the concerns of the American Jewish community, . . . [t]owards this goal . . . introduc[ing] AIPAC members to [either] candidates for Federal office” or their campaign staffs, (CAR 1727-1728, 3695, 3702, 3706, 3715), and similar urging of AIPAC supporters to become active in federal election campaigns. (CAR 3683-3686, 3687, 3700, 3702, 3715.)

On June 16, 1992, the Commission found “probable cause to believe that the American Israel Public Affairs Committee violated 2 U.S.C. § 441b,” which prohibits corporate campaign contributions and expenditures. (CAR 3871.) The Commission held, based on AIPAC’s admission of the routine, ongoing activities stated above, “that AIPAC has made, in cooperation, consultation, or coordination with federal candidates,

²¹ To do this, AIPAC Political Director Elizabeth Shroyer compiled a list of Jewish “political committees,” also known as PACs. CAR 1728. AIPAC claims, however, that in 1988 it stopped maintaining the list to “avoid even the appearance that such a list was indicative of a relationship between AIPAC and pro-Israel PACs.” (CAR 3701.) The Commission did not determine which information sources Ms. Shroyer has used since 1988 to monitor Jewish participation in federal election campaigns.

communications to persons urging support, financial or otherwise, for such federal candidates or providing assistance to federal candidates in their campaigns.” (CAR 3672.) Because of the “cooperation, consultation, or coordination with federal candidates,” the Commission held that AIPAC’s campaign activities were not merely “independent expenditures,” but “contributions” to the favored candidates.

The Commission also found that AIPAC’s annual expenditures for campaign communications coordinated with candidates “likely crossed” the statutory \$1,000 threshold. (CAR 3772.) This undoubtedly is the case. These AIPAC communications involve meetings with nearly every candidate for federal office, (CAR 136, 3692-3693); systematic dissemination of the Campaign Update reports and other literature identified above; and regular meetings and phone calls with AIPAC supporters—all carried out by several paid, full-time AIPAC staff members whose “central mission” is to conduct these activities, and who comprise a major department of an organization with an annual budget of nearly ten million dollars.²²

The Commission's Decisions²³

Despite the findings stated above, the Commission in 1992 held that AIPAC is not a political committee. The Commission based this finding solely on the ground that

²² In the administrative proceedings, AIPAC made no claim that disclosure of its election activities would subject the organization to harassment warranting an exemption under *Brown v. Socialist Workers '74 Campaign Committee (Ohio)*, 459 U.S. 87 (1962).

²³ Evidence, findings, and reasons upon which the FEC based its decisions are stated in the General Counsel’s Brief dated January 30, 1992, (CAR 3671-3778); the General Counsel’s Report dated May 29, 1992, (CAR 3842-3869); the General Counsel’s Report dated March 8, 2000, (CAR 3964); and the Commission’s July 27, 1992 Statement of Reasons, (CAR 3924-3926). *See National Rifle Association v. Federal Election Commission*, 854 F.2d 1330, 1333, n. 7 (D.C. Cir. 1988) (General Counsel reports “provide the substantive basis for the Commission’s actions”).

“AIPAC’s political activities [do] not rise to such a level as to make them a major purpose of the organization.” (CAR 3672.) The Commission said

AIPAC has not become a political committee under the Act because AIPAC’s campaign-related activities, while likely to have crossed the \$1,000 threshold, constitute only a small portion of its overall activities and does [sic] not appear to be its major purpose. The evidence shows that AIPAC is primarily and fundamentally a lobbying organization interested in U.S.-Israel relations and in legislation affecting Israel. Its campaign-related activities and communications are undertaken as an adjunct to, and in support of, its lobbying efforts.

(CAR 3772.)

The Court of Appeals rejected the Commission’s “major purpose” test. *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1996) (*en banc*). The Supreme Court, without deciding this issue, vacated the appellate decision and remanded the case for determination of whether AIPAC is eligible for the 2 U.S.C. § 431(9)(B)(iii) membership communication exemption. *FEC v. Akins*, 524 U.S. 11, 28-29 (1998).

