FIRST GENERAL COUNSEL'S REPORT

SENITIVE

MUR: 6081
DATE COMPLAINT FILED: 9/26/2008
DATE OF NOTIFICATION: 10/2/2008
LAST RESPONSE RECEIVED: 11/25/2008
DATE ACTIVATED: 12/17/2008
EXPIRATION OF SOL: 8/1/2013

COMPLAINANTS:
Obama for America
Democracy 21

RESPONDENTS:
American Issues Project, Inc.
Ed Martin
Ed Failor Jr.
Harold Simmons

RELEVANT STATUTES
AND REGULATIONS:
2 U.S.C. § 431(4)
2 U.S.C. § 431(8)
2 U.S.C. § 431(9)
2 U.S.C. § 431(17)
2 U.S.C. § 432
2 U.S.C. § 433
2 U.S.C. § 434(b)
2 U.S.C. § 434(c)
2 U.S.C. § 441a(a) & (f)
26 U.S.C. § 501(c)
11 C.F.R. § 100.22
11 C.F.R. § 100.57
11 C.F.R. § 109.10(c)
11 C.F.R. § 114.10

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED:

1 In MUR 6094, Democracy 21 filed a complaint alleging that American Issues Project and another group violated the Federal Election Campaign Act by failing to register and report as political committees. Because the substantive allegations leveled against AIP in MUR 6094 are identical to the allegations raised in this matter, we thus administratively severed AIP from MUR 6094 and address those allegations in this report.
I. INTRODUCTION

This matter stems from Complaints filed by Obama for America and Democracy alleging that American Issues Project, Inc. ("AIP") committed a knowing and willful violation of the Federal Election Campaign Act, as amended, (the "Act") because it failed to organize, register, and report as a political committee. In addition, the complaint filed by Obama for America ("Obama Complaint") alleges that AIP failed to file a post-convention independent expenditure report in violation of 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10(c). The Obama Complaint also alleges that Harold Simmons, the main (and possibly only) contributor to AIP, violated the $5,000 contribution limit to political committees by knowingly and willfully violating the biennial aggregate contribution limit of 2 U.S.C. § 441a(a)(3).

Citing the Supreme Court's decision in FEC v. Massachusetts Citizens for Life, 479 U.S. 238 (1986) ("MCFL"), and Commission's regulations, including those for qualified nonprofit corporations, AIP argues that it cannot be treated as a political committee. According to AIP, it devoted the majority of its spending to activities and programs appropriate for 501(c)(4) social welfare organizations and not to the nomination or election of federal candidates. In its October 17, 2011, Supplemental Response, AIP further maintains that the Supreme Court's decision in Citizens United negated the "legal fiction" that AIP was required to be a qualified nonprofit corporation ("QNC") to make lawful expenditures during the 2008 election cycle.

Based on the available information, we recommend that the Commission find reason to believe that AIP violated 2 U.S.C. §§ 432, 433, and 434 by failing to organize, register, and

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2 Citizens United v. FEC, 130 S. Ct. 76 (2010), allowing corporations to make expenditures and electioneering communications, renders AIP's claim to QNC status moot.

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report as a political committee and that the Commission authorize pre-probable cause conciliation With respect to the other violations, first, we recommend that the Commission find no reason to believe that AIP violated 2 U.S.C. § 441a(f) by knowingly accepting contributions in excess of $5,000. Next, because we conclude that AIP was required to file reports as a political committee, we recommend that the Commission dismiss the allegation that AIP violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10(c), which require the filing of a Form 5 for independent expenditures made by every person other than a political committee. Further, we recommend that the Commission find no reason to believe that Harold Simmons violated 2 U.S.C. § 441a(a)(1)(C) & (a)(3), because there are no limits on contributions to independent expenditure only political committees. Finally, we recommend that the Commission find no reason to believe that AIP's officers Ed Martin and Ed Failor, Jr. violated the Act.

II. FACTUAL AND LEGAL ANALYSIS

A. Facts

1. AIP

AIP is a 501(c)(4) nonprofit Delaware corporation that was originally registered as Citizens for the Republic ("CFTR") in May 2007, before changing its name first to Avenger, Inc. on March 19, 2008, and then to AIP on August 6, 2008. AIP's corporate filings state that its purpose is "the promotion of social welfare, including, for such purposes, [as] the making of

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4 See Democracy 21 Complaint, Exs. A, C, and D (Delaware corporate filings); see also Will Evans and Peter Overby, Obama Goes After Conservative Group - but Can't Find Business Filings, NPR - SECRET MONEY BLOG, Aug. 26, 2008, available at http://www.npr.org/blogs/secretmoney/2008/08/obama_goes_after_conservative.html. Based on AIP's corporate filings, it appears that CFTR and Avenger Inc. were run by a different board of directors than the board that currently runs AIP, which consists of Ed Martin and Ed Failor Jr.
distributions to organizations that qualify as exempt organizations . . . .5 AIP's website stated that its goal was to "stand strong for the American ideals that make this country special and promote conservative values that have stood the test of time."6

