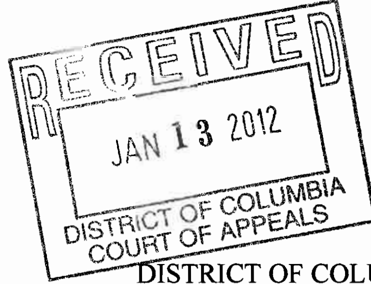


DISTRICT OF COLUMBIA

COURT OF APPEALS

STEVEN J. ROSEN,	)	
	)	
Plaintiff-Appellant	)	
v.	)	
	)	Appeal No. 11-cv-368
AMERICAN ISRAEL PUBLIC AFFAIRS COMMITTEE, INC., et. al.,	)	
	)	
Defendants-Appellees	)	
	)	

On July 25, 2011 the Defendant-Appellee filed its BRIEF OF APPELLEES claiming that the Plaintiff's defamation suit was properly dismissed in Superior Court. The Defendant-Appellee responded to declassified FBI files first obtained on July 31, 2009 by the amicus curiae under the Freedom of Information Act. [1] The Defendant-Appellee fundamentally misrepresents the contents and meaning of the declassified FBI files through erroneous statements and selective extraction. This could prejudice the amicus curiae's public interest efforts to obtain the due regulation of AIPAC under the Foreign Agents Registration Act, a review of its tax-exempt status, and future disgorgement of benefits derived from illicit utilization of confidential business information. It could also negatively impact the future efforts of private parties that directly suffered confidential business information loss to AIPAC from seeking redress through individual civil actions.

[1] See Amicus Curie's Ex. D David M Hardy, Section Chief, Records Management Division, FBI, response cover letter to Amicus Curiae releasing 82 pages under FOIA 1124826-000 dated July 31, 2009

A. AIPAC WAS NOT CLEARED OF WRONGDOING OVER CIRCULATION OF 1984 CLASSIFIED US GOVERNMENT DOCUMENTS AS CLAIMED BY THE DEFENDANT-APPELLEE.

Between 1984 and 1987 the American Israel Public Affairs Committee was investigated by the FBI for theft of government property and espionage. The Defendant-Appellee argues in his July 25, 2011 BRIEF OF APPELLEES "what he [Rosen] does not go on to indicate is that following an FBI investigation, that AIPAC was cleared of any wrongdoing and the document that formed the basis of the investigation contained no classified national defense information. (App. 606-629)."

In fact, AIPAC was never "cleared of any wrongdoing." The FBI investigation files declassified and released to the amicus curiae in 2009 reveal that the investigation was terminated because the Israeli Minister of Economics who passed the classified US International Trade Commission report *Probable Economic Effect of Providing Duty-Free Treatment for Imports from Israel* to AIPAC claimed diplomatic immunity from prosecution and refused to reveal how he obtained it to FBI special agents. According to a final March 31, 1986 FBI report "In view of the above information and due to the fact that [censored] has claimed diplomatic immunity in the matter, active investigation into this matter will be discontinued at WFO." However, this was far from an exoneration of AIPAC's receipt and use of the classified information. This is reflected in the FBI Washington Field Office's readiness to reopen the case if any new leads were developed. The same March 31, 1986 summary report states "Washington Field will be contacted by the USTR or the ITC if pertinent information is developed regarding this or similar incidents."[2]

[2] See Amicus Curie's Ex. E Declassified FBI investigation files "Theft of classified documents from the Office of the United States Trade Representatives" released under FOIA 1124826-000 to the Amicus Curiae on July 31, 2009

B. AIPAC AND ITS EMPLOYEES WERE NOT CLEARED OF IMPROPRIETY OVER CIRCULATION OF 1984 CLASSIFIED US GOVERNMENT DOCUMENTS AS CLAIMED BY THE DEFENDANT-APPELLEE.

The Defendant-Appellee argues in his July 25, 2011 BRIEF OF APPELLEES that, "There was no evidence of any kind presented in the record that the alleged 1984 involvement by AIPAC that was investigated by the FBI, involved any impropriety by AIPAC or any AIPAC employee." This statement is also false. AIPAC was advised that the classified report in its possession was stolen property and had to be returned to the US Trade Representative. According to the FBI's February 13, 1986 interview of AIPAC's Head of Congressional Relations and Lobbying, an AIPAC employee made an illegal copy of the classified document before returning it to the government. "Prior to returning the document, BLANK asked to have a duplicate copy of the document made so that the staff of the AIPAC could further examine the report." Knowingly copying, retaining and continuing to use this report after the return order was clearly an impropriety of AIPAC and its employees. [3]

