No. 08-15643

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JON MARCUS,

Plaintiff-Appellant,

v.

UNITED STATES ATTORNEY GENERAL MICHAEL MUKASEY; AND FEDERAL ELECTION COMMISSION,

Defendants-Appellees.

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On Appeal from the United States District Court
for the District of Arizona

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# BRIEF FOR THE FEDERAL ELECTION COMMISSION

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June 3, 2008

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# BRIEF FOR THE FEDERAL ELECTION COMMISSION

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## COUNTERSTATEMENT OF JURISDICTION

The Federal Election Commission ("FEC" or "Commission") does not dispute appellant's jurisdictional statement.

## COUNTERSTATEMENT OF ISSUE PRESENTED

Whether the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455 ("Act" or "FECA") contains a clear and unambiguous

requirement that the United States Department of Justice ("DOJ") must await a referral from the Commission before beginning criminal FECA investigations.

## COUNTERSTATEMENT OF THE CASE

This is an appeal by the plaintiff — Jon Marcus — from a March 10, 2008 order of the United States District Court for the District of Arizona granting the motions to dismiss filed by the Commission and DOJ. R. 4-10.[1] The district court also denied plaintiff's motion for a declaratory judgment that the Attorney General is barred from conducting an investigation or prosecution of alleged violations of the FECA until the FEC has investigated and referred the matter to DOJ. *Id.* The court held that the Act does not restrict in any way the Attorney General's authority to investigate and prosecute criminal violations of the Act. R. 8.

## COUNTERSTATEMENT OF THE FACTS

### A. THE FEDERAL ELECTION COMMISSION AND JURISDICTION OVER CIVIL ENFORCEMENT OF THE ACT

The Federal Election Commission is the independent agency of the United States government empowered to administer, interpret and enforce three federal statutes — the FECA, the Presidential Election Campaign Fund Act, 26 U.S.C.

[1] "R. __" citations are to the Excerpts of Record filed by the appellant on April 28, 2008.

§§ 9001-9013,[2] and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042.[3] *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), and 437g.

The FECA imposes extensive requirements for comprehensive public disclosure of contributions and expenditures in connection with federal election campaigns. 2 U.S.C. §§ 432-434. The Act places dollar limitations on contributions by individuals and multi-candidate political committees to candidates for federal office, 2 U.S.C. § 441a(a), and prohibits campaign contributions by corporations and unions from their treasury funds. 2 U.S.C. § 441b(a). The Act also prohibits contributions made in the "name of another person." 2 U.S.C. § 441f. Making contributions to a candidate through an intermediary in the name of that intermediary is a violation of this provision. *See Mariani v. United States*, 212 F.3d 761, 775 (3rd Cir. 2000) (en banc).

Pursuant to the Act, the Commission has "exclusive jurisdiction with respect to the civil enforcement" of the Act and the two presidential public funding

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[2] The Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 ("Fund Act"), provides for a voluntary program of public financing of the general election campaigns of eligible major and minor party nominees for the offices of President and Vice President of the United States.

[3] The Presidential Primary Matching Payment Account Act 26 U.S.C. §§ 9031-9042 ("Matching Payment Act"), provides partial federal financing for the campaigns of presidential primary candidates who choose to participate and satisfy certain eligibility requirements.

statutes. 2 U.S.C. § 437c(b)(1). The Commission is authorized to institute investigations of possible violations of these statutes and must follow detailed administrative procedures prescribed by Congress in the Act. 2 U.S.C. § 437g(a). The Act provides that the Commission may initiate an administrative enforcement proceeding based upon a complaint that is "in writing, signed and sworn to," made by "any person who believes a violation" of the Act "has occurred," 2 U.S.C. § 437g(a)(1), or upon "the basis of information ascertained in the normal course of carrying out its supervisory duties," 2 U.S.C. § 437g(a)(2). If an administrative complaint is filed, the Commission must notify the respondent and provide him with an opportunity to respond. If the Commission finds reason to believe that there has been a violation of the Act, the Commission may "make an investigation of [the] alleged violation, which may include a field investigation or audit, in accordance with the provisions of [section 437g(a)]." 2 U.S.C. § 437g(a)(2). The Act permits the Commission to issue subpoenas and orders in aid of its investigation and provides it with the power to seek judicial enforcement of such orders in federal district court. 2 U.S.C. §§ 437d(a)(3) and (4); 2 U.S.C. § 437d(b).

At the conclusion of an administrative investigation, the statute authorizes the Commission's General Counsel to recommend that the Commission vote on whether there is probable cause to believe that the Act has been violated.

2 U.S.C. § 437g(a)(3). If she recommends that the Commission find probable cause to believe respondents have violated the Act, the statute requires the General Counsel to notify the respondents, provide them with a brief stating her position on the issues, and give the respondents the opportunity to submit a response brief. *Id.* The General Counsel then prepares a report to the Commission, recommending what action the Commission should take. 11 C.F.R. § 111.16. Upon consideration of the briefs and report, the Commission determines whether there is "probable cause to believe" a violation has occurred. 2 U.S.C. § 437g(a)(4)(A)(i).

If the Commission finds probable cause to believe a violation that is *not* knowing and willful has occurred, it attempts to resolve the matter by "informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement" with the respondent. 2 U.S.C. § 437g(a)(4)(A)(i). The Act requires any such conciliation effort to continue for at least 30 days — or 15 days if the probable cause finding was made within 45 days of an election — and authorizes the Commission to continue such negotiations for up to 90 days. *Id*. If the Commission is unable to negotiate an acceptable conciliation agreement, the Act permits the Commission to file a civil law enforcement suit in federal district court. The Commission's decision whether to file a civil enforcement suit is discretionary, and the litigation in district court is *de novo*.
*See* 2 U.S.C. § 437g(a)(6)(A).

If the Commission finds probable cause to believe that a knowing and willful violation of the Act has occurred, the statute permits the Commission to engage in conciliation and seek civil penalties for violations that are higher than those the Commission may seek for violations that are non-willful. The amount the Commission may seek for most knowing and willful violations (currently $11,000 or 200% of the contribution or expenditure involved in the transaction) is double the amount it may seek if the violation is non-willful.
2 U.S.C. § 437g(a)(5)(A), (B). Knowing and willful violations of 2 U.S.C. § 441f (contributions in the name of another) can result in penalties of "not less than 300 percent of the amount involved in the violation and . . . not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation."
2 U.S.C. § 437g(a)(5)(B).

