

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

JACK and RENEE BEAM,

Plaintiffs,

**Civil Action No. 07-cv-1227
Honorable Rebecca R. Pallmeyer**

vs.

**ALBERTO R. GONZALES, UNITED
STATES ATTORNEY GENERAL, AND
ROBERT LENHARD, FEDERAL ELECTION
COMMISSION CHAIRMAN,
In their official capacities,**

Defendants.

/

**PLAINTIFFS' RESPONSE TO DEFENDANT FEDERAL
ELECTION COMMISSION'S MOTION TO DISMISS**

Under the express terms of the Act, congress gave the FEC exclusive jurisdiction over the Act and also created a mechanism by which the FEC could refer certain matters to the Attorney General for criminal enforcement but only after the FEC has first exercised its exclusive jurisdiction. By giving the FEC "exclusive" jurisdiction over civil enforcement, congress clearly and unambiguously intended to prohibit the Attorney General from interfering with the FEC's jurisdiction. By creating a referral mechanism, congress specifically addresses the sequence that the FEC goes first, and the Attorney General only upon receiving a referral and only after the FEC has exercised its exclusive jurisdiction.

Both the FEC and the Attorney General completely ignore the fact that congress gave the FEC "exclusive" jurisdiction. Although Defendants seem to disagree, the term "exclusive" jurisdiction means "to the exclusion of *all* others." Blacks Law Dictionary 564 (6th ed. 1990). By

using the term “exclusive” to describe the FEC’s jurisdiction, congress clearly and unambiguously intended that the FEC exercise its jurisdiction to the exclusion of the Attorney General.

Unable to explain this obvious problem, both the FEC and the Attorney General attempt to recast the issue before this Court as to whether the FEC has exclusive ‘civil’ jurisdiction while the Attorney General has exclusive ‘criminal’ jurisdiction. The problem, however, is that both the FEC and the Attorney General want to exercise “exclusive” jurisdiction over the same law at the same time. In other words, Defendants assert that they share exclusive jurisdiction over the same law.

Not only is the concept of ‘shared jurisdiction’ perplexing, but such an interpretation squarely collides with the express mandate of congress that the FEC has exclusive jurisdiction over the FECA, and criminal penalties may be pursued only *after* the FEC has referred the matter to the Attorney General. This is why the Act gives the FEC “exclusive” jurisdiction while at the same time providing a referral mechanism to allow the FEC to refer the case to the Attorney General. Under these express provisions of the Act, the FEC must go first, and the Attorney General goes second and only if the FEC refers the matter to him. The Attorney General is circumventing the law and reversing the order of the statute so that he may investigate first without a referral and the FEC investigates second. Recognizing that this is contrary to the statute, the Attorney General attempts to recast the issue by repeating that the FEC has ‘civil’ jurisdiction and the AG has ‘criminal’ jurisdiction.

By recasting the issue into a question not before this Court, the Attorney General and FEC avoid addressing the big pink elephant in the room, that is, that their theory of “shared exclusive jurisdiction” is both confounding and contrary to the express provisions of the Act. Finding no such authority for their theory of “shared exclusive” jurisdiction and running head-on into the express

language of the Act, the Attorney General simply falls back on his position that the Attorney General is omnipotent and his authority is plenary.

Defendants attempt to add a further twist to their position by overlooking the Act's use of 'exclusive' jurisdiction and focusing on civil versus criminal *enforcement*. This is a distinction *without* a difference. The FEC's congressionally mandated *exclusive* jurisdiction extends to both investigating and enforcing the Act without the interference of the Attorney General. This is why congress created a referral mechanism so that the FEC could exercise its exclusive jurisdiction and refer matters to the Attorney General for criminal enforcement after exercising its exclusive jurisdiction.

The issue is not about civil versus criminal "enforcement." The issue is about the sequence of jurisdiction. Exclusive jurisdiction does not mean 'sometimes.' The Attorney General is asking the Court to interpret the Act to mean that the FEC has exclusive jurisdiction, but only if the Attorney General is not exercising his own exclusive jurisdiction. This does not work, and the Attorney General cannot qualify the FEC's exclusive jurisdiction by focusing on 'enforcement.'

The FEC and the Attorney General have parted ways on this point. In its motion to dismiss, the FEC openly acknowledges that it is now seeking an interpretation of the Act that includes shared jurisdiction. On page 14 of its motion to dismiss, the FEC explains that "the Commission has successfully investigated thousands of cases during the 30 years that the Department of Justice has been exercising *concurrent* criminal authority" (FEC Motion to Dismiss, pg. 14). The problem with the FEC's position, however, is that the Act makes no mention of 'concurrent' jurisdiction with the Attorney General. The congressional mandate contained in the statute is that the FEC has *exclusive* jurisdiction (which means to the exclusion of all others, including the Attorney General),

and the Act provides the mechanism by which the FEC may refer matters to the Attorney General only *after* it has exercised its exclusive jurisdiction.

The FEC also erroneously claims that this Court is without jurisdiction to consider Plaintiffs' claims under the Administrative Procedures Act. Section 702 of the APA authorizes suit by a person suffering legal wrong because of agency action. Section 706 of the APA specifically empowers a federal court to "compel agency action unlawfully withheld or unreasonably delayed." The United States Supreme Court has interpreted the word *unlawfully* in § 706 to mean that under the APA a federal court can only compel agency action that is "legally required." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004). The first step in the analysis under an APA claim is to identify a relevant federal statute that *requires* an action to be taken by a federal agency.

