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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-15643

JON MARCUS,

Plaintiff-Appellant,

v.

MICHAEL B. MUKASEY, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF OF THE ATTORNEY GENERAL

STATEMENT OF JURISDICTION

Plaintiff Jon Marcus brought suit in district court seeking declaratory relief under 28 U.S.C. §§ 2201 & 2202, alleging that a grand jury investigation into his activities violated the Federal Election Campaign Act, 2 U.S.C. § 437g. Excerpts of Record ("ER") 139-43. Marcus invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 & 1346. ER 140.

The district court granted defendants' motions to dismiss on March 10, 2008. ER 3-10. Marcus filed a timely notice of appeal on March 18. ER 1-2. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court properly held that the Federal Election Campaign Act does not divest the Attorney General of his traditional authority over criminal investigations and prosecutions.

2. Whether, in any event, declaratory relief is precluded in a civil lawsuit that seeks to collaterally challenge a grand jury investigation or indictment.

STATEMENT OF THE CASE

Plaintiff Jon Marcus brought suit against the United States Attorney General and the Chairman of the Federal Election Commission, complaining of an alleged grand jury investigation into Marcus's violation of federal campaign finance laws. ER 141-42. Marcus claimed that the grand jury's investigation was unlawful under the Federal Election Campaign Act, and sought declaratory relief. ER 142-43.

The district court dismissed Marcus's suit in March 2008, holding in accordance with this Court's decision in United States v. International Union of Operating Engineers, 638 F.2d 1161 (9th Cir. 1979), that the Federal Election Campaign Act placed no restrictions upon the investigative or prosecutorial authority of the Attorney General. ER 8-9. Marcus appealed.

STATEMENT OF THE FACTS

I. Statutory Background

1. The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, imposes a variety of requirements on campaign expenditures and contributions in the federal election process. Among other provisions, the Act places dollar limits on individual campaign contributions, 2 U.S.C. § 441a, prohibits certain corporate contributions, 2 U.S.C. § 441b, and forbids contributions made in the name of another, 2 U.S.C. § 441f. Violations of the Act carry both civil and criminal penalties. 2 U.S.C. § 437g(a)(6), (d)(1).

The Act establishes a Federal Election Commission ("FEC") with six voting members, no more than three of whom may be affiliated with the same political party. 2 U.S.C. § 437c(a)(1). The Commission possesses "exclusive jurisdiction with respect to the civil enforcement" of the Act's provisions, 2 U.S.C. § 437c(b)(1), as well as the authority to issue subpoenas, administer oaths, render advisory opinions regarding compliance with the Act, and litigate civil actions through its general counsel, 2 U.S.C. § 437d(a). The Act provides that, as a general matter, "the power of the Commission to initiate civil actions * * * shall be the exclusive civil remedy for the enforcement of the provisions of this Act." 2 U.S.C. § 437d(e).

In cases where the Commission, by an affirmative vote of at least four members, finds reason to believe that a person has violated or is about to violate the

Act, the Commission must notify that person of the factual basis for the alleged violation and make an investigation. 2 U.S.C. § 437g(a)(2). If the Commission subsequently finds probable cause of such violation by an affirmative vote of at least four members, it must typically "attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved." 2 U.S.C. § 437g(a)(4)(A)(i). The Commission may enter into a conciliation agreement only by an affirmative vote of at least four members, and any such agreement, if abided by, provides "a complete bar to any further action by the Commission, including the bringing of a civil proceeding." Id.

If the Commission, by an affirmative vote of at least four members, finds probable cause that a knowing and willful violation of the Act's criminal provisions has occurred or is about to occur, it may refer the violation to the Attorney General without regard to the Act's conciliation provisions. 2 U.S.C. § 437g(a)(5)(C). In such cases, the Attorney General "shall report to the Commission any action taken by the Attorney General regarding the apparent violation" at regular intervals until the matter is concluded. 2 U.S.C. § 437g(c). If a criminal defendant has entered into a conciliation agreement with the Commission that remains in effect, he may introduce the agreement to establish lack of knowledge or intent at trial, as well as to mitigate his penalty at sentencing. 2 U.S.C. § 437g(d)(2)-(3).