After a Commission finding of probable cause to believe that a "knowing and willful" violation has occurred, the statute also permits the Commission to refer such apparent violation to the Attorney General for criminal prosecution, pursuant to 2 U.S.C. § 437g(d), without having to engage in conciliation first:

> If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States

> without regard to any limitations set forth in paragraph (4)(A) [the conciliation requirement].

2 U.S.C. § 437g(a)(5)(C). When the Commission refers a knowing and willful violation of the Act to the Attorney General, the Act requires the Department of Justice to report periodically to the Commission concerning the matter. 2 U.S.C. § 437g(c). If there is a conciliation agreement with the Commission, it may be introduced by the defendants in a subsequent criminal prosecution for the same "act or failure to act constituting such violation," to "evidence their lack of knowledge or intent to commit the alleged violation," 2 U.S.C. § 437g(d)(2), and as a mitigating factor in sentencing. 2 U.S.C.§ 437g(d)(3).

### B. THE DEPARTMENT OF JUSTICE AND JURISDICTION OVER CRIMINAL ENFORCEMENT OF THE ACT

With limited exceptions, the Attorney General has exclusive authority and plenary power to control the conduct of litigation in which the United States in involved. 28 U.S.C. § 516. Pursuant to this provision, the Attorney General has jurisdiction to prosecute criminal violations of the FECA, as well as criminal violations of the provisions of the Fund Act and the Matching Payment Act. Criminal sanctions for violations of the Act vary according to the offense and the amount of money involved in the violation, and include fines and imprisonment. 2 U.S.C. § 437g(d). A five-year statute of limitations applies to criminal violations of the Act. 2 U.S.C. § 455.

For 30 years, the Commission and the Department of Justice have construed the Act to permit the Attorney General to pursue criminal violations of the Act and the presidential public funding statutes, either when the Department uncovers a criminal violation on its own or when the Commission refers a matter pursuant to 2 U.S.C. § 437g(a)(5)(C). In 1977, one year after the Act was amended to give the Commission exclusive *civil* enforcement authority, the Commission and the Department of Justice entered into a Memorandum of Understanding ("MOU") in which the agencies jointly outlined their respective roles in pursuing election law violations. 43 Fed. Reg. 5441 (1978) (R. 111). That joint memorandum not only describes the circumstances under which the Commission is to refer apparent criminal violations of the Act to the Attorney General, but also specifically addresses criminal violations of the FECA that come to the attention of the Department of Justice independently of the Commission. In such instances, the MOU provides that DOJ will "apprise the Commission of such information at the earliest opportunity" and "continue its investigation to prosecution when appropriate and necessary to its prosecutorial duties and functions." *Id.* While DOJ is to "endeavor" to share information with the Commission subject to existing law, the MOU specifically provides that "information obtained during the course of [a] grand jury proceeding[] will not be disclosed to the Commission." *Id.*

In the years since the MOU issued, the Department of Justice has prosecuted numerous such criminal cases without any referral from the Commission. Among these are *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999); *United States v. Gabriel*, 125 F.3d 89 (2d Cir. 1997); *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994); *United States v. Hopkins*, 916 F.2d 207 (5th Cir. 1990); *Goland v. United States*, 903 F.2d 1247 (9th Cir. 1990); *United States v. Hsia*, 87 F. Supp. 2d 10 (D.D.C. 2000); *United States v. Mariani*, 7 F. Supp. 2d 556 (M.D. Pa. 1998); *United States v. Crop Growers Corp*. 954 F. Supp. 335 (D.D.C. 1997).

When Congress first created the Commission in the 1974 Amendments to the Act, it did not give the Commission exclusive jurisdiction over civil enforcement of the Act, but instead "*primary* jurisdiction with respect to the civil enforcement" of the Act. FECA Amendments of 1974, Pub. L. No. 93-443 § 310(b) (emphasis added) (R. 22). At that time, the contribution and expenditure limitations were contained in Title 18, and the Commission had no authority whatever to file civil actions in federal district court regarding those provisions. The Commission could refer to the Department of Justice civil violations of the Title 18 provisions over which the Commission had jurisdiction, but after referral all civil and criminal court actions were at the Attorney General's discretion. 2 U.S.C. § 437g(a)(7) (1974) (R. 109). *See also Buckley v. Valeo*, 519 F.2d 821,

893 n.191 (D.C. Cir. 1975) (concluding that the Attorney General had discretion whether to file civil enforcement proceedings referred by the Commission), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976). In 1976, when Congress amended the Act in response to the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), it recodified the Act, transferred to Title 2 the contribution limitations and prohibitions previously codified in Title 18, and gave the Commission, rather than the Attorney General, the power to file civil actions to enforce those provisions. 2 U.S.C. § 437g(a)(5)(B) (1976) (R. 44).

### C. DISTRICT COURT PROCEEDINGS

On February 21, 2007, Marcus filed a judicial complaint alleging that he is a target of an ongoing grand jury investigation involving illegal contributions that Marcus allegedly made during the 2004 presidential election to a presidential candidate. R. 131, 141; Complaint ¶¶ 1, 12, 13. Marcus claims that the grand jury investigation is illegal because the FECA purportedly provides the Commission with the exclusive authority to perform an investigation in the first instance, and the Department of Justice is precluded from proceeding unless and until it receives a referral from the FEC. R. 142; Complaint at ¶¶ 19-21. Marcus sought declaratory relief against the Commission and the Attorney General on this basis, and filed a motion for a declaratory judgment. R. 145.

Following briefing by the parties, the district court granted the defendants' motions to dismiss and denied plaintiff's motion for a declaratory judgment. After reviewing the statutes, the district court followed the precedent of *United States Postal Serv. v. International Union of Operating Eng'rs, Local 701*, 638 F.2d 1161 (9th Cir. 1979) ("*Operating Engineers")*, and held that "Congress did not intend to impose a limitation on the ability of the Attorney General to prosecute violations of the [FECA] by allowing the [FEC] to refer violations to the Attorney General." R. 8. The district court also concluded that any amendments to the FECA "did not overturn th[e] case law precedent including that of [*Operating Engineers*]." *Id.* In the absence of any statutory authority to support Marcus's position, the district court concluded that "it could not be implied that administrative processing and referral are a prerequisite to the initiation of litigation by the Attorney General." *Id.* (citing *Operating Engineers* 638 F.2d at 1161, 1163).

