UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GEOFFREY N. FIEGER, NANCY FISHER and FIEGER, FIEGER, KENNEY AND JOHNSON, P.C.,

Plaintiffs,

-vs-

ALBERTO GONZALES, United States Attorney General, and MICHAEL E. TONER, Federal Election Commission Chairman,

Defendants.
_____/

CIVIL NO. 07-10533

HON. LAWRENCE P. ZATKOFF
MAG. JUDGE MONA K. MAJZOUB

ATTORNEY GENERAL ALBERTO GONZALES'S BRIEF IN RESPONSE TO PLAINTIFFS' MOTION FOR DECLARATORY RELIEF AND WRIT OF MANDAMUS

PRIMARY ISSUE

WHETHER FECA PRECLUDES THE DEPARTMENT OF JUSTICE FROM CONDUCTING A CRIMINAL INVESTIGATION AND PROSECUTION OF ALLEGED CAMPAIGN FINANCE LAW VIOLATIONS ABSENT A REFERRAL FROM THE FEC.

MOST PERTINENT AUTHORITY

United States v. International Union of Operating Engineers, Local 701, 638 F.2d 1161 (9th Cir. 1980)

2 U.S.C. § 437c(b)(1)

FACTS

Plaintiffs are attorney Geoffrey Fieger, the firm of which he is the president, and Nancy Fisher, that firm's office manager. (Application for Writ of Mandamus and Complaint [hereinafter "Complaint"], ¶ 1) They allege that the FBI and the IRS are conducting an investigation of them for violations of the Federal Campaign Finance Act, 2 U.S.C. ¶ 431 *et seq.* (Complaint, ¶ 15)[1] Plaintiffs further allege that this is an improper investigation because the Federal Election Campaign Act ("FECA" or "the Act") endows the Federal Election Commission ("FEC") with the exclusive authority to perform an investigation, in the first instance, and that the Department of Justice ("DOJ") is precluded from proceeding unless and until it receives a referral from the FEC. (Complaint, ¶ 13) Because there has been no such referral, plaintiffs claim, DOJ is prohibited from conducting the alleged investigation into plaintiffs' campaign contributions. They seek mandamus relief against the FEC and a declaratory judgment against both DOJ and the FEC. This is defendant Attorney General's brief in response to plaintiffs' "Motion for Declaratory Judgment and Writ of Mandamus".[2]

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[1] There have been a number of sealed proceedings before Judge Rosen relating to the criminal investigation out of which this case arises. 2:05X71710-GER, 2:05X71994-GER, 2:05X74527-GER, 2:06X50057-GER

[2] The Rules do not recognize such a motion, and plaintiffs in effect admit as much. In the brief in support of their motion, where they describe the standard of review, they describe the court's role when faced with a motion for summary judgment brought pursuant to Fed.R.Civ.P. 56. The instant motion should be evaluated employing those standards.

ARGUMENT

SUMMARY OF ARGUMENT

This is really a very simple case. The Attorney General has plenary authority to investigate and prosecute all federal criminal matters. This authority will be found not to exist *only* where there is a clear and unambiguous expression of legislative will to the contrary. There has been no such expression with regard to the Attorney General's authority under FECA. Indeed, the only time that Congress ever considered withdrawing criminal enforcement authority from the Attorney General, it decided not to. Rather, although Congress has expressly provided the FEC with exclusive responsibility over *civil* FECA matters, it has purposely not done the same with regard to *criminal* FECA matters. The statutory language compels this conclusion. The legislative history compels this conclusion. The relevant case law compels this conclusion.

THE FEDERAL ELECTION CAMPAIGN ACT DOES NOT REQUIRE THE ATTORNEY GENERAL TO AWAIT A REFERRAL FROM THE FEC BEFORE HE CAN COMMENCE A CRIMINAL INVESTIGATION OR PROSECUTION OF CAMPAIGN FINANCE LAW VIOLATIONS.