AIP President and Board Member Ed Martin reportedly said that he joined AIP to "jump[] at the chance" to get involved with the group because it offered a new avenue to press a conservative agenda as the presidential race played out.7 In addition, Martin "worried that McCain would be vastly outspent, because Obama opted out of public financing and its accompanying spending restrictions . . . ."8 Another news source reported that "[Martin] said the group formed to combat the 'hundreds of millions' that left-leaning groups such as NARAL Pro-Choice America and others would inevitably spend on the election, along with Mr. Obama's decision to opt out of the public financing system that forces campaigns to abide by spending limits."9

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6 AIP Website, http://www.americanissuesproject.org/about (last visited Sept. 3, 2010) (archived website available in Voting Ballots Matters) (the "AIP Website"). The AIP Website is no longer publicly available. It appears that AIP blocked public access to its website at some point in 2009 (or at the latest, early 2010). At that time, the AIP Website required an administrative username and password to access any content. At some point in 2011 (or at the earliest, September 2010) the AIP Website's domain name appears to have been taken over by another group also referring to itself as "American Issues Project." This new group, however, appears to be a business consulting company and unrelated to AIP.

7 Deirdre Shesgreen, Outside Groups Ready to Enter Political Fray, ST. LOUIS POST-DISPATCH, Sept. 18, 2008, at A1.

8 Id.


In its October 17, 2011, response, AIP did not directly address the substance of the news articles under consideration by the Office of the General Counsel. AIP responded that "[d]uring the 2008 presidential election, liberal supporters of President Obama targeted AIP and its major donors for threats, verbal assault and intimidation." Oct. 17, 2011 Resp. at 1. And AIP included in its response "just a few of the news articles describing the scheme developed in 2008 by the Obama campaign for their left-wing defenders to carry out planned attacks against conservative groups and donors to conservative causes." Id.
2. **AIP's Spending**

In late August 2008, AIP ran a television advertisement attacking Barack Obama called "Know Enough."\(^{10}\) In October 2008, AIP aired "What Happened?," which focused on the ties to the mortgage industry of Senators Reid and Dodd. Finally, on the day after the 2008 election, AIP issued a report called "Issue Autopsy '08," a poll of likely voters in battleground states.

The "Know Enough" ad focused on Obama's asserted connections with William Ayers, a former member of a domestic terrorist group called the "Weather Underground." After detailing the Weather Underground's attempted attacks on the U.S. Capitol and other federal buildings in the 1970s, the "Know Enough" advertisement states that "Barack Obama is friends with Ayers" and that "Obama's political career was launched in Ayers' home."\(^{11}\) The advertisement ends with a picture of Obama and asks rhetorically, "Do you know enough to elect Barack Obama?"\(^{12}\)

AIP filed an FEC Form 5 (Report of Independent Contributions Made and Contributions Received) with the Commission on August 19, 2008, disclosing $2,878,872.75 in expenditures on this advertisement, as well as an identical amount in receipts. The filing disclosed that all of AIP's receipts came from Simmons, that the advertisement "Oppose[d]" Barack Obama, and that AIP filed its Form 5 as a "qualified nonprofit corporation" or "QNC." American Issues Project, FEC Form 5 (Aug. 19, 2008).

AIP considered its next television advertisement, launched October 8, 2008, as "the second major phase of a major television advertising campaign... spotlighting the role congressional liberals played in blocking oversight and reform of Fannie Mae and Freddie

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\(^{10}\) When "Know Enough" was aired, an AIP spokesperson reportedly stated that "the group has set aside money to carry out non-election-related work to meet the legal requirements [for 501(c)(4) organizations]." Jim Kuhnhenn, *Obama Seeks to Silence Ad Tying Him to 60s Radical*, ASSOCIATED PRESS, Aug. 26, 2008.

\(^{11}\) See Attach. 1.

\(^{12}\) *Id.*
The initial ad buy was for $1 million. AIP did not report this advertisement to the Commission as an independent expenditure or as an electioneering communication, presumably because it was aimed at Senators Reid and Dodd, both of whom were not on the ballot in 2008 but had filed statements of candidacy with the Commission for their 2010 Senate races.

Finally, in 2008, AIP produced and circulated “Issue Autopsy ‘08,” which was a survey of early voters and likely voters in four swing states testing voters’ opinions on key issues in the days leading up to the election. The report was released on the day after the election, November 5, and the results of the poll were published on the AIP Website.

AIP regularly updated its website through much of 2009. It also released a television advertisement in February 2009 called “Every Single Day,” which reportedly cost almost $1 million and criticized stimulus spending by the Obama administration. The group released two more advertisements in 2009, “Chattering” on February 23, and “Shocked” on March 23.

