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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'S REPLY MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS** CV07-00398-PCT-EHC

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

INTRODUCTION

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"). This question was decisively resolved in the Attorney General's favor by the Ninth Circuit. *See United States v. Int'l Union of Operating Eng'rs Local 701*, 638 F.2d 1161 (9th Cir. 1979). 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. Plaintiff's various arguments must be rejected because they ignore controlling precedent and 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 Plaintiff's complaint for failure to state a claim.

ARGUMENT

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

Plaintiff entirely fails 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). As the Ninth Circuit recognized, Congress did not limit the Attorney's General's authority to enforce the FECA. *Int'l Union,* at 1163 ("Nothing in [the FECA] suggests, much less clearly and 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.").

Plaintiff relies 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. Pl.'s Response to Def.'s Mot. to Dismiss at 1-6 ("Pl.'s Resp."). Plaintiff cites 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, Plaintiff 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). Plaintiff argues that "[t]he Attorney General utterly fails to explain how the FEC can share its exclusive jurisdiction..." Pl.'s Resp. at 3. Plaintiff apparently assumes that only one entity may have jurisdiction over FECA violations. 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.[1] The Attorney General has authority to investigate criminal matters falling within FECA's prohibitions. The FEC has authority to investigate civil violations of FECA. Plaintiff falsely assumes that there can be no concurrent civil and criminal investigations, but there is nothing in the statutory language that states this.[2]

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[1] Contrary to Plaintiff's argument, *see* Pl.'s Resp. at 5, there is no disagreement between the FEC and the Attorney General on this point.

[2] Plaintiff attempts 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 as to the same conduct be codified separately.

Plaintiff also seemingly suggests that *United States v. Morgan* can be ignored and that the Attorney General is impliedly precluded from initiating criminal investigations pertaining to any federal criminal law that Congress does not place in Title 18 of the United States Code. *See* Pl.'s Resp. at 5-6. 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.,*

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, Plaintiff discusses 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* Pl.'s Resp. at 6-9. Cases that pre-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). This non-substantive change in procedure cannot be relied on by Plaintiff to present the type of clear and unambiguous Congressional directive that is required to alter the powers of the Attorney General. As discussed in Defendant's opening brief, at least six courts, including the Ninth Circuit, have considered the authority of the Attorney General to institute criminal investigations under FECA, and all have reached the same conclusion. Plaintiff basically ignores 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), Plaintiff offers only rhetoric and unsubstantiated legal assertions.

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47 U.S.C. § 231; 50 U.S.C. § 1705.

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: June 1, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Memorandum in Support of Defendant's Motion to Dismiss was served this 1st day of June 2007, by the electronic case filing system, upon counsel as follows:

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