A. The Attorney General Has Plenary Authority to Investigate and Prosecute Violations of Federal Law. That Authority Can Be Limited Only By a Clear Declaration of Congressional Intent.

The starting point for any challenge of the sort presented here is recognition of the fact that the discretion to institute legal actions is invested in the Attorney General, as head of the Department of Justice. 28 U.S.C. § 503. While this no doubt has been recognized as implicit in the structure of the Executive Branch since the founding of the Republic, the Supreme Court explicitly addressed the plenary authority of the Attorney General in *United States v. San Jacinto Tin Co.*, 125 U.S. 273, 278-79 (1888):

> [T]here is no very specific statement of the general duties of the Attorney General, but it is seen from [28 U.S.C. § 501 *et seq.*] that he has the authority, and it is made his duty, to supervise the conduct of all suits brought by or against the United States . . . . There is no express power vested in him to authorize suits to be brought against the debtors of the government, or upon bonds, or to begin criminal prosecutions, or to institute proceedings in any numerous cases in which the United States is plaintiff; and yet he is invested with the general superintendence of all such suits. . . . We cannot believe that where a case exists in which this is done it is not within the authority of that officer to cause such action to be instituted and prosecuted.

The Attorney General's plenary authority is so deeply embedded in our jurisprudence that it can be limited only by the most explicit expression of Congressional will to the contrary. That has been the working standard for almost one hundred years, since the Supreme Court said so in *United States v. Morgan*, 222 U.S. 274 (1911). That case arose under the Pure Food and Drug Act, which provided for the Department of Agriculture to collect and analyze specimens of suspected misbranded or adulterated goods that were traveling in interstate commerce. If the goods were found to be adulterated, notice was to be given to the party from whom the goods were seized, and that party was to be provided with an opportunity to be heard. If, after such hearing, it appeared as if there had been a violation of the law, the Secretary of Agriculture was to certify such fact to the district attorney, who was required to institute criminal proceedings. A case could also reach the district attorney by way of referral from state officials, who could do so without providing the target with an opportunity to be heard. The issue for the Supreme Court was whether the district attorney could proceed on a case arising out of the Department of Agriculture's seizure of goods, where the administrative process described above had not been implemented. The Court answered with a resounding "yes":

> Repeals by implication are not favored, and there is certainly no presumption that a law passed in the interest of the public health was to hamper district attorneys, curtail the powers of grand juries

> or make them, with evidence in hand, halt in their investigation and await the action of the Department. *To graft such an exception upon the criminal law would require a clear and unambiguous expression of the legislative will.*

Id. at 281-82 (Emphasis added). In response to the defendant's claim that the preliminary hearing before the Secretary of Agriculture was designed to prevent malicious prosecutions, the Court stated that that interest could be protected by the grand jury's responsibility of having to find probable cause before criminal charges could be laid. *Id.* at 282. *See also United States v. Dotterweich*, 320 U.S. 277 (1943).

Morgan continues to guide courts faced with challenges similar to the one lodged in this case. For instance, in *Kent v. Benson*, 945 F.2d 372 (11th Cir. 1991), plaintiffs, who were targets of a grand jury investigation, sought a writ of mandamus to compel the Administrator of the FDA to provide them with notice and an opportunity to be heard administratively before referring their alleged criminal violations to the U.S. Attorney for prosecution. The court, citing *Morgan* and *Dotterweich*, found the plaintiffs' arguments so lacking in merit that it imposed monetary sanctions. *Id.* at 384. *See also United States v. Hercules, Inc.*, 961 F.2d 796, 799 (8th Cir. 1992) (section 122 of CERCLA does not limit plenary authority of Attorney General).

B. FECA Has Never Impinged on the Attorney General's Plenary Authority to Initiate Criminal Investigations of Campaign Finance Law Violations.

