IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACK and RENEE BEAM,	)	
	)	
Plaintiffs,	)	No. 07 CV 1227
	)	
v.	)	Judge Pallmeyer
	)	
ALBERTO R. GONZALES, *et al.*,	)	
	)	
Defendants.	)	

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

INTRODUCTION

In this lawsuit Plaintiffs seek 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 and the explicit statutory language of the Act. Because Plaintiffs' claims are wholly without legal support, their Motion for Declaratory Judgment should be denied and the claim against the Attorney General 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). It contains both civil and criminal penalties. 2 U.S.C. § 437g(d)(1). 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 delineates 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 March 2, 2007, Plaintiffs filed the instant action seeking declaratory relief and mandamus.[1] In the Complaint, Plaintiffs allege that they are a target of a criminal investigation instituted by the Attorney General under FECA because of their political activities, including their support and financial contributions to John Edwards' 2004 presidential campaign. *See* Compl. ¶¶ 1, 12. Plaintiffs further allege 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.* ¶¶ 11, 13. Plaintiffs seek a declaration that Defendants' conduct is "unlawful, unconstitutional, and contrary to the requirements of the Federal Campaign Finance Act [sic]." *Id.* at 7 ¶ a. Plaintiffs brought two additional claims against the FEC – one under the Administrative Procedure Act, and one seeking a Writ of Mandamus.[2] *Id.* ¶¶ 29, 31. On March 22, 2007, Plaintiffs filed a motion for declaratory judgment.

LEGAL STANDARDS

Plaintiffs assert that the summary judgment standard should be followed by the Court, in which they would have to demonstrate that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. *See* Pls.' Mem. at 4; Fed. R. Civ. P. 56(c).

In addition to responding to Plaintiffs' motion, the Attorney General files this memorandum in support of his motion to dismiss. Under the motion to dismiss standard, all

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[1] Counsel for Plaintiffs has filed lawsuits in three other districts containing the same claims, and motions to dismiss are pending in each of those cases. *See Marcus v. Gonzales, et al.*, Civ. No. 07-0398 (D. Ariz); *Bialek v. Gonzales, et al.*, Civ. No. 07-cv-00321 (D. Colo.); *Feiger v. Gonzales, et al.*, Civ. No. 2:07-cv-10533 (E.D. Mich.).

[2] In this memorandum, the Attorney General addresses the only claim against him, which is the declaratory judgment claim in Count I of the Complaint.

well-pled factual allegations are to be taken as true and reasonable inferences drawn in favor of the plaintiff. *Jackson v. E.J. Brach Corp.*, 176 F.3d 971, 977-78 (7th Cir. 1999). "However, [a] complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)." *Id.* at 978 (internal quotations omitted).

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. The Court, at this juncture, can decide the legal issue before it and resolve the case.

ARGUMENT

Plaintiffs' 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 that have decided the issue of whether the Attorney General has the independent authority to conduct his own criminal investigations for violations of FECA unanimously have found that he does. Plaintiffs' attempt to argue to the contrary is in conflict with fundamental principles of statutory interpretation and case law directly on point.

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

A. Statutory Language Supports Defendant's Position

As the Seventh Circuit has noted, "[c]ourts recognize that criminal prosecution is an executive function within the exclusive prerogative of the Attorney General." *United States v. Palumbo Bros.,* 145 F.3d 850, 865 (7th Cir. 1998) (internal quotations omitted). It cannot be disputed 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. 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."); *United States v. Int'l Union of Operating Eng'rs Local 701*, 638 F.2d 1161, 1162 (9th Cir. 1979) ("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, Plaintiffs do not dispute this basic legal tenet. *See* Pls.' 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 the contrary, [the Attorney General] is vested with plenary power over all litigation to which the United States or one of its agencies is a party.") (emphasis added); *United States v. Tonry*, 433 F. Supp. 620, 623 (E.D. La. 1977) (holding that, absent a specific provision "prohibiting the Attorney General from going forward with [a] criminal investigation . . . the general authority of

the Attorney General to proceed cannot be limited").[3]

Congress has not made the requisite clear, unambiguous, and explicit statement to limit the Attorney General's criminal authority under FECA. Indeed, the statutory language makes it clear that Congress intended for the FEC to retain 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). While Plaintiffs attempt to make much out of the word "exclusive" in the statute, the key word conveniently overlooked by Plaintiffs is "civil." This statutory language is unambiguous and indicates a clear intent by Congress that the FEC would have exclusive authority over civil enforcement actions only. If Congress wanted to grant the FEC with similar exclusive power over any criminal actions, it could have easily done so. It did not.

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). *See also Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 861 n.15 (7th Cir. 2002). Courts often follow this longstanding canon to determine Congressional intent regarding the scope of a statute. *See, e.g.,*

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[3] 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 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 attorney," following notice to the accused. *Morgan*, 222 U.S. at 280. The Supreme Court held 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 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 remove power from the Attorney General. *Id.* at 282.

