IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-2291

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

Plaintiffs-Appellants,

v.

UNITED STATES ATTORNEY GENERAL;
FEDERAL ELECTION COMMISSION CHAIRMAN
IN HIS OFFICIAL CAPACITY,

Defendants-Appellees.

On Appeal from the United States District Court
Eastern District of Michigan, Southern Division

FINAL BRIEF FOR THE FEDERAL ELECTION COMMISSION CHAIRMAN IN HIS OFFICIAL CAPACITY

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes and Regulations

Legislative Materials

Miscellaneous

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COUNTERSTATEMENT OF JURISDICTION

The Federal Election Commission ("FEC" or "Commission") contests this Court's jurisdiction with respect to appellants' second and third causes of action that allege the Commission has failed to conduct an investigation required by 2 U.S.C. § 437g(a)(2). Appellants rely upon the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), and Mandamus Statute, 28 U.S.C. § 1361(a), as the

jurisdictional bases for these claims, which the district court correctly held provide no jurisdiction. The Commission does not contest jurisdiction for appellants' first cause of action.

COUNTERSTATEMENT OF ISSUES PRESENTED

I. Whether the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455 ("Act" or "FECA") contains a clear and unambiguous requirement that the United States Department of Justice ("DOJ") must await a referral from the Commission before beginning criminal FECA investigations.

II. Whether the APA, 5 U.S.C. §§ 701-706, or Mandamus Statute, 28 U.S.C. § 1361(a), affords respondents in a Commission investigation the opportunity to challenge the pace of that investigation.

COUNTERSTATEMENT OF THE CASE

This is an appeal by the plaintiffs — Geoffrey N. Fieger, Nancy Fisher, and Fieger, Fieger, Kenney and Johnson, P.C. — from an August 15, 2007 order of the United States District Court for the Eastern District of Michigan (Zatkoff, J.) granting summary judgment to the Commission and denying plaintiffs' motion for a declaratory judgment that the Attorney General is barred from conducting an investigation or prosecution of alleged violations of the FECA until the FEC has investigated and referred the matter to DOJ. (R.33 Opinion and Order, pgs. 5-19,

Apx. pgs. 24-38.) The court granted the defendants' dispositive motions, holding that (1) the Act does not restrict in any way the Attorney General's authority to investigate and prosecute criminal violations of the Act; and (2) that the court lacked jurisdiction to hear plaintiffs' APA-based claim, or to issue a writ of mandamus, concerning the pace of the Commission's administrative investigation of their activities. (*Id.* 14, 17-18, Apx. pgs. 33, 36-37.)

COUNTERSTATEMENT OF THE FACTS

A. THE FEDERAL ELECTION COMMISSION AND JURISDICTION OVER CIVIL ENFORCEMENT OF THE ACT

The Federal Election Commission is the independent agency of the United States government empowered to administer, interpret and enforce three federal statutes — the FECA, the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013,[1] and the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042.[2] *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), and 437g.

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[1] The Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001-9013 ("Fund Act"), provides for a voluntary program of public financing of the general election campaigns of eligible major and minor party nominees for the offices of President and Vice President of the United States.

[2] The Presidential Primary Matching Payment Account Act 26 U.S.C. §§ 9031-9042 ("Matching Payment Act"), provides partial federal financing for the campaigns of presidential primary candidates who choose to participate and satisfy certain eligibility requirements.

The FECA imposes extensive requirements for comprehensive public disclosure of all contributions and expenditures in connection with federal election campaigns. 2 U.S.C. §§ 432-434. The Act places dollar limitations on contributions by individuals and multi-candidate political committees to candidates for federal office, 2 U.S.C. § 441a(a), and prohibits campaign contributions by corporations and unions from their treasury funds. 2 U.S.C. § 441b(a). The Act also prohibits contributions made in the name of another. 2 U.S.C. § 441f. Contributing money to a candidate in one's own name using funds provided by someone else is an example of activity that violates 2 U.S.C. § 441f. 11 C.F.R. § 110.4(b)(2)(i).

Pursuant to the Act, the Commission has "exclusive jurisdiction with respect to the civil enforcement" of the Act and the two presidential public funding statutes. 2 U.S.C. § 437c(b)(1). The Commission is authorized to institute investigations of possible violations of these statutes and must follow detailed administrative procedures prescribed by Congress in the Act. 2 U.S.C. § 437g(a). The Act provides that the Commission may initiate an administrative enforcement proceeding based upon a complaint that is "in writing, signed and sworn to," made by "any person who believes a violation" of the Act "has occurred," 2 U.S.C. § 437g(a)(1), or upon "the basis of information ascertained in the normal course of carrying out its supervisory duties," 2 U.S.C. § 437g(a)(2). If an

administrative complaint is filed, the Commission must notify the respondent and provide him with an opportunity to respond. If the Commission finds reason to believe that there has been a violation of the Act, the Commission may "make an investigation of [the] alleged violation, which may include a field investigation or audit, in accordance with the provisions of [section 437g(a)]." 2 U.S.C. § 437g(a)(2). The Act permits the Commission to issue subpoenas and orders in aid of its investigation and provides it with the power to seek judicial enforcement of such orders in federal district court. 2 U.S.C. §§ 437d(a)(3) and (4); 2 U.S.C. § 437d(b).

At the conclusion of an administrative investigation, the statute authorizes the Commission's General Counsel to recommend that the Commission vote on whether there is probable cause to believe that the Act has been violated. 2 U.S.C. § 437g(a)(3). If she recommends that the Commission find probable cause to believe respondents have violated the Act, the statute requires the General Counsel to notify the respondents, provide them with a brief stating her position on the issues, and give the respondents the opportunity to submit a response brief. *Id.* The General Counsel then prepares a report to the Commission, recommending what action the Commission should take. 11 C.F.R. § 111.16. Upon consideration of the briefs and report, the Commission determines whether there is "probable cause to believe" a violation has occurred. 2 U.S.C. § 437g(a)(4)(A)(i).

If the Commission finds probable cause to believe a violation that is *not* knowing and willful has occurred, it attempts to resolve the matter by "informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement" with the respondent. 2 U.S.C. § 437g(a)(4)(A)(i). The Act requires any such conciliation effort to continue for at least 30 days — or 15 days if the probable cause finding was made within 45 days of an election — and authorizes the Commission to continue such negotiations for up to 90 days. *Id*. If the Commission is unable to negotiate an acceptable conciliation agreement, the Act permits the Commission to file a civil law enforcement suit in federal district court. The Commission's decision whether to file a civil enforcement suit is discretionary, and the litigation in district court is *de novo*.
See 2 U.S.C. § 437g(a)(6)(A).