On March 21, 2000, the Commission, without further investigation, concluded that AIPAC “was a membership organization during the period addressed in MUR 2804.” CAR 3986.²⁴ The Commission found that AIPAC is not “organized primarily for the purpose of influencing” federal elections. (CAR 3982.)²⁵ The Commission based this finding solely on its 1992 determination that AIPAC’s election campaign communications to its supporters are not a major purpose, or not the major purpose, of AIPAC. (*Id.*) On this basis, the Commission held that AIPAC’s membership communication falls within the § 431(9)(B)(iii) membership communication exemption.

²⁴ The post-remand portion of the record was filed by the Commission October 2, 2000. The Commission’s March 21, 2000 decision is found at tab 13 of that filing.

²⁵ The General Counsel’s Report is found at tab 12 of the post-remand record.

The Commission did not consider whether AIPAC's communications should be disentitled to the § 431(9)(B)(iii) membership communication exemption because they solicit campaign contributions and are coordinated with candidates and therefore are communications "by" the candidates, not constitutionally protected internal membership communications "by" AIPAC. The Commission also did not determine whether AIPAC activities other than communication to members are campaign contributions that require AIPAC to comply with political committee disclosure obligations.

Plaintiffs thereafter filed a second complaint with the Commission. Statement of Material Facts ¶ 43. Plaintiffs claimed that, even if AIPAC is eligible for the § 431(9)(B)(iii) membership communication exemption, its membership communications costing over \$2,000 must be reported under § 431(9)(B)(iii) because they are "communication[s] expressly advocating the election or defeat of . . . clearly identified candidate[s]."

The Commission dismissed plaintiffs' second complaint "as a matter of prosecutorial discretion." CAR II Tab 12. The Commission said:

AIPAC's membership communications . . . did not contain express advocacy. [Citations omitted.] 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 . . . 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.

(CAR II Tab 15.)

Reviewability

Commission decisions dismissing complaints are subject to review in this Court under 2 U.S.C. § 437g(a)(8). The doctrine of *Heckler v. Chaney*, 470 U.S. 821 (1985)—which holds unreviewable agency decisions declining to take enforcement action on grounds of prosecutorial discretion—does not apply to the Commission. *Democratic Congressional Campaign Committee v. FEC*, 831 F. 2d 1131, 1133-34 (D.C. Cir. 1987). Commission decisions asserting prosecutorial discretion as the ground for dismissal of administrative complaints are subject to judicial review. *Id.*

Merits

The Commission Improperly Failed to Consider and Find Whether AIPAC’s Lobbying is Primarily Based on Influencing Elections

The Court cannot accept the Commission’s finding that AIPAC is not “organized primarily for the purpose of influencing” elections, within the meaning of § 431(9)(B)(iii), merely because “[t]he evidence shows that AIPAC is primarily . . . a lobbying organization.” (CAR 3772, 3982.) As the Commission itself found, AIPAC’s “campaign-related activities and communications are undertaken as an adjunct to, and in support of, its lobbying efforts.” (CAR 3772.) The critical question, overlooked by the Commission, is whether AIPAC’s “lobbying efforts” are primarily based on “campaign-related activities and communications” that influence elections.

The evidence suggests that AIPAC’s lobbying *is* primarily based on influencing elections. Regarding Senator Percy’s defeat in 1984, AIPAC Executive Director Thomas Dine said, “All the Jews in America, coast to coast, gathered to oust Percy and the American politicians—those who hold public positions now and those who aspire—got the message.” (CAR 145.) An attendee at AIPAC’s 1983 Policy Conference wrote that

AIPAC members are supposed to report all contributions to the organization so that, although AIPAC itself never contributes, its lobbyists can say later to the politician “We were responsible for you receiving X amount of dollars” in the last campaign.