In this case, the relevant federal statute upon which Plaintiffs rely in bringing their APA claim is 2 U.S.C. § 437g(a)(2). Section 437g(a)(2) commands that, once the FEC has found reason to believe that a violation of the Act has been committed, the "Commission ***shall make an investigation of such alleged violation.***" Thus, § 437(g)(2) *requires* the FEC to follow the statute and conduct an investigation after finding reason to believe Plaintiffs violated the Act. Here, the FEC found reason to believe that Plaintiffs committed a violation of the Act such that the FEC is now bound to "make an investigation of such alleged violation." In this regard, the FEC's duty to investigate under § 437g(a)(2) is mandatory and not permissive or discretionary. Under 28 U.S.C. § 1331, this Court has jurisdiction over federal questions, and Plaintiffs' federal question arises

under § 437g(2)(2), and § 706 acts simply as a waiver of sovereign immunity to file suit against the United States or one of its agencies.¹

The FEC contends, however, that this Court does not have jurisdiction to consider this claim unless the Federal Election Campaign Act specifically authorizes such an action. Such an assertion sorely conflates the concepts of jurisdiction and sovereign immunity, and such an assertion is also wholly contrary to Supreme Court precedent. To reach this patently erroneous conclusion, the FEC relies on § 701(a)(1), which provides that “[t]his chapter applies, according to the provisions thereof, except to the extent that statutes preclude judicial review.” Next, the FEC asks this Court to review the Federal Election Campaign Act to determine whether the Act precludes judicial review of a particular claim.

Relying on § 437g(a)(8), the FEC points out that

[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

2 U.S.C. § 437g(a)(8). Section 437g(a)(8) deals with a party who files a complaint with the FEC. If the FEC dismisses the complaint, or fails to act on the complaint within 120 days, the complainant may file suit in the District of Columbia to seek judicial review of the FEC’s decision.

The FEC believes, however, that § 437g(a)(8) acts to “preclude judicial review” under the APA to any other individuals except those who filed administrative complaints with the FEC. In other words, the FEC believes that only a complainant may file suit under the APA and § 437g(a)(8)

¹ Neither § 437g of the FECA nor § 706 of the APA grant jurisdiction. Jurisdiction is granted under the general federal question statute found at 28 U.S.C. § 1331. The APA acts as a waiver of sovereign immunity allowing an aggrieved party to file suit against an agency of the United States.

precludes judicial review of any and all other APA claims. According to the FEC, because Plaintiffs are respondents to an FEC matter under review (and not complainants) they cannot file suit under the APA.² Not only is this analysis incorrect, but it conflicts with the APA analysis set forth by the United States Supreme Court in *Norton*.

In an APA claim, *Norton* instructs the lower federal courts to first identify the relevant statute that requires a federal agency to perform certain acts. In this case, 2 U.S.C. § 437g(a)(2) is the relevant statute that provides that once the FEC has found reason to believe that a violation of the Act has been committed, the “Commission ***shall make an investigation of such alleged violation.***” Relying on § 437g(a)(2) as the relevant statute, the APA acts as a waiver of sovereign immunity allowing “a person suffering legal wrong . . . to [seek] judicial review thereof.” 5 U.S.C. § 702. Finally, 28 U.S.C. § 1331 is the jurisdictional basis for such a claim.

Beyond its erroneous jurisdictional argument, the FEC also argues that a federal court cannot tell the FEC how and in what manner to conduct its investigation. This may be true, but this is not what Plaintiffs are seeking. The FEC is not conducting ***any*** investigation because the Attorney General has usurped its exclusive jurisdiction and prevented the FEC from conducting its statutorily mandated investigation. This is not a case where Plaintiffs are asking this Court to tell the FEC how

² This is not the first time that the FEC has made this erroneous jurisdictional argument. The FEC made the same argument in *Stockman v. FEC*, 138 F.3d 144 (5th Cir. 1998), where the Fifth Circuit adopted the FEC’s theory that only an administrative complainant may file suit under the APA. In *Stockman*, the court rejected Stockman’s APA claim “because the [Campaign] Act creates a cause of action for unreasonable delay for the complainant alone (Stockman is the respondent in the FEC investigation), and even then, the claim must be brought in the District of Columbia.” Thus, the Fifth Circuit concluded that the Campaign Act’s creation of a cause of action for an administrative complainant displaced, or repealed, the APA as to any and all other individuals. Even a cursory reading of the United States Supreme Court’s decision in *Norton* reveals the infirmity of the FEC’s argument.

and in what manner it must conduct its investigation. Instead, Plaintiffs are asking this Court to compel the FEC to conduct an investigation that is legally required by statute.

Recognizing its statutorily mandated duty to conduct an investigation, the FEC simply falls back and asserts that “[t]he statute does not prescribe any particular actions that the Commission is required to take in conducting an investigation, does not state what, if any, information the Commission must seek, and it provides no time limit for completing any investigative action.” (FEC’s motion for summary judgment, pg. 20). The FEC also asserts that “plaintiffs lack personal knowledge concerning the broad range of investigative activities the Commission might be engaging in regarding the enforcement matter at issue, and can only speculate about what the Commission might have done in this investigation other than seeking information directly from them.” (FEC motion to dismiss, pg. 15 n. 19). The FEC’s assertions are entirely disingenuous. The FEC *is not* conducting *any* investigation. The Court should not be persuaded by the FEC’s mysterious claims that it is conducting an investigation, but we don’t have to tell you what and how we do it. The FEC is not conducting *any* investigation.

Accordingly, Plaintiffs respectfully request that this Honorable Court deny the FEC's motion for summary judgment, and grant Plaintiffs' motion for declaratory judgment.

Respectfully submitted,

FIEGER, FIEGER, KENNEY & JOHNSON, P.C.

/s/ Michael R. Dezsi

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 17, 2007 she electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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