IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK BEAM and RENEE BEAM,

Plaintiffs,

v.

ALBERTO GONZALES, UNITED STATES ATTORNEY GENERAL, and ROBERT LENHARD, FEDERAL ELECTION COMMISSION CHAIRMAN,

Defendants.

Civil No. 07cv1227

Judge Pallmeyer
Mag. Judge Cole

BRIEF IN SUPPORT OF DEFENDANT FEDERAL ELECTION COMMISSION'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6) AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT

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Defendant Federal Election Commission ("Commission" or "FEC"), by and through its undersigned counsel, files this combined brief in opposition to plaintiffs Jack and Renee Beam's Motion for Declaratory Judgment and in support of the Commission's motion to dismiss the Complaint for failure to state a claim pursuant to Fed. R. Civ. P 12(b)(6).

On March 2, 2007, attorney Jack Beam and his spouse, Renee Beam, filed an Application for Writ of Mandamus and Complaint ("Complaint"). The plaintiffs allege that they are the targets of an ongoing grand jury investigation involving alleged illegal contributions made during the 2004 Presidential election campaign centered on the law firm with which Mr. Beam is affiliated. They also claim to be respondents in an ongoing administrative enforcement action being conducted by the Federal Election Commission ("FEC" or "Commission") concerning these same activities. The grand jury investigation is illegal, plaintiffs claim, because the Federal

Election Campaign Act, 2 U.S.C. 431-55 ("FECA" or "the Act")[1] purportedly delegates to the Commission the exclusive authority to conduct an administrative investigation in the first instance, and that the Department of Justice ("DOJ") is precluded from instituting its own criminal investigation into the same violations of federal campaign finance law unless and until the Commission completes its investigation and votes to refer a matter to the Attorney General. Complaint ¶11, 13. The Commission has neither investigated nor referred the matter, plaintiffs claim, and as a result, the alleged grand jury investigation into their contributions is illegal. They seek a declaratory judgment against both the Commission and the Attorney General, and mandamus relief against the Commission.

As the Commission demonstrates below, all of plaintiffs' legal claims are premised upon a fundamental misunderstanding of the Act, which contains no requirement that the Attorney General await a referral from the Commission before beginning his own criminal investigations. Moreover, plaintiffs have no cause of action to challenge the pace of the Commission's alleged investigation into their contributions. Plaintiff's Complaint and motion are thus nothing more than a misguided attempt to collaterally attack an alleged ongoing grand jury investigation and interfere with an ongoing Commission enforcement investigation, and plaintiffs' motion should be denied and their Complaint dismissed for failure to state a claim.

BACKGROUND

1. Federal Election Commission

The Federal Election Commission is the independent agency of the United States government empowered to administer, interpret and enforce three federal statutes — the FECA,[2]

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[1] Throughout their Complaint and motion papers, plaintiffs erroneously refer to the "Federal Campaign Finance Act" rather than the Federal Election Campaign Act. Cmplt. ¶¶ 5, 15, 21; Mem. 1, 3, 4, 6, 12, 15, 22, 27, 28, and 29. In addition, plaintiffs have improperly named the Chairman of the Commission as a defendant. If plaintiffs have any cause of action, it is against the Commission itself, which alone has the powers and duties at issue in this case. See, e.g., 2 U.S.C. 437c(b), 437d(a), 437g(a).

[2] The Act imposes extensive requirements for comprehensive public disclosure of all 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. 2 U.S.C. 441f. Contributing money to

the Presidential Election Campaign Fund Act, 26 U.S.C. 9001-9013,[3] and the Presidential Primary Matching Payment Account Act, 26 U.S.C. 9031-9042.[4] See generally 2 U.S.C. 437c(b)(1), 437d(a) and 437g. Pursuant to the Act, the Commission has "exclusive jurisdiction with respect to the civil enforcement" of the Act and the two presidential public funding statutes. 2 U.S.C. 437c(b)(1). The Commission is authorized to institute investigations of possible violations of the Act, 2 U.S.C. 437g(a)(1) and (2), pursuant to detailed administrative procedures prescribed by Congress in the Act. 2 U.S.C. 437g(a).[5]

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 a 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 "shall 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),(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

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a candidate in one's own name using funds provided by someone else is an example of activity that would violate 2 U.S.C. 441f. 11 C.F.R. 110.4(b)(2)(i).

