UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

GEOFFREY N. FIEGER,
NANCY FISHER, AND
FIEGER, FIEGER, KENNEY
& JOHNSON, P.C.,

Plaintiffs,

Civil Action No. 07-10533
Hon. Lawrence P. Zatkoff

vs.

ALBERTO R. GONZALES, UNITED
STATES ATTORNEY GENERAL, and
MICHAEL E. TONER, FEDERAL
ELECTION COMMISSION CHAIRMAN,
In their official capacities,

Defendants.

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR DECLARATORY JUDGMENT AND RESPONSE IN OPPOSITION TO DEFENDANT GONZALES'S MOTION TO DISMISS

A. Defendants' arguments are based on outdated law from the 1970s. Defendant also fails to address how the FEC can share its 'exclusive' jurisdiction with the Attorney General.

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.

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 but only after the FEC exercised its exclusive jurisdiction.

Under the Attorney General's theory, he claims to have exclusive jurisdiction over criminal laws (including the civil laws contained in the FECA which carry criminal penalties), and the FEC has exclusive jurisdiction over civil laws. But here, the Attorney General and FEC both want to exercise jurisdiction *over the same exact law at the same exact time*. So in reality, the Attorney General is advancing an argument that he and the FEC *share* exclusive jurisdiction over the FECA. In other words, 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.

Not only is the concept of 'shared jurisdiction' perplexing, but such an interpretation squarely collides with the express mandate of congress that the FEC has exclusive jurisdiction over the FECA, and criminal penalties may be pursued only *after* the FEC has referred the matter to the Attorney General. The Attorney General can find no such express congressional mandate to support

his "shared exclusive jurisdiction" theory that he may infringe upon and stifle the exclusive jurisdiction of the FEC. This is not what congress intended, and such an interpretation is expressly foreclosed by the Act. Finding no such authority and running head-on into the express language of the Act, the Attorney General simply falls back on his position that the Attorney General is omnipotent and his authority is plenary.

The Attorney General utterly fails to explain how the FEC can share its *exclusive* jurisdiction or how the FEC and the Attorney General can simultaneously exercise co-existing exclusive jurisdiction over the same law. The very definition of "exclusive jurisdiction" means "to the exclusion of all others." BLACKS LAW DICTIONARY 564 (6th ed. 1990). 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 to exercise its congressionally mandated exclusive jurisdiction. And why has the FEC done this? Because the Attorney General has effectively stripped the FEC of its exclusive jurisdiction and forced it to wait to exercise its jurisdiction until after the Attorney General concludes his illegal and extra-jurisdictional investigation. This is simply not how it works. Congress gave the FEC the exclusive jurisdiction over civil enforcement of the Act in the first instance. The Attorney General is circumventing the law and trying to reverse the order of the statute so that he may investigate first without a referral and the FEC may investigate second. Recognizing that this is contrary to the

statute, the Attorney General attempts to recast the issue by repeating that the FEC has 'civil' jurisdiction and the AG has 'criminal' jurisdiction.

Defendants misguided arguments stem from provisions of the Act that existed more than 30 years ago. For example, on pages 5-6 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. These facts support Plaintiff's argument and further expose the anachronistic nature of the Attorney General's position.

B. Contrary to Defendants' 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 9-11 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* decision 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 addresses 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 reliance on *United States v. Palumbo Brothers, Inc.*, 145 F.3d 850 (7th Cir. 1998), is also misplaced. 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. *Palumbo* is not even remotely relevant to the question before this Court.

On page 13-14 of its response brief, the Attorney General suggests that plaintiff "forgot to read the statute" and that conciliation is not required under the Act, and thus congress contemplated that the Attorney General could prosecute without a referral. Again, the Attorney General severely misses the mark 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 merely demonstrates that a criminal defendant 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.

In the end, the Attorney General utterly fails to address the most obvious problem with his interpretation of the statute. Under his 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.

Accordingly, Plaintiff respectfully requests that this Honorable Court grant his motion for declaratory judgment and deny the Attorney General's motion to dismiss.

Respectfully submitted,

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& GIROUX, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 30, 2007 he electronically filed the foregoing pleading with the Clerk of the Court using the ECF system, which will send notification to the following: Peter A Caplan (peter.caplan@usdoj.gov), Benjamin A. Streeter (bstreeter@fec.gov), and Colleen T. Sealander (csealander@fec.gov). A copy was also served via first class mail upon Alan M. Dershowitz, Esq., 26 Reservoir Street, Cambridge, MA 02138.

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