UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK and RENEE BEAM,

Plaintiffs,

Civil Action No. 07-cv-1227
Honorable Rebecca R. Pallmeyer

vs.

ALBERTO R. GONZALES, UNITED STATES ATTORNEY GENERAL, AND ROBERT LENHARD, FEDERAL ELECTION COMMISSION CHAIRMAN,
In their official capacities,

Defendants.
_____/

PLAINTIFFS' RESPONSE TO DEFENDANT GONZALES'S MOTIONS TO DISMISS

The Attorney General asserts repeatedly that the FEC has "civil" jurisdiction while the Attorney General has "criminal" jurisdiction, but this is not remotely close to the issue before this Court. Plaintiff does not dispute that the FEC has civil jurisdiction or that the Attorney General has criminal jurisdiction, but this is not the issue. The issue presented is an issue of sequence, that is, who exercises jurisdiction in the first instance. Congress clearly and expressly answered this question by granting the FEC exclusive civil jurisdiction and providing a mechanism by which the FEC could refer certain matters to the Attorney General *after* it exercised its exclusive jurisdiction. The entire statutory scheme of the Act makes clear that the sequence is that the FEC exercises its exclusive jurisdiction in the first instance, and that the Attorney General exercises its jurisdiction only upon a referral by a majority vote of the FEC.

The Attorney General utterly fails to explain how the FEC can share its *exclusive* jurisdiction with the Attorney General. In this case, the Attorney General has already thwarted the exclusive

jurisdiction of the FEC by initiating its unlawful and extra-jurisdiction investigation. The Attorney General is currently conducting a nationwide unprecedented investigation against prominent democrats, like Plaintiff, who were supporters of the John Edwards 2004 presidential campaign. More than a year after the Attorney General began this unlawful and extra-jurisdictional investigation, the FEC opened its own investigation of several of the individuals already under investigation by the Attorney General.

To date, however, the FEC has sat out on the sideline because it is unable (or unwilling) to conduct its own investigation. And why has the FEC done this? Because the Attorney General has effectively stripped the FEC of its exclusive jurisdiction and forced it to sit on the sidelines. This is simply not how it works. Congress gave the FEC the exclusive jurisdiction over civil enforcement of the Act. The Attorney General is proposing that the Court interpret the Act so as to provide the FEC with exclusive jurisdiction *but only* to the extent that the Attorney General has not begun its own investigation. This is not what congress intended, and such an interpretation is expressly foreclosed by the Act.

Under the express terms of the Act, congress gave the FEC exclusive jurisdiction over civil matters, and created a mechanism by which the FEC could refer certain matters to the Attorney General but only after the FEC exercised its exclusive jurisdiction. Because neither the Attorney General nor the FEC can explain how the FEC can share its exclusive jurisdiction with the Attorney General, they create a red herring by tautologically repeating that the FEC has "civil" jurisdiction over civil laws and the Attorney General has "criminal" jurisdiction over criminal laws. But this argument is fatally flawed because there is only *one set of laws at issue* here and those are *civil* laws contained in the Federal Election Campaign Act.

While it is true that these *civil* laws carry criminal penalties, the FEC has exclusive jurisdiction over these *civil* laws and the only way in which the FEC can exercise its exclusive civil jurisdiction is to the exclusion of the Attorney General. Congress understood this problem, and so it created a statutory scheme under which the FEC has exclusive civil jurisdiction over the civil enforcement and provided the FEC with a mechanism to refer certain violations to the Attorney General for criminal investigation.

Both the Attorney General and the FEC utterly fail to address the most obvious problem with their interpretation of the statute. Under their interpretation of the Act, if the FEC votes 5 to 1 *against* referral, the lone disgruntled FEC member can just simply walk across the street and say to the Attorney General, "the FEC won't vote to refer this matter to you, so I'm bringing it to you myself. This way, you can still prosecute the case." Congress outlawed such a practice by giving the FEC exclusive jurisdiction in the first instance, and allowing the Attorney General to proceed only after the FEC has opened its jurisdictional door by an affirmative bipartisan vote of 4 of its members. The Attorney General should not be allowed to simply circumvent this procedure to carry out its own political agenda.

Defendants misguided arguments stem from provisions of the Act that existed more than 30 years ago. For example, on pages 7-8 of its response brief, the Attorney General relies on a conference report from the 1974 amendments to support its argument that the FEC has jurisdiction over civil laws while the Attorney General has jurisdiction over criminal laws. In 1974, defendants' arguments would have made sense because back then the substantive restrictions on campaign finance were contained in the federal penal code (Title 18 U.S.C.). Thus, in 1974, the Attorney General would have been correct to argue that he had jurisdiction over certain campaign finance laws

because those laws were criminal laws contained in the federal criminal penal code. But this is no longer the case.

In 1976, congress moved most of the substantive restrictions on campaign finance from the federal penal code and placed them into the Federal Election Campaign Act subject to the exclusive civil jurisdiction of the FEC. Therefore, prior to 1976, there were two sets of laws – one set subject to the jurisdiction of the FEC and another subject to the jurisdiction of the Attorney General. In 1976, congress changed that scheme so that the FEC would have the first opportunity to resolve alleged violations of the Act. At the same time, congress also limited the Attorney General's jurisdiction to independently prosecute violations of the Act without a referral by the FEC. Contrary to Defendants' assertions, these facts support Plaintiff's argument and further expose the anachronistic nature of the Defendants' arguments.

B. Contrary to Defendant Gonzales's assertions, there is not a single case interpreting the current statutory scheme as amended in 1980.