[3] 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.

[4] The Presidential Primary Matching Payment 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.

[5] At any time during the administrative enforcement process, the Commission may determine that no violation has occurred, decide to take no further action, or dismiss the administrative complaint for some other reason.

probable cause to believe that the Act has been violated. 2 U.S.C. 437g(a)(3).[6] If the Commission finds probable cause to believe a violation 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).[7] If the Commission finds probable cause to believe that a knowing and willful violation of the Act 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:[8]

> 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 [requiring conciliation] set forth in paragraph (4)(A).

2 U.S.C. 437g(a)(5)(C).

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[6] 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).

[7] 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 has no authority to require respondents to enter into conciliation agreements; such agreements are totally voluntarily. 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).

[8] The Act also provides that the Commission can seek higher civil penalties for violations that are "knowing and willful" versus those 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 in 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).

When the Commission refers a knowing and willful violation of the Act to the Attorney General, the Act requires DOJ 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 defendant 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 violation," 2 U.S.C. 437g(d)(2), and as a mitigating factor in sentencing. 2 U.S.C. 437g(d)(3).

2. Department of Justice

28 U.S.C. 516 provides that the Attorney General has exclusive authority and plenary power to control the conduct of litigation in which the United States in involved. 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. 2 U.S.C. 437g(d) sets out the criminal sanctions for violations of the Act, which vary according to the provision and the amount of money involved in the violation, and include fines and imprisonment. A five-year statute of limitations applies to criminal violations of the Act. 2 U.S.C. 455.[9]

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 presidential public funding statutes that DOJ uncovers on its own, as well as in response to referrals the Commission makes 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 DOJ entered into a Memorandum of Understanding ("MOU") (App. 99) in which the agencies jointly outlined their respective roles in pursuing election law violations. 43 Fed. Reg. 5441 (1978).[10] That joint memorandum describes the circumstances under which the Commission is

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[9] In 2002, Congress increased the criminal statute of limitations from three years to five years.

[10] When Congress first created the Commission in 1974, 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 and the contribution and expenditure limitations that were then contained in Title 18. Under the 1974 Amendments to the Act, the Commission could refer to the Department of Justice civil violations of the Title 18 provisions over which the Commission had jurisdiction, but it had no authority whatever to file civil actions in federal district court regarding those provisions. All such civil and criminal court actions were at the Attorney General's discretion, after referral from the Commission. 2 U.S.C. 437g(a)(7) (1974)

to refer apparent criminal violations of the Act to the Attorney General and specifically addresses criminal violations of the FECA that come to the attention of DOJ independent of the Commission. In such an instance, 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." 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." In the years since the MOU issued, DOJ 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. 1996); 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 State 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).

ARGUMENT

Plaintiffs' Complaint should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) because it fails to state a claim upon which relief can be granted as a matter of law. It is well-settled that such a motion should be granted if "plaintiff could prove no set of facts in support of his claim that would entitle him to relief." Alper v. Altheimer & Gray, 257 F.3d 680, 685 (7th Cir. 2000); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); See Conley v. Gibson, 355 U.S. 41, 45 – 46 (1957). The Court should "accept as true the well pleaded allegations of the complaint and the inferences that may be reasonably drawn from those allegations." Panras v. Liquid Carbonic Indust. Corp. 74 F.3d 786, 791 (7th Cir. 1996). As we demonstrate below, because plaintiffs' request for declaratory relief against the Commission is based upon a

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(App. 97). See also Buckley v. Valeo, 519 F.2d 821, 893 n.191 (D.C. Cir. 1975) (concluding that the Attorney General has 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).

meritless legal theory, and because they have no cause of action against the Commission for mandamus relief, their motion should be denied and their Complaint dismissed.

1. The Court Should Dismiss Plaintiffs' Request for Declaratory Relief.

Plaintiffs' request for declaratory relief is premised entirely upon the 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).