### D. RELATED PROCEEDINGS

This case is one in a series of four related civil cases brought by various individuals and the law firm Fieger, Fieger, Kenney, and Johnson ("Fieger firm"), all of whom claim to be targets of an ongoing grand jury investigation into illegal campaign contributions. The Fieger law firm represents the plaintiffs in all four civil cases, which were filed in different federal district courts within weeks of each other and raise the same legal issue based on the same underlying factual

allegations. The plaintiffs all allege that they are the targets of an ongoing grand jury investigation and that the Commission is tacitly cooperating and conspiring with the Attorney General to circumvent FECA's jurisdictional requirements. Each case hinges on the legal issue presented in this case: whether DOJ is precluded from prosecuting violations of FECA unless and until it receives a referral from the FEC. As discussed below, a criminal trial is underway related to the investigation the plaintiffs are attempting to challenge collaterally in these four civil cases. The trial is proceeding against two partners in the Fieger law firm, but not the appellant, Jon Marcus.

### 1. *Bialek v. Mukasey*, No. 07-1284 (10th Cir.)

On February 14, 2007, Barry Bialek, a Colorado physician who had worked as a consultant for the Fieger firm, filed a judicial complaint against the Attorney General and the Commission's Chairman. The district court in Colorado ruled on the principal issue before this Court and rejected the argument that a Commission referral is a prerequisite to DOJ's criminal enforcement of the FECA. *Bialek v. Gonzales*, Civil No. 07-0321, 2007 WL 1879989 (D. Colo. June 28, 2007). Bialek appealed the decision and oral argument was heard before the Tenth Circuit on March 19, 2008. *Bialek v. Mukasey*, No. 07-1284 (10th Cir. appeal docketed July 13, 2007).

### 2. *Beam v. Mukasey*, Civ. No. 07-1227 (N.D. Ill.)

On March 2, 2007, attorney Jack Beam, an affiliate of the Fieger firm, and his spouse, Renee Beam, filed a complaint against the Attorney General and the Commission's Chairman. After briefing by the parties, the court issued a Minute Order on June 22, 2007, granting defendants' motions to dismiss without prejudice, and giving plaintiffs leave to file an amended complaint. Plaintiffs filed an amended complaint and the district court dismissed that complaint without prejudice on March 7, 2008. The district court in Illinois ruled on the same issue, *inter alia*, that is before this Court and rejected the argument that a Commission referral is a prerequisite to DOJ's criminal enforcement of the FECA. Plaintiffs filed a second amended complaint on March 24, 2008. Motions to dismiss the second amended complaint are now pending and party discovery is stayed.

### 3. *Fieger v. United States Attorney General*, No. 07-2291 (6th Cir.)

On February 5, 2007, attorney Geoffrey Fieger, the Fieger firm, and Nancy Fisher, the Fieger firm's office manager, filed a judicial complaint against the Attorney General and the Commission's Chairman. The district court in Michigan ruled on the identical issue that is before this Court and rejected the argument that a Commission referral is a prerequisite to DOJ's criminal enforcement of the FECA. *Fieger v. Attorney General*, Civil No. 07-10533, 2007 WL 2351006, at *3-7 (E.D. Mich. Aug. 15, 2007). Plaintiffs appealed the decision and oral argument

is scheduled before the Sixth Circuit on July 24, 2008. *Fieger v. Mukasey*, No. 07-2291 (6th Cir. appeal docketed October 17, 2007).

**4. *United States v. Fieger, et al.*, Crim. No. 07-20414 (E.D. Mich.)**

On August 22, 2007, a grand jury in the Eastern District of Michigan handed up a ten-count indictment against Geoffrey Fieger and Vernon Johnson, both shareholders in the Fieger firm. Indictment, *United States v. Fieger, et al.*, Criminal No. 07-20414 (E.D. Mich.) (available through PACER at https://ecf.mied.uscourts.gov/cgi-bin/ShowIndex.pl). The activity covered within the indictment includes: conspiracy to violate the FECA (18 U.S.C. § 371) by making prohibited corporate contributions; making prohibited corporate contributions and contributions in the name of another person (2 U.S.C. § 441b and 441f); causing false statements (18 U.S.C. § 1001); and obstruction of justice (18 U.S.C. § 1503). On June 2, 2008, a jury found Fieger and Johnson not guilty on all counts.

## SUMMARY OF ARGUMENT

Marcus's claim is premised upon a fundamental misunderstanding of the Act, which contains no requirement that DOJ await a referral from the Commission before beginning its own criminal investigations, as this Court held in *Operating Engineers*, 638 F.2d at 1168. It is well settled that the Attorney General has plenary authority over criminal matters that is not diminished without a "clear and

unambiguous" directive from Congress. The district court correctly found that there is no basis to imply a directive from Congress to restrict the Attorney General's authority regarding criminal enforcement of the FECA. Marcus's reliance on the statutory provision (2 U.S.C. § 437g(a)(5)(C)) that affirmatively authorizes the Commission to refer a case to the Attorney General is entirely misplaced. That provision only addresses the Commission's authority and does not restrict the prosecution of criminal matters by the Attorney General.

Numerous courts in addition to the Ninth Circuit have examined the question and held that FECA's referral provision does not restrict the Attorney General's authority. The legislative history also strongly supports this conclusion. The committee report that accompanied the legislative provision at issue explicitly stated an intent not to limit the traditional criminal authority of the Attorney General.

Ultimately, Marcus's case represents nothing more than a misguided attempt to collaterally attack an ongoing criminal prosecution. The district court correctly found that neither the plain language of the statute nor the legislative history supports a conclusion that Congress intended to limit the Attorney General's authority to prosecute criminal violations of the FECA.

## ARGUMENT

### I. STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision on a motion to dismiss. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1030 (9th Cir. 2008).