If the Commission finds probable cause to believe that a knowing and willful violation of the Act has occurred, the statute permits the Commission to engage in conciliation and seek civil penalties for violations that are higher than those the Commission may seek for violations that are non-willful. The amount the Commission may seek for most knowing and willful violations (currently $11,000 or 200% of the contribution or expenditure involved in the transaction) is double the amount it may seek if the violation is non-willful.
2 U.S.C. § 437g(a)(5)(A), (B). Knowing and willful violations of 2 U.S.C. § 441f

(contributions in the name of another) can result in penalties of "not less than 300 percent of the amount involved in the violation and . . . not more than the greater of $50,000 or 1,000 percent of the amount involved in the violation."

2 U.S.C. § 437g(a)(5)(B).

After a Commission finding of probable cause to believe that a "knowing and willful" violation has occurred, the statute also permits the Commission to refer such apparent violation to the Attorney General for criminal prosecution, pursuant to 2 U.S.C. § 437g(d), without having to engage in conciliation first:

> 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 of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, 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) [the conciliation requirement].

2 U.S.C. § 437g(a)(5)(C). When the Commission refers a knowing and willful violation of the Act to the Attorney General, the Act requires the Department of Justice to report periodically to the Commission concerning the matter. 2 U.S.C. § 437g(c). If there is a conciliation agreement with the Commission, it may be introduced by the defendants in a subsequent criminal prosecution for the same "act or failure to act constituting such violation," to "evidence their lack of

knowledge or intent to commit the alleged violation," 2 U.S.C. § 437g(d)(2), and as a mitigating factor in sentencing. 2 U.S.C.§ 437g(d)(3).

B. THE DEPARTMENT OF JUSTICE AND JURISDICTION OVER CRIMINAL ENFORCEMENT OF THE ACT

With limited exceptions, the Attorney General has exclusive authority and plenary power to control the conduct of litigation in which the United States in involved. 28 U.S.C. § 516. Pursuant to this provision, the Attorney General has jurisdiction to prosecute criminal violations of the FECA, as well as criminal violations of the provisions of the Fund Act and the Matching Payment Act. Criminal sanctions for violations of the Act vary according to the offense and the amount of money involved in the violation, and include fines and imprisonment. 2 U.S.C. § 437g(d). A five-year statute of limitations applies to criminal violations of the Act. 2 U.S.C. § 455.

For 30 years, the Commission and the Department of Justice have construed the Act to permit the Attorney General to pursue criminal violations of the Act and the presidential public funding statutes, either when the Department uncovers a criminal violation on its own or when the Commission refers a matter pursuant to 2 U.S.C. § 437g(a)(5)(C). In 1977, one year after the Act was amended to give the Commission exclusive *civil* enforcement authority, the Commission and the Department of Justice entered into a Memorandum of Understanding ("MOU") in

which the agencies jointly outlined their respective roles in pursuing election law violations. 43 Fed. Reg. 5441 (1978) (R.19 MSJ Attachment #1, pg. 101, Apx. pg. 159). That joint memorandum not only describes the circumstances under which the Commission is to refer apparent criminal violations of the Act to the Attorney General, but also specifically addresses criminal violations of the FECA that come to the attention of the Department of Justice independently of the Commission. In such instances, the MOU provides that DOJ will "apprise the Commission of such information at the earliest opportunity" and "continue its investigation to prosecution when appropriate and necessary to its prosecutorial duties and functions." *Id.* While DOJ is to "endeavor" to share information with the Commission subject to existing law, the MOU specifically provides that "information obtained during the course of [a] grand jury proceeding[] will not be disclosed to the Commission." *Id.*

In the years since the MOU issued, the Department of Justice has prosecuted numerous such criminal cases without any referral from the Commission. Among these are *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999); *United States v. Gabriel*, 125 F.3d 89 (2d Cir. 1997); *United States v. Curran*, 20 F.3d 560 (3d Cir. 1994); *United States v. Hopkins*, 916 F.2d 207 (5th Cir. 1990); *Goland v. United States*, 903 F.2d 1247 (9th Cir. 1990); *United States v. Hsia*, 87 F. Supp. 2d 10 (D.D.C. 2000); *United States v. Mariani*, 7 F. Supp. 2d 556

(M.D. Pa. 1998); *United States v. Crop Growers Corp*. 954 F. Supp. 335 (D.D.C. 1997).

When Congress first created the Commission in the 1974 Amendments to the Act, it did not give the Commission exclusive jurisdiction over civil enforcement of the Act, but instead "*primary* jurisdiction with respect to the civil enforcement" of the Act. FECA Amendments of 1974, Pub. L. No. 93-443 § 310(b) (emphasis added) (R.19 MSJ Attachment #1, pg. 12, Apx. pg. 70). At that time, the contribution and expenditure limitations were contained in Title 18, and the Commission had no authority whatever to file civil actions in federal district court regarding those provisions. The Commission could refer to the Department of Justice civil violations of the Title 18 provisions over which the Commission had jurisdiction, but after referral all civil and criminal court actions were at the Attorney General's discretion. 2 U.S.C. § 437g(a)(7) (1974) (R.19 MSJ Attachment #1, pg. 99, Apx. pg. 157). *See also Buckley v. Valeo*, 519 F.2d 821, 893 n.191 (D.C. Cir. 1975) (concluding that the Attorney General had discretion whether to file civil enforcement proceedings referred by the Commission), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976). In 1976, when Congress amended the Act in response to the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), it recodified the Act, transferred to Title 2 the contribution limitations and prohibitions previously codified in Title 18, and gave

the Commission, rather than the Attorney General, the power to file civil actions to enforce those provisions. 2 U.S.C. § 437g(a)(5)(B) (1976) (R.19 MSJ Attachment #1, pg. 105, Apx. pg. 163).

C. DISTRICT COURT PROCEEDINGS

On February 5, 2007, attorney Geoffrey Fieger; the law firm of Fieger, Fieger, Kenney & Johnson, P.C. ("the Fieger firm"), the firm of which Geoffrey Fieger is president; and Nancy Fisher, the Fieger firm's office manager, filed a judicial complaint naming the Attorney General and the Federal Election Commission Chairman as defendants in their official capacities. Plaintiffs alleged in the complaint that the Fieger firm and its employees were targets of a ongoing grand jury investigation into alleged illegal contributions made during the 2004 Presidential election campaign and that the Commission "is tacitly cooperating and conspiring with the Attorney General and its subordinate offices to circumvent [FECA's] jurisdictional requirements." Complaint ¶ 21. According to plaintiffs, the FECA provides the Commission with the exclusive authority to perform an investigation, in the first instance, and DOJ is precluded from proceeding unless and until it receives a referral from the FEC. Complaint ¶13. Plaintiffs alleged that because there has been no such referral by the Commission to DOJ, the grand jury investigation of their activities was illegal. They sought mandamus relief against the Commission and a declaratory judgment against both the Commission

and the Attorney General.