AIP contends that “[t]he majority of [its] annual expenditures are devoted to grassroots lobbying and education on issues, public policies and other communications, activities and programs appropriate to a 501(c)(4) social welfare organization in accordance with all applicable

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provisions of the Internal Revenue Code.” According to AIP, it “is a Section 501(c)(4) organization and... a majority of its program expenditures were related to issues rather than candidates, political parties or campaigns.”

Along with its response, AIP submitted its 2008 Form 990 tax return, which assertedly demonstrates that “AIP spent a majority of its program expenditures during the 2008 fiscal year on non-political activities, programs and issues.” AIP contends that the Form 990 shows that “of the $5,897,307 in program expenditures in [fiscal year] 2008, AIP spent $2,876,753.00 on political campaign/lobbying activities.” The Form 990 also reports on spending that includes $788,599 on an “Online Advocacy Project” and $2,231,955 on Educational Research and Media, but does not detail whether any of this activity includes advertisements such as “What Happened” and “Every Single Day.”

B. ANALYSIS

1. The Test for Political Committee Status

The Act and Commission regulations define a “political committee” as “any committee, club, association or other group of persons which receives contributions aggregating in excess of...

18 Resp. at 2. AIP also stated — in a letter posted on its website from its counsel to one of the Complainants — that “AIP is not going away. It will be involved going forward as a qualified nonprofit corporation with substantial plans to provide the leadership necessary to fill the void and fight for conservative principles from now on.” Attach. 2 at 3, Letter from Cleta Mitchell, Counsel, AIP to Fred Wertheimer, President, Democracy 21 (Oct. 11, 2008).

19 October 17, 2011 Resp. at 1.

20 Id.

21 Id. In addition to AIP’s 2008 IRS Form 990, we have obtained the application for 501(c)(4) status (IRS Form 1024) submitted by AIP’s predecessor, CFTR, and AIP’s 2007 IRS Form 990. These annual reports cover AIP’s tax year, which begins on May 1 of the corresponding year of the annual report and ends on April 30 of each following year. For example, AIP’s 2007 Form 990 covers the period of May 1, 2007 through April 30, 2008.

22 AIP’s 2008 IRS Form 990 describes the Online Advocacy Project in the following terms: “a sophisticated plan for online grassroots outreach to support its mission...” AIP’s Educational Research and Media is described as “a national media educational program to educate and inform the public on core conservative issues in support of its mission.”
$1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000
during a calendar year.” 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5. In Buckley v. Valeo,
424 U.S. 1 (1976), the Supreme Court decided that defining political committee status “only in
terms of the annual amount of ‘contributions’ and ‘expenditures’” might be overbroad, reaching
“groups engaged purely in issue discussion.” Id. at 79. To cure that infirmity, the Court
concluded that the term “political committee” “need only encompass organizations that are under
the control of a candidate or the major purpose of which is the nomination or election of a
candidate.” Id. (emphasis added). Accordingly, under the statute as thus construed, an
organization that is not controlled by a candidate must register as a political committee only if
(1) it crosses the $1,000 threshold and (2) it has as its “major purpose” the nomination or election
of federal candidates.

a. The Commission’s Case-By-Case Approach to Major Purpose

Although Buckley established the major purpose test, it provided no guidance as to the
proper approach to determine an organization’s major purpose. See, e.g., Real Truth About
Abortion, Inc. v. FEC, 681 F.3d 544, 556 (4th Cir. 2012), cert. denied, 81 U.S.L.W. 3127 (U.S.
Jan. 7, 2013) (No. 12-311) (“RTAA”). The Supreme Court’s discussion of major purpose in a
subsequent opinion, MCFL, 479 U.S. 238, was similarly sparse. See id. at 262. In that case, the
Court identified an organization’s independent spending as a relevant factor in determining an
organization’s major purpose, but examined the entire record as part of its analysis and did not
chart the outer bounds of the test. 479 U.S. at 238. Following Buckley and MCFL, lower courts
have refined the major purpose test — but only to a limited extent. In large measure, the
contours of political committee status — and the major purpose test — have been left to the
Commission.

Following Buckley, the Commission adopted a policy of determining on a case-by-case
basis whether an organization is a political committee, including whether its major purpose is the
nomination or election of federal candidates. Political Committee Status, 72 Fed. Reg. 5596
(Feb. 7, 2007) (Supplemental Explanation and Justification) (“Supplemental E&J”). The
Commission has periodically considered proposed rulemakings that would have determined
major purpose by reference to a bright-line rule — such as proportional (i.e., 50%) or aggregate
threshold amounts spent by an organization on federal campaign activity. But the Commission
consistently has declined to adopt such bright-line rules. See Independent Expenditures;
Corporate and Labor Organization Expenditures: 57 Fed. Reg. 33,548, 33,558-59 (July 29,
1992) (Notice of Proposed Rulemaking); Definition of Political Committee, 66 Fed. Reg. 13,681,
13,685-86 (Mar. 7, 2001) (Advance Notice of Proposed Rulemaking); see also Summary of
Comments and Possible Options on the Advance Notice of Proposed Rulemaking on the
Definition of “Political Committee,” Certification (Sept. 27, 2001) (voting 6-0 to hold proposed
rulemaking in abeyance).