C. THE 1984 INVESTIGATION OF AIPAC CENTERED ON CLASSIFIED US GOVERNMENT DOCUMENT THEFT.

The Defendant-Appellee further argues in his July 25, 2011 BRIEF OF APPELLEES that "The matter clearly involved no classified documents." This is false. The FBI investigation was pursued on the basis of the US Trade Representative's criminal complaint that AIPAC had in its possession the stolen government classified document *Probable Economic Effect of Providing Duty Free Treatment*

[3] See Amicus Curie's Ex. E Declassified FBI investigation files "Theft of classified documents from the Office of the United States Trade Representatives" released under FOIA 1124826-000 to the Amicus Curiae on July 31, 2009

for U.S. Imports from Israel, Investigation No. 332-180. [4] This document was a product of an advice and consent process informing the US government whether or not to deliver valuable permanent trade preferences to Israel in the mid-1980s. This process involved soliciting and compiling confidential business data from over seventy US industry participants.

In the year 2011 the amicus curiae won partial declassification and release of *Probable Economic Effect of Providing Duty Free Treatment for U.S. Imports from Israel* through a lengthy appeals process to the Interagency Security Classification Appeals Panel. However a December 22, 2011 letter the Office of the US Trade Representative affirmed that only "some portions" of the report had been declassified and released. Other portions of the report remain classified "because the data discloses confidential business information which the ITC obtained from private sources."[5]

D. AIPAC'S DE FACTO POLICY ON CLASSIFIED INFORMATION HANDLING IS OF PUBLIC INTEREST

The question of whether the Defendant-Appellee condones the receipt, circulation and tactical use of classified information is of primordial importance in this defamation suit and to outside efforts to properly regulate AIPAC. It is of vast public importance to outside stakeholders who believe that, based on public interest research and news reports, AIPAC engages in classified information trafficking with utter impunity. The Defendant-Appellee's efforts to minimize AIPAC's past activities is an attempt to muddy a deep and well-documented pool of evidence relevant to this question. Moreover,

[4] See Amicus Curie's Ex. E Declassified FBI investigation files "Theft of classified documents from the Office of the United States Trade Representatives" released under FOIA 1124826-000 to the Amicus Curiae on July 31, 2009

[5] See Amicus Curie's Ex. F Jonathan R. Weinberger, Associate General Counsel, Executive Office of the President, Office of the United States Trade Representative, decision to declassify and release some portions of the report "Probable Economic Effect of Providing Duty-Free Treatment for Imports from Israel" sent to the Amicus Curiae on December 22, 2011.

this question could be rather easily resolved if both parties were compelled by the Appeals Court to engage in a bona fide process of discovery and cross-examination.

On November 15, 1985, just as news of the Jonathan Pollard Israeli espionage incident was breaking, the FBI Director ordered the FBI Washington Field Office to “expeditiously conduct investigation in accordance with the provisions of Section 52, manual of Investigative Operations and Guidelines” into AIPAC’s possession of *Probable Economic Effect of Providing Duty Free Treatment for U.S. Imports from Israel, Investigation No. 332-180*. On December 17, 1985 FBI Special Agent John Hosinki reported on a meeting with AIPAC during which he demanded information about "1. Who at AIPAC had knowledge of this report being in the possession of AIPAC, 2. Who received or handled this report at AIPAC, 3. Who furnished this report to AIPAC," and the current residence for an AIPAC employee with knowledge of the matter.

FBI agents interviewed an AIPAC employee on December 19, 1985 who admitted that she had received the classified report. She stated to the FBI that “it was her responsibility to study any reports or documents pertaining to American Israeli trade and considered the receipt of this report a very ordinary event.” On December 19, 1985 FBI agents interviewed another AIPAC employee who confirmed that “this document was marked ‘confidential’" and that she received the document “from an Israeli Embassy official” whom she then identified by name. On February 13, 1985 the FBI interviewed a third AIPAC employee who confirmed that after being ordered to return the classified document by the USTR, he “asked to have a duplicate copy of the document made so that the staff of the AIPAC could further examine the report.” The AIPAC employee also confirmed that an Israeli Embassy official “had initially provided the report to a representative of AIPAC.”

The FBI Washington Field Office on March 7, 1986 interviewed this Israeli diplomat who had provided the classified report to AIPAC. The diplomat “advised that he furnished the report to an

employee at the American Israel Public Affairs Committee (AIPAC) during the Spring or Summer of 1984." The diplomat further advised that "it would be impossible within the professional ethics of a diplomat to identify individuals who provide certain information to a diplomat."