2. Since 1977, shortly after the Federal Election Campaign Act was amended to grant exclusive civil jurisdiction over violations of the Act to the FEC, the division of authority between the Commission and the Department of Justice has been governed by a memorandum of understanding between the two agencies. The memorandum, which was published in the Federal Register shortly after its adoption, see 43 Fed. Reg. 5441 (Feb. 8, 1978), sets forth the roles of each agency in enforcing the civil and criminal provisions of the Act. The memorandum "recognizes the Federal Election Commission's exclusive jurisdiction in civil matters" under the Act, and describes the circumstances in which the Commission will refer willful and knowing violations to the Department of Justice. Id. The memorandum further provides:

> Where information comes to the attention of the Department indicating a probable violation of Title 2, the Department will apprise the Commission of such information at the earliest opportunity.
>
> Where the Department determines that evidence of a probable violation of Title 2 amounts to a significant and substantial knowing and wilful violation, the Department will continue its investigation to prosecution when appropriate and necessary to its prosecutorial duties and functions, and will endeavor to make available to the Commission evidence developed during the course of its investigation subject to restricting law. * * * *
>
> Where the Department determines that evidence of a probable violation of title 2 does not amount to a significant and substantial knowing and wilful violation * * * the Department will refer the matter

to the Commission as promptly as possible for its consideration of the wide range of appropriate remedies available to the Commission.

Id.[1]

II. Factual Background and Prior Proceedings

1. In February 2007, Jon Marcus brought suit against the Attorney General and the Chairman of the Federal Election Commission. Marcus claimed that he was the target of an ongoing federal grand jury investigation into violations of campaign finance laws, and contended that because the Federal Election Commission had not completed a civil investigation and referred the matter to the Attorney General, the grand jury's criminal investigation was contrary to "the jurisdictional requirements" of the Federal Election Campaign Act, 2 U.S.C. § 437g. ER 141-42. On this basis, Marcus sought declaratory relief from the investigation. ER 143.

2. In March 2008, on cross-motions by the parties, the district court dismissed Marcus's suit. The court rejected Marcus's argument that the Attorney General lacked authority to conduct a grand jury investigation without a referral from the Federal Election Commission, and "note[d] specifically" that this Court had already

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[1]Congress' expansion of the campaign finance laws in 2002 has prompted the Department and the FEC to begin negotiations for an updated memorandum of understanding. See Public Integrity Section, U.S. Dep't of Justice, Federal Prosecution of Election Offenses 205 (7th ed. Aug. 2007). These developments do not address the Attorney General's underlying authority to investigate and prosecute campaign finance violations independent of referral from the FEC. See id. at 177.

reached the same conclusion in United States v. International Union of Operating Engineers, 638 F.2d 1161 (9th Cir. 1979). ER 8. Subsequent amendments to the Federal Election Campaign Act, which Marcus claimed to have repudiated Operating Engineers, had no bearing on the continued vitality of that precedent. ER 8-9.

Consistent with Operating Engineers, the district court reasoned that although the statute "provides that '[t]he Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions' . . . [t]his 'directive' applies to civil enforcement of the Act, not to criminal enforcement of the Act." ER 8 (quoting 2 U.S.C. § 437c(b)(1)). The Act's legislative history likewise "demonstrate[d] that Congress did not intend to limit or displace the Attorney General's independent authority to pursue criminal violations of the Act." ER 8. Because "the plain language of the Act neither grants the Commission exclusive jurisdiction to enforce criminal violations of the Act nor infringes the Attorney General's plenary power to enforce criminal violations of the Act," and because both this Court's precedent and the statute's legislative history further supported that conclusion, the district court held that any alleged investigation of Marcus was consistent with the Federal Election Campaign Act and dismissed Marcus's suit. ER 8.

III. Related Proceedings

At approximately the same time that Marcus brought this suit, three other sets of plaintiffs filed actions in the district courts of Colorado, Illinois, and Michigan,

raising claims virtually identical to those presented here. The Colorado and Michigan suits were dismissed on grounds closely resembling those adopted by the district court in this case. The Tenth Circuit recently affirmed the Colorado dismissal based on reasoning that parallels this Court's decision in Operating Engineers. Bialek v. Mukasey, 529 F.3d 1267 (10th Cir. 2008). The Michigan suit is currently on appeal to the Sixth Circuit. See Fieger v. Gonzales, Civ. No. 07-10533, 2007 WL 2351006, at *3-8 (E.D. Mich. 2007), appeal docketed, No. 07-2291 (6th Cir. Oct. 17, 2007). Motions to dismiss are pending in the Illinois suit. Beam v. Gonzales, Civ. No. 07-1227 (N.D. Ill., suit filed Mar. 2, 2007).

In August 2007, a federal grand jury in the Eastern District of Michigan handed down a ten-count indictment against two defendants for violations of the Federal Election Campaign Act and related offenses, based on campaign contributions related to those alleged in Marcus's complaint. In June 2008, both defendants were acquitted of the charges. United States v. Fieger, Crim. No. 07-20414 (E.D. Mich.).