(CAR 103.) *See also* (CAR 3688) (affidavit of AIPAC Executive Director Thomas Dine saying “modern lobbying techniques” include “candidate support practices” and “other volunteer political activities such as political action committees, . . . to maximize . . . impact on the political process”); (CAR 94) (newspaper article reporting former AIPAC employee Barbara Amouyal as having said that AIPAC mixed lobbying with political fundraising, that legislators perceived that AIPAC was deeply involved in the political fundraising process, that this fostered resentment, and that she had “heard from congressional staffers and from members about this resentment”); (CAR 145) (reporting AIPAC member Michael Goland to have lobbied two Senators against arms for Saudi Arabia by threatening to subject them to “negative advertisements similar to those that had brought Percy down”). This evidence says that AIPAC’s lobbying is based primarily on election clout, not academic argument. To achieve its lobbying goals, AIPAC operates primarily as an election machine, not a think tank.

The Commission’s view that an organization is not “organized primarily for the purpose of influencing” elections—even if it is primarily organized for the purpose of lobbying and its lobbying is primarily based on influencing elections—is “not in accordance with law.” 5 U.S.C. § 706(2)(A). The Commission’s view defeats the fundamental purpose of the Campaign Act—preventing corruption and the appearance of corruption, which result when “large contributions are given to secure a political *quid pro quo* from current and potential office holders.” *Buckley v. Valeo*, 424 U.S. 1, 26 (1976).

The Commission's view also negates the central role that disclosure obligations play in achieving the Act's fundamental purpose.

[D]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.

Id. at 67. Courts “must reject administrative constructions of the statute that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.” *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981).

Under the Commission's erroneous view, a membership organization is “not organized primarily for the purpose of influencing” elections even if its lobbying is based entirely on influencing elections through membership communication. According to the Commission, an organization that spends 60% of its resources lobbying the Congress and 40% of its resources electing the Congress through membership communication is “primarily a lobbying organization” and “not organized primarily for the purpose of influencing” elections, even if its lobbying consists entirely of demanding favors, promising election support if the favors are granted, and threatening defeat if the favors are denied. Under the Commission's view, moreover, such a membership organization not only escapes the reach of the “organized primarily” clause, it also avoids all disclosure of its election influencing, so long as its membership communication is artfully constructed to stop short of “express advocacy of . . . election or defeat.” *Id.* This is true even if the organization is so large and powerful that 40% of its resources are

sufficient to win all elections and the remaining 60% produce obedience by all Members of Congress to whatever the organization commands, because any noncompliance results in a political death sentence. Disclosure of such an organization's stranglehold on elections, however, is a principal goal of the Campaign Act. The Act must be construed to achieve, not defeat, that goal.

Because of its erroneous view, the Commission did not consider, and made no finding, whether AIPAC's lobbying is primarily *quid pro quo* lobbying—demands that Members of Congress vote for legislation and appropriations favored by AIPAC *because of* AIPAC's support for them in past election campaigns or AIPAC's promises to support, or threats to oppose, their future re-election. Because the Commission failed to consider and make a finding on this issue, the Commission's decision is arbitrary and capricious and contrary to law. *Motor Vehicle Mfrs. Assoc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency decision arbitrary and capricious if agency “entirely failed to consider an important aspect of the problem”); *Industrial Union v. American Petroleum Inst.*, 448 U.S. 607, 630 (1980) (agency failure to make finding on principal issue invalidates agency decision).

Under 5 U.S.C. § 706(2)(A), the Court should “hold unlawful and set aside” the Commission's “finding[] and conclusion[]” that AIPAC is not “organized primarily for the purpose of influencing” elections merely because “[t]he evidence shows that AIPAC is primarily . . . a lobbying organization.” (CAR 3772, 3982.) The Court should remand

the case to the Commission and order it to investigate and find whether AIPAC's lobbying is primarily based on election influencing.²⁶

If AIPAC's lobbying is primarily based on election influencing, the Court should require the Commission to find that AIPAC is "organized primarily for the purpose of influencing" elections, and that its election campaign membership communications are election "expenditures." The Court should require the Commission to determine whether these expenditures make AIPAC a "political committee" and obligate AIPAC to comply with the disclosure obligations that apply to political committees.