See FEC v. Machinists Non-Partisan Political League, 655 F.2d 380, 396 (D.C. Cir. 1981) (stating that
political committee “contribution limitations did not apply to . . . groups whose activities did not support an existing ‘candidate’” and finding Commission’s subpoena was overly intrusive where directed toward “draft” group lacking a “candidate” to support); FEC v. GOPAC, Inc., 917 F. Supp. 851, 861-62 (D.D.C. 1996) (holding that a group’s support of a “farm team” of future potential federal candidates at the state and local level did not make it a political committee under the Act); see also Unity08 v. FEC, 596 F.3d 861, 869 (D.C. Cir. 2010) (concluding that an organization “is not subject to regulation as a political committee unless and until it selects a ‘clearly identified’ candidate”).

Like other administrative agencies, the Commission has the inherent authority to interpret its statute through a case-by-case approach. See SEC v. Chenery Corp., 332 U.S. 194, 202-03 (1947) (“[T]he choice made between proceeding by general rule or by individual . . . litigation is one that lies primarily in the informed discretion of the administrative agency.”)
In 2004, for example, the Commission issued a notice of proposed rulemaking asking whether the agency should adopt a regulatory definition of "political committee." See Political Committee Status: 69 Fed. Reg. 11,736, 11,745-49 (Mar. 11, 2004) (Notice of Proposed Rulemaking). The Commission declined to adopt a bright-line rule, noting that it had been applying the major purpose test "for many years without additional regulatory definitions," and concluded that "it will continue to do so in the future." See Final Rules on Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,064-65 (Nov. 23, 2004).

b. Challenges to the Commission's Major Purpose Test and the Supplemental E&J

When the Commission's 2004 decision not to adopt a regulatory definition was challenged in litigation, the court rejected plaintiffs' request that the Commission initiate a new rulemaking. Shays v. FEC, 424 F. Supp. 2d 100, 117 (D.D.C. 2006) ("Shays I"). The district court found, however, that the Commission had "failed to present a reasoned explanation for its decision" to engage in case-by-case decision-making, rather than rulemaking, and remanded the case to the Commission to explain its decision. Id. at 116-17.

Responding to the remand, the Commission issued a Supplemental Explanation and Justification for its final rules on political committee status to further explain its case-by-case approach and provide the public with additional guidance as to its process for determining political committee status. Supplemental E&J at 5595. The Supplemental E&J explained that "the major purpose doctrine requires fact-intensive analysis of a group's campaign activities compared to its activities unrelated to campaigns." Id. at 5601-02. The Commission concluded that the determination of an organization's major purpose "requires the flexibility of a case-by-case analysis of an organization's conduct that is incompatible with a one-size fits-all rule," and
that "any list of factors developed by the Commission would not likely be exhaustive in any
event, as evidenced by the multitude of fact patterns at issue in the Commission's enforcement
actions considering the political committee status of various entities." Id.

To determine an entity's "major purpose," the Commission explained that it considers a
group's "overall conduct," including public statements about its mission, organizational
documents, government filings (e.g., IRS notices), the proportion of spending related to "federal
campaign activity," and the extent to which fundraising solicitations indicate funds raised will be
used to support or oppose specific candidates. Id. at 5597, 5605. Among other things, the
Commission informed the public that it compares how much of an organization's spending is for
"federal campaign activity" relative to "activities that are not campaign related." Id. at 5601,
5605 (emphasis added).

To provide the public with additional guidance, the Supplemental E&J referenced
enforcement actions on the public record, as well as advisory opinions and filings in civil
enforcement cases following the 2004 rulemaking. Id. at 5604-05. The Commission noted that
the settlements in several MURs involving section 527 organizations "provide considerable
guidance to all organizations" regarding the application of the major purpose test and "reduce
any claim of uncertainty because concrete factual examples of the Committee's political
committee analysis are now part of the public record." Id. at 5595, 5604.

After the Commission issued the Supplemental E&J, the Shays I plaintiffs again
challenged, under the Administrative Procedure Act, 5 U.S.C. §§ 551-59, the Commission's
case-by-case approach to political committee status. The court rejected the challenge, upholding
the Commission's case-by-case approach as an appropriate exercise of the agency's discretion.