Following briefing by the parties and oral argument, the district court granted the Commission's motion for summary judgment, granted the Attorney General's motion to dismiss, and denied plaintiffs' motion for declaratory judgment. *Fieger v. Gonzales*, Civil No. 07-10533, 2007 WL 2351006, at *3-7 (E.D. Mich. Aug. 15, 2007) (R.33 Opinion and Order, pgs. 5-14, Apx. pgs. 24-33). The court found that "there is no language in the Act that evidences a 'clear and unambiguous' intent of Congress" to restrict the Attorney General's power to enforce criminal violations of the Act. (*Id.* at 10, Apx. pg. 29.) The court also found that "the Act specifically provides that the Commission has 'exclusive jurisdiction with respect to the *civil* enforcement of such provisions.'" *Id.* at 8, Apx. pg. 27 (quoting 2 U.S.C. § 437c(b)(1)). Finally, the court found that there was "no legal basis" for plaintiffs' claims under the APA and the mandamus statute, 28 U.S.C. § 1361(a), seeking an order that the Commission proceed with an investigation of plaintiffs' alleged activities. *Id.* at 14-18, Apx. pgs. 33-37.

D. RELATED PROCEEDINGS

This case is one in a series of four related civil cases brought by various individuals and the Fieger law firm, all of whom claim to be targets of an ongoing grand jury investigation into illegal campaign contributions. Two members of the firm are defendants in the related criminal case. The Fieger law firm represents the

plaintiffs in all four civil cases, which were filed in different federal district courts within weeks of each other and raise the same legal issue based on the same underlying factual allegations. The plaintiffs all allege that they are the targets of an ongoing grand jury investigation and that the Commission is tacitly cooperating and conspiring with the Attorney General to circumvent FECA's jurisdictional requirements. Each case hinges on the legal issue presented in this case: whether DOJ is precluded from prosecuting violations of FECA unless and until it receives a referral from the FEC. As discussed below, a grand jury has handed up indictments related to the investigation the plaintiffs are attempting to challenge collaterally in these four cases.

1. *Bialek v. Keisler,* No. 07-1284 (10th Cir.)

On February 14, 2007, Barry Bialek, a Colorado physician who had worked as a consultant for the Fieger firm, filed a judicial complaint against the Attorney General and the Commission's Chairman. The district court in Colorado ruled on the principal issue before this Court and rejected the argument that a Commission referral is a prerequisite to DOJ's criminal enforcement of the FECA. *Bialek v. Gonzales*, Civil No. 07-0321, 2007 WL 1879989 (D. Colo. June 28, 2007). Bialek appealed the decision and oral argument before the Tenth Circuit is scheduled for March 19, 2008. *Bialek v. Keisler*, No. 07-1284 (10th Cir. appeal docketed July 13, 2007).

2. *Beam v. Gonzales*, Civ. No. 07-1227 (N.D. Ill.)

On March 2, 2007, attorney Jack Beam, an affiliate of the Fieger firm, and his spouse, Renee Beam, filed a complaint against the Attorney General and the Commission's Chairman. After briefing by the parties, the court issued a Minute Order on June 22, 2007, granting defendants' motions to dismiss without prejudice, and giving plaintiffs leave to file an amended complaint. A motion to dismiss the amended complaint is now pending and party discovery is stayed.

3. *Marcus v. Gonzales*, Civ. No. 07-398 (D. Ariz.)

On February 21, 2007, plaintiff Jon Marcus filed a complaint against the Commission's Chairman and the Attorney General. The motions to dismiss of the Commission and DOJ are fully briefed and pending before the court.

4. *United States v. Fieger, et al.*, Crim. No. 07-20414 (E.D. Mich.)

On August 22, 2007, a grand jury in the Eastern District of Michigan handed up a ten-count indictment against Geoffrey Fieger and Vernon Johnson, both shareholders in the Fieger firm. Indictment, *United States v. Fieger, et al.*, Criminal No. 07-20414 (E.D. Mich.) (available through PACER at https://ecf.mied.uscourts.gov/cgi-bin/ShowIndex.pl). The activity covered within the indictment included: conspiracy to violate the FECA (18 U.S.C. § 371) by making prohibited corporate contributions; making prohibited corporate

contributions (2 U.S.C. § 441b); causing false statements (18 U.S.C. § 1001); and obstruction of justice (18 U.S.C. § 1503).

SUMMARY OF ARGUMENT

Appellants' claim is premised upon a fundamental misunderstanding of the Act, which contains no requirement that DOJ await a referral from the Commission before beginning its own criminal investigations. It is well settled that the Attorney General has plenary authority over criminal matters that is not diminished without a "clear and unambiguous" directive from Congress. The district court correctly found that there is no language in the FECA that evidences a "clear and unambiguous" directive from Congress to restrict the Attorney General's authority. Appellants' reliance on the statutory provision (2 U.S.C. § 437g(a)(5)(C)) that affirmatively authorizes the Commission to refer a case to the Attorney General is entirely misplaced. That provision only addresses the Commission's authority and does not restrict the prosecution of criminal matters by the Attorney General.

Numerous courts have examined the question and held that FECA's referral provision does not restrict the Attorney General's authority. The legislative history also strongly supports this conclusion. The committee report that accompanied the legislative provision at issue explicitly stated an intent not to limit the traditional criminal authority of the Attorney General.

Ultimately, appellants' case represents nothing more than a misguided attempt to collaterally attack an ongoing criminal prosecution. The district court correctly found that neither the plain language of the statute nor the legislative history supports a conclusion that Congress intended to limit the Attorney General's authority to prosecute criminal violations of the FECA.

Appellants also seek an order requiring the Commission to expedite its administrative investigation of appellants under the Administrative Procedure Act and the mandamus statute. Such relief is precluded by FECA and, in any event, unavailable under the APA and the mandamus statute.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision on a motion for summary judgment. *Dixon v. Gonzalez*, 481 F.3d 324, 330 (6th Cir. 2007); *Alpert v. Gonzalez*, 481 F.3d 404, 407 (6th Cir. 2007); *May v. Franklin County Comm'rs*, 437 F.3d 579, 583 (6th Cir. 2006).

II. THE ATTORNEY GENERAL HAS AUTHORITY TO INITIATE CRIMINAL INVESTIGATIONS UNDER THE FECA WITHOUT A REFERRAL FROM THE FEC

A. NO STATUTORY LANGUAGE RESTRICTS THE ATTORNEY GENERAL'S CRIMINAL AUTHORITY TO ENFORCE THE FECA

Appellants' case is premised entirely on the erroneous argument that the Act precludes the grand jury and the Department of Justice from investigating possible criminal violations of federal campaign finance law unless and until the Commission finds probable cause to believe that a knowing and willful violation of the Act has occurred and refers the matter to the Attorney General pursuant to 2 U.S.C. § 437g(a)(5)(C). The district court correctly found that "there is no language in the Act that evidences a 'clear and unambiguous' intent of Congress" to restrict the Attorney General's authority. (R.33 Opinion and Order, pg. 10, Apx. pg. 29); *see also Bialek*, 2007 WL 1879989, at *3. On this basis the district court properly granted the Commission's and DOJ's dispositive motions.