The Commission Improperly Failed to Consider Whether AIPAC's Membership Communications are Disentitled to the § 431(9)(B)(iii) Exemption Because They Solicit Contributions and are Coordinated with Candidates and Therefore are "By" the Candidates, Not AIPAC

Only campaign communications "by" a membership organization to its members can qualify for exemption under 2 U.S.C. § 431(9)(B)(iii). The purpose of § 431(9)(B)(iii) is to exempt genuine intra-organizational communications, not to allow use of an organization's internal communication channels as conduits for campaign appeals by candidates. The purpose of the statutory exemption is solely to protect the constitutional right of organizations to communicate with their members.

Election campaign communications that present an appearance or a danger of *quid pro quo* corruption are subject to legislative restriction, and the fundamental purpose of the Campaign Act is to combat the appearance and danger of this type of corruption.

²⁶ The Court also should require that the Commission, in making this finding, explain its interpretation of "organized primarily" and how this provision applies to the evidence. *Common Cause v. FEC*, 676 F. Supp. 286, 292-93 (D.D.C. 1986). The Commission based its "organized primarily" finding solely on its 1992 "major purpose" finding, CAR 3982. What the Commission means by "major purpose," however, is not clear. Statement of Facts ¶ 11.

Buckley v. Valeo, 424 U.S. 1 (1976). Independent campaign advocacy is entitled to far greater constitutional protection than campaign advocacy that is coordinated with candidates. *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 259-260 (1986). Requests for campaign contributions communicated by an organization to its members, in close coordination with candidates, present an appearance and danger of *quid pro quo* corruption, where the candidates have reason to believe that the organization likely will seek favors from the candidates if they are elected.

These are precisely the kinds of communications that the Commission found that AIPAC makes to its members. See pages 5-6, above. And, because AIPAC is a lobbying organization, the likelihood that AIPAC will seek favors from the candidates who are elected is indisputable.

The Commission must interpret and apply the Campaign Act in a manner that serves, not defeats, the purposes of the Act. *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981). To serve the purposes of the Act, communication “by” an organization to its members, within the meaning § 431(9)(B)(iii), must not include communication that is coordinated with a candidate and that solicits a contribution to the candidate’s campaign, where facts known to the organization and the candidate provide reason to believe that the organization likely will ask the candidate to take action beneficial to the organization if the candidate is elected. These solicitations present a danger and appearance of *quid pro quo* corruption and are not entitled to the constitutional protection that is afforded to independent intra-organizational communications.

The Commission failed to address this issue when it held that AIPAC's candidate-coordinated communications are exempt membership communications. The case must be remanded to the Commission for proper resolution of this issue.

The Commission Improperly Failed to Investigate and Find Whether AIPAC is a Political Committee Due to Expenditures Other Than Membership Communications

The record shows that, apart from AIPAC's membership communications, the Commission failed to determine the true extent of AIPAC's involvement in election campaigns. Statement of Material Facts ¶¶ 16-41. The only facts found by the Commission were those either admitted by AIPAC or established by the Commission's review of campaign contribution reports. Except for review of these reports, the Commission's investigation of matters not admitted by AIPAC was limited to single sets of interrogatories, to some witnesses. The Commission took no depositions, and it failed to pursue many investigative leads. *Compare, Common Cause v. Federal Election Commission*, 489 F. Supp. 738, 741 (D.D.C. 1980) (to investigate alleged violations, the Commission "conducted over 60 depositions, and collected approximately 60,000 pages of documents"). Though the Court of Appeals commented on the likely insufficiency of the Commission's investigation, *Akins v. FEC*, 101 F.3d 731 at n. 13 (D.C. Cir. 1996) (*en banc*), the Commission never addressed the point.²⁷