Shays v. FEC, 511 F. Supp. 2d 19, 24 (D.D.C. 2007) ("Shays II"). The court recognized that "an
organization... may engage in many non-electoral activities so that determining its major
purpose requires a very close examination of various activities and statements.” *Id.* at 31.

Recently, the Fourth Circuit rejected a constitutional challenge to the Commission’s case-
by-case determination of major purpose. The court upheld the Commission’s approach, finding
that *Buckley* “did not mandate a particular methodology for determining an organization’s major
purpose,” and so the Commission was free to make that determination “either through
categorical rules or through individualized adjudications.” *RTAA*, 681 F.3d at 556. The court
concluded that the Commission’s case-by-case approach was “sensible,... consistent with
Supreme Court precedent and does not unlawfully deter protected speech.” *Id.* at 558. The
Fourth Circuit concluded that the Supplemental E&J provides “ample guidance as to the criteria
the Commission might consider” in determining an organization’s political committee status and
therefore is not unconstitutionally vague. *Id.; see* Transcript of Telephonic Oral Ruling, *Free

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25. The *RTAA* court rejected an argument — similar to the one made by AIP here — that the major purpose
test must be confined to “(1) examining an organization’s expenditures to see if campaign-related speech amounts to
50% of all expenditures; or (2) reviewing ‘the organization’s central purpose revealed by its organic documents.’”
*RTAA*, 681 F.3d at 555. The Fourth Circuit recognized that determining an organization’s major purpose “is
inherently a comparative task, and in most instances it will require weighing some of the group’s activities against
others.” *Id.* at 556; *see also* Koerber *v. FEC*, 483 F. Supp. 2d 740 (E.D.N.C. 2008) (denying preliminary relief in
challenge to Commission’s approach to determining political committee status, and noting that an organization’s
‘major purpose’ is inherently comparative and necessarily requires an understanding of an organization’s overall
(considering organization’s statements in brochures and “fax alerts” sent to potential and actual contributors, as well
as its spending influencing federal elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) (“The
organization’s purpose may be evidenced by its public statements of its purpose or by other means, such as its
expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.”); *id.* at 864, 865
(applying a fact-intensive inquiry, including review of organizations’ meetings attended by national leaders and
organization’s “Political Strategy Campaign Plan and Budget,” and concluding that organization did not have as its
major purpose the election of federal candidates).
Commission’s method of determining political committee status to be constitutional), appeal
docketed, No. 12-8078 (10th Cir. Oct. 19, 2012). 26

c. Organizational and Reporting Requirements for Political
Committees

Political committees — commonly known as “PACs” — must comply with certain
organizational and reporting requirements set forth in the Act. PACs must register with the
Commission, file periodic reports for disclosure to the public, appoint a treasurer responsible for
maintaining its records, and identify themselves through “disclaimers” on all of their political
advertising, on their websites, and in mass e-mails. See 2 U.S.C. §§ 432-34; 11 C.F.R.
§110.11(a)(1). 27 The Act’s reporting requirements “are minimal” and the organizational
requirements are not “much of an additional burden.” SpeechNow.org v. FEC, F.3d 686, 696
(D.C. Cir. 2010) (“SpeechNow”). These requirements, which promote disclosure, do not, of
course, prohibit speech. RTAA, 681 F.3d at 552 n.3.

In the wake of the Supreme Court’s decision in Citizens United v. FEC, 130 S. Ct. 876
(2010), which struck down the Act’s prohibitions on corporate independent expenditures and
electioneering communications, the D.C. Circuit held in SpeechNow that political committees
that engage only in independent expenditures are not subject to contribution limits. See 599 F.3d
at 696. These political committees, often referred to as independent expenditure-only political

26 The Supreme Court’s decision in FCC v. Fox Television Stations, Inc. is not to the contrary. See 132 S. Ct.
2307, 2317 (2012) (“[A] regulation is not vague because it may at times be difficult to prove an incriminating fact
but rather because it is unclear as to what fact must be proved”). In that case, the FCC’s indecency standard was
held to be vague for lack of notice when it applied a new stricter standard, ex post facto, to the Fox defendants, and
when it relied on a single “isolated and ambiguous statement” from a 50-year old administrative decision to support
its finding of indecency against the ABC defendants. Id. at 2319. Here, in sharp contrast, the Supplemental E&J —
which was issued several years before the conduct at issue — provides extensive guidance on the Commission’s
approach to major purpose and has withstood both APA and constitutional challenges. See also Center for
Individual Freedom v. Madigan, 697 F.3d 464 (7th Cir. 2012) (“Madigan”) (rejecting vagueness challenge to the
definition of “political committee” in the Illinois campaign finance statute).

27 An organization must register as a political committee when it crosses the $1,000 threshold and determines,
based on the guidance in the Supplemental E&J, that it has the requisite major purpose.
committees or Super PACs, continue to be subject, however, to the “minimal” “reporting
requirements of 2 U.S.C. §§ 432, 433, and 434(a), and the organizational requirements of
2 U.S.C. §§ 431(4) and 431(8).” Id. at 689.