"As in all statutory construction cases, [the courts] begin with the language of the statute. The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002) (citations omitted). Here, 28 U.S.C. § 516 unambiguously provides the Attorney General plenary authority over criminal litigation: "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 therefore, is reserved to officers of the Department of Justice, under the direction of the Attorney General." "Congress has given very broad authority to the Attorney General to institute and conduct litigation in order to establish and safeguard government." *United States v. California*, 332 U.S. 19, 27 (1947). While Congress may restrict the Attorney General's statutory authority to control litigation, it has long been settled that this authority is not diminished without a "clear and unambiguous" directive from Congress. *United States v. Morgan*, 222 U.S. 274, 282 (1911); *Executive Business Media, Inc. v. United States Dep't of Defense*, 3 F.3d 759, 762 (4th Cir. 1993); *United States v. Walcott*, 972 F.2d 323, 326 (11th Cir. 1992); *United States v. Hercules Inc.*, 961 F.2d 796, 798 (8th Cir. 1992); *accord United States v. Libby*, 429 F. Supp. 2d 27, 32 (D.D.C. 2006).[3]

[3] Plaintiffs attempts (Br. 12 n.2) to distinguish *Morgan*, but that case and its progeny stand for the proposition that there is a presumption against interpreting federal laws to limit the powers of the Attorney General to prosecute criminal violations in the absence of clear statutory language, not that a statute must affirmatively state that the Attorney General's overall plenary powers are preserved in order for his power not to be limited: "For the statute contains no expression dictating an intention to withdraw offenses under this act from the general powers of the grand jury. . . ." *Morgan*, 222 U.S. at 281. *See also United States v. International Union of Operating Eng'rs, Local 701*, 638 F.2d 1161, 1163 (9th Cir. 1979). Indeed, *Morgan* rejected the argument that an administrative notice was a prerequisite to a criminal prosecution, just as an FEC referral is not a

No language in the FECA clearly and unambiguously limits the Attorney General's authority to investigate or charge a criminal violation of federal election law unless and until he has received a referral from the Commission. To the contrary, the plain language of the referral provision on which appellants rely, 2 U.S.C. § 437g(a)(5)(C), contains no limits whatsoever on the Attorney General's authority. The provision only addresses the *Commission's* authority; nothing in it (or in any other provision of the Act) even addresses, much less purports to restrict, the usual plenary authority of the Department of Justice and the grand jury to investigate activities that might be criminal:

> 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 of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, 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).

In other words, this provision simply authorizes the Commission, after a finding of probable cause, to refer a case to the Attorney General if the violation is knowing and willful. That referral authority is purely discretionary, and it does nothing to limit the Attorney General's authority. *See* (R.33 Opinion and Order, pg. 10, Apx. pg. 29); *Bialek*, 2007 WL 1879989, at *3.

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prerequisite to a criminal prosecution brought by the Attorney General under the FECA.

Moreover, as explained *supra* pp. 2-9, both the Commission and the Department of Justice have long interpreted the Act to permit the Attorney General to investigate and prosecute criminal violations of the Act without a referral from the Commission. The Commission and the Department of Justice are both charged with enforcing the Act, and the Commission has the explicit statutory authority to interpret, and make policy respecting, its provisions, 2 U.S.C. § 437c(b)(1). When two agencies agree on the meaning of the statutory division of authority between them, deference should be afforded. *See AFL-CIO, Local 3306 v. FLRA*, 2 F.3d 6, 10 (2d Cir. 1993); *CF Industries, Inc. v. FERC*, 925 F.2d 476, 478 (D.C. Cir. 1991). "[T]he Commission is precisely the type of agency to which deference should presumptively be afforded." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). *See also FEC v. National Rifle Ass'n of America*, 254 F.3d 173, 185 (D.C. Cir. 2001).

Finally, appellants argue (Br. 6) that the plain meaning of the referral provision should be disregarded to avoid what they call an "absurd result," but appellants' argument ignores important FECA provisions and assumes improperly that the Commissioners would violate the law. Contrary to appellants' suggestion (*id.)*, a single dissenting Commissioner in a five-to-one decision cannot "simply walk across the street" and single-handedly present the matter to the Attorney General. A lawful referral requires an affirmative vote of at least four members of

the Commission, and no more than three Commissioners may be affiliated with the same political party. *See* 2 U.S.C. §§ 437g(a)(5)(C), 437c(a)(1). Appellants' argument assumes that dissenting Commissioners would circumvent the four-vote requirement for referrals, but the Court should presume that the Commissioners discharge their duties in good faith. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996) (presuming government prosecutors' proper discharge of their duties).

In sum, the plain language of the controlling statutes do not restrict the Attorney General's independent authority to enforce the FECA criminally, and the district court's decision can be affirmed on that basis alone.

B. FECA'S LEGISLATIVE HISTORY SHOWS NO CONGRESSIONAL INTENT TO LIMIT THE ATTORNEY GENERAL'S AUTHORITY

The legislative history of the Act also shows that Congress did not intend to limit the authority of the Attorney General to investigate possible criminal violations of the Act without a referral from the Commission. Committee reports are the most reliable source for finding the legislature's intent as they "presumably are well-considered and carefully prepared." *Schmitt v. City of Detroit*, 395 F.3d 327, 330 n.2 (6th Cir. 2005) (quoting *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395 (1951) (Jackson, J., concurring)). The 1976 committee report that accompanied the House bill when the Commission was given exclusive civil enforcement authority explicitly stated an intent *not* to limit the traditional

criminal authority of the Attorney General.

> H.R. 12406, following the pattern set in the 1974 Amendments, channels to the Federal Election Commission complaints alleging on any theory, that a person is entitled to relief, because of conduct regulated by this Act, *other than complaints directed to the Attorney General* and seeking the institution of a criminal proceeding.

H.R. Rep. No. 94-917 at 4 (1976), 94th Cong., 2d Sess., *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1976* ("*1976 Legislative History*") at 804 (emphasis added) (R.19 MSJ Attachment #1, pg. 26, Apx. pg. 84). Senator Cannon, Chairman of the Senate Rules and Administration Committee and sponsor of S. 3065, gave a similar explanation of the bill:

> Under existing law, every violation of the Federal election campaign laws is a criminal act and the Federal Election Commission has extremely limited civil enforcement powers at the present time. S. 3065 would provide criminal penalties for willful and knowing violations of the law of a substantive nature, and civil penalties and immediate disclosure of violations for less substantial infractions of the campaign finance laws. At the same time S. 3065 would give the Commission expanded *civil* enforcement powers including the power to ask the court for imposition of civil fines for such violations as, for example, the negligent failure to file a particular report, as well as more substantial civil fines for willful and knowing violations of the act. 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*.