The Commission has a statutory duty to investigate complaints of election law violations. 2 U.S.C. § 437g(a)(2). While the Commission's conduct of an investigation requires discretion, and the agency's determination of whether further inquiry likely

²⁷ The Court's comment has no binding effect, since the Supreme Court vacated the appellate court's decision. *FEC v. Akins*, 524 U.S. 11 (1998). The Supreme Court, however, did not criticize, or in any other way undermine the appellate court's observation concerning the investigation.

would be fruitful is entitled to deference, the Commission's compliance with the statutory duty to investigate is not immune from judicial review and must be found deficient if "arbitrary and capricious." *Common Cause v. Federal Election Commission*, 655 F. Supp. 619, 622-623 (D.D.C. 1986). Where the Commission's investigation is inadequate, the case must be "returned to [the Commission] to supplement the record accordingly." *Id.* at 623, citing *Airmark Corp. v. FAA*, 758 F.2d 685, 692 (D.C. Cir. 1985). The Commission's dismissal of complaints without adequate investigation is dismissal "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

If the Commission on remand finds that AIPAC is a political committee due to its membership communication, further investigation to determine other grounds for this designation will be unnecessary. But if this is not the case, the Court should require the Commission to investigate and find whether AIPAC is a political committee due to current or recent activities similar to the past activities that the Commission failed to investigate properly. Statement of Material Facts ¶¶ 16-41. The occurrence of those activities in the past is ample justification for inquiry whether AIPAC is involved in similar activities now, even if the Commission does not already have evidence of them. The Commission should send interrogatories and document requests to AIPAC and follow up appropriately with depositions of AIPAC officers, active members, and witnesses identified during the investigation.

The Commission Improperly Failed to Find that AIPAC's Past Membership Communications Were Express Advocacy of the Election or Defeat of Clearly Identified Candidates and Improperly Failed to Investigate AIPAC's Current Membership Communications

Plaintiffs' second administrative complaint claimed that, even if AIPAC's communications are entitled to the § 431(9)(B)(iii) exemption, AIPAC has failed to

comply with the § 431(9)(B)(iii) requirement to report membership communications “expressly advocating the election or defeat of . . . clearly identified candidate[s].” The Commission’s dismissal of plaintiffs’ complaint cannot be sustained.

“Only Isolated Occasions”

As its principal ground for dismissing plaintiffs’ second complaint, the Commission erroneously asserted that “[t]he 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.” Statement of Material Facts ¶ 5. The Commission’s assertion is contrary to the findings and evidence in MUR 2804, and contrary to law.

Contrary to the Commission’s assertion, the findings and evidence in MUR 2804 show that AIPAC routinely and widely communicates with its members, advocating election of clearly identified candidates. As we noted above, *supra* at 5-6, the Commission found: (a) “AIPAC has made, in cooperation, consultation, or coordination with federal candidates, communications to [AIPAC members] urging support, financial or otherwise, for such federal candidates”; (b) AIPAC distributes “Campaign Update” reports, literature on AIPAC’s issues, and candidate position papers to AIPAC members at AIPAC’s annual Policy Conference and breakfast meetings, and in individual communications; and (c) the “Campaign Update” reports “make[] it clear to AIPAC’s most politically active supporters which candidates rate best on the issues relevant to AIPAC and, thus, are deserving of support, financial or otherwise.” These three findings, taken together, constitute a finding that AIPAC routinely and widely communicates with its members, expressly advocating election of clearly identified candidates.

The Commission's contrary assertion is not in accordance with law. The Commission did not expressly articulate its interpretation of the statute; but its reasoning necessarily says that "a communication" within the meaning of the statute does not occur unless both express advocacy of support and identification of candidates deemed worthy of support occur in the same sentence, or only moments apart in an oral statement, or perhaps within the same paragraph or page of a written communication, or within some other unexplained degree of proximity. (CAR II 94, 104-07.) The Commission's position denies that an oral statement saying "We urge you to choose candidates to support and we urge you to support them financially or by working in their campaigns," *combined with* delivery of a Campaign Update report clearly stating "which candidates rate best on the issues relevant to AIPAC and, thus, are deserving of support, financial or otherwise," constitute "a communication" expressly urging election of clearly identified candidates.