Notably, the Supreme Court has stressed that such requirements serve the vital role of
disclosure in political discourse. See Citizens United, 130 S. Ct. at 916 (recognizing that
increased “transparency” resulting from FECA disclosure requirements “enables the electorate to
make informed decisions and give proper weight to different speakers and messages”); Doe v.
Reed, 561 U.S. ___, 130 S. Ct. 2811, 2820 (2010) (holding that public disclosure of state
referendum petitions serves important government interest of “promot[ing] transparency and
accountability in the electoral process,” and “preserving the integrity of the electoral process”);
Madigan, 697 F.3d at 490 (upholding Illinois’s campaign finance disclosure provisions against
constitutional facial challenge, finding a substantial relation to “Illinois’s interest in informing its
electorate about who is speaking before an election”); see also Doe, 130 S. Ct. at 2837 (Scalia,
J., concurring) (“Requiring people to stand up in public for their political acts fosters civic
courage, without which democracy is doomed.”). 28

2. Application of the Test for Political Committee Status to American Issues
   Project

   a. Statutory Threshold

   To assess whether an organization has made an “expenditure,” the Commission “analyzes
whether expenditures for any of an organization’s communications made independently of a
candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader
definition at 11 C.F.R. § 100.22(b).” Supplemental E&J at 5606.

28 But cf. Minn. Citizens for Life, Inc. v. Swanson, 692 F.3d 864, 876 (8th Cir. 2012) (striking down certain
registration and disclosure provisions of Minnesota’s campaign finance law, finding that those obligations as applied
to associations that do not meet Buckley’s “major purpose test” are unduly burdensome and do not match any
“sufficiently important disclosure interest”).
AIP's Form 5 filed with the Commission lists independent expenditures totaling almost $2.9 million for the “Know Enough” advertisement. Thus, AIP made expenditures well in excess of the $1,000 statutory threshold for political committee status.

b. Major Purpose

AIP states — in its Response, on its website, and in its tax returns — that its major purpose is not federal campaign activity but rather grassroots advocacy, education on issues and public policies, and other activities appropriate for a section 501(c)(4) organization. The Commission noted in the Supplemental E&J that it may consider such statements in its analysis of an organization’s major purpose, Supplemental E&J at 5606, but that such statements are not necessarily dispositive. See Real Truth About Obama v. FEC, No. 3:08-cv-00483, 2008 WL 4416282, at *14 (E.D. Va. Sept. 24, 2008) (“A declaration by the organization that they are not [organized] for an electioneering purpose is not dispositive.”) (emphasis in original, alteration added), aff’d, 575 F.3d 342 (4th Cir. 2009), vacated on other grounds, 130 S. Ct. 2371 (2010), remanded and decided, 796 F. Supp. 2d 736, affirmed sub nom. Real Truth About Abortion v. FEC, 681 F.3d 544 (4th Cir. 2012), cert. denied, 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311).

Under the Commission’s case-by-case approach, the Commission considers the organization’s “overall conduct,” including its disbursements, activities, and statements. Supplemental E&J at 5597. Here, AIP’s proportion of spending related to federal campaign activity is alone sufficient to establish that its major purpose in 2008 was the nomination or election of federal candidates.

AIP spent $2,878,872.75 in 2008 on a single independent expenditure. AIP’s argument that it was not a political committee rests on its contention that this amount does not constitute a
majority of its 2008 fiscal tax year spending, which was $5,897,307. AIP’s argues — by
stressing that the Commission should focus on its spending reported in its IRS Form 990 — that
“major purpose” is determined based on a group’s fiscal tax year, as opposed to a calendar year.
The Commission has determined previously, however, that “neither FECA, as amended, nor any
judicial decision interpreting it, has substituted tax status for the conduct-based determination
required for political committee status.” Supplemental E&J at 5999. Rather, when interpreting
and applying the Act, the Commission has concluded that “a detailed examination of each
organization’s contributions, expenditures, and major purpose” is the proper approach, as
described in detail above. Id.

Furthermore, a calendar year, not a self-selected fiscal year, provides the firmest statutory
footing for the Commission’s major purpose determination — and is consistent with FECA’s
plain language. The Act defines “political committee” in terms of expenditures made or
contributions received “during a calendar year.” 2 U.S.C. § 431(4) (emphasis added). A
calendar year test is therefore consistent with the Act’s plain language.

Moreover, using a calendar year as the statutory basis for defining “political committee”
as required by the Act but not as the basis for examining major purpose, as AIP suggests, could
lead to absurd results. For example, two groups with identical spending patterns could be
evaluated differently if one group ended its fiscal tax year on May 31 and the other’s fiscal tax
year ended on December 31. The possibility of such an incongruous result is underscored by the
ability of a nonprofit organization to change its tax filing period with the IRS.