1. The 1974 Amendments

The modern era of campaign finance regulation dates to the immediate aftermath of the Watergate scandal. Congress established the FEC in the FECA Amendments of 1974, P.L. 93-443, 88 Stat. 1263, 1280, *reprinted in* Legislative History of Federal Election Campaign Act

Amendments of 1974 (hereinafter "1974 Amendments"), at 1152.[3] Although in those amendments Congress provided the FEC with primary jurisdiction over *civil* enforcement of the Act, it specifically declined to provide that body with similar authority over *criminal* enforcement of FECA. Indeed, it is clear beyond doubt that this is so because, although the Senate bill endowed the FEC with criminal enforcement authority, that provision was deleted by the Conference Committee. Instead, the bill that ultimately was enacted preserved the historic authority of the Attorney General to investigate and prosecute criminal campaign finance violations, with or without a referral from the FEC. Reporting on the Conference Committee's product, Senator Cannon stated on the floor that "the Department of Justice would not be deprived of any of its power to initiate civil or criminal actions in response to referrals from the commission *or complaints from other sources.*" 1974 Amendments at 1079. (Emphasis added). The Conference Committee Report, itself, confirmed the accuracy of these comments:

> The conference substitute generally follows the provisions of the House amendment with two modifications. First, the Commission is given power to bring civil actions in Federal district court to enforce the provisions of the Act where its informal methods of obtaining compliance fail to correct violations. Second, the commission is given primary jurisdiction for the enforcement of the provisions of the Act. Thus, any person must exhaust his administrative remedies with respect to violations under this Act. *The primary jurisdiction of the Commission to enforce the provisions of the Act is not intended to interfere in any way with the activities of the Attorney General or Department of Justice in performing their duties under the laws of the United States.*

Conf. Rep. No. 93-1438, at 94 (1974), 1974 Amendments at 1038 (emphasis added).[4]

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[3] The relevant legislative history materials are attached to the FEC's papers, which are being filed today.

[4] This circuit has observed that committee reports are especially relevant sources of legislative intent. *Schmitt v. City of Detroit*, 395 F.2d 327, 331 n.2 (6th Cir. 2005)

2. The 1976 Amendments

On January 30, 1976, the Supreme Court issued its decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), in which it addressed a number of the provisions of the then-existing campaign finance law. One provision under challenge was § 310 of Pub.L. 93-443, then codified as 2 U.S.C. § 437c(a), which established an FEC made up of six members plus the Secretary of the Senate and the Clerk of the House – the latter two serving *ex officio*. The Court struck down that section of the statute because it invested improper litigative and executive authority in members who were not selected in accordance with the Constitution's Appointments Clause:

> We hold that these provisions of the Act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II § 2, cl. 2, of the Constitution. Such functions may be discharged only by persons who are "Officers of the United States" within the meaning of that section.

Id. at 140.

To address this and other defects, Congress amended the Act in 1976. The amendments made the six FEC Commissioners Presidential appointees, subject to Senate confirmation, and the *ex officio* members non-voting positions. Pub.L. 94-283, *reprinted in* Legislative History of FECA Amendments of 1976 at 1128. Plaintiffs contend that these amendments did more than that – that they endowed the FEC with exclusive jurisdiction over criminal violations of the Act, to the exclusion of the Attorney General's historic plenary authority over enforcement of the criminal laws. In support of this argument, plaintiffs cite the addition of the word "exclusive" before the word "primary," in describing the FEC's jurisdiction over enforcement of the Act. In so arguing, plaintiffs badly miss the point. The provision to which they refer describes only the FEC's jurisdiction over *civil* matters:

> 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 primary jurisdiction with respect to the *civil* enforcement of such provisions.[5]

Pub.L. 94-283, § 101(c)(2), *codified at* 2 U.S.C. § 437c(b)(1) (Emphasis added).