As noted above, 28 U.S.C. 516 provides: "[e]xcept 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 very broad authority to the Attorney General to institute and conduct litigation in order to establish and safeguard government." United States v. California, 332 U.S. 19, 26-27 n.3 (1947). While Congress has the authority to restrict this authority, it has long been settled that the statutory authority of the Attorney General to control litigation is not diminished without a "clear and unambiguous" directive from Congress. United States v. Morgan, 222 U.S. 274, 282 (1911); United States v. Palumbo Bros., Inc., 145 F.3d 850, 865 (7th Cir. 1998). See also 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 (8th Cir. 1992); accord United States v. Libby, 429 F.Supp.2d 27, 32 (D.D.C. 2006).[11]

There is no language in the Act that evidences a "clear and unambiguous" intent of Congress to prohibit the Attorney General from investigating or charging a criminal violation of

[11] Plaintiffs attempt (Mem. 4 n.1) to distinguish Morgan by arguing that the statute at issue there "expressly recognized the Attorney General's ability to prosecute without a referral." Plaintiffs have it backwards — Morgan 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, and that "clear and unambiguous" statutory language is required to overcome the presumption, not that a statute must affirmatively state that the Attorney General's powers are preserved in order for them not to be limited. United States v. International Operating Engineers, Local 701, 638 F.2d 1161, 1163 (9th Cir. 1979). See also Palumbo Bros., 145 F.3d at 865.

federal election law unless and until he receives a referral from the Commission. The Act's referral provision on which plaintiffs rely, Section 437g(a)(5)(C), provides only that:

> 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 on paragraph (4)(A).

The provision affirmatively authorizes the Commission to refer a case to the Attorney General, after a finding of probable cause, if the violation is knowing and willful.[12] This 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 Attorney General or a federal grand jury to investigate activities that might be criminal.

As we have already explained, supra pp. 6 - 8, both the Commission and the Department of Justice 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. 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). When two agencies agree on the meaning of the statutory division of authority between them, deference should be afforded. See AFL-CIO, Local 3306 v. FLRB, 2 F.3d 6, 10 (2d Cir. 1993); CF Industries, Inc. v. FERC, 925 F.2d 476, 478 (D.C. Cir. 1991). When construing provisions of the Act, "the Commission is precisely the type of agency to which deference should presumptively be afforded." FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37 (1981). See also FEC v. National Rifle Ass'n of America, 254 F.3d 173, 185 (D.C. Cir. 2001).

While the absence of "clear and unambiguous" statutory language is conclusive under the Morgan line of cases, the legislative history of the Act also supports the view of the Commission and DOJ that Congress did not intend to limit the then-existing authority of the Attorney General

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[12] Contrary to plaintiffs' apparent assumption, this is not the only circumstance in which the Act authorizes the Commission to report unlawful activity it uncovers to other law enforcement officials. The Commission is also given more general authority in 2 U.S.C. 437d(a)(9) "to report apparent violations to the appropriate law enforcement authorities."

to investigate possible criminal violations of the Act without a referral from the Commission. "Generally, committee reports represent the most persuasive indicia of Congressional intent (with the exception, of course, of the language of the statute itself)", Mills v. United States, 713 F.2d 1249 (7th Cir. 1983), and the 1976 committee report that accompanied the House bill when the Commission was given exclusive civil enforcement authority explicitly states 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) (App. 24). 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. 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); 1976 Legislative History at 470-71 (emphasis added) (App. 21-22). See also 94 Cong. Rec. H3778 (daily ed. May 3, 1976) (remarks of House Committee Chairman Hayes) (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) (App. 28). Thus, far from supporting plaintiffs' strained interpretation of the Act, the

legislative history of the 1976 FECA Amendments reinforces the long-standing conclusion of the Commission and DOJ that the Act was not intended to limit or displace the Attorney General's independent authority to pursue criminal violations of the Act.[13]

The federal courts that have addressed the issue have unanimously rejected the argument plaintiffs make here.

> [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.

United States v. International Operating Engineers, Local 701, ("Operating Engineers"), 638 F.2d 1161, 1168 (9th Cir. 1979). 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." United States v. Tonry, 433 F. Supp. 620, 623 (E.D. La. 1977) came to the same conclusion: "[a]t 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

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[13] The only support plaintiffs are able to find in the Act's entire 33-year legislative history for their view 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 (App. 37). 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 Warehouseman, 377 U.S. 58, 66 (1964) (quotation and citations omitted).

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." United States v. Galliano, 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).