Finally, examining a group’s spending with reference to a calendar year, rather than a
fiscal year, is consistent with the Commission’s actions in the enforcement matters cited as
guidance in the 2007 Supplemental E&J. In two matters cited by the 2007 Supplemental E&J —
and in one concluded shortly thereafter — the Commission focused on the group’s activity
during the 2004 calendar year for that election to determine major purpose, and only used the
groups’ later activity to assess their ongoing reporting obligations as political committees. The
Commission, however, has not routinely examined a group’s post-election activity unless such
activity implicated its ongoing obligations under the Act.

A clear majority of AIP’s total expenditures made during the 2008 calendar year was for
"Know Enough," an independent expenditure. The “Know Enough” advertisement accounts
for, at the least, 55% of the group’s 2008 calendar year activity of no more than $5,209,991 on
programmatic activity. Because AIP spent more than a majority of its funds on express
advocacy in 2008, it had as its major purpose federal campaign activity (i.e., the nomination or
election of a federal candidate). Accordingly, we recommend that the Commission find reason

For example, in MUR 5487 (Progress for America Voter Fund), the Commission’s major purpose analysis
of the group’s spending was based on the funds raised and spent “before the 2004 General Election.” See
Conciliation Agreement ¶ 33-36, MUR 5487 (Progress for America Voter Fund). The Commission limited its
analysis to activity during 2004 even though Progress for America Voter Fund had raised approximately $4.6
million and spent approximately $11.2 million since the 2004 presidential election. See ¶ 18. The Commission
has also noted when groups cease to function after an election cycle. See Conciliation Agreement ¶ 16, MUR 5754
(MoveOn.org Voter Fund); Conciliation Agreement ¶ 36, MURs 5511, 5525 (Swift Boat Veterans and POWs for
Truth).

Not surprisingly, many political committee enforcement matters involve groups that only spend funds
during the calendar year of an election, and that spending thus necessarily forms the sole basis for major purpose
analysis.

Here, the Commission need consider only AIP’s express advocacy during the 2008 calendar year to
conclude its major purpose is the nomination or election or a federal candidate. Buckley does not require, however,
that the determination of an organization’s major purpose must be confined to consideration of its express advocacy.

In reaching that calculation, we included all non-overhead expenses from AIP’s 2007 tax year, which ended
on April 30, 2008 — a total of $312,684. We also excluded the $1 million that AIP spent on the “Every Single
Day” advertisement in 2009.

In reaching this conclusion, we do not intend to express the view that a finding of major purpose requires
clearance of a 50 percent threshold, but only that the spending on federal campaign activity in this case is alone
sufficient to support a finding of major purpose.
to believe that American Issues Project violated 2 U.S.C. §§ 432, 433, and 434. Because AIP should be considered an independent expenditure only political committee that would not be subject to the Act’s contribution limits, we recommend that the Commission find no reason to believe that AIP violated 2 U.S.C. § 441a(f). Finally, we recommend that the Commission find no reason to believe that AIP’s officers and directors Martin and Failor violated the Act because we have no information suggesting that they should be held personally liable for AIP’s violations.

3. Failure to Report Independent Expenditures for the General Election

The Obama Complaint also alleges that AIP failed to properly report a portion of the cost of “Know Enough” as an independent expenditure that was made in connection with the general election. AIP’s website states that it aired the “Know Enough” advertisement on August 29, 2008, the day after the Democratic Convention ended. But AIP’s Form 5 — disclosing the “Know Enough” independent expenditure — stated that the expenditure was made only with respect to the convention and it included only the total cost of the media purchase. The Obama Complaint alleges that AIP was required to file an additional Form 5 disclosing the portion of the “Know Enough” expenditure that was allocable to the general election because AIP aired “Know Enough” after the convention but before the general election.

34 The complaints also allege that AIP knowingly and willfully violated the Act’s requirements that a political committee register and report to the Commission. However, there is insufficient information to support a knowing and willful finding.

35 See SpeechNow, 599 F.3d at 689; Advisory Op. 2010-09 (Club for Growth); Advisory Op. 2010-11 (Commonsense Ten).

36 See Obama for America Compl. at 3.

37 See Democracy 21 Compl., Ex. J.
If, however, as we conclude, AIP was required to register and report as a political committee under the Act, it was not required to file Form 5 to disclose its independent expenditures to air "Know Enough" on August 29, 2008. Instead, AIP should have disclosed its independent expenditures on Schedule E of its regularly scheduled reports and filed a 48-hour notice for its August 29, 2008 independent expenditure using Form 3X. Thus, its failure to file an additional independent expenditure report would be encompassed by its other reporting obligations under 2 U.S.C. § 434(a) and (b).

