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

DEFENDANT FEDERAL ELECTION COMMISSION'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

Defendant Federal Election Commission ("FEC" or "Commission"), through its undersigned counsel, hereby responds to Plaintiffs Jack and Renee Beam's Response to the Commission's Motion to Dismiss filed on May 17, 2007 (Dkt # 34). The Commission incorporates by reference the arguments contained in the reply brief filed by the Attorney General on May 23, 2007 (Dkt # 37).

1. The Commission has already demonstrated that the plain text of statutory language, along with the Supreme Court's decision in United States v. Morgan, 222 U.S. 274 (1911), control the outcome of plaintiffs' declaratory judgment claim (Count 1). See 28 U.S.C. 516, 2 U.S.C. 437c, 437g. In our opening brief, we showed that absent a "clear and unambiguous" directive from Congress, Morgan, 222 U.S. at 282, the Attorney General has

plenary authority to conduct litigation on behalf of the federal government, including enforcing the Act. Br. at 5, 7-8 (explaining application of 28 U.S.C. 516). Section 437c(b)(1) provides (emphasis added) that "[t]he Commission shall have exclusive jurisdiction with respect to the civil enforcement" of the FECA, and is therefore such a "clear and unambiguous" directive with regard to civil enforcement authority; nowhere in the Act is the Commission given the power to criminally enforce its provisions.

Moreover, contrary to plaintiffs' claim (Pl. Opp. 3), the FECA contains no "sequence of jurisdiction" that requires the Attorney General to await the Commission's civil resolution of FECA violations before he may pursue criminal violations of the statute. Although 2 U.S.C. 437g requires the Commission to exercise its civil enforcement jurisdiction through a series of administrative steps, including an attempt to resolve violations of the Act informally before filing a civil enforcement action in federal district court, none of those requirements mentions the Attorney General, let alone the timing of any of his criminal enforcement actions. The plain language of the referral provision, 2 U.S.C. 437d(a)(5)(C), provides only that "[i]f 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 the Act occurred, the Commission "may refer such apparent violation to the Attorney General," without regard to whether the Commission has tried to settle any civil violation of the Act.[1] Under Morgan, the absence of a clear and

[1] The legislative history only confirms that FECA does not require a referral from the FEC before the Department of Justice ("DOJ") can initiate an investigation. Our opening brief showed that the legislation in 1976 that provided the Commission with exclusive civil authority expressly exempted from this authority "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 (App. 24). See also FEC Br. at 9-12. Plaintiffs do not contest this showing in their opposition.

unambiguous limit on the Attorney General's power is fatal to plaintiffs' declaratory judgment claim.

2. There is nothing inconsistent in the positions taken in this litigation by the Commission and the Attorney General (Pl. Opp. 3-4) or anything unusual about the Commission and the Attorney General each having jurisdiction to enforce the Act, since the Commission's jurisdiction is to civilly enforce the Act and the Attorney General's jurisdiction involves only criminal enforcement. As we have explained, and plaintiffs ignore, it is "civil enforcement" of the Act over which the Commission has "exclusive" jurisdiction pursuant to 2 U.S.C. 437c(b)(1); it does not "share" this jurisdiction with the Attorney General. Similarly, it is jurisdiction over "criminal enforcement" of the law that the Attorney General claims, and he does not "share" that jurisdiction with the Commission. Thus, there is no conflict between the agencies, let alone a "congressional mandate" that precludes the Attorney General from having jurisdiction to enforce the Act criminally until after the Commission has asserted its civil jurisdiction. Pl. Opp. at 3.

3. In its brief the Commission cited numerous cases in which courts have concluded that criminal enforcement may originate with DOJ or can originate as a referral from the Commission. See United States v. International Operating Engineers, Local 701, 638 F.2d 1161, 1168 (9th Cir. 1979); United States v. Jackson, 433 F. Supp. 239, 241 (W.D.N.Y. 1977); United States v. Tonry, 433 F. Supp. 620, 623 (E.D. La. 1977); 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). Commentators have reached this same conclusion. See Elections and Elective Franchise, 10A Fed. Proc., L. Ed. § 28:352 (1994) ("exhaustion of administrative remedies by the Attorney General under 2 U.S.C. 437g is not a prerequisite to indictment for violations of the Federal Election Campaign Act"). Plaintiffs do

not even refer to, let alone make any attempt to distinguish, any of this authority. See Roeder v. Islamic Republic of Iran, 195 F.Supp.2d 140, 184 (D.D.C. 2002) ("An attorney can not carry out the practice of law like an ostrich with her head in the sand").