Plaintiffs cite no cases at all that have ever questioned this settled law. Instead, even though Galliano was decided in 1988, plaintiffs argue that Operating Engineers is no longer good law because Congress overturned it in the 1979 Amendments to the Act. There is no evidence however, to support plaintiffs' argument (Mem. 8 - 9) that in 1979 Congress 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)[14] "in direct response to the Ninth Circuit's decision" in Operating Engineers. Plaintiffs cite no discussion of that decision in the legislative history, which actually contains no evidence that Congress was even aware of that decision when it adopted the 1979 amendments. Indeed, the 4-vote requirement was contained in the bill reported by the House Committee on Administration on September 7, 1979, three weeks before the Ninth Circuit decided Operating Engineers on October 1, 1979. See H.R. 5010 96th Cong. (1st Sess. 1979), reprinted in Legislative History of Federal Election Campaign Act Amendments of 1979 ("1979 Legislative

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[14] 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 or willful violation of a provision of chapter 95 or 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 subparagraph (A) [the thirty day conciliation period].

90 Stat. 484 (1976) (App. 32). That provision was amended in 1980 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 or willful violation of a provision of chapter 95 or 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 subparagraph (4)(A) [the thirty day conciliation period].

93 Stat. 1339, 1360 (1980) (emphasis added) (App. 85).

History") at 283 (dated September 7, 1979) (App. 47). The 4-vote requirement could not, therefore, have been written in response to the Operating Engineers decision.

Moreover, the 4-vote requirement added in 1979 states a limitation only on the Commission's authority, not the Attorney General's. Under the 1976 Act, a vote of at least four of the six Commissioners was already required for the Commission to initiate investigations and civil actions. At that time, referrals to the Attorney General, like almost all other enforcement actions, had to "be made by a majority vote of the members of the Commission." 2 U.S.C. 437c(c) (1976) (App. 108). Thus, in most circumstances, a "majority vote" of six Commissioners to refer a case to the Attorney General already required four or more Commissioners, even prior to the 1979 Amendments.[15] The effect of the 4-vote requirement was only to ensure that no fewer votes would be required even if one Commission seat was 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 305(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 (App. 119). 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 fundamentally alter the Attorney General's existing authority over criminal enforcement of the Act. See Chisom v. Roman, 501 U.S. 380, 396 n.23 (1991) ("Congress's silence in this regard can be likened to the dog that did not bark. See A. Doyle, Silver Blaze"); Common Cause v. FEC, 842 F.2d 436, 444 (D.C. Cir. 1987) (addressing legislative history of the 1979 Amendments and quoting Finegan v. Leu, 456 U.S. 431, 441 n.12 (1982)); id. at 447 (citing Sherlock Holmes).

Plaintiffs make a number of arguments for drawing inferences about Congressional intent from various and sundry provisions of the Act, but none of these provisions contains any language addressing, much less purporting to limit, the usual authority of DOJ and the grand jury

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[15] The 1979 Amendments recodified section 437g which, as we have described supra pp. 3 - 6, governs the Commission's administrative enforcement procedures, and the 4-vote requirement was added to a number of its provisions. Sections 309(a)(2); 309(a)(4)(A)(i); 309(a)(6)(A) (App. 83-85).

to investigate activity that might be a criminal violation of law. Plaintiffs assert (Mem. 10 – 11, 14), for example, that respondents are entitled to the opportunity to negotiate with the Commission for the Commission's agreement in a conciliation agreement not to refer their cases to the Attorney General, and that section 437g(d)(3), which permits a conciliation agreement to be used in criminal proceedings, requires that a defendant have an opportunity to conciliate before any criminal investigation is begun. As we have already described, however, section 437g(a)(5)(C) itself plainly provides that the Commission is not required to engage in the conciliation procedures set forth in section 437g(a)(4)(A) before referring a matter to the Attorney General, so plaintiffs' argument is contrary to the language of the statute.[16]

Plaintiffs argue (Mem. 7, 21 - 22) that an independent grand jury investigation would be contrary to Congress' decision to give the Commission "exclusive" and "primary" jurisdiction over the Act. 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 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).[17] Plaintiffs carefully avoid any discussion of this explicit statutory limitation on the Commission's exclusive jurisdiction, which plainly demonstrates that Congress did not intend it to interfere with the Attorney General's plenary authority over criminal prosecution. Since the Attorney General having plenary power to initiate criminal prosecutions of the Act is not inconsistent with the Commission having "exclusive" civil jurisdiction over that same statute, there is no merit to plaintiffs' claim that this 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,