SUMMARY OF THE ARGUMENT

The district court properly dismissed Marcus's challenge under the Federal Election Campaign Act. As this Court explained nearly three decades ago in United States v. International Union of Operating Engineers, 638 F.2d 1161 (9th Cir. 1979), nothing in the Act disturbs the Attorney General's traditional authority over federal criminal investigations and prosecutions. Marcus's attempts to escape the force of

that binding precedent are without merit. Indeed, the Tenth Circuit recently rejected a challenge virtually identical to Marcus's and recognized the continued vitality of this Court's decision in Operating Engineers. Bialek v. Muaksey, 529 F.3d 1267 (10th Cir. 2008). The statute's grant of exclusive civil jurisdiction to the Federal Election Commission is just that--a grant of civil jurisdiction. The Act says nothing about the Attorney General's criminal enforcement authority, and Marcus's efforts to infer such limits from restrictions on the Federal Election Commission fail.

Marcus's suit against the Attorney General also fails because individuals may not obtain declaratory relief from criminal investigation or prosecution through civil litigation. Longstanding principles of equity jurisprudence prohibit parties from interfering with federal criminal investigations or indictments through the guise of a civil lawsuit. That rule is founded both on separation-of-powers principles and on the traditional precept that equitable relief will not lie when an adequate alternative remedy is available. "Prospective defendants cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure." Deaver v. Seymour, 822 F.2d 66, 71 (D.C. Cir. 1987). That is precisely the effect of Marcus's suit, and the district court's dismissal is equally justified on this alternative ground.

STANDARD OF REVIEW

This Court reviews a dismissal for failure to state a claim de novo, construing the complaint's allegations in the light most favorable to the plaintiff. Sybersound

Records, Inc. v. UAV Corp., 517 F.3d 1137, 1142 (9th Cir. 2008). The Court may affirm on any ground supported by the record. Id. at 1142-43.

ARGUMENT

I. THE FEDERAL ELECTION CAMPAIGN ACT DOES NOT ALTER THE ATTORNEY GENERAL'S TRADITIONAL AUTHORITY OVER CRIMINAL INVESTIGATIONS.

1. Marcus contends that the Federal Election Campaign Act prohibits the Attorney General from investigating and prosecuting campaign finance crimes until after referral from the Federal Election Commission. This Court has already rejected precisely that argument, holding that "Congress did not intend to impose this limitation upon the power of the Attorney General to enforce the law." United States v. International Union of Operating Engineers, 638 F.2d 1161, 1162 (9th Cir. 1979). That conclusion controls the outcome of this appeal, and this Court need go no further to affirm the district court's dismissal of Marcus's suit.

Appellees in Operating Engineers, like Marcus here, contended that the Federal Election Campaign Act required the Attorney General "to exhaust the administrative remedy before the Federal Election Commission (FEC), available under section 437g of the Act, before seeking an indictment." 639 F.2d at 1162. This Court began its analysis from the proposition that any infringement on the Attorney General's prosecutorial authority "'would require a clear and unambiguous expression of the

legislative will.'" Id. (quoting United States v. Morgan, 222 U.S. 274, 282 (1911)). After assessing the civil enforcement scheme provided by the Act, the Court determined that "[n]othing in these provisions suggests, much less clearly and [un]ambiguously states, that action by the Department of Justice to prosecute a violation of the Act is conditioned upon prior consideration of the alleged violation by the FEC. Indeed, it would strain the language to imply such a condition." Id. at 1163.

Moreover, the Court explained, "[t]he fact that the FEC may refer certain complaints to the Department of Justice for prosecution, after administrative processing, does not in itself imply that administrative processing and referral are prerequisite to the initiation of litigation by the Attorney General." 638 F.2d at 1163 (citation omitted). Nor do the statute's procedural requirements for civil enforcement actions and conciliation agreements confine the Attorney General's prosecutorial discretion; rather, they establish limits on the Commission's ability to investigate and pursue remedies for civil infractions. Id. at 1164. In short, those provisions "detail duties of the FEC and rights of persons complained against, not limitations upon the statutory power of the Attorney General to initiate prosecution on behalf of the United States." Id. at 1163.

The Court found additional support for its interpretation in the Act's extensive legislative history and in the 1977 memorandum of understanding between the FEC

and the Justice Department, which had contemporaneously interpreted the Act to allow criminal investigations by the Attorney General without first exhausting the Commission's civil remedies. 638 F.2d at 1165-68. The Court concluded:

> 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.

2. That analysis is entirely correct. "Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government." United States v. Nixon, 418 U.S. 683, 694 (1974) (citing 28 U.S.C. § 516). Accordingly, "criminal prosecution is 'an executive function within the exclusive prerogative of the Attorney General.'" United States v. Palumbo Bros., Inc., 145 F.3d 850, 865 (7th Cir. 1998) (quoting United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1366 (9th Cir. 1987)). See also In re Persico, 522 F.2d 41, 54 (2d Cir. 1975) (same) (citing United States v. Cox, 342 F.2d 167, 190 (5th Cir. 1965) (Wisdom, J., specially concurring)). Congress may entrust these investigatory and prosecutorial powers to another Executive officer, but it has long been established

that "[t]o graft such an exception upon the criminal law would require a clear and unambiguous expression of the legislative will." United States v. Morgan, 222 U.S. 274, 282 (1911).