4. Finally, plaintiffs provide no meaningful response to the Commission's showing that this Court lacks jurisdiction under either the Administrative Procedure Act or the mandamus statute to decide plaintiffs' claims that the Commission has unlawfully stopped its investigation of allegations of plaintiffs' own misconduct (Counts 2 and 3). We showed (FEC Br. 14-19) that the requirement in 2 U.S.C. 437g(a)(2) that the Commission "make an investigation" is a "broad statutory mandate," not the kind of precise and definite act that the Supreme Court held in Norton v. SUWA, 542 U.S. 55 (2004), is required for mandamus or an APA claim under 5 U.S.C. 706(1) to compel agency action unlawfully withheld or delayed. Moreover, plaintiffs never discuss why a certain pace for the Commission's investigation is a precise and definite act or otherwise "legally required" under the APA. Indeed, plaintiffs offer no reason why the Court should interfere with the broad congressional delegation of discretion to the Commission to conduct its administrative investigations as it sees fit, but instead simply assert that the Commission is required to "make an investigation" of their activities. As the Norton Court concluded, however, it is not enough that the action be "legally required," it must also be a "discrete" act, compliance with which can be assessed by the courts:

> The principal purpose of the APA limitations . . . -- and of the traditional limitations upon mandamus from which they were derived -- is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. . . . If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved -- which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate,

> injecting the judge into day-to-day agency management. The prospect of pervasive oversight by federal courts over the manner and pace of the agency's compliance with such congressional directives is not contemplated by the APA.

542 U.S. at 66-67. Since the Act imposes no guidelines or deadlines for the Commission's investigations, and places all of their details entirely within the Commission's discretion, the requirement that the Commission "make an investigation" under 2 U.S.C. 437g(a)(2) is not a sufficiently discrete action on which to base an APA claim under section 706(1).[2]

Plaintiffs (Opp. at 7) dismiss as "mysterious" the FEC's argument, citing Stockman v. FEC, 138 F.3d 144 (5th Cir. 1998), as well as the language of 5 U.S.C. 701(a), that the pace of the Commission's administrative investigations is not reviewable under the APA, but plaintiffs never explain why the reasoning of that case, and 5 U.S.C. 701(a), do not each preclude their APA claim. The Commission demonstrated that review is barred by 5 U.S.C. 701(a), which states that the APA does not apply where the relevant "statute precludes judicial review" or is "committed to agency discretion." Here, because 2 U.S.C. 437g(a)(8) only allows a delay claim when brought by an administrative complainant, and then only in the United States District Court for the District of Columbia, the FECA impliedly precludes a delay claim brought by the targets of a Commission investigation. Thus, the Court should dismiss plaintiffs' APA claim, as the Fifth Circuit did with a similar claim by an administrative respondent in Stockman.

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[2] Although plaintiffs once again assert (Pl. Opp. 7 (emphasis in original)) that the "FEC **is not** conducting **any** investigation" in this matter, we noted in our opening brief (Br. 14-15) that this is patently false because plaintiffs themselves have attached to their Motion for Declaratory Relief documents from the Commission notifying them of the Commission's investigation. However, as we demonstrate above, it is irrelevant whether there is any ongoing investigation because the APA provides no waiver of sovereign immunity for plaintiffs to challenge the manner of whatever investigation the Commission may be conducting now or in the future. Thus, the Court lacks jurisdiction to hear those claims.

CONCLUSION

For the reasons stated above, and in its opening brief, the Federal Election Commission respectfully requests that this Honorable Court dismiss plaintiffs' complaint.

Respectfully submitted,

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May 24, 2007

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2007, I electronically filed the foregoing Defendant Federal Election Commission's Reply Brief in Support of its Motion to Dismiss. The Court's Commission/ECF system will send notification of such filing to the following e-mail addresses:

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