The Commission reasoned that AIPAC's exhortations to its members to choose candidates and to contribute financially or otherwise to their campaigns are not by themselves communications that trigger the statutory reporting requirement because these exhortations by themselves do not identify the candidates deemed deserving of support. (CAR II at 104.) The Commission also reasoned that AIPAC Campaign Updates clearly identifying candidates deemed deserving of support are not, by themselves, communications that trigger the statutory reporting requirement because the Campaign Updates by themselves do not contain express exhortations to support the candidates' campaigns. (CAR II 098.) Based on this reasoning, the Commission dismissed plaintiffs' complaint.

The Commission's reasoning is absurd. It defeats the purpose of the statute's disclosure provisions.²⁸ It is absurd to maintain that a membership organization lawfully can escape the requirement to report membership "communication expressly advocating the election or defeat of a clearly identified candidate" simply by artfully splitting the communication into two parts—communicating the first part (express advocacy) on one occasion or by one means, and communicating the second part (identification of favored candidates) on another occasion or by another means. Where, as here, both parts of the communication are transmitted to the same members during the same election campaign, the two parts taken together meet the statutory standard. The Commission's contrary position must be rejected.

"No Indication Costs Exceeded \$2,000"

The Commission's erroneous limitation of its focus to "isolated occasions"—a few instances in which AIPAC communicated simultaneously and by the same means both express advocacy of election and clear candidate identification—caused the Commission erroneously to conclude that "there is no indication the costs associated with [AIPAC's membership] communications exceeded the \$2,000 reporting threshold." The Commission's cost conclusion was erroneous because the Commission limited its cost assessment only to the cost of the "isolated" communications. Statement of Material Facts ¶ 47.

Because of this erroneous limitation of its cost assessment, the Commission never articulated the standard for measuring, and never measured, the cost of the routine, widespread membership communications that AIPAC makes to its members during each

²⁸ The purpose of these provisions is discussed *supra*, at 2. See also, *FEC v. Furgatch*, 807 F.2d 857, 862 (9th Cir. 1987).

election campaign—communications that are split into two parts, but that in combination meet the statutory standard. The case must be remanded with direction to the Commission to find whether the cost of these routine, widespread communications crossed the \$2,000 statutory threshold, as they undoubtedly did.

The cost of these communications includes the cost of gathering, preparing, and disseminating the Campaign Updates (and other written communications, such as candidate position papers, (CAR II 099-101)), as well as the cost of AIPAC's communications exhorting members to contribute financially or otherwise to candidates' campaigns. These costs—including staff salaries, overhead, travel expenses, policy conference expenses, and publication and distribution costs—almost certainly exceed an average of \$2,000 for each election campaign involved. As the administrative complaint noted, and the record shows:

AIPAC's election activities involve meetings with nearly every candidate for federal office; . . . systematic dissemination of the Campaign Update reports and other literature identified; . . . and regular meetings and phone calls with AIPAC supporters—all carried out by several paid, full-time AIPAC staff members whose "central mission" is to conduct these activities, and who comprise a major department of an organization with an annual budget of nearly ten million dollars.

Statement of Material Facts ¶ 43; (CAR 136, 1474-1476, 3692-3693, 3749.)

“Further Investigation Frustrated by Problems of Proof”

The Commission's decision asserted that “any further investigation” of AIPAC's relevant membership communications “would be frustrated by problems of proof.”

Statement of Material Facts ¶ 47. This assertion is arbitrary and capricious because it is based on the Commission's erroneous view of what would have to be investigated—namely, more instances similar to the “isolated occasions” found by the Commission.

