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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jon Marcus, Plaintiff, v. United States Attorney General Alberto R. Gonzales, Federal Election Commission Chairman Michael E. Toner, In their official capacities, Defendants.	**DEFENDANT ATTORNEY GENERAL GONZALES'S MOTION TO DISMISS** CV07-00398-PCT-EHC

DEFENDANT ATTORNEY GENERAL GONZALES'S MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Attorney General Gonzales hereby moves to dismiss the Complaint in the above-captioned action for failure to state a claim. A memorandum setting forth the points and authorities relied upon in support of this motion is attached.

Dated: May 4, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Dismiss was served this 4th day of May 2007, by the electronic case filing system, upon counsel as follows:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jon Marcus, Plaintiff, v. United States Attorney General Alberto R. Gonzales, Federal Election Commission Chairman Michael E. Toner, In their official capacities, Defendants.	**DEFENDANT ATTORNEY GENERAL GONZALES'S OPPOSITION TO PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND IN SUPPORT OF MOTION TO DISMISS** CV07-00398-PCT-EHC

DEFENDANT ATTORNEY GENERAL GONZALES'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR DECLARATORY JUDGMENT AND IN SUPPORT OF HIS MOTION TO DISMISS

INTRODUCTION

In this lawsuit Plaintiff seeks a declaration that the Attorney General does not have the power to institute grand jury proceedings that are allegedly underway to investigate criminal conduct under

the Federal Election Campaign Act of 1971 as amended, 2 U.S.C. § 431 *et seq.* ("FECA" or "the Act"). Such a declaration would contravene fundamental principles of American law, the explicit statutory language of the Act, and a controlling Ninth Circuit decision that resolved this precise issue. *See United States v. Int'l Union of Operating Eng'rs Local 701*, 638 F.2d 1161 (9th Cir. 1979). Because Plaintiff's claims are wholly without legal support, Plaintiff's motion for Declaratory Judgment should be denied and his case should be dismissed.

STATUTORY BACKGROUND

The purpose of FECA is to protect the integrity of the political process by limiting spending on federal election campaigns and prohibiting "actual or perceived pernicious influences over candidates for elective office." *Orloski v. Federal Election Comm'n*, 795 F.2d 156, 163 (D.C. Cir. 1986). The Act established a Federal Election Commission ("Commission" or "FEC"), which includes six voting members, no more than three of which may be affiliated with the same political party. 2 U.S.C. § 437c(a)(1). The Act provides that "[t]he Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions." *Id.* at § 437c(b)(1); *see also* § 437d(e) ("the power of the Commission to initiate civil actions . . . shall be the exclusive civil remedy for the enforcement of the provisions of this Act").

Section 437g of the Act establishes procedures for the Commission to follow when it learns of an alleged violation of the Act. Among other provisions is the requirement of informal settlement. Once the Commission determines that there is probable cause to believe that someone has violated the Act, the Commission shall attempt informal conciliation with that individual. 2 U.S.C. § 437g(a)(4)(A)(i). An affirmative vote of four members of the Commission is required for the Commission to enter into a conciliation agreement. *Id.* A conciliation agreement is a bar to further action by the Commission, including the initiation of a civil proceeding, as long as the conciliation agreement is not breached. *Id.* Once in place, a conciliation agreement also may be used by a criminal defendant as a defense in any criminal action. *Id.* at § 437g(d)(3). If a conciliation agreement is not reached, the Commission may take

further action, including, upon an affirmative vote of four of its members, instituting a civil action for relief. *Id.* at § 437g(a)(6)(A).

The Act also provides for the Commission to make referrals to the Attorney General, even before working on a conciliation agreement. If, by an affirmative vote of four of its members, 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 paragraph (4)(A)." 2 U.S.C. § 437g(a)(5)(C). Paragraph (4)(A) addresses informal conciliation attempts.