This amendment is silent with regard to the *criminal* enforcement of the Act, and it surely is not a "clear and unambiguous" expression of a legislative will to in any way affect the Attorney General's plenary authority to investigate and prosecute criminal violations. Contrary to plaintiffs' contention, a reader searches in vain for any suggestion that the 1976 Amendments "*required* a referral from the FEC before the Attorney General could initiate criminal proceedings[.]" (Brief in Support of Plaintiffs' Motion for Declaratory Judgment, p.8)

The *only* authority to which plaintiffs can point to support their interpretation of the amendment is the comment of Senator Brock, a vocal opponent of that year's changes to the Act, indicating that "[t]he Justice Department is no longer able to prosecute on its own. . . ." (Brief in Support of Plaintiffs' Motion for Declaratory Judgment, p.8) Senator Brock was simply wrong. Again, Senator Cannon, who was a sponsor of the bill that ultimately became law, described the relevant amendment as follows:

> 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

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[5] Although plaintiffs take much comfort in this amendment, they do not completely set forth the relevant statutory language in their papers. Instead, they selectively quote it in the brief in support of their motion for declaratory relief:

> These 1976 amendments are important because they show that Congress fully intended to depoliticize campaign finance disputes by taking them away from the purview of the Attorney General and placing them in the first instance within the "exclusive primary" jurisdiction of the FEC.

Id. at p.8. Of course, missing from this statement is the small detail that those amendments explicitly confined the FEC's "exclusive primary jurisdiction" to the *civil* enforcement of the Act.

> 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.*

1976 Amendments, p.470 (Emphasis added).

Neither the statutory language nor the legislative history support plaintiffs' contention that the 1976 Amendments in any way affected the Attorney General's authority to criminally enforce FECA.[6] The courts agree with this conclusion.

3. *United States v. Int'l Union of Operating Engineers, Local 701*

The most extensive analysis of the issue that is raised in this case is contained in *United States v. Int'l Union of Operating Engineers, Local 701*, 638 F.2d 1161 (9th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980). That appeal arose out of a district court's dismissal of an indictment for campaign finance law violations, on the grounds that the Attorney General had failed to exhaust administrative remedies before the FEC. The appeals court reversed, holding that "[w]e conclude Congress did not intend to impose this limitation upon the power of the

[6] Plaintiffs also suggest that the 1976 Amendments, for the first time, provided for a bi-partisan FEC. (Brief in support of plaintiffs' motion for declaratory relief, p.7) This is incorrect. At the time of the creation of the FEC, Congress took care to ensure that the voting members of that body were evenly split between the two major political parties. In its original incarnation, the six voting members of the FEC were appointed – two each – by the President *pro tem* of the Senate, the Speaker of the House and the President. Each of those three appointing authorities was forbidden to choose both of their appointees from the same political party. *See Buckley v. Valeo*, 424 U.S. 1, 679-80 (1976).

Attorney General to enforce the law." *Id.* at 1161. What followed in *Operating Engineers* was a lengthy analysis of much of the legislative history discussed above, and a conclusion that responds directly to plaintiffs' contention in this case:

> In sum, neither 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.

Id. at 1168.

Other courts have agreed with this analysis in the FECA context. *See 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). In *United States v. Jackson*, 433 F.Supp. 239, 241 (W.D.N.Y. 1977), the court determined 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 of 26 U.S.C. § 9042(c)." And again, in *United States v. Tonry*, 433 F.Supp. 620, 623 (E.D. La. 1977), the court 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." And, as recently as 1988, a court of appeals, citing *Operating Engineers*, observed that "[i]t is well settled that criminal enforcement of FECA provisions may

originate with either the FEC, *see* 2 U.S.C. § 437g(a)(5)(C) (1982) or the Department of Justice." *Galliano v. United States Postal Service*, 836 F.2d 1362, 1368 n.6 (D.C. Cir. 1988) (Bader Ginsberg, J.).