### II. THIS COURT HAS CORRECTLY HELD THAT THE ATTORNEY GENERAL HAS AUTHORITY TO INITIATE CRIMINAL INVESTIGATIONS UNDER THE FECA WITHOUT A REFERRAL FROM THE FEC

In analyzing whether the FECA imposes any administrative prerequisite to a DOJ criminal investigation, this Court has squarely held that "Congress did not intend to impose this limitation upon the power of the Attorney General to enforce the law." *Operating Engineers*, 638 F.2d at 1162. In *Operating Engineers*, the Court relied on the "presumption against a congressional intention to limit the power of the Attorney General to prosecute offenses under the criminal laws of the United States . . . [as] 'an executive function within the exclusive prerogative of the Attorney General.' " *Operating Engineers*, 638 F.2d at 1162, (quoting *In re Subpoena of Persico*, 522 F.2d 41, 54 (2nd Cir. 1975)). While Congress may restrict the Attorney General's statutory authority to control litigation, it has long been settled that this authority is not diminished without a "clear and unambiguous expression of legislative will." *Operating Engineers*, 638 F.2d at 1162 (quoting

*United States v. Morgan*, 222 U.S. 274, 282 (1911)). This Court correctly found no such expression of legislative will to bar the Attorney General's authority to initiate criminal investigations under the FECA.

> [N]either the language nor the legislative history of the Act provides the kind of "clear and unambiguous expression of legislative will" necessary to support a holding that Congress sought to alter the traditionally broad scope of the Attorney General's prosecutorial discretion by requiring initial administrative screening of alleged violations of the Act. On the contrary, the language and legislative history indicates that while centralizing and strengthening the authority of the FEC to enforce the Act administratively and by civil proceedings, Congress intended to leave undisturbed the Justice Department's authority to prosecute criminally a narrow range of aggravated offenses.

638 F.2d at 1168. This authority is binding and dispositive on the central legal issue in Marcus's appeal, and there is no reason this Court should reach any different result here.

### A. NO STATUTORY LANGUAGE RESTRICTS THE ATTORNEY GENERAL'S CRIMINAL AUTHORITY TO ENFORCE THE FECA

Marcus's case is premised entirely on the erroneous argument that the Act precludes the grand jury and the Department of Justice from investigating possible criminal violations of federal campaign finance law unless and until the Commission finds probable cause to believe that a knowing and willful violation of the Act has occurred and refers the matter to the Attorney General pursuant to 2 U.S.C. § 437g(a)(5)(C). Relying on *Operating Engineers*, the district court

correctly concluded that "Congress did not intend to limit or displace the Attorney General's independent authority to pursue criminal violations of the Act . . ." R. 8; *see also Bialek*, 2007 WL 1879989, at *3; *Fieger*, 2007 WL 2351006, at *5 ("there is no language in the Act that evidences a 'clear and unambiguous' intent of Congress" to restrict the Attorney General's power to enforce criminal violations of the Act). On this basis the district court properly granted the Commission's and DOJ's motions to dismiss.

"As in all statutory construction cases, [the courts] begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citations omitted). Here, 28 U.S.C. § 516 unambiguously provides the Attorney General plenary authority over criminal litigation: "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General." "Congress has given a very broad authority to the Attorney General to institute and conduct litigation in order to establish and safeguard government rights and properties." *United States v. California*, 332 U.S. 19, 27 (1947). This statutory authority remains in place unless there is a "clear and unambiguous expression of legislative

will" to alter it. *United States v. Morgan*, 222 U.S. 274, 282 (1911); *accord Executive Business Media, Inc. v. United States Dep't of Defense*, 3 F.3d 759, 762 (4th Cir. 1993); *United States v. Walcott*, 972 F.2d 323, 326 (11th Cir. 1992); *United States v. Hercules Inc.*, 961 F.2d 796, 798-99 (8th Cir. 1992).[4]

As *Operating Engineers* concluded, no language in the FECA clearly and unambiguously limits the Attorney General's authority to investigate or charge a criminal violation of federal election law unless and until he has received a referral from the Commission. To the contrary, the plain language of the referral provision on which Marcus relies, 2 U.S.C. § 437g(a)(5)(C), contains no limits whatsoever on the Attorney General's authority. The provision only addresses the *Commission's* authority; nothing in it (or in any other provision of the Act) even addresses, much less purports to restrict, the usual plenary authority of the

[4] Marcus attempts (Br. 12 n.2) to distinguish *Morgan*, but that case and its progeny stand for the proposition that there is a presumption against interpreting federal laws to limit the powers of the Attorney General to prosecute criminal violations in the absence of clear statutory language, not that a statute must affirmatively state that the Attorney General's overall plenary powers are preserved in order for his power not to be limited: "For the statute contains no expression indicating an intention to withdraw offenses under this act from the general powers of the grand jury. . . ." *Morgan*, 222 U.S. at 281. *See also Operating Engineers*, 638 F.2d at 1163. Indeed, *Morgan* rejected the argument that an administrative notice was a prerequisite to a criminal prosecution, just as an FEC referral is not a prerequisite to a criminal prosecution brought by the Attorney General under the FECA.

Department of Justice and the grand jury to investigate activities that might be criminal:

> If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

In other words, this provision simply authorizes the Commission, after a finding of probable cause, to refer a case to the Attorney General if the violation is knowing and willful. That referral authority is purely discretionary, and it does nothing to limit the Attorney General's authority. *See* R.8; *Bialek*, 2007 WL 1879989, at *3; *Fieger*, 2007 WL 2351006, at *5. As this Court noted, "[t]he fact that the FEC may refer certain complaints to the Department of Justice for prosecution . . . does not in itself imply that administrative processing and referral are a prerequisite to the initiation of litigation by the Attorney General." *Operating Engineers,* 638 F.2d at 1163 (citing cases); *accord* R. 9.

Moreover, the Commission and DOJ have long interpreted the Act to permit the Attorney General to investigate and prosecute criminal violations of the Act without a referral from the Commission. *Operating Engineers*, 638 F.2d at 1166 & n.9 (quoting in full the Memorandum of Understanding ("MOU") between the FEC and DOJ, 43 Fed. Reg. 5441 (1978)). The MOU has been in place for thirty years

and, in addition to specifying how information is shared between DOJ and the Commission, it specifies that when "information comes to the attention of the Department … [it] will continue its investigation to prosecution when appropriate . . ." *Id.* This Court properly relied upon the MOU, holding that "[s]ubstantial deference is due this interpretation of a statute by the agencies charged with its administration." *Operating Engineers*, 638 F.2d at 1166-67 (citing cases). More generally, since the Commission and DOJ are both charged with enforcing the Act, and the Commission has the explicit statutory authority to interpret, and make policy respecting, its provisions, 2 U.S.C. § 437c(b)(1), deference to such interpretations should be afforded. This is particularly the case when two agencies agree on the meaning of the statutory division of authority between them. *Operating Engineers*, 638 F.2d at 1166-67 (citing cases)*; AFL-CIO, Local 3306 v. FLRA*, 2 F.3d 6, 10 (2d Cir. 1993); *CF Industries, Inc. v. FERC*, 925 F.2d 476, 478 n.1 (D.C. Cir. 1991); *see also FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981) (holding that "the Commission is precisely the type of agency to which deference should presumptively be afforded").