FACTUAL BACKGROUND

On February 21, 2007, Plaintiff filed the instant action seeking declaratory relief.[1] In the Complaint, Plaintiff alleges that he is the target of a criminal investigation instituted by the Attorney General under FECA because of his political activities, including his support and financial contributions to John Edwards' 2004 presidential campaign. *See* Compl. ¶¶ 1, 12-13. Plaintiff further alleges that the Commission is the only entity that can proceed with an investigation under the Act and that it has not made any referrals to the Attorney General regarding violations of the Act. *Id.* ¶¶ 7, 9-11. Plaintiff seeks "a declaration that Defendants' conduct is unlawful, unconstitutional, and contrary to the requirements of the Federal Campaign Finance Act [sic][.]" *Id.* at 5.

On March 15, 2007, Plaintiff filed a motion for declaratory judgment. Doc. #6. In the memorandum supporting the motion, Plaintiff reiterates his belief that the Attorney General does not have the authority to institute criminal investigations under FECA. Plaintiff relies on statutory language and legislative history in support of his argument.

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[1] Counsel for Plaintiff has filed lawsuits in three other districts containing claims identical to this one. *See Bialek v. Gonzales, et al.*, Civ. No. 07-00321 (D. Colo.) (motion to dismiss pending); *Beam v. Gonzales, et al.*, Civ. No. 07-cv-1227 (N.D. Ill.) (response to complaint due May 11, 2007); *Feiger v. Gonzales, et al.*, Civ. No. 2:07-cv-10533 (E.D. Mich.) (motion to dismiss pending).

LEGAL STANDARDS

Plaintiff asserts that the summary judgment standard should be followed by the Court, in which he would have to demonstrate that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. *See* Pl.'s Mem. at 3; Fed. R. Civ. P. 56(c).

In addition to responding to Plaintiff's motion, Defendant files this Memorandum in support of his motion to dismiss. Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). Under the motion to dismiss standard, all well-pled factual allegations are to be taken as true and construed in the light most favorable to the Plaintiff. *See Figueroa v. United States*, 7 F.3d 1405, 1408-09 (9th Cir. 1993). Because this case involves an analysis of one discrete legal issue—whether the Attorney General has the authority to institute criminal proceedings for criminal violations of the federal campaign finance laws without a referral from the FEC—the facts are largely immaterial. Dismissal is appropriate because Plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Figueroa*, 7 F.3d at 1409. The Court, at this juncture, can decide the legal issue before it and resolve the case.

ARGUMENT

Plaintiff's arguments are specious at best. Not only do courts universally recognize that the Attorney General has broad, plenary power to conduct criminal investigations, but courts deciding the issue of whether the Attorney General has the independent authority to conduct his own criminal investigations for violations of FECA, including the Ninth Circuit, unanimously have found that he does. *See Int'l Union*, 638 F.2d 1161. Plaintiff's attempt to argue to the contrary is in conflict with fundamental principles of statutory interpretation and case law directly on point.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

I. THE ATTORNEY GENERAL HAS PLENARY POWER TO INSTITUTE CRIMINAL INVESTIGATIONS, WHICH FECA DOES NOT REMOVE

A. Statutory Language Supports Defendant's Position

It cannot be denied that "the Attorney General has the power to conduct federal criminal litigation." *In re Persico*, 522 F.2d 41, 54 (2d Cir. 1975); *see also* 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General"). Courts through the years have recognized this longstanding maxim. *See, e.g.*, *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.'") (quoting *United States v. Gen. Dynamics Corp.,* 828 F.2d 1356, 1366 (9th Cir. 1987)); *United States v. Hercules*, 961 F.2d 796, 798 (8th Cir. 1992) ("Pursuant to 28 U.S.C. § 516, the Attorney General has exclusive authority and plenary power to control the conduct of litigation in which the United States is involved, unless Congress specifically authorizes an agency to proceed without the supervision of the Attorney General."); *Int'l Union*, 638 F.2d at 1162 ("We approach the interpretation of the statute with the presumption against a congressional intention to limit the power of the Attorney General to prosecute offenses under the criminal laws of the United States"); *United States v. Jackson*, 433 F. Supp. 239, 241 (W.D.N.Y. 1977) ("The Attorney General, as chief legal officer of the United States, has the authority and duty to control and supervise all criminal proceedings."), *aff'd*, 586 F.2d 832 (2d Cir. 1978). Indeed, Plaintiff does not dispute this basic legal tenet. *See* Pl.'s Mem. at 4.

