

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

JACK and RENEE BEAM,)	
)	
Plaintiffs,)	No. 07 CV 1227
)	
v.)	Judge Pallmeyer
)	
ALBERTO R. GONZALES, <i>et al.</i> ,)	
)	
Defendants.)	

**DEFENDANT ATTORNEY GENERAL’S REPLY MEMORANDUM
IN SUPPORT OF HIS MOTION TO DISMISS**

The sole issue in this case is purely legal: whether the Attorney General has authority to initiate investigations of criminal violations of the Federal Election Campaign Act of 1971 as amended, 2 U.S.C. § 431 *et seq.* (“FECA”), without a referral from the Federal Election Commission (“FEC”). As explained in Defendant’s opening brief, it is well-established that the Attorney General has plenary power to investigate criminal violations of any federal law unless Congress clearly and unambiguously removes such power from the Attorney General. Plaintiffs’ various arguments, although artful and spirited, must be rejected because they fail to address, much less satisfy, the exacting standard that this Court must apply to the present legal question. Accordingly, this Court should join the unanimous conclusion reached by courts around the country that have faced this precise legal issue and dismiss Plaintiffs’ complaint for failure to state a claim.

ARGUMENT

I. FECA DOES NOT REMOVE THE ATTORNEY GENERAL'S PLENARY POWER TO INITIATE CRIMINAL INVESTIGATIONS

Plaintiffs entirely fail to address the weight of authority holding that the Attorney General has plenary authority over criminal matters, or that any limitation of the Attorney General's authority must be "clear and unambiguous." *United States v. Morgan*, 222 U.S. 274, 282 (1911); *United States v. Palumbo Bros.*, 145 F.3d 850, 865 (7th Cir. 1998) ("Courts recognize that criminal prosecution is an executive function within the exclusive prerogative of the Attorney General.") (internal quotations omitted). Plaintiffs rely solely on the spurious, extra-textual argument that FECA requires the Attorney General to await a referral from the FEC before he may exercise his jurisdiction over criminal matters. Pls.' Response to Def.'s Mot. to Dismiss at 1-4 ("Pls.' Resp."). Plaintiffs cite no clear and unambiguous authority for this assertion because there *is no authority* for this assertion. Congress did *not* expressly provide an exhaustion requirement for criminal investigations under FECA. The fact that referrals are *allowed* under the statute is in no manner an exhaustion *requirement* for such a referral. If Congress had wished to create such an exhaustion requirement, it could have explicitly done so. It did not. Because the Attorney General's powers to initiate criminal investigations under FECA is not explicitly removed, Plaintiffs cannot prevail on this claim.

Moreover, Congress did not give the FEC exclusive jurisdiction over all aspects of FECA; it provided for exclusive jurisdiction over only "civil enforcement" of FECA. 2 U.S.C. § 437c(b)(1) ("The Commission shall have exclusive jurisdiction with respect to the *civil* enforcement of such provisions.") (emphasis added). Plaintiffs argue that "[t]he Attorney General utterly fails to explain how the FEC can share its exclusive jurisdiction with the

Attorney General.” Pls.’ Resp. at 1. Plaintiffs apparently assume that only one entity may have jurisdiction over FECA. FECA, like many statutes, contains both civil and criminal penalties. *See* 2 U.S.C. § 437g(d)(1) (noting criminal penalties for violations of FECA). Therefore, both the FEC and the Attorney General have jurisdiction under FECA. The Attorney General has authority to investigate criminal matters falling within FECA’s prohibitions. The FEC has authority to investigate civil violations of FECA. Plaintiffs falsely assume that there can be no concurrent civil and criminal investigations, but there is nothing in the statutory language that states this.¹ To the contrary, the statutory language supports the fact that there can be concurrent civil and criminal investigations, as it provides for both civil and criminal liability. Most importantly, Congress has not made the requisite clear, unambiguous, and explicit statement to limit the Attorney General’s criminal authority under FECA.

Finally, Plaintiffs discuss the 1980 amendments in an attempt to persuade the Court to ignore a unanimous body of case law acknowledging the Attorney General’s authority to prosecute criminal violations of campaign finance laws. *See* Pls.’ Resp. at 4-7. Cases that pre-

¹ Plaintiffs attempt to distinguish *United States v. Palumbo Bros.*, 145 F.3d 850 (7th Cir. 1998), by asserting that the case contained two sets of laws, rather than one. This distinction is irrelevant. In *Palumbo Bros.*, the court found 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.” *Id.* at 866. There is no requirement that the civil and criminal prohibitions on the same conduct be codified separately.

Plaintiffs also seemingly suggest that *United States v. Morgan* can be ignored and that the Attorney General is impliedly unauthorized to initiate criminal investigations pertaining to any federal criminal law that Congress does not place in Title 18 of the United States Code. *See* Pls.’ Resp. at 3-4. This argument lacks merit. There is no rule limiting the Attorney General’s enforcement authority to statutes contained in Title 18 of the United States Code. Statutes with criminal penalties are scattered throughout the various titles of the United States Code. *See, e.g.*, 47 U.S.C. § 231; 50 U.S.C. § 1705.

date the 1980 amendments cannot be so casually discarded because those cases analyzed FECA's referral provision, which the amendments did not substantively change. Congress added language in 1980 to explicitly set forth that FEC referrals to the Attorney General are to be made "by an affirmative vote of 4 of its members":

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).

2 U.S.C. § 437g(a)(5)(C). As stated in Defendant's opening brief, this non-substantive change in procedure cannot be relied on by Plaintiffs to present the type of clear and unambiguous Congressional directive that is required to alter the powers of the Attorney General. *See Firststar Bank v. Faul*, 253 F.3d 982, 988 (7th Cir. 2001) ("The courts presume that Congress will use clear language if it intends to alter an established meaning about what a law means; if Congress fails to do so, courts presume that the new statute has the same effect as the older version."). As discussed in Defendant's opening brief, at least six courts have considered the authority of the Attorney General to institute criminal investigations under FECA, and all have reached the same conclusion. Plaintiffs basically ignore the persuasive weight of this authority. Rather than directing the Court to clear and unambiguous language in the statute that abrogates the Attorney General's power (which, of course, cannot be done), Plaintiffs offer only rhetoric.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Attorney General's prior brief, Defendant's motion to dismiss should be granted.

Dated: May 23, 2007

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

PATRICK J. FITZGERALD
United States Attorney

LINDA A. WAWZENSKI
Assistant United States Attorney
219 S. Dearborn Street
Chicago, Illinois 60604
(312) 353-1994

/s/ Eric J. Beane
THEODORE C. HIRT
Assistant Branch Director
TAMARA ULRICH
ERIC J. BEANE
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, D.C. 20530
(202) 616-2035
eric.beane@usdoj.gov

Attorneys for Defendant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DEFENDANT ATTORNEY GENERAL'S REPLY MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS was served on May 23, 2007 in accordance with Fed. R. Civ. P. 5, L.R. 5.5, and the General Order on Electronic Case Filing ("ECF") pursuant to the district court's system as to ECF filers.

s/ Eric J. Beane

ERIC J. BEANE
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, D.C. 20530
(202) 616-2035