The Federal Election Campaign Act contains no such clear and unambiguous direction. The Act does not restrict or even mention the Attorney General's authority over criminal violations, nor does it vest criminal jurisdiction in any other agency or Executive official. To the contrary, the Act provides that the Federal Election Commission "shall have exclusive jurisdiction with respect to the civil enforcement" of the Act, 2 U.S.C. § 437c(b)(1), but does not work any similar change in criminal enforcement. Congress' silence with regard to criminal matters is reason enough to conclude that it did not intend to disturb the traditional responsibilities of the Attorney General. Congress' decision to confer exclusive civil jurisdiction to the Commission, while including no such provision as to criminal jurisdiction, makes that conclusion even more inescapable.

The authority by which the Commission may refer cases to the Attorney General for criminal investigation, 2 U.S.C. § 437g(a)(5)(C), is wholly consistent with this reading. Marcus contends (Br. 17) that the subsection "require[s] a referral from the FEC before the Attorney General [can] initiate criminal proceedings." But that is not what the statute says. To the contrary, the statute provides only that, if the Commission votes to find probable cause of certain knowing and willful violations

of the Act, "it may refer such apparent violation[s] to the Attorney General." That such an avenue exists for referring potential violations "does not in itself imply that administrative processing and referral are prerequisite to the initiation of litigation by the Attorney General." Operating Engineers, 638 F.2d at 1163.

The referral provision, by its terms, addresses the Commission's authority. A referral to the Attorney General bears the imprimatur of the Commission, and requires regular reports from the Attorney General on any action taken regarding the matter. See 2 U.S.C. § 437g(c). The Act's provisions ensure that such a step is not undertaken by the Commission lightly. The statute contains no language, however, to suggest that the Attorney General is prohibited from acting on the basis of other information or referrals, and Marcus offers no reason why the statute's silence should be read to contain such a limitation, let alone a clear and unambiguous one.

3. The legislative history of the Federal Election Campaign Act further underscores that its provisions have no bearing on the Attorney General's criminal authority. When Congress created the Federal Election Commission in 1974, it considered and rejected language that would have conditioned the prosecutorial acts of the Attorney General on the Commission's approval. The original Senate bill provided that "[n]otwithstanding any other provision of law, the Commission shall be the primary civil and criminal enforcement agency for violations of the provisions of this Act * * * . Any violation of any such provision shall be prosecuted by the

Attorney General or Department of Justice personnel only after consultation with, and with the consent of, the Commission." S. 3044, 93d Cong., § 207, sec. 309(d), at 49 (2d Sess. 1974), reprinted in Fed. Election Comm'n, Legislative History of Federal Election Campaign Act Amendments of 1974, at 51 (1977) [hereinafter 1974 Legislative History]. Congress discarded that provision in conference, replacing it with the House's language that afforded the Commission only "primary jurisdiction with respect to the civil enforcement of such provisions." H.R. Rep. No. 93-1438, at 22 (2d Sess. 1974) (Conf. Rep.), reprinted in 1974 Legislative History at 966. In so doing, the Conference Report explicitly disclaimed the Senate's proposal: "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 personnel in performing their duties under the laws of the United States." Id. at 94, reprinted in 1974 Legislative History at 1038. See also Operating Engineers, 638 F.2d at 1165 (recounting the history of the 1974 amendments).

Congressional statements reinforce this understanding. Senator Cannon, one of the key supporters of the Act, explained when introducing the Conference Bill that "the Department of Justice would not be deprived of any of its power to initiate civil or criminal actions in response to referrals by the commission or complaints from other sources." 93 Cong. Rec. S18525 (daily ed. Oct. 8, 1974) (statement of Sen.

Cannon), reprinted in 1974 Legislative History at 1079. Similar sentiments were echoed by the Act's supporters in the House. See, e.g., 93 Cong. Rec. H10327 (daily ed. Oct. 10, 1974) (statement of Rep. Hays) ("We allow [the Commission] to go to court independently on civil matters * * * but all criminal matters must still be handled by the Justice Department."), reprinted in 1974 Legislative History at 1105; 93 Cong. Rec. H10331 (daily ed. Oct. 10, 1974) (statement of Rep. Frenzel) ("Criminal enforcement remains with the Justice Department, but the Attorney General is held accountable to the Commission for reporting on the disposition of violations referred to him."), reprinted in 1974 Legislative History at 1109. The Conference language was enacted into law without alteration. Pub. L. No. 93-433, § 208, sec. 310(b), 88 Stat. 1263, 1281 (Oct. 15, 1974), reprinted in 1974 Legislative History at 1153.