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[16] Plaintiffs speculate (Mem. 10, 21-23) that the Commission might issue an advisory opinion "diametrically opposed" to an ongoing criminal prosecution, even though they do not identify a single instance of this happening in the Commission's 32 years of existence. In fact, the Commission will only issue an advisory opinion regarding "a specific transaction or activity that the requesting person plans to undertake or is presently undertaking," 11 C.F.R. 112.1(b). Thus, past activities already subject to criminal prosecution would not qualify for an advisory opinion.

[17] The modifier "primary" on which plaintiffs rely in claiming that the Commission has "primary exclusive jurisdiction" over violations of the Act was removed from Section 437c(b) in 1979. Federal Election Campaign Act of 1979, Amendments, section 306(b)(1), 93 Stat. 1355, 2 U.S.C. 437(c)(b)(1) (1980) (App. 80).

> 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). See also United States v. Capetto, 502 F.2d 1351, 1356 (7th Cir. 1974) (describing as "settled" "that acts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings" and providing examples).

Finally, plaintiffs argue (Mem. 16) that the Commission's "exclusive" jurisdiction would be "thwarted" if it did not foreclose concurrent criminal investigation because no respondent would "rationally" cooperate with a civil investigation while facing criminal charges for the same conduct, but would invariably invoke the Fifth Amendment. As a matter of fact, contrary to plaintiffs' theory, the Commission has successfully investigated thousands of cases during the 30 years that DOJ has been exercising concurrent criminal authority in accord with the MOU and the Operating Engineers decision.[18] Moreover, plaintiffs offer no reason to believe that a respondent's invocation of the Fifth Amendment would be any less likely merely because a prospective criminal prosecution would be delayed until after a referral by the FEC.

2. The Court Should Dismiss Plaintiffs' APA and Mandamus Claims.

Plaintiffs' second and third causes of action are directed solely at the Commission, and concern plaintiffs' allegation that they are respondents in an ongoing administrative enforcement action pending before the Commission concerning the same contributions allegedly at issue in the grand jury investigation, but that the Commission has delayed its investigation. Cmplt. ¶¶ 26-32, Mem. 24-28. Relying upon the Administrative Procedure Act, 5 U.S.C. 701-706, and the mandamus statute, 28 U.S.C. 1361(a), plaintiffs ask the Court to order the Commission to proceed with an investigation of their activities.

The documents the plaintiffs have submitted with their motion for declaratory judgment and writ of mandamus demonstrate that the Commission has, in fact, opened an investigation into their activities in accord with 2 U.S.C. 437g(a)(2). Plaintiffs' exhibit B is a notification to

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[18] An adverse inference may be drawn 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 Authority 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).

Jack Beam that the Commission had found reason-to-believe that he has violated the Act's prohibition against contributions made in the name of another, 2 U.S.C. 441f. It explicitly refers to the Commission's investigation twice in informing him of the Commission's actions and it invites him to submit any factual materials he believes pertinent in response to the Commission's findings. Since plaintiffs are already aware that the Commission has, in fact, opened an investigation, their claim can only be construed as alleging that the Commission has so far failed to take some undefined investigative steps that plaintiffs believe should have been completed by now. We show below that such a claim is not supported by any evidence or by any language in the statute, and the relief plaintiffs seek is not within the Court's jurisdiction under the APA or the mandamus statute.[19]

Plaintiffs assert two causes of action that they say provide this Court with jurisdiction to review their claim that the Commission has impermissibly delayed its investigation of their activities: for judicial review of an agency's failure to act under section 706 of the APA and for mandamus compelling the Commission to "perform its duty" owed to plaintiffs and "conduct its investigation in the first instance" under 28 U.S.C. 1651(a). As a unanimous Supreme Court has explained, however, judicial review of agency action or failure to act under the APA is limited to "discrete" actions, that are "required." Norton v. Southern Utah Wilderness Alliance ("SUWA"), 542 U.S. 55, 63 (2004) (emphasis in original). The Court explained that a "failure to act," part of the APA's definition of what constitutes an "agency action," 5 U.S.C. 551(13), "is simply the omission of an action without formally rejecting a request — for example, the failure to promulgate a rule or take some decision by a statutory deadline." Id. (emphases added).