If this defamation proceeding wishes to understand AIPAC's de facto policy on classified US government information, it should depose and cross-examine the following parties who have now been identified through cross-referencing public information and newly released law-enforcement documents. Dan Halpern was the former Israeli Minister of Economics who obtained and gave the classified report to AIPAC. Douglas Bloomfield was the lobbying official who ordered that illegal copies be made of the classified report after AIPAC was ordered to return it to the US Trade Representative. Ester Kurz was the AIPAC employee who received the report at a meeting with Halpern and later claimed to have destroyed the illicit duplicate by "throwing it down her garbage chute" according to her FBI interview.

It is amicus curiae's view that the Plaintiff-Appellant has not deposed, nor would he ever call Douglas Bloomfield to testify about his classified information handling, compensation, retention by and employment incentives given by AIPAC. This is because Bloomfield has been publicly pressuring and advocating that AIPAC provide a private financial settlement to Rosen. In a *New Jersey Jewish News* article published days after the Plaintiff-Appellant filed his defamation suit, Bloomfield seemed to subtly threatened to reveal AIPAC as an Israeli government agent, claiming "Trials can be dangerous things. And not just for the accused. They can make or break prosecutors, defense lawyers, and judges. And even a vaunted lobby. The American Israel Public Affairs Committee and its leaders could be the biggest losers in a case that threatens to expose the group's inner secrets. One of the topics AIPAC won't want discussed, say these sources, is how closely it coordinated with Benjamin Netanyahu in the 1990s, when he led the Israeli Likud opposition and later when he was prime minister, to impede the

Oslo peace process being pressed by President Bill Clinton and Israeli Prime Ministers Yitzhak Rabin and Shimon Peres. That could not only validate AIPAC's critics, who accuse it of being a branch of the Likud, but also lead to an investigation of violations of the Foreign Agents Registration Act."[6]

Properly deposing AIPAC executives and Mr. Bloomfield about why he was allowed to continue working at the organization even after improperly handling US government classified information would serve the public's heavy interest in this proceeding. A proper deposition and interview of AIPAC employee Ester Kurz and her superiors along the same lines would also be of great value. This is because their past illicit activities continue to negatively impact thousands of US workers and tens of industries.

E. AIPAC'S CIRCULATION OF CLASSIFIED GOVERNMENT DOCUMENTS HARMED US INDUSTRIES AND WORKERS AND UNDERMINED THEIR CONFIDENCE IN GOVERNMENT AND DUE PROCESS

The Defendant-Appellant has previously described in Superior Court AIPAC's possession of *Probable Economic Effect of Providing Duty Free Treatment for U.S. Imports from Israel, Investigation No. 332-180* and the FBI investigation as "ancient" and "irrelevant to this action." Nothing could be further from the truth. The negative consequences of AIPAC's possession of this particular classified document are ongoing and may even be measured on a yearly basis. This is because *Probable Economic Effect of Providing Duty Free Treatment for U.S. Imports from Israel, Investigation No. 332-180* was no ordinary government document. Rather, it was a compilation of confidential US business information broadly solicited by the International Trade Commission, on behalf of the US Trade

[6] See Amicus Curie's Ex. F Bloomfield, Douglas "The 'AIPAC Two' aren't the only ones on trial" New Jersey Jewish News, March 5, 2009

Representative, as originally announced through a February 15, 1984 *Federal Register* notice.[7] In that notice, the US government specifically promised to protect confidential business information submitted by industry organizations concerned about giving trade preferences to Israel. The US Bromine Alliance complained bitterly to ITC Chairwoman Paula Stern on November 1, 1984 that "The US Bromine Alliance provided very sensitive cost information to the Commission in response to the Commission's requests for confidential business data in connection with its report on a free trade agreement with Israel. The Alliance presumes that these data were quoted in the Commission's confidential report to the USTR, a copy of which was obtained by representatives of the American-Israel Public Affairs Committee..."[8] ITC Chairwoman Paula Stern confirmed in a November 29, 1984 letter that the US Bromine Alliance had indeed lost a great deal of confidential business information when the report was circulated by the Israeli Government and given to AIPAC. "You requested us to describe, characterize, or specify what business confidential information submitted by the U.S. Bromine Alliance in your letter of April 27, 1984 was included in the U.S. International Trade Commission's confidential report to the U.S. Trade Representative on investigation No. 332-180, Probable Effect of Providing Duty-Free Treatment for Imports from Israel...Specific business confidential numbers extracted from the Alliance's letter and shown in the report included: (1) the production cost for bromine, (2) production cost, raw material cost, depreciation or manufacturing cost, by-product cost, and shipping cost for the compound TBBPA and (3) the length of time that sales of domestic TBBPA could be supplied from inventory."[9]