As we showed above, further investigation seeking to prove such other similar instances is not essential to this case. The evidence and findings in MUR 2804 concerning AIPAC's routine, widespread membership communications are sufficient to find reason to believe that § 431(9)(B)(iii) requires AIPAC to disclose the cost of these communications. The record reveals the magnitude, and obvious high cost, of this systematic AIPAC activity, comprising, as it does, the central mission of the paid professional staff of a major department of an organization having a \$10 million annual budget. Further investigation should seek primarily more detailed information concerning the extent and cost of AIPAC's routine, widespread membership communications—including staff salaries, overhead, travel expenses, policy conference expenses, publication and distribution costs and similar information revealed by written financial records and other documents.

“Expiration of the Applicable Statute of Limitations”

As another reason for dismissing the complaint, the Commission asserted that “any . . . enforcement of this activity would be frustrated by . . . expiration of the applicable statute of limitations.” Statement of Material Fact ¶ 47. This assertion is contrary to law. No statute of limitations precludes the Commission from either ordering AIPAC to report the cost of its membership communications, or seeking judicial equitable relief enforcing the order. The five-year statute of limitations, 28 U.S.C. § 2462, applies only to enforcement penalties, not equitable relief. *FEC v. The Christian*

Coalition, 965 F. Supp. 66 (D.D.C. 1997); *FEC v. National Republican Senatorial Committee*, 877 F. Supp. 15 (D.D.C. 1995).²⁹

Even if the five year statute of limitations applied to the Commission's pursuit of judicial equitable relief, the statute has not run. The commencement on August 12, 1992, of judicial proceedings seeking review of MUR 2804 tolled the running of the statute of limitations, because AIPAC itself raised at the outset in MUR 2804 the issue of whether its communications urging support of candidates were membership communications. (CAR II 341.) AIPAC raised this issue in defense against plaintiffs' allegations that the communications had to be disclosed as campaign expenditures. AIPAC's raising of the membership communication issue necessarily raised the question whether its communications had to be disclosed *because* they were membership communications, given the extensive expenditures devoted to them. The administrative complaint in MUR 2804 sought disclosure of AIPAC's campaign communications. Administrative complaints are not required to cite statutes. That the complaint did not cite § 431(9)(B)(iii) does not mean that AIPAC's obligation to disclose its membership communications under that statute was not at issue in MUR 2804, where AIPAC expressly asserted that its campaign communications were membership communications and the Commission's investigation revealed their great extent.

The remand to the Commission did not end the tolling, as the remand proceedings were required by court order. Even if the remand were deemed to have ended tolling, recommencement of judicial proceedings on May 19, 2000, again tolled the running of

²⁹ The contrary decision in *FEC v. National Right to Work Committee, Inc.*, 916 F. Supp. 10 (D.D.C. 1996), is not persuasive, as the opinion in *FEC v. The Christian Coalition*, 965 F. Supp. 66 (D.D.C. 1997), demonstrates.

the statute. The statute of limitations therefore has not run as to all of the AIPAC membership communications that occurred during the period at issue in MUR 2804 (1983-1990).³⁰

Even if this were not the case, there is no reason to believe that AIPAC has not continued, to this day, its widespread, routine membership communications advocating election of clearly identified candidates. We discuss this further below. No applicable statute of limitations has run as to AIPAC's ongoing activities.

“No Information AIPAC Continued Communications After 1990”

The Commission asserted there is “no information AIPAC continued [its election-related membership] communications after 1990.” Statement of Material Facts ¶ 47.

This assertion is arbitrary and capricious, however, as it is contradicted by the record.

Statement of Material Facts ¶¶ 33-41.

More important, AIPAC's response to plaintiffs' second complaint admitted that AIPAC continues to urge its members to contribute financially or otherwise to federal election campaigns, and continues to send them Campaign Updates stating which candidates support AIPAC positions. (CAR II 049 and 053.) There is no reason to believe that anything has changed.³¹ The Commission's refusal to investigate AIPAC's

³⁰ Even if the statute of limitations would preclude judicial enforcement of part or all of a Commission decision finding that AIPAC is required to disclose the election-related membership communications found in MUR 2804, that would not be a valid reason for the Commission to refuse to issue the decision. Instead, it would be an arbitrary and capricious reason. Because the existing evidence and findings warrant issuance of the decision, no additional prosecutorial resources would have to be expended. The Commission need only announce the legal conclusion that the existing evidence and findings compel.