When Congress amended the Act in 1976 to grant the Commission exclusive civil jurisdiction, it again made clear that the change did not affect the Attorney General's criminal powers, but was limited to civil enforcement. The House bill that would ultimately become law "follow[ed] the pattern set in the 1974 Amendments" by excluding from the FEC's jurisdiction "complaints directed to the Attorney General and seeking the institution of a criminal proceeding." H.R. Rep. No. 94-917, at 4 (2d Sess. 1976), reprinted in Fed. Election Comm'n, Legislative History of Federal Election Campaign Act Amendments of 1976, at 804 (1977) [hereinafter

1976 Legislative History]; see S. Rep. No. 94-677, at 7 (2d Sess. 1976) (noting that "[t]he proposed changes would give the Commission exclusive civil enforcement authority," but suggesting no change to the Attorney General's authority over criminal violations), reprinted in 1976 Legislative History at 283; H.R. Rep. No. 94-1057, at 43 (2d Sess. 1976) (Conf. Rep.) ("The Conference substitute is the same as the House amendment and the Senate bill."), reprinted in 1976 Legislative History at 1037. That sentiment was again echoed by Senator Cannon, who explained that "[t]he 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. Mar. 22, 1976) (statement of Sen. Cannon), reprinted in 1976 Legislative History at 470-71. See also Operating Engineers, 638 F.2d at 1165-66.

Marcus's sole response to this history is an isolated floor statement by a staunch opponent of the Federal Election Campaign Act, Senator Brock. See Br. 17-18, 28 (quoting 122 Cong. Rec. S12471 (1976)); 94 Cong. Rec. S6479 (daily ed., May 4, 1976) (statement of Sen. Brock) (labeling the Act "a deceit, a sham, and a fraud on the American public"), reprinted in 1976 Legislative History at 1109. Yet as this Court recognized in Operating Engineers, "Senator Brock was a leading Senate opponent of the legislation. His characterization of the legislation is thereby entitled

to little weight." 638 F.2d at 1168. See also Bryan v. United States, 524 U.S. 184, 196 (1998) ("[T]he fears and doubts of the opposition are no authoritative guide to the construction of legislation. In their zeal to defeat a bill, they understandably tend to overstate its reach." (quotation marks and citations omitted)). Marcus's suggestion that the definitive statement of Congress' intent lies not in the language of its statute, its Conference Reports, or the statements of legislative sponsors, but rather in the lone views of a dissenting Senator, stretches an argument for "clear and unambiguous intent" well beyond its breaking point.

4. Marcus's contention that Operating Engineers "has now been superceded by subsequent amendment to the Act in 1980," Br. 18, is similarly without merit. Marcus makes much of an amendment requiring that the Commission refer violations to the Attorney General only "by an affirmative vote of 4 of its members." Br. 19 (quoting 2 U.S.C. § 437g(a)(5)(C)); see Br. 23-24 (same). Yet that provision is not substantively different from any other version of the Act since the Commission's formation. As far back as 1974, when the Commission was first created as a six-member body, it was required that "[a]ll decisions of the Commission with respect to its duties and powers under the provisions of this title shall be made by a majority vote of the members of the Commission." Pub. L. No. 93-433, § 208, sec. 310(c), 88 Stat. at 1282, reprinted in 1974 Legislative History at 1154. As Congress recognized, this amounted to "the requirement of four votes for affirmative action" well before

the amendment cited by Marcus. H.R. Rep. No. 94-917, at 4, reprinted in 1976 Legislative History at 804. Consistent with that understanding, Congress described the amendment as merely "incorporat[ing] the language * * * of the current Act regarding referral of knowing and willful violations to the Attorney General." H.R. Rep. No. 96-422, at 22 (1979), reprinted in Fed. Election Comm'n, Legislative History of Federal Election Campaign Act Amendments of 1979, at 206 (1983) [hereinafter 1979 Legislative History].

The only other amendment cited by Marcus concerns the use of conciliation agreements in criminal cases. Br. 25-26 (citing 2 U.S.C. § 437g(d)(2)). But the language of that provision is in all relevant respects identical to the 1976 language that this Court considered in Operating Engineers. See Pub. L. No. 94-283, § 112, sec. 329(b), 90 Stat. 475, 495 (May 11, 1976), reprinted in 1976 Legislative History at 1147. As this Court then explained, and contrary to Marcus's contention, nothing in that provision requires the Attorney General to wait for a referral from the Federal Election Commission before exercising his own criminal authority. 638 F.2d at 1167. See also infra pages 21-22.

In short, Marcus's claim that the 1980 amendments were enacted "in a direct repudiation of the Ninth Circuit's opinion" (Br. 20) is contradicted by the substance of those amendments and their Congressional Reports. It is also belied by the timing of the amendments, which were first reported on September 7, 1979, weeks before

this Court's decision in Operating Engineers. See H.R. 5010, 96th Cong. § 108, sec. 309(a)(5)(C), at 130 (1979), reprinted in 1979 Legislative History at 412; ER 8.