But the US Bromine Alliance, representing thousands of American jobs and vast sunk investments for domestic production and opposed to facing a foreign government-owned and subsidized

---

[7] See Amicus Curie's Ex. H Federal Register / Vol. 49, No 32 / Probable Economic Effect of Providing Duty-Free Treatment for Imports from Israel" February 15, 1984

[8] See Amicus Curie's Ex. I US Bromine Alliance Letter to the International Trade Commission over Data loss" ITC Public file November 1, 1984

[9] See Amicus Curie's Ex. J International Trade Commission Chairwoman Paula Stern letter to the Bromine Alliance on confidential business data loss, November 29, 1984

competitor, was far from the only US interest group negatively impacted by the circulation of the classified report. Many others were concerned that information delivered in strict confidence to the government could be so easily lost and turned against them. This undermined their faith in the US government and belief in due process. Footwear Industry Association Executive Vice President Fawn Evenson characterized AIPAC's action as "heavy handed".[10] An analysis of all industry participants that participated in hearings or the preparation of *Probable Effect of Providing Duty-Free Treatment for Imports from Israel* reveals that 76 organizations such as Monsanto, the AFL-CIO, and Dow Chemical lobbied against trade preferences by providing critical public and private input, 4 were neutral, and only 23 relatively minor entities providing information in favor of it.[11] By violating the due process of the negotiations, AIPAC and Israel were able to leverage the sensitive information from the classified document, unavailable from any legitimate market research or public domain source, and win zero-sum economic advantages that have been quantitatively revealed over time. With the report in hand, AIPAC and the Israeli Ministry of Economics were able to launch a broad public relations campaign aimed at minimizing informed industry group concerns about impact of the trade preferences and while publicizing inflated estimates of mutual benefits in order to win its ratification by Congress. In reality the actual trade benefits have been almost entirely one-sided, an anomaly among all US bilateral trade agreements.

Quantitatively the US-Israel bilateral agreement is America's single worst performing bilateral trade agreement as measured by its large contribution to the US trade deficit. Every other bilateral agreement[12] either delivers a trade surplus to the US, or generates imports and exports roughly at par over time while increasing mutually beneficial overall trade volumes. Measured by the bilateral trade

---

[10] Hosenball, Mark "Footwear Industry News" October 1, 1984
[11] See Amicus Curie's Ex. A Filing to the USTR Section 301 Committee seeking $6.64 billion in compensation for US Industry Organizations May 24, 2010 (does not include appendix of FBI documents).
[12] Australia, Bahrain, Chile, Jordan, Morocco, Singapore.

deficit, the 1985 US-Israel bilateral agreement turned a generally balanced trading relationship in place through the mid-1980s into a chronic US deficit with Israel that steadily grew from zero to $9.2 billion by 2009, reaching $9.6 billion in 2010. Under unfavorable conditions such as floating tarriffs and "at risk" (no patent) launch of products such as generic pharmaceuticals or outright copycat drugs, the US share of Israel's total goods import market dropped from over 25% in 1985 to less than 15% in 2007 while the US is now the destination for up to 40% of Israel's exports.[13] There has been some redress for subsequent intellectual property violations. Since the year 2000 Israel appeared on the USTR's official "watch list" no less than five times as an intellectual property violator. This problem was foreseen in 1984 by Monsanto's leadership's concerns over Israeli patent protection.[14] But Monsanto's right to petition government effectively was subverted along the due process rights of the 73 other petitioner organizations when AIPAC obtained their closely held trade and market secrets.

E. AIPAC'S PAST CIRCULATION OF CLASSIFIED GOVERNMENT DOCUMENTS IS NON TRIVIAL AND SUBJECT TO FUTURE REDRESS AND DISGORGEMENT

In an earlier December 23, 2010 Superior Court motion the Defendant-Appellee claimed that "many of the documents are almost 30 years old when AIPAC was a different organization, with different board members and a different executive director." While AIPAC has undergone employee turnover, its corporate culture has not changed. This is likely due to the fact that it rarely faces penalties for illegal acts. However, when AIPEC was incorporated in the District of Columbia in 1963 it was granted perpetuity and responsibility for its actions. Moreover when AIPAC applied for in 1967, and received in 1968, IRS tax exempt status as a social welfare organization, it became subject to even higher standards of conduct in order to maintain the many considerable benefits granted to charities by

[13] US Census Bureau International Trade Statistics Division TradeStat Express Database
[14] See Amicus Curie's Ex. K Monsanto Letter to Kenneth Mason of the International Trade Commission over patent concerns" ITC public file, May 2, 1984

the IRS. While the Defendant-Appellee may wish to be exempt from the long term consequences of what it deems "ancient" incidents, a corporation cannot escape the legal, moral and reputational consequences of its past actions through wishful thinking or court documents that attempt to rewrite and trivialize history.