94 Cong. Rec. S3860-61 (daily ed. March 22, 1976) (statement of Sen. Cannon); *1976 Legislative History* at 470-71 (emphases added) (R.19 MSJ Attachment #1,

pgs. 23-24, Apx. pgs. 81-82). *See also* 94 Cong. Rec. H3778 (daily ed. May 3, 1976) (remarks of House Committee Chairman Hays) (the bill "centralize[s] the authority to deal with complaints alleging on any theory that a person is entitled to relief because of conduct regulated by this act, other than complaints directed to the Attorney General and seeking the institution of a criminal proceeding," *reprinted in 1976 Legislative History* at 1078) (R.19 MSJ Attachment #1, pg. 30, Apx. pg. 88). Thus, far from supporting appellants' strained interpretation of the Act, the legislative history of the 1976 FECA Amendments reinforces the longstanding conclusion of the Commission and the Department of Justice that the Act was not intended to limit or displace the Attorney General's independent authority to pursue criminal violations of the Act.

The only support for their view that appellants are able to find (*see* Br. 17-18) in the Act's entire 33-year legislative history is a single paragraph in a 1976 floor statement by Senator Brock. However, Senator Brock was a vociferous opponent of the bill, which he condemned as "a deceit, a sham, and a fraud on the American public." 94 Cong. Rec. S6479 (daily ed., May 4, 1976) (Sen. Brock); *1976 Legislative History* at 1109 (R.19 MSJ Attachment #1, pg. 39, Apx. pg. 97). The Supreme Court has:

> often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. The

> fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.

NLRB v. Fruit Vegetable Packers Warehouseman, 377 U.S. 58, 66 (1964) (quotation marks and citations omitted); *Bryan v. United States*, 524 U.S. 184, 196 (1998) ("the fears and doubts of the opposition are no authoritative guide to the construction of legislation" (brackets and internal quotation marks omitted)). Accordingly, the district court correctly found that Senator Brock's "statement is of little weight." (R.33 Opinion and Order, pg. 11, Apx. pg. 30); *see also Bialek*, 2007 WL 1879989, at *5 ("[A] single statement from an opponent of the Act is not indicative of Congressional intent to limit the prosecutorial authority of the Attorney General.").[4]

C. NUMEROUS FEDERAL COURTS HAVE FOUND THAT FECA'S REFERRAL PROVISION DOES NOT RESTRICT THE ATTORNEY GENERAL'S AUTHORITY

Seven federal courts have addressed the argument that appellants make here and rejected it. As the Ninth Circuit explained:

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[4] Plaintiffs also argue (Br. 25-26) that there was substantive significance when certain criminal provisions were moved from Title 18 to Title 2 in 1976. This inference is entirely misplaced. The mere "rearrangement of the Code cannot reasonably be interpreted as having been intended to change the meaning of the [relevant] provision." *FCC v. Pacifica Foundation*, 438 U.S. 726, 738 (1978). Plaintiffs conclusorily assert that this move had significant effect, without any support in the statutory language or legislative history.

> [N]either the language nor the legislative history of the Act provides the kind of "clear and unambiguous expression of legislative will" necessary to support a holding that Congress sought to alter the traditionally broad scope of the Attorney General's prosecutorial discretion by requiring initial administrative screening of alleged violations of the Act. On the contrary, the language and legislative history indicates that while centralizing and strengthening the authority of the FEC to enforce the Act administratively and by civil proceedings, Congress intended to leave undisturbed the Justice Department's authority to prosecute criminally a narrow range of aggravated offenses.

United States v. International Operating Eng'rs, Local 701, ("*Operating Engineers*"), 638 F.2d 1161, 1168 (9th Cir. 1979). Similarly, the district court in the related *Bialek* case correctly rejected the argument that a Commission referral is a prerequisite to the Department's criminal enforcement of the FECA. 2007 WL 1879989, at *3-5; *see also Beam v. Gonzales*, Civ. No. 07-1227 (N.D. Ill. June 22, 2007) (minute order rejecting argument that a referral from the Commission is a prerequisite for DOJ investigation).

In *United States v. Jackson*, 433 F. Supp. 239, 241 (W.D.N.Y. 1977), the court similarly concluded that "[a] finding of probable cause by the Commission and its subsequent referral to the Attorney General is not a condition precedent to the jurisdiction of the Attorney General to investigate and prosecute alleged criminal violations." The court in *United States v. Tonry*, 433 F. Supp. 620, 623 (E.D. La. 1977), came to the same conclusion: "At no place in the statute is specific provision made prohibiting the Attorney General from going forward with

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." Thus, two decades ago it was already "settled that criminal enforcement of FECA provisions may originate either with the FEC, *see* 2 U.S.C. § 437g(a)(5)(C) (1982), or the Department of Justice." *Galliano v. United States Postal Serv.*, 836 F.2d 1362, 1368, n.6 (D.C. Cir. 1988). *See also United States v. Hsia*, 24 F. Supp. 2d 33, 43 (D.D.C. 1998), *rev'd on other grounds*, 176 F.3d 517 (D.C. Cir. 1999). Appellants do not cite any cases that have ever questioned this settled law.

D. THE 1979 FECA AMENDMENTS DID NOT OVERTURN PRIOR CASES INTERPRETING THE REFERRAL PROVISION

Appellants' argument that the 1979 Amendments to the FECA overturned the *Operating Engineers* decision is belied by the legislative history and has been rejected in subsequent cases.[5]

Specifically, appellants erroneously argue (Br. 18-20) that *Operating Engineers* is no longer good law because Congress in the 1979 Amendments —

[5] The 1979 Amendments to the FECA were signed by the President and became effective on January 8, 1980. However, those amendments passed Congress in 1979 and are commonly referred to as the 1979 Amendments. *See, e.g.*, FEC, *Legislative History of the Federal Election Campaign Act Amendments of 1979* (1983) (excerpts) (R.19 MSJ Attachment #1, pgs. 41-96, Apx. pgs. 99-154).

purportedly in response to the Ninth Circuit's decision in that case — added the phrase "by an affirmative vote of 4 of its members" to the referral provision found at 2 U.S.C. § 437g(a)(5)(C).[6] Appellants, however, cite no discussion whatsoever of *Operating Engineers* in the legislative history. Indeed, the legislative history contains no mention of the case or any evidence, direct or indirect, that Congress was even aware of the decision when it adopted the 1979 Amendments.