Well after the 1979 amendments, Operating Engineers continues to be relied upon by other courts of appeals--most recently by the Tenth Circuit in rejecting the very same claims that Marcus now presses in this appeal. See Bialek, 529 F.3d 1267, 1271 & n.5 (10th Cir. 2008) (holding that the 1979 amendments "do[] not affect the Ninth Circuit's reasoning, and Bialek is without support when he claims that this portion of the 1979 amendments was intended to overrule the Ninth Circuit"). See also Galliano v. U.S. Postal Serv., 836 F.2d 1362, 1368 n.6 (D.C. Cir. 1988) (citing Operating Engineers in noting that it is "settled that criminal enforcement of FECA provisions may originate either with the FEC or the Department of Justice"). The statute today is in no relevant sense different from the one considered by this Court in Operating Engineers. Marcus offers no good reason to discard this Court's prior, reasoned analysis of the Act's text and legislative history, and his suit must fail accordingly.

4. Marcus's remaining arguments offer no greater justification to disregard the clear language and legislative history of the statute, let alone the settled law of this Court.

Marcus suggests that the Attorney General's prosecutorial discretion would interfere with the Commission's ability to provide advisory opinions and rules, or to

enter into conciliation agreements. Br. 21-23, 25-26. Those contentions rest on misunderstandings of the Commission's civil enforcement powers. The Commission's advisory opinions bear only on prospective conduct, 11 C.F.R. § 112.1(b), and afford immunity from sanction only for individuals who subsequently rely upon them. See 2 U.S.C. § 437f(c). Such opinions are therefore of no import to previously completed conduct that might be the subject of a criminal investigation. In any event, the Commission's advisory opinions and rules are not "rendered meaningless" (Br. 22) by a criminal investigation or prosecution: to the contrary, the interpretations of the Commission are entitled to as great weight in criminal prosecutions as in civil enforcement suits. In re Sealed Case, 223 F.3d 775, 779 (D.C. Cir. 2000). See also Bialek, 529 F.3d at 1272.

The Commission's ability to enter into conciliation agreements is likewise consistent with the Attorney General's criminal authority. The Commission need not pursue the conciliation process at all in cases where it refers potential violations to the Attorney General. 2 U.S.C. § 437g(a)(5)(C). See Operating Engineers, 638 F.2d at 1167 ("[C]learly Congress did not intend that persons violating the Act must be given an opportunity to enter into a conciliation agreement before a criminal prosecution could be initiated."). Moreover, nothing prevents the Commission from entering into such agreements during the pendency of a criminal prosecution. Conciliation agreements have force both as evidence to establish lack of knowledge

or intent at trial, and as mitigating evidence at sentencing. 2 U.S.C. § 437g(d)(2)-(3). Rather than suggest a conflict between the Attorney General and the Commission, conciliation agreements--like advisory opinions--help to ensure consistency between the two agencies. These powers are a substantial reason why Marcus's specter of "inevitable conflicts" (Br. 22) between the Attorney General and the Commission has not materialized despite the concurrent exercise of their responsibilities over the past three decades.

Marcus asserts that independent prosecutions by the Attorney General would jeopardize the Commission's investigations due to witnesses invoking their Fifth Amendment rights. Br. 28-32. That argument misunderstands the contours of the Fifth Amendment, which does not turn on whether an individual is the subject of a criminal investigation, but rather "privileges him not to answer official questions put to him in any * * * proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). Because the Fifth Amendment's privilege turns on the potential for incrimination, and not on whether an individual is presently subject to investigation, witnesses in Commission proceedings would have the same Fifth Amendment privileges whether or not the Attorney General could independently pursue investigation or prosecution at the same time. See Bialek, 529 F.3d at 1272.

Marcus's reliance (Br. 33-34) on United States v. LaSalle National Bank, 437 U.S. 298 (1978), is similarly misplaced. The LaSalle Court addressed the authority of the Internal Revenue Service to issue administrative summonses in aid of a criminal investigation. Id. at 307-08. Noting that the IRS, upon referring a case to the Justice Department, "loses its ability to compromise both the criminal and the civil aspects of a fraud case," the Court reasoned that IRS summonses issued after referral risked being used for criminal investigatory purposes by the Justice Department. Id. at 312. Because the limited purposes for which the IRS could execute summonses "d[id] not include the goal of filing criminal charges against citizens," id. at 316 n.18, the Court set out a prophylactic rule prohibiting the Service from issuing summonses after referral to the Justice Department, or before such referral in the absence of a valid civil purpose. Id. at 312-13, 316.