If the 1984 "incident" dismissed by AIPAC had occurred just a decade later, it likely could have more easily been criminally prosecuted. The Economic Espionage Act 1996 Act protects US industries from economic intelligence gathering, including theft of trade secrets, in order to prevent international rivals from unfairly gaining long-term economic advantages. Because of the ongoing nature of trade and trade regulations, AIPAC will still have to face consequences for its actions in 1984. This is because now that *Probable Effect of Providing Duty-Free Treatment for Imports from Israel* is finally partially declassified, organizations that suffered misappropriate of their data in 1984 can in 2012 finally begin to seek compensation from AIPAC and the Israeli Ministry of Economics over ongoing losses.

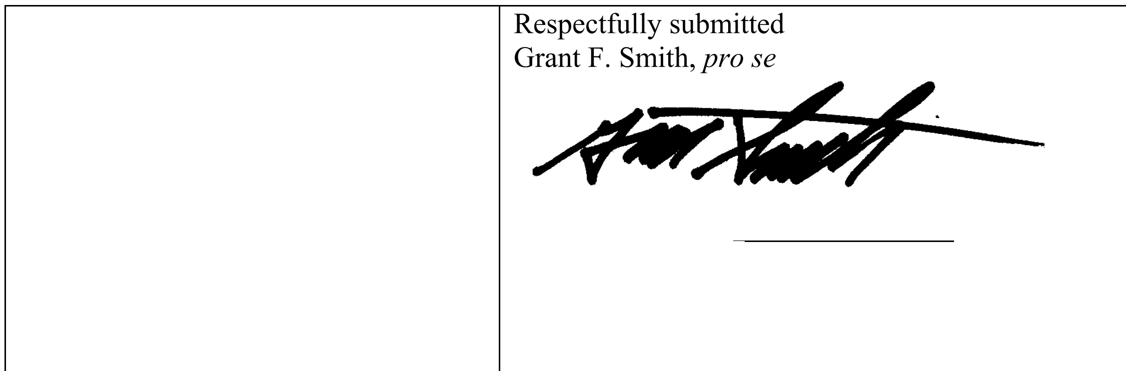
D. CONCLUSION

The Defendant-Appellee clearly wishes to minimize the contents and implications of the full FBI investigation file uncovered and first made public by the *amicus curiae*, introduced into public interest complaints and partially introduced as evidence by the Plaintiff-Appellant. While the Defendant-Appellee is entitled to its own opinions about the relevance of this evidence, the Defendant-Appellee is not entitled to manufacture its own facts and seek dismissal through misrepresentations and selective citations. From an interested outside perspective, the Defendant-Appellee's ongoing and purposeful misrepresentations and omissions designed to minimize AIPAC's past handling of classified government documents are indistinguishable from the conduct for which it publicly chastised the Plaintiff as being outside "the conduct that AIPAC expects from its employees." The *amicus curiae*

would invite the Appeals Court to exercise its inherent powers to craft and issue the appropriate orders against the Defendant-Appellee and its legal counsel as may be necessary in order to ensure that the court is able to reach a resolution that will be just and based on a full airing of all relevant past AIPAC activities.

The *amicus curiae* also notes that other courts, both criminal and civil, have started, or soon will be initiating, actions relevant to instances of classified US government information that is privately sought, obtained and circulated by persons not entitled to receive it. The consequence of the circulation of classified information by nongovernmental entities and individuals is becoming a matter of much broader public interest because the stakes are high and potential fallout enduring. If the Court thought it would be helpful, the *Amicus Curiae* could participate in upcoming hearings and the informed questioning of current and former AIPAC officials.

Finally, the amicus curiae notes the value of bona fide discovery and cross examination of AIPAC employees and officials directly involved in the 1984 incident investigated by the FBI. From the outside public interest standpoint, it is evident that AIPAC has been circulating classified US government information for a long time with impunity, to the lasting detriment of Americans. The Defendant-Appellee must not be allowed to use this or any other court proceeding to knit together dark yarn of false statements into an opaque cloak of manufactured facts.



Respectfully submitted
Grant F. Smith, *pro se*