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[6] Section 313(a)(5)(D) of the 1976 Amendments provided that:

> If the Commission determines that there is probable cause to believe that a knowing and willful violation subject to and as defined in section 329, or a knowing and willful violation of a provision of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 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 subparagraph (A) [the thirty day conciliation period].

90 Stat. 484 (1976) (R.19 MSJ Attachment #1, pg. 34, Apx. pg. 92). The 1979 Amendments altered that provision to state:

> 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 of this Act which is subject to subsection (d), or a knowing and willful violation of a provision of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 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 subparagraph (4)(A) [the thirty day conciliation period].

93 Stat. 1339, 1360 (1980) (emphasis added) (R.19 MSJ Attachment #1, pg. 87, Apx. pg. 145).

As the district court explained when presented with the same argument appellants make here, the timing of the *Operating Engineers* decision makes appellants' interpretation chronologically impossible: "In fact, the 4-vote requirement was contained in the bill reported by the House Committee on Administration on September 7, 1979, which was three weeks *before* the Ninth Circuit decided *Operating Engineers*. . . . Therefore the 4-vote requirement could not have been written in response to the *Operating Engineers* decision." (R.33 Opinion and Order, pg. 13, Apx. pg. 32) (citing H.R. 5010 96th Cong. (1st Sess. 1979), *reprinted in Legislative History of Federal Election Campaign Act Amendments of 1979* ("*1979 Legislative History*") (dated September 7, 1979)) (emphasis added). *See also Galliano,* 836 F.2d at 1368 (decided eight years after *Operating Engineers*). Appellants never address the fact that the timing of the decision precludes their claim about congressional intent, even after the district court's clear holding.

In any event, the 4-vote requirement added in the 1979 Amendments states a limitation only on the Commission's authority, not the Attorney General's. Under the 1976 Amendments, a vote of at least four of the six Commissioners was already required for the Commission to initiate investigations and civil actions. At that time, referrals to the Department of Justice, like almost all other enforcement actions, had to "be made by a majority vote of the members of the Commission...."

2 U.S.C. § 437c(c) (1976) (R.19 MSJ Attachment #1, pg. 110, Apx. pg. 168). Thus, in most circumstances, a "majority vote" of six Commissioners to refer a case to the Department of Justice already required four or more Commissioners, even prior to the 1979 Amendments. The 1979 Amendments recodified section 437g which, as described *supra* pp. 4-8, governs the Commission's administrative enforcement procedures, and the 4-vote requirement was added to a number of provisions at that time. *See* amended Sections 309(a)(2); 309(a)(4)(A)(i); 309(a)(6)(A) (R.19 MSJ Attachment #1, pg. 86-87, Apx. pg. 144-45) codified as 2 U.S.C. §§ 437g(a)(2), (a)(4)(A)(i), (a)(6)(A).

The effect of the 4-vote requirement was only to ensure that no fewer votes would be required even if one Commission seat were vacant or a Commissioner recused. The House Committee report plainly indicates that Congress did not intend this minor procedural change to alter the substance of section 437g(a)(5)(C), since it explained that the bill merely "incorporates the language in section 303(5)(D) of the current Act regarding referral of knowing and willful violations to the Attorney General." H.R. Rep. No. 96-422, at 22 (1979) (Section-by-Section Explanation of the Bill), *1979 Legislative History* at 206 (R.19 MSJ Attachment #1, pg. 121, Apx. pg. 179); *see supra* pp. 21-23. Accordingly, even if the new language had been drafted after the *Operating Engineers* decision, Congress clearly did not intend it to overrule that

decision or to alter fundamentally the Attorney General's existing authority over criminal enforcement of the Act.

E. OTHER PROVISIONS OF THE FECA ARE CONSISTENT WITH THE ATTORNEY GENERAL'S PLENARY POWER TO INITIATE CRIMINAL PROSECUTIONS

Appellants attempt to draw inferences about congressional intent from various other provisions of the Act, but none of these provisions contains any language addressing, much less purporting to limit, the usual authority of the Department of Justice and the grand jury to investigate activity that might be a criminal violation of law.

First, appellants rely (Br. 24-25) on 2 U.S.C. § 437g(d), which simply permits a defendant in a criminal proceeding to introduce as evidence a conciliation agreement, if one exists, entered into with the Commission that "deals with" the alleged criminal acts. Without any legal support, appellants interpret this provision to mean that administrative respondents are *entitled* to an opportunity to negotiate with the Commission for the Commission's agreement in a conciliation agreement before any criminal investigation can begin. As explained *supra* pp. 19-20, however, the plain language of section 437g(a)(5)(C) flatly states that the Commission can refer a matter to the Attorney General "without regard to any limitations set forth" in section 437g(a)(4)(A) — *i.e.*, the provision concerning conciliation after a probable cause determination. Thus, the statute creates no right

to conciliation before a criminal investigation begins, even if that investigation results from a Commission referral. Appellants' interpretation of section 437g(d) is therefore foreclosed by other provisions of the Act.

Second, appellants suggest (Br. 21) that the Commission's jurisdiction could be eroded when they speculate that the Commission might issue an advisory opinion "diametrically opposed" to an ongoing criminal prosecution, even though they do not identify a single instance of this happening in the Commission's 32 years of existence. In fact, the Commission will issue an advisory opinion only regarding "a specific transaction or activity that the requesting person plans to undertake or is presently undertaking," 11 C.F.R. § 112.1(b); *see generally* 2 U.S.C. § 437f(a). Thus, past activities already subject to criminal prosecution would not qualify for an advisory opinion. Furthermore, because courts must defer to the Commission's constructions of the Act that have been established in Commission administrative proceedings, there is little risk, as appellants claim (Br. 21), that "entirely inconsistent and diametrically opposed . . . enforcement of the Act" will result if the Attorney General retains his authority to initiate criminal investigations. Indeed, the D.C. Circuit has held that "[d]eference is due [to the Commission's interpretations of the FECA] as much in a criminal context as in any other. . . ." *In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) (citing cases). Again, appellants fail to provide even one example of the worst-case

scenario they envision in the decades of shared enforcement authority under the Act.

Third, appellants argue (Br. 12-17) that an independent grand jury investigation would be contrary to Congress's decision to give the Commission "exclusive" and "primary" jurisdiction over the Act. As explained *supra* pp. 21-23, however, Congress carefully limited the Commission's exclusive jurisdiction to "civil" enforcement, 2 U.S.C. § 437c(b)(1), 437d(e). *See also* 2 U.S.C. § 437d(a)(6) (describing the Commission's power to initiate, defend and appeal "civil actions") and § 437g(a)(6) (providing that the Commission may file a "civil action" to enforce the Act). In fact, the modifier "primary" on which appellant relies (Br. 30-33) in claiming that the Commission has "primary exclusive jurisdiction" over violations of the Act was removed from § 437c(b) in 1979. FECA Amendments of 1979, § 306(b)(1), 93 Stat. 1355, amending 2 U.S.C. § 437(c)(b)(1) (1980) (R.19 MSJ Attachment #1, pg. 82, Apx. pg. 140).