No similar problem exists for the Commission, which (unlike the IRS) does not lose its civil authority when it refers a case to the Department, and which possesses broad investigative powers that are not limited to particular civil purposes. Compare 2 U.S.C. § 437d with 26 U.S.C. § 7602 (1978). Even if that were not so, nothing in LaSalle suggests that restrictions may be placed on the Attorney General's investigative authority because of statutory limits on an agency's subpoena power. Quite the contrary, the LaSalle Court emphasized that the authority to investigate and prosecute criminal cases was "reserved to the Department of Justice," and included

the "grand jury as a principal tool of criminal accusation." 437 U.S. at 312. LaSalle accordingly affords no support for Marcus's claim. See Bialek, 529 F.3d at 1272.

Equally misguided is Marcus's allegation (Br. 18-20, 23-25) that the referral and reporting provisions of the Act are rendered meaningless if the Attorney General can independently conduct investigations. As Congress made clear when it initially enacted those provisions in 1974,[2] the requirements do not prevent the Attorney General from investigating violations independently. See supra pages 13-16. Although the Attorney General retains the discretion whether to prosecute particular cases, it was Congress' hope that the reporting requirements and gravity of the Commission's referrals would bring additional violations to the Justice Department's attention--not prevent it from pursuing cases on its own. See, e.g., 93 Cong. Rec. H10331 (daily ed. Oct. 10, 1974) (statement of Rep. Frenzel) ("Criminal enforcement remains with the Justice Department, but the Attorney General is held accountable to the Commission for reporting on the disposition of violations referred to him."), reprinted in 1974 Legislative History at 1109. Marcus suggests (Br. 25) that a lone Commissioner, frustrated by the lack of support for a referral, "could simply walk across the street to a politically allied Attorney General and say, 'prosecute this

[2]Marcus's characterization of the reporting requirement as a "new provision," Br. 19, is incorrect. The requirement has existed since the Commission's creation. Pub. L. No. 93-443, § 208, sec. 314(b), 88 Stat. at 1285, reprinted in 1974 Legislative History at 1157.

case.'" Yet as this Court recognized in Operating Engineers, Congress expressed no such concern when it enacted the Federal Election Campaign Act or its amendments. 638 F.2d at 1164-65. And as the Tenth Circuit recently explained in rejecting such an argument, "it is doubtful that Congress would implicitly divest the DOJ of its authority based on a hypothetical fear of insistent FEC commissioners. We expect that FEC commissioners, like any other government officials, follow the law." Bialek, 529 F.3d at 1274.

Marcus asserts, without support, that "[s]ince 1974, virtually all campaign finance cases have been resolved by the FEC"; that "[i]n the history of the United States, no case resembling the facts here has ever been criminally charged or tried to a verdict before a jury"; and that "the FEC has resolved, civilly, about 99.9% of campaign finance disputes without the interference or intervention of the Attorney General." Br. 5 n.1, 27. See also Br. 40. Even if those claims were not squarely contradicted by the prosecutions cited by the Commission, FEC Br. 9, they would have no bearing on the question before this Court. The position of the Justice Department and the Commission, as memorialized in the agencies' thirty-year-old memorandum of understanding, is that the Attorney General possesses independent authority to investigate potential criminal violations of the campaign finance laws. That conclusion is compelled by the statute's text and legislative history. The

Attorney General's criminal enforcement power is not altered by Marcus's bare assertion that he has not prosecuted enough cases.

Finally, Marcus claims that the Attorney General is foreclosed from conducting a grand jury investigation by the doctrine of primary jurisdiction. Br. 37-39. But that doctrine applies only "in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme." United States v. Phila. Nat'l Bank, 374 U.S. 321, 353 (1963). Marcus's argument for primary jurisdiction amounts to no more than a repetition of his other attempts to create a "clear and unambiguous" restriction on the Attorney General's authority. See United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1366 & n.18 (9th Cir. 1987) ("For all practical purposes, there is no difference between requiring exhaustion of and requiring deferral to an administrative remedy. In either case there can be no litigation before the agency has acted."). For the reasons discussed above, those attempts are without merit, and the district court's judgment should accordingly be affirmed.

II. MARCUS IS NOT ENTITLED TO OBTAIN RELIEF FROM CRIMINAL INVESTIGATION OR PROSECUTION THROUGH A CIVIL LAWSUIT.

Even if Marcus's interpretation of the Federal Election Campaign Act had merit, traditional equitable principles preclude the relief he seeks. Marcus alleges that he has been the subject of a grand jury investigation and asks that the court declare

such proceedings "unlawful," ER 143, effectively enjoining any future criminal investigation or prosecution of his conduct. That result finds no support in law. Parties may not seek equitable relief to halt a grand jury investigation or prosecution through civil litigation.