Defendants assert that there are several cases which address the issue presented herein. This is simply incorrect. Defendants rely on cases from the 1970s which were superceded by the 1980 amendments to the Act. On pages 10-12 of its response brief, the Attorney General cites *Int'l Union*, *Jackson*, and *Tonry* to support its position. Each of these cases, however, were decided prior to the 1980 amendments which substantially and significantly altered the referral provision of the Act. Given the statutory amendments to the Act in 1980, the decisions and discussions in *Int'l Union*, *Jackson*, and *Tonry* were limited to the pre-1980 amendments and should not be relied on in interpreting the current statutory scheme.

Also misplaced is Defendants' reliance on dicta from *Galliano v. U.S. Postal Serv.*, 836 F.2d 1362, 1368 n.6 (D.C. Cir. 1988). There, the court considered whether the FEC's exclusive jurisdiction displaced *pro tanto* the application of certain fraud proscriptions contained in the United States Postal Service's regulations. In a footnote unrelated to the issue presented in the case, the court noted that criminal enforcement of the FEC may originate either with the FEC or the Department of Justice. 836 F.2d 1362 n.6. In support of this footnote, the court cited the *Int'l Union* case from 1979. Defendants' reliance on the *Galliano* decisions is hardly a smoking gun. The footnote was pure dicta unrelated to the issues presented therein, and based on the 1979 decision of *Int'l Union* which has been superceded by the 1980 amendments to the statute. In short, since the 1980 amendments to the Act, there has not been one case which squarely addressed the issue now before this Court.

Also without merit is the Attorney General's reliance on *United States v. Hsia*, 24 F. Supp. 2d 33 (Dist. D.C. 1998), *rev'd on other grounds*, 176 F.3d 517 (D.C. Cir. 1999). There, the defendant challenged her indictment on the grounds that the more specific provisions of the FEC impliedly repealed the more general provisions of the criminal code and thus she could not be charged under both. The court rejected Hsia's argument and stated that the "Attorney General . . . is in no way limited by the FEC." Like the language lifted from *Galliano*, the language cited by the Attorney General from *Hsia* is dicta and does nothing to answer the question before this Court.

The Attorney General's citation to *United States v. Palumbo Brothers, Inc.*, 145 F.3d 850 (7th Cir. 1998), is also without merit. There, the defendants were charged in a multiple count indictment with violating the criminal RICO statutes. Defendants argued that, if at all, their conduct violated the National Labor Relations Act and the Labor Management Act and that those labor

statutes preempted any criminal prosecution under the criminal RICO statutes. Unlike the instant case, *Palumbo* dealt with two sets of laws, the criminal laws under RICO and civil laws under the NLRA. Here, the Attorney General and the FEC both claim to have "exclusive"jurisdiction over *the same law at the same time*. *Palumbo* is not even remotely relevant to the question before this Court.[1]

The FEC and the Attorney General may enter into hundreds of "Memoranda of Understanding" ("MOUs")(See FEC's response brief, pg. 5). These MOUs do not trump congressional mandates contained in the United States Code. And the fact that the Attorney General has charged a handful of cases (most of which resulted in pleas) in 35 years without a referral, does not mean that the Attorney General should continue to ignore the law (See FEC's response brief, pg. 6). Just because they do it doesn't make it right. And just because nobody has challenged them doesn't make it wrong.

On page 12 of the Attorney General's brief (and page 13 of the FEC's brief), Defendants again attempt to discredit Plaintiff's argument by recasting the issue of conciliation. Specifically, Defendants assert that conciliation is not required under the Act, and thus Plaintiff's argument must fail. Defendants miss the mark by wide margin on this point. Plaintiff agrees that the Act allows the FEC to skip conciliation efforts and refer a matter to the Attorney General. The issue here is not whether conciliation is required under the Act. The issue is whether the Act sets forth a sequence in which the FEC exercises its jurisdiction in the first instance, and the Attorney General only after receiving a referral from the FEC. The conciliation provision demonstrates that a criminal defendant

[1] In short, there are no cases that are helpful in addressing the issue before this Court because it is a pure question of statutory construction. In *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 307 (1978), the Court held that a question similar to that presented here was not predicated on analysis of precedent but rather a review of the statutory scheme.

may use a conciliation agreement, **if at all, only *after*** the FEC has exercised its exclusive jurisdiction and referred the matter to the Attorney General.

Specifically, the conciliation statute allows a defendant in a criminal action to introduce as evidence "a conciliation agreement *entered* into between the defendant and the Commission." 2 U.S.C. § 437g(d)(2). By using the word "entered" in the past tense, congress reinforces the statutory sequence that the FEC exercise its exclusive jurisdiction *first* and the Attorney General *second* and only after receiving the statutorily mandated referral.

Contrary to Defendants' assertions, congress provided a clear and express intent that the FEC has exclusive jurisdiction over the Act in the first instance, and that the Attorney General cannot proceed unless and until the FEC has referred the matter by "an affirmative vote of 4 of its members." Accordingly, Plaintiffs prays that this Honorable Court grant their motion for declaratory relief on an expedited basis.

Respectfully submitted,

FIEGER, FIEGER, KENNEY, JOHNSON
& GIROUX, P.C.

s/ Michael R. Dezsi
Michael R. Dezsi (P64530)
Attorney for Plaintiffs
19390 W. Ten Mile Road
Southfield, Michigan 48075
(248) 355-5555
m.dezsi@fiegerlaw.com

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 17, 2007 she electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Eric J. Beane at eric.bean@usdoj.gov
Linda A. Wawzenski at linda.wawzenski@usdoj.gov
Tamra L. Ulrich at tamara.ulrich@usdoj.gov
Attorneys for United States Attorney General Alberto Gonzales

Benjamin A. Streeter, III at bstreeter@fec.gov
Colleen T. Sealander at csealander@fec.gov
Attorneys for Robert Lenhard/Federal Election Commission

s/ Julie A. Nardone
JULIE A. NARDONE