As the district court pointed out, appellants carefully avoid any discussion of the explicit statutory language regarding the Commission's exclusive *civil* jurisdiction. *See* (R.33 Opinion and Order, pg. 8, Apx. pg. 27.) (criticizing plaintiffs for "consistently ignor[ing] that the Act states that the Commission has exclusive jurisdiction over '*civil* enforcement,' always dropping the word 'civil' in presenting their arguments"). Since the Attorney General's plenary power to

initiate *criminal* prosecutions of the Act is consistent with the Commission's exclusive *civil* jurisdiction over that same statute, there is no merit to appellants' claim that the Commission's authority impliedly limits the Attorney General's powers.

> The civil and regulatory laws of the United States frequently overlap with the criminal laws, however, thereby creating the possibility of parallel civil and criminal proceedings, either successive or simultaneous. In the absence of substantial prejudice to the rights of the parties involved, such parallel proceedings are unobjectionable under our jurisprudence.

SEC v. Dresser Industries, Inc., 628 F.2d 1368, 1374 (D.C. Cir. 1980) (citation omitted); *accord* R.33 Opinion and Order, pg. 14, Apx. pg. 33.

Appellants also argue (Br. 27-28) that the Commission's "exclusive" jurisdiction would be "thwarted" if concurrent criminal investigations could proceed because no respondent would cooperate with a Commission civil investigation while facing criminal charges for the same conduct, but would instead invariably invoke the Fifth Amendment. Appellants hyperbolically claim that "the FEC would be powerless to proceed" if an individual feared prosecution during an ongoing civil investigation by the Commission. *Id.* As a matter of fact, however, the Commission has successfully investigated thousands of cases during the 30 years that the Department of Justice has been exercising concurrent criminal

authority in accord with the MOU and the *Operating Engineers* decision.[7] Moreover, appellants offer no reason to believe that a respondent's invocation of the Fifth Amendment would be any less likely merely because a prospective criminal prosecution would be delayed until after a referral by the FEC. An administrative respondent would have the same incentive to invoke the Fifth Amendment regardless of the order of civil and criminal investigations. In any event, there are many sources of information in an investigation beyond the administrative respondents themselves.

All told, appellants do not present a shred of evidence to support their speculative and exaggerated claim (Br. 28) that "the Attorney General is effectively making the Fifth Amendment an absolute impediment to the FEC's ability to carry out its investigative and resolution functions." To the contrary, the Commission's successful enforcement record speaks for itself, and there is no evidence that the Attorney General's concurrent criminal authority has hampered the Commission's civil enforcement efforts.

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[7] The Commission can draw an adverse inference from a respondent's invocation of the Fifth Amendment in determining whether there has been a civil violation of the Act. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998); *McKinney v. Galvin*, 701 F.2d 584, 589 n.10 (6th Cir. 1983); *Pagel, Inc. v. SEC*, 803 F.2d 942, 946-47 (8th Cir. 1986).

III. APPELLANTS CANNOT RELY ON THE APA AND THE MANDAMUS ACT TO CHALLENGE THE PACE OF THE COMMISSION'S INVESTIGATION

Appellants' second and third causes of action allege that the Commission has found reason to believe that they have violated the Act but has failed to conduct an investigation as required by 2 U.S.C. § 437g(a)(2). Relying upon the Administrative Procedure Act and the mandamus statute, appellants ask the Court to order the Commission to proceed with an investigation of their activities. The district court correctly held that the appellants failed to establish jurisdiction for either claim. (R.33 Opinion and Order, pgs. 14-18, Apx. pgs. 33-37.)

The documents appellants submitted to the district court demonstrated that the Commission has, in fact, opened an investigation into their activities in accord with 2 U.S.C. § 437g(a)(2). Appellants' exhibits included a notification to appellants that the Commission had found reason to believe that they had violated the Act's prohibition on corporate contributions, 2 U.S.C. § 441b(a), and its prohibition against contributions made in the name of another, 2 U.S.C. § 441f. *See* Plaintiffs' Exh. B, in Support of Mot. for Decl. J., filed Feb. 7, 2007 (R. 4, pg. 2, Apx. 52). The notification explains that an investigation has been opened and invites appellants to submit any factual materials they believe are pertinent in response to the Commission's findings. *Id.* Since appellants are already aware that the Commission has, in fact, opened an investigation, their claim can only be

construed as alleging that the Commission has so far failed to take some undefined investigative steps that appellants believe should have been completed by now. FECA forcloses such a claim under either the APA or the mandamus statute.[8]

The two causes of action that appellants assert provide this Court with jurisdiction to review their claim of impermissible delay in the Commission's investigation are (1) judicial review of an agency's failure to act under section 706 of the APA (Br. 36), and (2) a claim for mandamus compelling the Commission to "perform its duty" owed to appellants and "conduct its investigation in the first instance" under 28 U.S.C. § 1651(a) (Br. 43). As a unanimous Supreme Court has explained, however, judicial review of agency action or failure to act under the APA is limited to "discrete" actions that are "legally *required*." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (emphasis in original). A "failure to act," part of the APA's definition of "agency action," 5 U.S.C. § 551(13), "is simply the omission of an action without formally rejecting a request — for example, the failure to promulgate a rule or take some decision *by a statutory deadline*." *Norton*, 542 U.S. at 63 (emphasis added). The Supreme

[8] The Commission is precluded under 2 U.S.C. § 437g(a)(12)(A) from providing additional investigative information on the public record; that provision prohibits "[a]ny notification or investigation made under this section" to be "made public by the Commission" without the written consent of the administrative respondents. In any event, as explained below, such evidence is irrelevant because appellants' claims fail on their face.

Court also explained (*id.*) that the relief provided by section 706(1) of the APA and by mandamus are essentially the same:

> The APA continued forward the traditional practice prior to its passage, when judicial review was achieved through one of the so-called prerogative writs — principally writs of mandamus under the All Writs Act, now codified at 28 U.S.C. § 1651(a). The mandamus remedy was normally limited to enforcement of a 'precise definite act . . . about which [an official] had no discretion whatever. . . . 706 (1) empowers a court only to compel an agency to perform a ministerial or non-discretionary act or to take action upon a matter, without directing *how* it shall act.