Marcus argues (Br. 25) that the plain meaning of the referral provision should be disregarded based on his speculation that a dissenting Commissioner "could simply walk across the street" and circumvent the referral procedures by providing information to DOJ, but Marcus's argument ignores important FECA provisions and

assumes improperly that the Commissioners would violate the law. Contrary to Marcus's suggestion (*id.)*, a single dissenting Commissioner in a five-to-one decision cannot single-handedly present the matter to the Attorney General. A lawful referral requires an affirmative vote of at least four members of the Commission, and no more than three Commissioners may be affiliated with the same political party. *See* 2 U.S.C. §§ 437g(a)(5)(C), 437c(a)(1). Marcus's argument assumes that dissenting Commissioners would circumvent the four-vote requirement for referrals, but the Court should presume that the Commissioners discharge their duties in good faith. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996) (presuming government prosecutors' proper discharge of their duties).

In sum, as this Court has previously held, the plain language of the controlling statutes do not restrict the Attorney General's independent authority to enforce the FECA criminally, and the district court's decision can be affirmed on that basis alone.

### B. FECA'S LEGISLATIVE HISTORY SHOWS NO CONGRESSIONAL INTENT TO LIMIT THE ATTORNEY GENERAL'S AUTHORITY

The legislative history of the Act also shows that Congress did not intend to limit the authority of the Attorney General to investigate possible criminal violations of the Act without a referral from the Commission. Committee reports are the most reliable source for finding the legislature's intent, as they "presumably

are well-considered and carefully prepared." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring)); *accord Bates v. United Parcel Service Inc.*, 465 F.3d 1069, 1082 (9th Cir. 2006). The 1976 committee report that accompanied the House bill when the Commission was given exclusive civil enforcement authority explicitly stated an intent *not* to limit the traditional criminal authority of the Attorney General:

> H.R. 12406, following the pattern set in the 1974 Amendments, channels to the Federal Election Commission complaints alleging on any theory, that a person is entitled to relief, because of conduct regulated by this Act, *other than complaints directed to the Attorney General* and seeking the institution of a criminal proceeding.

H.R. Rep. No. 94-917 at 4 (1976), 94th Cong., 2d Sess., *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1976* ("*1976 Legislative History*") at 804 (emphasis added) (R. 36). Senator Cannon, Chairman of the Senate Rules and Administration Committee and sponsor of S. 3065, gave a similar explanation of the bill:

> Under existing law, every violation of the Federal election campaign laws is a criminal act and the Federal Election Commission has extremely limited civil enforcement powers at the present time. S. 3065 would provide criminal penalties for willful and knowing violations of the law of a substantive nature, and civil penalties and immediate disclosure of violations for less substantial infractions of the campaign finance laws. At the same time S. 3065 would give the Commission expanded *civil* enforcement powers including the power to ask the court for imposition of civil fines for such violations as, for example, the negligent failure to file a particular report, as well as more substantial civil fines for willful and knowing

> violations of the act. The bill would grant the exclusive civil enforcement of the act to the Commission to avoid confusion and overlapping with the Department of Justice, *but at the same time, retain the jurisdiction of the Department of Justice for the criminal prosecution of any violations of this act*.

94 Cong. Rec. S3860-61 (daily ed. March 22, 1976) (statement of Sen. Cannon) (emphases added); *1976 Legislative History* at 470-71 (R. 33). *See also* 94 Cong. Rec. H3778 (daily ed. May 3, 1976) (remarks of House Committee Chairman Hays) (the bill "centralize[s] the authority to deal with complaints alleging on any theory that a person is entitled to relief because of conduct regulated by this act, other than complaints directed to the Attorney General and seeking the institution of a criminal proceeding," *reprinted in 1976 Legislative History* at 1078) (R. 40). Thus, far from supporting Marcus's strained interpretation of the Act, the legislative history of the 1976 FECA Amendments reinforces the longstanding conclusion of the Commission and the Department of Justice that the Act was not intended to limit or displace the Attorney General's independent authority to pursue criminal violations of the Act.

The only support for his view that Marcus is able to find (*see* Br. 17, 28) in the Act's entire 33-year legislative history is a single paragraph in a 1976 floor statement by Senator Brock. However, Senator Brock was a vociferous opponent of the bill, which he condemned as "a deceit, a sham, and a fraud on the American

public." 94 Cong. Rec. S6479 (daily ed., May 4, 1976) (Sen. Brock); *1976 Legislative History* at 1109 (R. 49). The Supreme Court has

> often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.

*NLRB v. Fruit Vegetable Packers Warehousemen*, 377 U.S. 58, 66 (1964) (quotation marks and citations omitted); *Bryan v. United States*, 524 U.S. 184, 196 (1998) ("the fears and doubts of the opposition are no authoritative guide to the construction of legislation" (brackets and internal quotation marks omitted)). Accordingly, Senator Brock's statement carries little weight. *See also Bialek*, 2007 WL 1879989, at *5 ("[A] single statement from an opponent of the Act is not indicative of Congressional intent to limit the prosecutorial authority of the Attorney General.").[5]

[5] Marcus also asserts (Br. 27-28) that there was substantive significance when certain criminal provisions were moved from Title 18 to Title 2 in 1976, but provides no support for this conclusory assertion in the statutory language or legislative history. The mere "rearrangement of the Code cannot reasonably be interpreted as having been intended to change the meaning of the [relevant] provision." *FCC v. Pacifica Foundation*, 438 U.S. 726, 738 (1978).

### C. NUMEROUS OTHER FEDERAL COURTS HAVE FOUND THAT FECA'S REFERRAL PROVISION DOES NOT RESTRICT THE ATTORNEY GENERAL'S AUTHORITY

Even aside from this Court's decision in *Operating Engineers,* seven other federal courts have addressed the argument that Marcus makes here and rejected it. The district courts in the related *Bialek, Fieger,* and *Beam* cases correctly rejected the argument that a Commission referral is a prerequisite to the Department's criminal enforcement of the FECA. *Bialek*, 2007 WL 1879989, at *3-5; *Fieger*, 2007 WL 2351006, at *5*; Beam v. Mukasey*, Civ. No. 07-1227 (N.D. Ill. March 7, 2008) *available at* https://ecf.ilnd.uscourts.gov/doc1/06711646448.