The Norton Court also explained that the relief provided by section 706(1) of the APA and by mandamus is essentially the same.

> The APA continued forward the traditional practice prior to its passage, when judicial review was achieved through one of the so-called

[19] While the Court should consider all of plaintiffs' well-pled allegations to be true in considering the Commission's motion to dismiss, 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 other than seeking information directly from them. The Commission is precluded from providing any information concerning its investigation by 2 U.S.C. 437g(a)(12)(A), which prohibits "[a]ny notification or investigation made under this section" to be "made public by the Commission" or any person without the written consent of the administrative respondents.

> prerogative writs – principally writs of mandamus under the All Writs Act, now codified at 28 U.S.C. 1651(a). The mandamus remedy was normally limited to enforcement of a "precise definite act . . . about which [an official] had no discretion whatever. . . . 706 (1) empowers a court only to compel an agency to perform a ministerial or non-discretionary act or to take action upon a matter, without directing *how* it shall act."

Id. at 63. Thus, plaintiffs have no cause of action under the APA or the mandamus statute unless they can demonstrate that the Commission "failed to take a discrete agency action that it is required to take." Id. (emphasis in original).

Plaintiffs do not and cannot make this showing. Nothing in section 437g or any other provision of the FECA imposes any deadlines for the Commission to take any particular investigatory actions. While the Act specifies that the Commission is to "investigate" after finding reason to believe that the Act has been violated, 2 U.S.C. 437g(a)(2), that is not a "precise, definite act . . . about which [the Commission] has no discretion whatever." Norton, 542 U.S. at 63 (internal quotations and citations omitted). The FECA does not prescribe any particular actions that the Commission is required to take in conducting an investigation, it does not state what, if any, information the Commission must seek, and it provides no time limit for completing any investigative action. While the Act does provide the Commission with the power to conduct audits and field investigations, 2 U.S.C. 437g(a)(2), and to take depositions, propound interrogatories and subpoena documents, 2 U.S.C. 437d(a)(3) & (4), nothing in the language of the Act states that the Commission is required to use any of these investigative tools in any particular investigation, let alone specifies any sequence or time frame in which the Commission must employ them.

To the contrary, it is well settled that an agency authorized to conduct investigations has broad authority to control the conduct and timing of its investigation. Heckler v. Chaney, 470 U.S. 821, 828 (1985); FEC v. Rose, 806 F.2d 1081, 1091 (D.C. Cir. 1984) (considering the FEC's discretion to set its own enforcement priorities and concluding: "[I]t is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintend[e]nce directing where limited agency resources will be devoted. We are not here to run the agencies."); see Durkin for U.S. Senate Comm. v. FEC, 2 Fed. Election Camp. Fin. Guide (CCH)

¶ 9147 at 51,113 (D.N.H. 1980) (finding mandamus relief not available to a respondent in an FEC enforcement proceeding) (App. 121-6).

In sum, the Act specifies no "discrete action" that the Commission is "required" to take in any particular time frame that could be subject to review under the APA or the mandamus statute. 542 U.S. at 63. Plaintiff's APA claim is improper because "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." Id. at 64 (emphasis in original). Nor can a court rely upon mandamus to exert control over an ongoing law enforcement investigation, for "[i]t is well settled that the question of whether and when prosecution is to be instituted is within the discretion" of the authorized government officials. Peek v. Mitchell, 419 F.2d 575, 577 (6th Cir. 1970).

Moreover, judicial review of the Commission's investigation at the request of a respondent is not permitted under the APA for the additional reason that it is precluded by 2 U.S.C. 437g(a)(8). Section 701(a) of the APA states that its judicial review provisions apply "except to the extent that" the relevant statutes "preclude judicial review," 5 U.S.C. 701(a)(1). As the Fifth Circuit has explained, the exception in 5 U.S.C. 701(a)(1) to the APA's judicial review provision requires the Court "to determine whether and to what extent the Campaign Act precludes judicial review of a particular claim [by looking] to the express language of the statute, as well as the structure of the statutory scheme, its legislative history, and the nature of the administrative action involved." Stockman v. FEC, 138 F.3d 144, 152 (5th Cir. 1998).