"The traditional rule, dating back to the English division between courts of law and equity, was that the latter had 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' and therefore could not enjoin criminal proceedings." Deaver v. Seymour, 822 F.2d 66, 68 (D.C. Cir. 1987) (quoting In re Sawyer, 124 U.S. 200, 210 (1888)). This prohibition on interference with criminal proceedings derives from the basic doctrine that courts of equity will not act when a party possesses an adequate remedy at law. Because "the adversary system 'afford[s] defendants, after indictment, a federal forum in which to assert their defenses,'" individuals cannot challenge a federal criminal investigation or prosecution through a suit in equity. Stolt-Nielsen, S.A. v. United States, 442 F.3d 177, 185 (3d Cir.) (quoting Deaver, 822 F.2d at 69), cert. denied, 127 S. Ct. 494 (2006).

"Courts exercise this restraint because, as Justice Frankfurter explained, '[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship.'" In re Sealed Case, 829 F.2d 50, 62 n.60 (D.C. Cir. 1987) (quoting Cobbledick v. United States, 309 U.S. 323, 325

(1940)). The same is true of grand jury investigations. United States v. Dionisio, 410 U.S. 1, 10 (1973) (quoting Blair v. United States, 250 U.S. 273, 281 (1919)). Individuals may decline to testify before the grand jury pursuant to certain constitutional safeguards, but "witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation." Blair, 250 U.S. at 282; see United States v. Calandra, 414 U.S. 338, 345 (1974).[3]

These equitable limits are reinforced by the Executive's "exclusive authority and absolute discretion to decide whether to prosecute a case." Nixon, 418 U.S. at 693. "It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions." United States v. Cox, 342 F.2d 167, 171 & n.8 (5th Cir. 1965) (en banc) (citing cases). See also Stolt-Nielsen, 442 F.3d at 187.

The impropriety of allowing a collateral civil challenge to criminal proceedings is further underscored by the contrast between the broad rules of civil discovery and grand jury secrecy. Allowing potential defendants access to grand jury testimony or

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[3]The obligation to cooperate in a grand jury investigation "is no different for a person who may himself be the subject of the grand jury inquiry." Dionisio, 410 U.S. at 10 n.8.

documents, simply by dint of having filed a collateral suit challenging an investigation or prosecution, would have the potential to greatly disrupt the grand jury as well as any subsequent criminal trial. The "general rule barring judicial interference with the conduct of a grand jury proceeding" is at its strongest in such cases: "courts do not, except in very limited circumstances not alleged here, entertain the claim of a person subject to a criminal investigation that the investigation is unlawful and must therefore be enjoined." In re Sealed Case, 829 F.2d at 62 n.60.[4]

"[S]ubjects of federal investigation have never gained injunctive relief against federal prosecutors." Deaver, 822 F.2d at 69-70. Principles of equity preclude such extraordinary relief in this case as well. If Marcus wishes to challenge the propriety of the Attorney General's actions, he may follow the approach taken by the appellees in Operating Engineers and file a motion to dismiss any indictment that may ultimately be returned against him. See 638 F.2d at 1162; Fed. R. Crim. P. 12(b)(3). But "[p]rospective defendants cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure." Deaver, 822 F.2d at 71. Marcus's suit seeks precisely that result, and the district court's dismissal should be affirmed on this

[4]Limited exceptions may apply for plaintiffs seeking to resist a subpoena or assert particular First Amendment rights. United States v. Ryan, 402 U.S. 530, 532 (1971); Deaver, 822 F.2d at 69, 70 n.8. Marcus's suit falls into neither category.

ground as well. See Sybersound Records, Inc., 517 F.3d at 1142-43 (affirmance of dismissal permitted on any supported ground).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

GREGORY G. KATSAS
Assistant Attorney General

DIANE J. HUMETEWA
United States Attorney

MICHAEL S. RAAB
(202) 514-4053
ERIC FLEISIG-GREENE
(202) 514-4815
Attorneys, Appellate Staff
Civil Division, Room 7214
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

JULY 2008

STATEMENT OF RELATED CASES

Counsel for the Attorney General are not aware of any related cases as defined in 9th Cir. R. 28-2.6.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). The foregoing brief contains 6851 words from its Statement of Jurisdiction to its Conclusion, and is presented in proportionally spaced 14-point Times New Roman typeface. The brief was prepared using WordPerfect 12 for Windows XP.

Eric Fleisig-Greene

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2008, I filed and served the foregoing Brief by causing an original and fifteen copies to be sent to the Court by Federal Express overnight, and two copies to be sent by Federal Express to:

Michael R. Dezsi
Fieger, Fieger, Kenney & Johnson
19390 W. Ten Mile Rd.
Southfield, MI 48075
248-355-5555

Greg J. Mueller
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463
202-694-1650

Eric Fleisig-Greene