Congress has the authority to limit the Attorney General's power to conduct criminal prosecutions. To do so, however, requires Congress to state "a clear and unambiguous expression of the legislative will" that such powers will be removed from the Attorney General. *United States v. Morgan*, 222 U.S. 274, 282 (1911); s*ee also Marshall v. Gibson's Products Inc.*, 584 F.2d 668, 676 n.11 (5th Cir. 1978) ("in the absence of an *express* congressional directive to

1 the contrary, [the Attorney General] is vested with plenary power over all litigation to which the
2 United States or one of its agencies is a party.") (emphasis added); *United States v. Tonry*, 433 F.
3 Supp. 620, 623 (E.D. La. 1977) (holding that, absent a specific provision "prohibiting the
4 Attorney General from going forward with [a] criminal investigation . . . the general authority of
5 the Attorney General to proceed cannot be limited").[2]

6 Congress has not made the requisite clear, unambiguous, and explicit statement to limit
7 the Attorney General's criminal authority under FECA. *Int'l Union*, 638 F.2d at 1163 ("Nothing
8 in these provisions suggests . . . that action by the Department of Justice to prosecute a violation
9 of the Act is conditioned upon prior consideration of the alleged violation by the FEC.").
10 Indeed, the statutory language makes it clear that Congress intended for the FEC to retain
11 exclusive jurisdiction over only *civil* matters under FECA. FECA provides that the
12 "Commission shall have exclusive jurisdiction with respect to the *civil* enforcement of such
13 provisions." 2 U.S.C. § 437c(b)(1) (emphasis added). While Plaintiff attempts to make much
14 out of the word "exclusive" in this sentence, the key word conveniently overlooked by Plaintiff
15 is "civil." This statutory language is unambiguous and indicates a clear intent by Congress that
16 the FEC would have exclusive authority over civil enforcement actions only. If Congress
17 wanted to grant the FEC with similar exclusive power over any criminal actions, it easily could
18 have done so. It did not.

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22 [2] In *Morgan*, the seminal case on this issue, the Supreme Court held that the Attorney General did not need a referral from the Department of Agriculture to institute criminal
23 proceedings under the Federal Food and Drug Act of 1906. That statute (much like FECA), authorized the Secretary of Agriculture to refer FDA violations to a "proper United Sates district
24 attorney," following notice to the accused. *Morgan*, 222 U.S. at 280. The Supreme Court held
25 that, because the statute did not set this forth as the exclusive method for the Attorney General to proceed with a criminal investigation, the Attorney General was not constrained by a referral
26 from the Secretary. *Id.* In rendering its ruling, the Supreme Court set out the test, which is still followed today, that "a clear and unambiguous expression of the legislative will" is necessary to
27 remove power from the Attorney General. *Id.* at 282.

28

That Congress sought to exclude criminal proceedings from the exclusive jurisdiction of the FEC is also borne out by the doctrine of *expressio unius est exclusio alterius*, which is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary (8th ed. 2004). By specifying which type of power it was granting exclusively to the FEC—civil—Congress expressed an intent *not* to grant exclusive criminal power to the FEC. 2 U.S.C. § 437c(b)(1); *cf. Fischer Imaging Corp. v. General Elec. Co.*, 187 F.3d 1165, 1173 n.8 (10th Cir. 1999) ("we assume that had the drafters intended to include 'by the court' in § 2-305, they would have done so"). Courts often follow this longstanding canon to determine Congressional intent regarding the scope of a statute. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517-519 (1992) (applying *expressio unius* maxim to conclude that when Congress defines statute's reach in preemption clause, matters beyond the reach of that clause are not pre-empted); *Fischer Imaging*, 187 F.3d at 1173 n.8 (applying *expressio unius* maxim to conclude that a jury had power to decide issue of the reasonable price of goods when Uniform Commercial Code did not state that issue was to be decided "by the court," as it did for other provisions). This doctrine is equally applicable in this case.

B. Legislative History Supports Defendant's Position

Because any statutory removal of the Attorney General's broad power must be a "clear and unambiguous expression of the legislative will," *Morgan*, 222 U.S. at 282, the Court need not resort to legislative history to resolve this case. If there is no statutory language that clearly and unambiguously removes power from the Attorney General, then Congress has not done so. In any event, the legislative history of FECA supports the conclusion that Congress never stripped away the Attorney General's power to institute criminal proceedings under FECA.