In *United States v. Jackson*, 433 F. Supp. 239, 241 (W.D.N.Y. 1977), the court similarly concluded that "[a] finding of probable cause by the Commission and its subsequent referral to the Attorney General is not a condition precedent to the jurisdiction of the Attorney General to investigate and prosecute alleged criminal violations." The court in *United States v. Tonry*, 433 F. Supp. 620, 623 (E.D. La. 1977), came to the same conclusion: "At no place in the statute is specific provision made prohibiting the Attorney General from going forward with criminal investigation without a referral by the Commission. In the absence of such a specific provision the general authority of the Attorney General to proceed cannot be limited." Thus, two decades ago it was already "settled that criminal enforcement of FECA provisions may originate either with the FEC, *see* 2 U.S.C. §

437g(a)(5)(C) (1982), or the Department of Justice." *Galliano v. United States Postal Serv.*, 836 F.2d 1362, 1368 n.6 (D.C. Cir. 1988). *See also United States v. Hsia*, 24 F. Supp. 2d 33, 43 (D.D.C. 1998), *rev'd on other grounds*, 176 F.3d 517 (D.C. Cir. 1999). Marcus cites no cases that have questioned this settled law.

### D. THE 1979 FECA AMENDMENTS DID NOT OVERTURN PRIOR CASES INTERPRETING THE REFERRAL PROVISION

Marcus's argument that the 1979 Amendments to the FECA overturned the *Operating Engineers* decision is belied by the legislative history and has been rejected in subsequent cases.[6]

Specifically, Marcus erroneously argues (Br. 18, 23-26) that *Operating Engineers* is no longer controlling because Congress in the 1979 Amendments — purportedly "subsequent" to this Court's decision in that case — added the phrase "by an affirmative vote of 4 of its members" to the referral provision found at 2 U.S.C. § 437g(a)(5)(C).[7] However, the four-vote requirement was contained in

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[6] The 1979 Amendments to the FECA were signed by the President and became effective on January 8, 1980. However, those amendments passed Congress in 1979 and are commonly referred to as the 1979 Amendments. *See, e.g.*, FEC, *Legislative History of the Federal Election Campaign Act Amendments of 1979* (1983) (excerpts) (R. 51-106).

[7] Section 313(a)(5)(D) of the 1976 Amendments provided that:

> If the Commission determines that there is probable cause to believe that a knowing and willful violation subject to and as defined in section 329, or a knowing and willful violation of a provision of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has

the bill reported by the House Committee on Administration on September 7, 1979, which was three weeks *before* this Court decided *Operating Engineers*. R. 97. Therefore, the four-vote requirement could not have been written in response to the *Operating Engineers* decision. *See Fieger*, 2007 WL 2351006, at *7 (citing H.R. 5010 96th Cong. (1st Sess. 1979)); *see also Galliano*, 836 F.2d at 1368 (decided eight years after *Operating Engineers*).

In any event, this minor statutory change had no effect on DOJ's authority to institute criminal proceedings. As the district court correctly concluded, the modified four-vote requirement "appears to be a procedural change which does not evidence a directive that alters the powers of the Attorney General." R. 9. Under the 1976 Amendments, a vote of at least four of the six Commissioners had already

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> occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in subparagraph (A) [the thirty day conciliation period].

90 Stat. 484 (1976) (R. 44). The 1979 Amendments altered that provision to state:

> If the Commission *by an affirmative vote of 4 of its members*, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d), or a knowing and willful violation of a provision of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A) [the thirty day conciliation period].

been required for the Commission to initiate investigations and civil actions. At that time, referrals to the Department of Justice, like almost all other enforcement decisions, had to "be made by a majority vote of the members of the Commission" 2 U.S.C. § 437c(c) (1976) (R. 125). Thus, in most circumstances, a "majority vote" of six Commissioners to refer a case to the Department of Justice already required four or more Commissioners, even prior to the 1979 Amendments. The 1979 Amendments recodified section 437g which, as described *supra* pp. 2-7, governs the Commission's administrative enforcement procedures, and the four-vote requirement was added to a number of provisions at that time. *See* amended Sections 309(a)(2); 309(a)(4)(A)(i); 309(a)(6)(A) (R. 96-97, codified as 2 U.S.C. §§ 437g(a)(2), (a)(4)(A)(i), (a)(6)(A)).

The effect of the four-vote requirement was only to ensure that no fewer votes would be required even if one Commission seat were vacant or a Commissioner recused. The House Committee report plainly indicates that Congress did not intend this minor procedural change to alter the substance of section 437g(a)(5)(C), since it explained that the bill merely "incorporates the language in section 303(5)(D) of the current Act regarding referral of knowing and willful violations to the Attorney General." H.R. Rep. No. 96-422, at 22 (1979) (Section-by-Section Explanation of the Bill), *1979 Legislative History* at 206 (R.

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93 Stat. 1339, 1360 (1980) (emphasis added) (R. 97).

131); *see supra* pp. 27-28. Accordingly, even if the new language had been drafted after the *Operating Engineers* decision, Congress clearly did not intend it to overrule that decision or to alter fundamentally the Attorney General's existing authority over criminal enforcement of the Act.

### E. OTHER PROVISIONS OF THE FECA ARE CONSISTENT WITH THE ATTORNEY GENERAL'S PLENARY POWER TO INITIATE CRIMINAL PROSECUTIONS

Marcus attempts to draw inferences about congressional intent from various other provisions of the Act, but none of these provisions contains any language addressing, much less purporting to limit, the usual authority of the Department of Justice and the grand jury to investigate activity that might be a criminal violation of law.

First, Marcus relies (Br. 25-26) on 2 U.S.C. § 437g(d), which simply permits a defendant in a criminal proceeding to introduce as evidence a conciliation agreement, if one exists, entered into with the Commission that "deals with" the alleged criminal acts. Without any legal support, appellant interprets this provision to mean that administrative respondents are *entitled* to an opportunity to negotiate with the Commission for the Commission's agreement in a conciliation agreement before any criminal investigation can begin. As explained *supra* pp. 20-22, however, the plain language of section 437g(a)(5)(C) flatly states that the Commission can refer a matter to the Attorney General "without regard to any

limitations set forth" in section 437g(a)(4)(A) — *i.e.*, the provision concerning conciliation after a probable cause determination. Thus, the statute creates no right to conciliation before a criminal investigation begins, even if that investigation results from a Commission referral. Marcus's interpretation of section 437g(d) is therefore foreclosed by other provisions of the Act.