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); *In re Globe Bldg. Materials, Inc.*, 463 F.3d 631, 625 (7th Cir. 2006) ("By specifying with such precision the claims over which the lien takes precedence, the Wisconsin legislature implicitly established the outer boundaries" of the statute); *Shell Oil*, 314 F.3d 861 ("By specifying with such precision when the States must stand aside in favor of federal regulation, Congress implicitly marked the outer bounds of the power it intended to exercise."). This doctrine is equally applicable in this case. 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).

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."[4] 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 demonstrates that Congress expressly wanted to limit FEC's exclusive powers to the civil realm and chose statutory language to reflect this. Indeed, all of the amendments to 2 U.S.C. § 437c through the years keep intact the reference to civil matters alone.

Although Plaintiffs discuss various amendments to FECA in an attempt to support their argument, none of them support the conclusion that Congress sought to remove the Attorney General's power to initiate criminal proceedings. Plaintiffs' arguments that minor language changes in the statute (many involving the internal FEC operations provisions of section 437g) 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 "clear and unambiguous expression of the legislative will" necessary to remove power from the Attorney

[4] 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.

General over criminal matters.[5] *Morgan*, 222 U.S. at 282.

C. Case Law Supports Defendant's Position

Courts unanimously have held that the Attorney General has power to institute criminal proceedings under FECA, without a referral from the FEC. The Ninth Circuit squarely faced the arguments Plaintiffs raise 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

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[5] The only evidence Plaintiffs point to that relates to this issue was language used by a leading opponent of the FECA Amendments in 1976. *See* Pls.' Mem. at 8. The views of one dissenting member are not entitled 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).

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 deference. *Id.* at 1165-67.

Plaintiffs' 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. Plaintiffs rest their argument on the fact that 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" *See* Pls.' Mem. at 9-10; 2 U.S.C. § 437g(a)(5)(C).[6] This non-substantive change in procedure cannot be relied on by Plaintiffs 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

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[6] Section 437g(a)(5)(C) states: "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)" (emphasis added). The 1980 amendments added the italicized language to what was formerly section (a)(5)(D).

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. at 241. The court disagreed. It stated:

> The statutory provision . . . 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. Therefore, well after the 1980 amendments to FECA, courts continue to assert that the Attorney General retains the power to prosecute criminal violations under FECA.

II. PLAINTIFFS' 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, Plaintiffs proffer several arguments. These specious arguments are easily dismissed.

Plaintiffs aver that concurrent jurisdiction would render "superfluous" the provisions allowing for referral to the Attorney General for criminal prosecution, by a vote of four Commission members. Pls.' Mem. at 13. 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 that the administrative process might be used unfairly." *Int'l Union*, 638 F.2d at 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.[7] *Id.*

Likewise, Plaintiffs cannot succeed on their arguments that allowing the Attorney General

[7] Of course, "the presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in [a] nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice." *United States v. Falk,* 479 F.2d 616, 620 (7th Cir. 1973).

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.[8] *See* Pls.' Mem. at 14. Plaintiffs' 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 the Seventh Circuit has 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.[9]

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[8] Plaintiffs cite *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. Pls.' Mem. at 19-20. This case does not support Plaintiffs' 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. *LaSalle*, 347 U.S. at 303-04, 311-12. Thus, *LaSalle* only discusses limits on an *agency's* power, not the Attorney General's.

[9] This argument also ignores the fact that simultaneous civil and criminal proceedings arising from the same statute and addressing the same conduct are permitted. *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1374 (D.C. Cir. 1980). *See also United States v. Prof'l Air Traffic Controllers Org.,* 653 F.2d 1134, 1142 (7th Cir. 1981) ("Conduct described as illegal can simultaneously be subject to both civil remedies and criminal sanctions. If statutory provisions permit, the Government may pursue either or both avenues for enforcement of the proscribed conduct to effectuate an overriding public policy.").

Lastly, Plaintiffs cannot invoke the doctrine of primary jurisdiction, because it is inapposite to the case before the Court. *See* Pls.' Mem. at 22-23. "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 – Plaintiffs attempt 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 Plaintiffs assert 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 Plaintiffs' 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 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 authority for civil enforcement under the Act. 2 U.S.C. § 437c(b)(1). Plaintiffs' strained arguments cannot change the well-settled law.

CONCLUSION

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

Dated: May 10, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing DEFENDANT ATTORNEY GENERAL'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR A DECLARATORY JUDGMENT AND IN SUPPORT OF HIS MOTION TO DISMISS was served on May 10, 2007 in accordance with Fed. R. Civ. P. 5, L.R. 5.5, and the General Order on Electronic Case Filing ("ECF") pursuant to the district court's system as to ECF filers.

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