Congress established the Commission in 1974 and gave it "primary jurisdiction with respect to the civil enforcement" of the Act. Pub. L. No. 93-443, 88 Stat. 1263, 1280 (1974) (codified as amended at 2 U.S.C. § 437c). The Conference Report accompanying the 1974

amendments to FECA noted, "[t]he 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."[3] Conf. Rep. No. 93-1237 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5618, 5662.

The legislative history of the 1976 amendments to FECA, which added the word "exclusive" to the phrase "primary civil jurisdiction," also indicates that Congress never intended to strip the Attorney General of his power to institute criminal proceedings under the Act. Senator Cannon, the sponsor of the bill that was enacted, stated that 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." 122 Cong. Rec. S. 3860-61. The legislative history of the Act confirms that Congress chose to limit FEC's exclusive powers to the civil realm. Indeed, all of the amendments to 2 U.S.C. § 437c through the years keep intact the reference to civil matters alone.

Although Plaintiff discusses various amendments to FECA in an attempt to support his argument, none of them support the conclusion that Congress sought to remove the Attorney General's power to initiate criminal proceedings. *See* Pl.'s Mem. at 5-14. Plaintiff's arguments that minor language changes in the statute (many involving provisions of section 437g governing internal FEC operations) express an intent to remove criminal power from the Attorney General are based on pure speculation. None of the statutory amendments to FECA even hint to a change in the scope of authority over criminal matters, let alone meet the standard of constituting the

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[3] Notably, the Senate bill (S. 3044) originally contained a reference to civil and criminal enforcement, but this provision was dropped in conference. Conf. Rep. No. 93-1237, *reprinted in* 1974 U.S.C.C.A.N. at 5661-62.

"clear and unambiguous expression of the legislative will" necessary to remove power from the Attorney General over criminal matters.[4] *Morgan*, 222 U.S. at 282.

C. Case Law Supports Defendant's Position

The Ninth Circuit squarely faced the arguments Plaintiff raises in this case and flatly rejected them. *Int'l Union,* 638 F.2d at 1162. In that case, the Ninth Circuit reversed a district court's dismissal of indictments of individuals for violating FECA because the Attorney General had not exhausted administrative remedies under the Act. *Id.* The Court concluded that "Congress did not intend to impose this limitation on the power of the Attorney General to enforce the law." *Id.* The court noted the general presumption that the Attorney General had broad criminal powers and the rule that any limitations on this power need to be clear and unambiguous. *Id.* After reviewing the administrative remedy provisions of 2 U.S.C. § 437g, it concluded that "[n]othing in these provisions suggests, much less clearly and unambiguously 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. The court further stated, "[t]he fact that the FEC may refer certain complaints to the Department of Justice for prosecution, after administrative proceeding, 2 U.S.C. § 437g(a)(5)(D), does not by itself imply that administrative proceeding and referral are prerequisite to the initiation of litigation by the Attorney General." *Id.* The Ninth Circuit noted that legislative history supported this view, as well as Department of Justice and FEC interpretations of the Act, which are entitled to deference. *Id.* at 1165-67.

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[4] The only evidence Plaintiff points to that relates to this issue was language used by a leading opponent of the FECA Amendments in 1976. *See* Pl.'s Mem. at 7-8. The views of one dissenting member are not entitled to weight, particularly in the face of contrary views by legislative committees. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. We have eschewed reliance on the passing comments of one Member and casual statements from the floor debates.") (internal quotations and citations omitted).

Plaintiff's unsupported assertion that *International Union* is distinguishable because of 1980 amendments to FECA is entirely unpersuasive. The Ninth Circuit analyzed the Act's referral requirement, which pre-dated the 1980 amendments, and its analysis holds true today. The 1980 amendments regarding referrals to the Attorney General merely added "by an affirmative vote of 4 of its members" to the statutory language:

> 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. § 450g(a)(5)(C) (emphasis added). The previous version of the statute contained a referral clause, but simply did not set forth how a referral was to be made. This change in procedure cannot be relied on by Plaintiff to present the type of clear and unambiguous Congressional directive to alter the powers of the Attorney General. *See Firstar 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.").