Second, Marcus suggests (Br. 22) that the Commission's jurisdiction could be eroded because, he speculates, the Commission might issue an advisory opinion "diametrically opposed" to an ongoing criminal prosecution. However, appellant does not identify a single instance of this happening in the Commission's 33 years of existence. In fact, the Commission will issue an advisory opinion only regarding "a specific transaction or activity that the requesting person plans to undertake or is presently undertaking," 11 C.F.R. § 112.1(b); *see generally* 2 U.S.C. § 437f(a). Thus, past activities already subject to criminal prosecution would not qualify for an advisory opinion. Furthermore, because courts must defer to the Commission's constructions of the Act that have been established in Commission administrative proceedings, there is little risk, as appellant claims (Br. 21), that "entirely inconsistent and diametrically opposed . . . enforcement of the Act" will result if the Attorney General retains his authority to initiate criminal investigations. Indeed, the D.C. Circuit has held that "[d]eference is due [to the Commission's interpretations of the FECA] as much in a criminal context as in any

other. . . ." *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) (citing cases). Again, Marcus fails to provide even one example of the worst-case scenario he envisions in the decades of shared enforcement authority under the Act.

Third, Marcus argues (Br. 12-17) that an independent grand jury investigation would be contrary to Congress's decision to give the Commission "exclusive" and "primary" jurisdiction over the Act. As explained *supra* pp. 17-22, however, Congress carefully limited the Commission's exclusive jurisdiction to "civil" enforcement, 2 U.S.C. §§ 437c(b)(1), 437d(e). *See also* 2 U.S.C. § 437d(a)(6) (describing the Commission's power to initiate, defend and appeal "civil actions") and § 437g(a)(6) (providing that the Commission may file a "civil action" to enforce the Act). In fact, the modifier "primary" on which appellant relies (Br. 35-37) in claiming that the Commission has "primary exclusive jurisdiction" over violations of the Act was removed from § 437c(b) in 1979. FECA Amendments of 1979, § 306(b)(1), 93 Stat. 1355, amending 2 U.S.C. § 437c(b)(1) (1980) (R. 92). Since the Attorney General's plenary power to initiate *criminal* prosecutions of the Act is consistent with the Commission's exclusive *civil* jurisdiction over that same statute, there is no merit to appellant's claim that the Commission's authority impliedly limits the Attorney General's powers.

> The civil and regulatory laws of the United States frequently overlap with the criminal laws, creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.

*SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980) (citation omitted).

Marcus also argues (Br. 28-30) that the Commission's "exclusive" jurisdiction would be "thwarted" if concurrent criminal investigations could proceed because no respondent would cooperate with a Commission civil investigation while facing criminal charges for the same conduct, but would instead invariably invoke the Fifth Amendment. Marcus hyperbolically claims that "the FEC would be powerless to proceed" if an individual feared prosecution during an ongoing civil investigation by the Commission. *Id.* at 29. As a matter of fact, however, the Commission has successfully investigated thousands of cases during the 30 years that the Department of Justice has been exercising concurrent criminal authority in accord with the MOU and the *Operating Engineers* decision.[8] Moreover, Marcus offers no reason to believe that a respondent's invocation of the

[8] The Commission can draw an adverse inference from a respondent's invocation of the Fifth Amendment in determining whether there has been a civil violation of the Act. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998); *McKinney v. Galvin*, 701 F.2d 584, 589 n.10 (6th Cir. 1983); *Pagel, Inc. v. SEC*, 803 F.2d 942, 946-47 (8th Cir. 1986).

Fifth Amendment would be any less likely merely because a prospective criminal prosecution would be delayed until after a referral by the FEC. An administrative respondent would have the same incentive to invoke the Fifth Amendment regardless of the order of civil and criminal investigations. In any event, there are many sources of information in an investigation beyond the administrative respondents themselves.

All told, Marcus does not present a shred of evidence to support his speculative and exaggerated claim (Br. 29) that the "FEC could never, *ever* carry out its congressionally mandated functions and duties if the Attorney General could, irrespective of a referral, issue an indictment during the pendency of an ongoing FEC investigation." (emphasis in original). To the contrary, the Commission's successful enforcement record speaks for itself, and there is no evidence that the Attorney General's concurrent criminal authority has hampered the Commission's civil enforcement efforts.

## CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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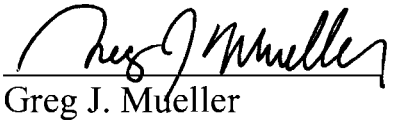

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June 3, 2008

# STATUTORY ADDENDUM

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**2 U.S.C. § 437c. Federal Election Commission**

(a) *Establishment; membership; term of office; vacancies; qualifications; compensation; chairman and vice chairman.*

(1) There is established a commission to be known as the Federal Election Commission. The Commission is composed of the Secretary of the Senate and the Clerk of the House of Representatives or their designees, ex officio and without the right to vote, and 6 members appointed by the President, by and with the advice and consent of the Senate. No more than 3 members of the Commission appointed under this paragraph may be affiliated with the same political party.

(2) (A) Members of the Commission shall serve for a single term of 6 years,1 except that of the members first appointed—

(i) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1977;

(ii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1979; and

(iii) two of the members, not affiliated with the same political party, shall be appointed for terms ending on April 30, 1981.

(B) A member of the Commission may serve on the Commission after the expiration of his or her term until his or her successor has taken office as a member of the Commission.

(C) An individual appointed to fill a vacancy occurring other than by the expiration of a term of office shall be appointed only for the unexpired term of the member he or she succeeds.

(D) Any vacancy occurring in the membership of the Commission shall be filled in the same manner as in the case of the original appointment.

(3) Members shall be chosen on the basis of their experience, integrity, impartiality, and good judgment and members (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall be individuals who, at the time appointed to the Commission, are not elected or appointed officers or employees in the executive, legislative, or judicial branch of the Federal Government. Such members of the Commission shall not engage in any other business, vocation, or employment. Any individual

who is engaging in any other business, vocation, or employment at the time of his or her appointment to the Commission shall terminate or liquidate such activity no later than 90 days after such appointment.