When faced with similar attacks on DOJ's authority to criminally enforce other statutes, courts almost uniformly adopt the approach of the *Operating Engineers* opinion, requiring a clear and unambiguous legislative directive before concluding that Congress intended to cabin that agency's plenary jurisdiction. The decision in *United States v. Palumbo Brothers, Inc.*, 145 F.3d 850 (7th Cir. 1998), is instructive in this regard because it addressed the tension inherent in the criminal enforcement of federal labor law. This nation's labor laws, particularly the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq*., and the Labor-Management Relations Act ("LMRA"), 29 U.S.C. §§ 141-197, perhaps have provided the most fertile ground for the development of the preemption doctrine, because those statutes have been recognized to fully occupy the field of employer-employee relations. *See, e.g., San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236 (1959) (NLRA preemption); *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987) (LMRA preemption). Nonetheless, the *Palumbo* court refused to sanction the dismissal of an indictment that necessarily interposed the criminal law on activities that also constituted unfair labor practices. With a nod to the approach taken by the *Operating Engineers* court, the *Palumbo* opinion concluded that Congress's provision of a civil remedy does not diminish the Attorney General's authority to prosecute the criminal law. This is so even where the available civil remedies are as comprehensive and as complete as they are in the federal labor arena:

> Given these canons of statutory construction and criminal jurisprudence, we recognize that the existence of a civil cause of

> action does not eliminate the availability or merit of an independent criminal prosecution that involves similar facts and implicates the same conduct, and we also observe that the availability of civil remedial orders imposed for violations of federal labor law does not eliminate the potential imposition of criminal penalties available for violations of criminal law.

Id. at 866.

Thus, neither the language of the 1976 Amendments nor the cases decided thereunder nor cases decided in analogous circumstances provide any support whatsoever for plaintiffs' contention that the Amendments limited the Department of Justice's ability to initiate criminal proceedings for violations of the campaign finance law.

4. The 1980 Amendments

Recognizing the fatal blow dealt their case by the *Operating Engineers* decision, plaintiffs argue – stridently but ineffectually – that "[i]n 1980, and in direct response to the Ninth Circuit's faulty reasoning, Congress enacted amendments to the Act which made clear it's [sic] intent to require a referral by the FEC *before* the Attorney General could prosecute." Brief in Support of Plaintiffs' Motion for Declaratory Relief, p.9 (Emphasis in original). There is nothing in the 1980 Amendments that supports plaintiffs' argument.

Plaintiffs' argument is based on the addition of eight words and one number to what is now 2 U.S.C. § 437g(a)(5)(C). Despite the importance of this change to plaintiffs' contention, they do not favor the court with a before-and-after view of the statutory language. In 1976, the section provided, in relevant part:

> If the Commission determines that there is probable cause to believe that a knowing and willful violation . . . 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 1980 Amendments effected the following change, indicated by italics, in that provision:

> 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 . . . 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).

(Emphasis added).

It is this language, describing the number of votes it takes for the FEC to refer a case to DOJ, that plaintiffs contend is "a clear and unambiguous expression of legislative will," *United States v. Morgan, supra* at 281-82, to confine the Attorney General's plenary authority to enforce the criminal law. One need only read the change to conclude that it does *nothing* to affect the Attorney General's power to investigate and prosecute criminal violations of the campaign finance law. The above language speaks only to the authority and responsibility of the FEC; under *Morgan*, it cannot be read to in any way affect the Attorney General's authority and responsibility.

Undaunted, though, plaintiffs plow forward, stridently arguing that any interpretation to the contrary would "undermine the entire statutory scheme of the Act[.]" Brief in Support of Plaintiffs' Motion for Declaratory Relief, p.14. However, they forgot to read the statute. For instance, they argue that to allow the Attorney General to independently commence an investigation of a criminal FECA case would gut the Act's provisions allowing for the FEC to administratively conciliate suspected statutory violations. Although they describe such an "end run" by the Attorney General as "duplicit[ous]," "intolerable," and "illegal," (Brief in Support of Plaintiff's Motion for Declaratory Relief, p.15), plaintiffs fail to bring to the court's attention the

fact that the Act explicitly countenances DOJ involvement without FEC conciliation. *The very provision upon which they rely says so.* The last clause of § 437g(a)(5)(C), quoted above, provides for FEC referral to the Attorney General "*without regard to any limitations set forth in paragraph (4)(A).*" (Emphasis added). Paragraph 4(A) describes the FEC's conciliation authority. Thus, the section upon which plaintiffs' place so much reliance specifically provides that the FEC can refer a matter to the Attorney General without engaging in conciliation. The Act itself allows for Attorney General involvement to the exclusion of the conciliation process.[7]