Here, Congress's specification in 2 U.S.C. 437g(a)(8) that only administrative complainants are authorized to petition for judicial review of the Commission's alleged failure to act in an enforcement investigation demonstrates that Congress intended to deny administrative respondents, like the plaintiffs here, such a right. Stockman, 138 F.3d at 155-57.

> [W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded.

Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1984). See also NLRB v. United Food & Commercial Wkrs Union, Local 23, AFL-CIO, 484 U.S. 112, 130-33 (1987) (National Labor Relations Act precludes judicial review under the APA of General Counsel's settlement determinations).

More generally, as the Stockman court also concluded, in large part Congress intended to, and did, deprive the federal courts of jurisdiction to review the Commission's handling of its administrative complaints. 138 F.3d at 153. See also Perot v. FEC, 97 F.3d 553, 559 (D.C. Cir. 1996). As we have already explained, Congress expressly vested the Commission with exclusive jurisdiction over the civil enforcement of the Act. 2 U.S.C. 437c(b)(1), 437c(d)(1), 437d(a)(6). See FEC v. National Conservative Political Action Comm. ("NCPAC"), 470 U.S. 480, 485-86 (1985). It created only two narrow exceptions permitting judicial action regarding an uncompleted Commission investigation. First, Congress provided that, upon petition by the Commission, the United States district courts have jurisdiction to compel compliance with Commission subpoenas. See 2 U.S.C. 437d(b). Second, as discussed above, Congress provided that an administrative complainant may bring a civil action against the Commission in the United States District Court for the District of Columbia "[i]f the FEC dismissed [his or her] complaint or failed to act on it in 120 days." NCPAC, 470 U.S. at 488; 2 U.S.C. 437g(a)(8).[20]

Finally, Congress also explicitly limited jurisdiction over such failure-to-act suits to the United States District Court for the District of Columbia. 2 U.S.C. 437g(a)(8)(A). That precludes this Court from having jurisdiction over such a suit even if it had been filed by an administrative complainant. Therefore, even if the APA were construed to give a right to judicial review to targets of a law enforcement investigation under other statutory schemes, Congress's explicit restriction of such a right in the FECA to administrative complainants, who can file suit only in the District of Columbia, plainly precludes such a cause of action here. See Stockman, 138 F.3d at 154.

In sum, nothing in the APA indicates that Congress intended it to authorize the subject of a law enforcement investigation to obtain judicial review of the conduct of an ongoing administrative investigation, and such an intent is particularly unlikely since judicial intervention at this preliminary stage would permit a respondent to discover the investigating agency's theories and investigatory strategy. See FTC v. Standard Oil Company of California, 449 U.S.

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[20] "When the FEC's failure to act is contrary to law," the D.C. Circuit "ha[s] interpreted § 437g(a)(8)(C) to allow nothing more than an order requiring FEC action." Perot, 97 F.3d at 559. If the Commission fails to conform to the court's directive within 30 days, the statutory remedy is to authorize the administrative complainant to sue the administrative respondent directly for violating the Act. 2 U.S.C. 437g(a)(8)(C).

232, 243 (1980) (Judicial review under the APA "should not be a means of turning prosecutor into defendant before [administrative] adjudication concludes"). As we have explained, the particular language, history, and structure of the FECA provide "clear and convincing evidence" that "Congress has expressed an intent to preclude judicial review," Heckler, 470 U.S. at 830, of alleged Commission failures to act in administrative enforcement proceedings, except when an administrative complainant invokes the special provisions of 2 U.S.C. 437g(a)(8) by filing a petition for review in the United States District Court for the District of Columbia. Accordingly, plaintiffs' claim against the Commission under the APA has no legal basis, and should be dismissed.

CONCLUSION

For the reasons stated above, the Federal Election Commission respectfully requests that this Honorable Court dismiss the Complaint and deny plaintiffs' motion for declaratory judgment.

DATED this 10th day of May, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2007, I electronically filed the foregoing Brief in Support of Defendant Federal Election Commission's Motion to Dismiss for Failure to State a Claim under Federal Rule of Civil Procedure 12(b)(6) and in Opposition to Plaintiffs' Motion for Declaratory Judgment. The Court's Commission/ECF system will send notification of such filing to the following e-mail addresses:

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