Indeed, before and after the *International Union* decision, courts have consistently held that the FEC's exclusive civil jurisdiction and its power to refer matters to the Attorney General do nothing to abridge the rights of the Attorney General to act independently on criminal matters falling within FECA. In another case, a criminal defendant sought to dismiss his indictment for knowingly and willfully furnishing false and fraudulent evidence to the FEC based, in part, on the argument that an FEC referral was a "condition precedent to the jurisdiction of the Attorney General to prosecute." *Jackson*, 433 F. Supp. 241. The court disagreed:

> The statutory provision in section 437g(a)(5)(D) requiring the Commission to make a finding of probable cause that knowing and willful violations of 26 U.S.C. § 9042(c) have occurred before referring such apparent violations to the Attorney General does not restrict the independent criminal enforcement powers of the Attorney General. That statutory provision is directed solely to, and merely limits, the powers of the Commission.

Id. Another court also determined that the Attorney General could act independently on criminal FECA violations. It noted that the FEC had exclusive jurisdiction over only civil matters, and stated that "[a]t no place in the statute is specific provision made prohibiting the Attorney General from going forward with a 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." *Tonry*, 433 F. Supp. at 623.

In 1988, then-circuit court Judge Ruth Bader Ginsburg acknowledged that "[i]t is 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. U.S. Postal Serv.*, 836 F.2d 1362, 1368 n.6 (D.C. Cir. 1988) (citing *Int'l Union*, 638 F.2d 1161). In 1998, a defendant indicted on various criminal counts stemming from allegedly using "conduit" contributors to hide the sources of funds in violation of FECA attempted to dismiss her indictment, in part, on the argument that FECA impliedly repealed the more general provisions of the criminal code. *United States v. Hsia*, 24 F. Supp. 2d 33, 36 & 38 (D.D.C. 1998), *rev'd on other grounds*, 176 F.3d 517 (D.C. Cir. 1999). The court rejected this argument, stating that "under accepted principles of statutory construction, repeals by implication are not favored and there must be substantial evidence that Congress expressly intended to preempt a general statute with a more specific statutory scheme in order to deprive a prosecutor of discretion to determine on which of a variety of seemingly applicable statutes to base a prosecution." *Id.* at 38. The court also acknowledged that the "Attorney General . . . is charged with prosecuting criminal violations of the federal election laws as well as other criminal laws, and her authority is in no way limited by the FEC." *Id.* at 43.

II. PLAINTIFF'S REMAINING ARGUMENTS LACK MERIT

In an attempt to circumvent the plain text of the statute, legislative history, and uniform case law, which all confirm that the Attorney General retains his power over criminal matters

under FECA, Plaintiff proffers several arguments. These specious arguments are easily dismissed.

Plaintiff cannot succeed on his arguments that allowing the Attorney General to initiate criminal proceedings under FECA would run contrary to the conciliation provisions in FECA and that they would inhibit the Commission's investigations because people would invoke their Fifth Amendment rights.[5] *See* Pl.'s Mem. at 15-19. Plaintiff's arguments rest on the flawed presumption that conciliation attempts must be made before a criminal investigation. This is clearly not the case. The Commission may refer a criminal matter to the Attorney General *without regard* to any conciliation attempts. 2 U.S.C. § 437g(a)(5)(C). Therefore, even if referrals were necessary to initiate criminal proceedings (which they are not), the criminal proceedings could pre-date conciliation attempts under the plain language of the statute. Similarly, the possibility of criminal liability is often present when agencies have dual power to investigate civil violations, and there is the possibility that some individuals may not want to cooperate with the agency due to Fifth Amendment concerns. This possibility, however, does not render the statute invalid. As courts have noted, "that a civil and criminal statute relate to the same subject matter or apply to similar conduct is not unprecedented." *Palumbo Bros.*, 145 F.3d at 866.