Finally, throughout their four-page dissection of the 1980 Amendments, plaintiffs fail to bring up § 437c(b)(1), which was the subject of discussion with regard to the 1976 Amendments. (Argument B(2), *supra*) That provision, which has been in the Act in one incarnation or another since its original enactment in 1974, still provides:

> 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 *civil* enforcement of such provisions. (Emphasis added)

The 1980 Amendments' only change to this section was to employ the language "exclusive jurisdiction," dispensing with the belt-and-suspenders "exclusive primary jurisdiction." It is interesting to note that plaintiffs found the 1976 addition of "exclusive" to "primary jurisdiction" so critical to their cause, but are silent as to the effect of the 1980 deletion of "primary." In any event, as the legislative history confirms, Congress – by way of the original

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[7] This also answers plaintiffs' contention that § 437g(d)(2), which allows the introduction of a conciliation agreement into evidence at a criminal trial to demonstrate lack of knowledge or intent, somehow precludes Attorney General involvement before the FEC conciliation process has occurred. (Brief in Support of Plaintiffs' Motion for Declaratory Relief, p.15) Again, the statute itself allows such Attorney General involvement. Plaintiffs cannot argue that the Act means one thing when it says the opposite.

1974 Senate bill – thought about providing the FEC with exclusive jurisdiction over *criminal* matters, but decided not to withdraw that authority from the Attorney General. Nothing in the statutory language, the legislative history or the case law over the past 33 years has changed that very basic fact.[8]

Plaintiffs attempt some mop-up arguments, which are as unavailing as all that came before them. First, they contend that to allow the Attorney General to pursue a FECA investigation without a referral from the FEC would constrain anyone subpoenaed by the FEC during an administrative investigation to assert his Fifth Amendment rights. (Brief in Support of Plaintiffs' Motion for Declaratory Judgment, pp.17-22) Any number of the alphabet-soup of federal agencies have the power to subpoena or summons a party during an administrative investigation – the IRS with a taxpayer, the Department of Labor with a union official, the EPA with a suspected polluter. Any such administrative investigation could theoretically evolve into a criminal matter, and this fact may implicate the Fifth Amendment rights of the subpoenaed party. Notwithstanding, in those situations the Attorney General can still, on his own, commence a criminal investigation. So it is here.

Plaintiffs also take one more shot at the "exclusive" jurisdiction of the FEC. (Brief in Support of Plaintiffs' Motion for Declaratory Relief, pp. 23-30) Suffice it to say that the very language cited by plaintiffs in support of this argument, § 437c(b)(1), speaks only of the FEC's

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[8] Plaintiffs make much of the 1980 Amendments' change in § 437g(a)(5)(c), providing for what they term as a "supermajority" of four votes to refer a matter to the Department of Justice. First, four out of six FEC members is not a "supermajority." Second, to the extent that plaintiffs argue that this provision was added in direct response to the decision in *Operating Engineers*, that argument is belied by the fact that the "four-vote" language was proposed in a bill reported out of a House Committee three weeks *before* the Ninth Circuit issued the *Operating Engineers* decision.

exclusive jurisdiction with respect to *civil* enforcement. Making the same wrong argument over and over does not make it right.

CONCLUSION

For the foregoing reasons, defendant Attorney General's Motion to Dismiss should be granted.

Respectfully yours,

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DATED: April 16, 2007

CERTIFICATION OF SERVICE

I hereby certify that on April 16, 2007, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Michael R. Dezsi

I further certify that I have mailed by U.S. mail the paper to the following non-ECF participants:

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