AIP did not register or report as a political committee, and thus did not file reports with the Commission on Form 3X. Nonetheless, because this particular violation would be subsumed as part of AIP's broader reporting requirements under 2 U.S.C. § 434 addressed above, we recommend that the Commission dismiss the allegation that AIP violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10(c).

4. Harold Simmons

The Obama Complaint alleges that Simmons has exceeded the limit for contributions to political committees and the aggregate limit for contributions by individuals by donating nearly $2.9 million to AIP. See 2 U.S.C. § 441a(a)(1)(C) & (a)(3). At this time we have limited information regarding the circumstances of Simmons's donation to AIP. In his response, Simmons addresses his contribution only by stating that the "contribution was in advancement of or related to [AIP]'s exempt function" under section 501(c)(4) of the Internal Revenue Code.

Contribution limitations for individuals contributing to political committees, including those that made only independent expenditures, were in effect at the time Simmons contributed.

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38 Compare 11 C.F.R. § 104.4 (independent expenditure reporting by political committees) with 11 C.F.R. § 109.10 (independent expenditure reporting by persons other than political committees).

39 See Obama for America Compl. at 3-4.
to AIP. But intervening judicial and Commission precedent permits unlimited contributions to independent expenditure only political committees. Accordingly, we recommend that the Commission find no reason to believe that Harold Simmons violated 2 U.S.C. § 441a(a)(1)(C) & (a)(3).

See SpeechNow, 599 F.3d at 689; Advisory Op. 2010-09 (Club for Growth); Advisory Op. 2010-11 (Commonsense Ten).
IV. RECOMMENDATIONS


2. Find no reason to believe that American Issues Project, Inc. violated 2 U.S.C. § 441a(f).

3. Dismiss the allegation that American Issues Project, Inc. violated 2 U.S.C. § 434(c) and 11 C.F.R. § 109.10(c).


5. Find no reason to believe that Ed Martin and Ed Failor, Jr. violated the Act.

6. Approve the attached Factual and Legal Analyses.

7. Enter into pre-probable cause conciliation with American Issues Project, Inc.

8. 
9. Approve the appropriate letters.

3/12/13

Date

Anthony Herman
General Counsel

Daniel A. Petalas
Associate General Counsel

William A. Powers
Assistant General Counsel

Attachments:
1 – “Know Enough” Script
<table>
<thead>
<tr>
<th>AUDIO</th>
<th>VIDEO</th>
</tr>
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</table>
| **ANNOUNCER:** | **Picture:** Several screen shots of Barack Obama with a microphone or at a podium  
**Text:** What does he really believe?  
Consider this: |
| Beyond the speeches, how much do you know about Barack Obama?  
What does he really believe?  
Consider this:  
United 93 never hit the Capitol on 9/11.  
But the Capitol was bombed thirty years before — by an *American* terrorist group called Weather Underground...  
that declared "war" on the U.S. — targeting the Capitol, the Pentagon, Police Stations, and more.  
One of the group's leaders, William Ayers, admits to the bombings, proudly saying later: "We didn't do enough."  
Some members of the group Ayers founded even went on to kill police.  
But Barack Obama is friends with Ayers, defending him as quote "respectable" and "mainstream."  
Obama's political career was launched in Ayers' home. And the two served together on a left-wing board.  
Why would Barack Obama be friends with someone who bombed the Capitol...and is proud of it?  
Do you know enough to elect Barack Obama? American Issues Project is responsible for the content of this ad. | **Picture:** Moving shot of the Capitol fading to a newspaper article  
**Text:** United 93 never hit the Capitol on 9/11  
**Picture:** Different screen shots of photographs, likely from the scene of the Capitol bombing  
**Text:** Weather Underground declared war on the United States  
**Picture:** Screenshot of Capitol, Pentagon, and group of police officers  
**Picture:** Moving shot of the Capitol fading to a newspaper article  
**Text:** United 93 never hit the Capitol on 9/11  
**Picture:** Different images and video of William Ayers  
**Text:** "...didn't do enough." William Ayers  
**Picture:** Mug shots of several individuals and a photo of a police cruiser  
**Text:** ‘Weather’ Fugitive Is Seized In Killings  
**Picture:** Barack Obama speaking  
**Text:** Obama an Ayers... “respectable”... “mainstream”  
**Picture:** Photos of Obama and Ayers, side-by-side  
**Text:** Obama's political career was launched in Ayers' home. Served together on left-wing board in Chicago.  
**Picture:** Video of police officer walking through rubble. Photo of William Ayers.  
**Text:** Why would Obama be friends with... someone who bombed the U.S. Capitol?  
**Picture:** Photo of Obama  
**Text:** Do you know enough to elect Barack Obama?  
AmericanIssuesProject.org  
Paid for by American Issues Project.  
Not Authorized by Any Candidate or Candidate's Committee. |