(4) Members of the Commission (other than the Secretary of the Senate and the Clerk of the House of Representatives) shall receive compensation equivalent to the compensation paid at level IV of the Executive Schedule (5 U.S.C. § 5315).

(5) The Commission shall elect a chairman and a vice chairman from among its members (other than the Secretary of the Senate and the Clerk of the House of Representatives) for a term of one year. A member may serve as chairman only once during any term of office to which such member is appointed. The chairman and the vice chairman shall not be affiliated with the same political party. The vice chairman shall act as chairman in the absence or disability of the chairman or in the event of a vacancy in such office.

(b) *Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office*.

(1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

(2) Nothing in this Act shall be construed to limit, restrict, or diminish any investigatory, informational, oversight, supervisory, or disciplinary authority or function of the Congress or any committee of the Congress with respect to elections for Federal office.

(c) *Voting requirements; delegation of authorities*. All decisions of the Commission with respect to the exercise of its duties and powers under the provisions of this Act shall be made by a majority vote of the members of the Commission. A member of the Commission may not delegate to any person his or her vote or any decision making authority or duty vested in the Commission by the provisions of this Act, except that the affirmative vote of 4 members of the Commission shall be required in order for the Commission to take any action in accordance with paragraph (6), (7), (8), or (9) of section 437d(a) of this title or with chapter 95 or chapter 96 of title 26.

(d) *Meetings*. The Commission shall meet at least once each month and also at the call of any member.

(e) *Rules for conduct of activities; judicial notice of seal; principal office*. The Commission shall prepare written rules for the

conduct of its activities, shall have an official seal which shall be judicially noticed, and shall have its principal office in or near the District of Columbia (but it may meet or exercise any of its powers anywhere in the United States).

(f) *Staff director and general counsel; appointment and compensation; appointment and compensation of personnel and procurement of intermittent services by staff director; use of assistance, personnel, and facilities of Federal agencies and departments; counsel for defense of actions.*

(1) The Commission shall have a staff director and a general counsel who shall be appointed by the Commission. The staff director shall be paid at a rate not to exceed the rate of basic pay in effect for level IV of the Executive Schedule (5 U.S.C. 5315). The general counsel shall be paid at a rate not to exceed the rate of basic pay in effect for level V of the Executive Schedule (5 U.S.C. 5316). With the approval of the Commission, the staff director may appoint and fix the pay of such additional personnel as he or she considers desirable without regard to the provisions of title 5, United States Code, governing appointments in the competitive service.

(2) With the approval of the Commission, the staff director may procure temporary and intermittent services to the same extent as is authorized by section 3109(b) of title 5, United States Code, but at rates for individuals not to exceed the daily equivalent of the annual rate of basic pay in effect for grade GS–15 of the General Schedule (5 U.S.C. § 5332).

(3) In carrying out its responsibilities under this Act, the Commission shall, to the fullest extent practicable, avail itself of the assistance, including personnel and facilities of other agencies and departments of the United States. The heads of such agencies and departments may make available to the Commission such personnel, facilities, and other assistance, with or without reimbursement, as the Commission may request.

(4) Notwithstanding the provisions of paragraph (2), the Commission is authorized to appear in and defend against any action instituted under this Act, either—

(A) by attorneys employed in its office, or

(B) by counsel whom it may appoint, on a temporary basis as may be necessary for such purpose, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and whose compensation it may fix without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title. The compensation of counsel so appointed

on a temporary basis shall be paid out of any funds otherwise available to pay the compensation of employees of the Commission.

**2 U.S.C. § 437g. Enforcement**

(a) *Administrative and judicial practice and procedure*.

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clauses (ii) and subparagraph (C), if the Commission determines, by an affirmative vote of 4 of its members, that there is

probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attempt by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(C) (i) Notwithstanding subparagraph (A), in the case of a violation of any requirement of section 304(a) of the Act (2 U.S.C. § 434(a)), the Commission may—

(I) find that a person committed such a violation on the basis of information obtained pursuant to the procedures described in paragraphs (1) and (2); and

(II) based on such finding, require the person to pay a civil money penalty in an amount determined under a schedule of penalties which is established and published by the Commission and which takes into account the amount of the violation involved, the existence of previous violations by the person, and such other factors as the Commission considers appropriate.

(ii) The Commission may not make any determination adverse to a person under clause (i) until the person has been given written notice and an opportunity to be heard before the Commission.

(iii) Any person against whom an adverse determination is made under this subparagraph may obtain a review of such determination in the district court of the United States for the district in which the person resides, or transacts business, by filing in such court (prior to the expiration of the 30-day period which begins on the date the person receives notification of the determination) a written petition requesting that the determination be modified or set aside.

(5) (A) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or in the case of a violation of section 320 (2 u.s.c. § 441f), which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1000 percent of the amount involved in the violation).

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may institute a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to obtain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6) (A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil action has committed a

knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation (or in the case of a violation of section 320 (2 u.s.c. § 441f), which is not less than 300 percent of the amount involved in the violation and is not more than the greater of $50,000 or 1000 percent of the amount involved in the violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any 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.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(10) *Repealed.*

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12) (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such

notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) *Notice to persons not filing required reports prior to institution of enforcement action; publication of identity of persons and unfiled reports*. Before taking any action under subsection (a) of this section against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i) of this title, the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) *Reports by Attorney General of apparent violations*. Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) *Penalties; defenses; mitigation of offenses*.

(1) (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation or expenditure—

(i) aggregating $25,000 or more during a calendar year shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both; or

(ii) aggregating $2,000 or more (but less than $25,000) during a calendar year shall be fined under such title, or imprisoned for not more than one year, or both.

(B) In the case of a knowing and willful violation of section 441b(b)(3) of this title, the penalties set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar

year. Such violation of section 441b(b)(3) of this title may incorporate a violation of section 441c(b), 441f, and 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(D) Any person who knowingly and willfully commits a violation of section 320 (2 U.S.C. § 441f) involving an amount aggregating more than $10,000 during a calendar year shall be—

(i) imprisoned for not more than 2 years if the amount is less than $25,000 (and subject to imprisonment under subparagraph (A) if the amount is $25,000 or more);

(ii) fined not less than 300 percent of the amount involved in the violation and not more than the greater of—

(I) $50,000; or

(II) 1,000 percent of the amount involved in the violation; or

(iii) both imprisoned under clause (i) and fined under clause (ii).

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of this title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) of this section which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

**28 U.S.C. § 516**

Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.