³¹ See, e.g., Harold Meyerson, *Netanyahu Feels the Heat*, Wash. Post, June 17, 2009, at A21. (“AIPAC encourages its backers to donate to candidates who toe a . . . hawkish line”).

current and recent membership communications to find whether these communications must be reported under § 431(9)(B)(iii), is arbitrary, capricious, and contrary to law.

Remand for proper investigation and findings is required. *Common Cause v. Federal Election Commission*, 655 F. Supp. 619, 622-623 (D.D.C. 1986).

Conclusion

Plaintiffs' motion should be granted.

Respectfully submitted,

/s/ Daniel M. Schember

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Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

_____)	
JAMES E. AKINS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
v.)	Civ. A. No. 92-1864 (RJL)
)	Civ. A. No. 00-1478 (RJL)
FEDERAL ELECTION COMMISSION,)	Civ. A. No. 03-2431 (RJL)
)	
Defendant.)	
_____)	

ORDER

On consideration of plaintiffs’ motion for summary judgment, it is this ____ day of _____, 20__,

ORDERED that plaintiffs’ motion is granted. It also is
ADJUDGED and ORDERED as follows.

1. Defendant Federal Election Commission’s dismissals of plaintiffs’ administrative complaints in MUR 2804 and MUR 5272 are unlawful and are set aside; the dismissals are “arbitrary, capricious, an abuse of discretion, . . . otherwise not in accordance with law,” and “without observance of procedure required by law.” 5 U.S.C. § 706(2).

2. The case is remanded to the Commission.

3. The Commission is ordered, on remand,

(a) to explain its interpretation of “organized primarily” as that phrase is used in 2 U.S.C. § 431(9)(B)(iii);

(b) to investigate and find whether lobbying by the American Israel Public Affairs Committee (AIPAC) is based “primarily” on AIPAC’s influencing of federal elections;

(c) if the Commission finds that AIPAC’s lobbying is based primarily on influencing elections, to find that AIPAC is “organized primarily for the purpose of influencing” them, within the meaning of § 431(9)(B)(iii);

(d) if the Commission finds that AIPAC is not organized primarily for the purpose of influencing elections, to decide whether AIPAC’s membership communication is disentitled to the § 431(9)(B)(iii) exemption because it solicits campaign contributions and is coordinated with candidates and therefore is not “by” AIPAC, within the meaning of the statute;

(e) if the Commission finds that AIPAC is organized primarily for the purpose of influencing federal elections or that its membership communication is disentitled to the § 431(9)(B)(iii) exemption, to investigate and find whether AIPAC is a “political committee,” within the meaning of § 431(4), due to its election communication to its members;

(f) if the Commission finds that AIPAC is not a political committee due to its election communication to its members, to investigate and find whether AIPAC is a political committee due to other expenditures;

(g) if the Commission finds that AIPAC is a political committee, to require AIPAC to comply with the applicable disclosure requirements;

(h) if the Commission finds that AIPAC is not a political committee and not organized primarily for the purpose of influencing federal elections, to

investigate and find whether AIPAC's membership communication includes "communication expressly advocating the election or defeat of . . . clearly identified candidate[s]," within the meaning of § 431(9)(B)(iii), irrespective of whether communication that expressly advocates election or defeat is separate from communication that identifies candidates and their political views; and

(i) if the Commission finds that AIPAC is not a political committee and not organized primarily for the purpose of influencing federal elections, but that AIPAC's membership communication includes communication expressly advocating the election or defeat of a clearly identified candidate, to investigate and find whether the cost of the communication requires AIPAC to report it under § 431(9)(B)(iii), and, if so, to require AIPAC to comply with the applicable reporting requirements.

Richard J. Leon
United States District Judge

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