Plaintiff avers that concurrent jurisdiction would render "meaningless" the provisions allowing for referral to the Attorney General for criminal prosecution, by a vote of four members. Pl.'s Mem. at 17-18. It does not. The procedural provisions of section 437g relate solely to the internal procedures of the Commission. They are "designed to minimize the risk

[5] Plaintiff cites *United States v. LaSalle Nat'l Bank*, 347 U.S. 298 (1978), to assert that the Supreme Court has refused to allow simultaneous civil and criminal investigations. Pl.'s Mem. at 17-18. This case does not support Plaintiff's position. The Court was analyzing whether a tax statute allowed an *agency* to issue subpoenas for a criminal investigation when there was admittedly no civil investigatory purpose to be served, since criminal investigations were generally within the purview of the Department of Justice. *Id.* at 303-04, 311-12. *LaSalle*, therefore, only discusses limits on an *agency's* power, not the Attorney General's.

that the administrative process might be used unfairly." *Int'l Union*, 638 F.2d 1164. Requiring an affirmative vote of four members to refer a case to the Attorney General ensures that the Commission acts in an unbiased fashion, and is unrelated to the responsibilities and duties of the Attorney General.[6] *Id.*

Lastly, Plaintiff cannot invoke the doctrine of primary jurisdiction, because it is inapposite to the case before the Court. *See* Pl.'s Mem. at 19-22. "The doctrine of primary jurisdiction . . . is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States v. W. Pac. R.R. Co.*, 352 U.S. 59, 63 (1956). It allows a court to refer questions to an agency "to take advantage of an agency's specialized knowledge, expertise, and central position within a regulatory regime." *Pharm. Research and Mfrs. of Am. v. Walsh*, 538 U.S. 644, 673 (2003) (Breyer, J., concurring). Rather than apply the doctrine as it is meant to be used—by courts addressing a claim involving administrative expertise—Plaintiff attempts to use it to require an agency to defer to another agency. This is an improper invocation of the doctrine, particularly where the agency that Plaintiff asserts should defer to the FEC with respect to criminal matters (the Department of Justice) is the agency with the specialized expertise in handling criminal matters.

In sum, there have long been laws providing for administrative procedures and remedies, which do not remove the Attorney General's criminal power, and Plaintiff's arguments ignore this fundamental state of the law. As far back as 1911, the Supreme Court recognized that a statute granting an agency power to take action in an area would not preclude the Attorney General from initiating a criminal investigation in the same area. *Morgan*, 222 U.S. at 281-82. For example, the existence of labor grievance procedures does not preclude separate, criminal investigations about the same conduct. *Palumbo Bros.*, 145 F.3d at 866. Likewise, the Federal Insecticide, Fungicide and Rodenticide Act, which gives the Environmental Protection Agency

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[6] Of course, there is a presumption that federal prosecutions are undertaken in good faith. *United States v. Lee*, 786 F.2d 951, 956-57 (9th Cir. 1986).

civil enforcement authority, does not strip the Attorney General from initiating a criminal proceeding under the statute. *United States v. Orkin Exterminating Co.*, 688 F. Supp. 223, 226 (W.D. Va. 1988). Nothing in the language of FECA takes away the Attorney General's power to institute criminal proceedings, as Congress specified that the Commission only had exclusive *civil* authority under the Act. 2 U.S.C. § 437c(b)(1). Plaintiff's strained arguments cannot change the well-settled law.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for a declaratory judgment should be denied, and Defendant's motion to dismiss should be granted.

Dated: May 4, 2007

Respectfully submitted,

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Attorneys for Defendant Attorney General Gonzales

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum in Opposition to Plaintiff's Motion for Declaratory Judgment and in Support of Defendant's Motion to Dismiss was served this 4th day of May 2007, by the electronic case filing system, upon counsel as follows:

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1
2 **UNITED STATES DISTRICT COURT**
FOR THE DISTRICT OF ARIZONA
3
4 Jon Marcus,
5 Plaintiff,
6 v.
7 United States Attorney General Alberto R. Gonzales, Federal Election
8 Commission Chairman Michael E. Toner, In their official capacities,
9
10 Defendants.

(PROPOSED) ORDER

CV07-00398-PCT-EHC

11 Upon consideration of Defendant Attorney General Gonzales's Motion to Dismiss
12 and Plaintiff's opposition thereto, it is hereby ORDERED that Defendant's Motion to
13 Dismiss is GRANTED and this case is DISMISSED.
14
15 DATED this _____ day of ___________, 2007.
16
17 Hon. Earl H. Carroll
18 United States District Judge
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