Thus, under *Norton*, appellants have no cause of action under the APA or the mandamus statute unless they can demonstrate that the Commission "failed to take a *discrete* agency action that it is *required to take*." *Id.* (emphasis in original). Nothing in section 437g or any other provision of the FECA, however, imposes any deadlines for the Commission to take any particular investigatory actions. While the Act specifies that the Commission is to "investigate" after finding reason to believe that the Act has been violated, 2 U.S.C. § 437g(a)(2), that is not a "precise, definite act . . . about which [the Commission] has no discretion whatever." *Norton*, 542 U.S. at 63 (internal quotations and citations omitted). The statute does not prescribe any particular actions that the Commission is required to take in conducting an investigation, does not state what, if any, information the Commission must seek, and it provides no time limit for completing any investigative action. While the Act does provide the Commission with the power

to conduct audits and field investigations, 2 U.S.C. § 437g(a)(2), and to take depositions, propound interrogatories and subpoena documents, 2 U.S.C. § 437d(a)(3) & (4), nothing in the language of the Act states that the Commission is required to use any of these investigative tools in any particular investigation, let alone specifies any sequence or time frame in which the Commission must employ them.

The requirement in 2 U.S.C. § 437g(a)(2) that the Commission "make an investigation" is a "broad statutory mandate," precisely the type of provision on which APA section 706(1) claims cannot be based.

> The principal purpose of the APA limitations . . . — and of the traditional limitations upon mandamus from which they were derived — is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. . . . If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved — which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management. The prospect of pervasive oversight by federal courts over the manner and pace of the agency's compliance with such congressional directives is not contemplated by the APA.

Norton, 542 U.S. at 66-67. Thus, courts are not to interfere with the broad Congressional delegation of discretion to the Commission to conduct its administrative investigations as it sees fit. *Id.*; *see also Heckler v. Chaney*,

470 U.S. 821, 828 (1985); *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1984) ("[I]t is not for the judiciary to ride roughshod over agency procedures or sit as a board of superintend[e]nce directing where limited agency resources will be devoted. We are not here to run the agencies."); *Durkin for U.S. Senate Comm. v. FEC*, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 9147 at 51,113 (D. N.H. 1980) (finding mandamus relief not available) (R.19 MSJ Attachment #1, pgs. 123-8, Apx. Pgs. 181-6).

In sum, the Act specifies no "discrete action" that the Commission is "required" to take in any particular timeframe that could be subject to review under the APA. *See Norton*, 542 U.S. at 63. Nor can a court rely upon mandamus to exert control over an ongoing law enforcement investigation, for "[i]t is well settled that the question of whether and when prosecution is to be instituted is within the discretion" of the authorized government officials. *Peek v. Mitchell*, 419 F.2d 575, 577 (6th Cir. 1970).

As the district court correctly held (R.33 Opinion and Order, pg. 17-18, Apx. pg. 36-37), the FECA's language and structure preclude an administrative *respondent* from obtaining review of the pace of a Commission investigation through a claim under the APA. *Accord Stockman v. FEC*, 138 F.3d 144 (5th Cir. 1998). Section 701(a) of the APA states that its judicial review provisions apply "except to the extent that" the relevant statutes "preclude judicial review," 5 U.S.C.

§ 701(a)(1), or "agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2). As the *Stockman* decision explained, this exception to the APA's judicial review provision in 5 U.S.C. § 701(a)(1) requires the Court "to determine whether and to what extent the Campaign Act precludes judicial review of a particular claim [by looking] to the express language of the statute, as well as the structure of the statutory scheme, its legislative history, and the nature of the administrative action involved." 138 F.2d at 152. *See also NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 130-33 (1987).

As a general matter, Congress intended to, and did, deprive the federal courts of jurisdiction to review the Commission's handling of its administrative complaints. *Stockman*, 138 F.3d at 153; *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996). It created only two narrow exceptions: First, it provided that, upon petition by the Commission, the United States district courts have jurisdiction to compel compliance with Commission subpoenas. *See* 2 U.S.C. § 437d(b). Second, Congress provided that an administrative *complainant* may bring a civil action against the Commission in the United States District Court for the District of Columbia "[i]f the FEC dismissed [his or her] complaint or failed to act on it in

120 days." *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 488 (1985); 2 U.S.C. § 437g(a)(8).[9]

Congress's specification in the FECA that only administrative *complainants* are authorized to petition for judicial review of the Commission's alleged failure to act in an enforcement investigation demonstrates that Congress intended to deny administrative *respondents*, like the appellants here, such a right.

> [W]hen a statute provides a detailed mechanism for judicial consideration of particular issues at the behest of particular persons, judicial review of those issues at the behest of other persons may be found to be impliedly precluded.

Block v. Community Nutrition Inst., 467 U.S. 340, 349 (1994). Moreover, Congress also explicitly limited jurisdiction over such failure-to-act suits to the United States District Court for the District of Columbia. 2 U.S.C. § 437g(a)(8)(A). That precludes this Court from having jurisdiction over such a suit even if it had been filed by an administrative complainant. Therefore, even if the APA were construed to give a right to judicial review to targets of a law enforcement investigation under other statutory schemes, Congress's explicit restriction of such a right in the FECA to administrative complainants, who can file

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[9] "When the FEC's failure to act is contrary to law," the D.C. Circuit "ha[s] interpreted § 437g(a)(8)(C) to allow nothing more than an order requiring FEC action." *Perot*, 97 F.3d at 559. If the Commission fails to conform to the court's directive within 30 days, the statutory remedy is to authorize the administrative

suit only in the District of Columbia, precludes appellants' alleged cause of action here. *See Stockman*, 138 F.3d at 154.[10]

In sum, the APA does not authorize the subject of a Commission investigation to obtain judicial review of the conduct of such an ongoing investigation. Judicial intervention at this preliminary stage would permit a respondent to discover the investigating agency's theories and strategy. *See FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 243 (1980) (Judicial review under the APA "should not be a means of turning prosecutor into defendant before [administrative] adjudication concludes."). Moreover, the particular language, history, and structure of the FECA provide "clear and convincing evidence" that "Congress has expressed an intent to preclude judicial review," *Heckler*, 470 U.S. at 830, of alleged Commission failure to act in administrative enforcement proceedings except when an administrative *complainant* invokes the special provisions of 2 U.S.C. § 437g(a)(8) by filing a petition for review in the United States District Court for the District of Columbia. Accordingly, the district court's holding that appellants' claims against the Commission under the APA and the

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complainant to sue the administrative respondent directly for violating the Act. 2 U.S.C. § 437g(a)(8)(C).

[10] Plaintiffs argue (Br. 41) that the "*Stockman* decision has never been followed by another circuit in the country," but do not point to a decision by any court that disagreed with *Stockman*'s straightforward interpretation of FECA's failure-to-act provision.

mandamus statute "have no legal basis" should be affirmed. (R.33 Opinion and Order, pg. 18, Apx. pg. 37.)

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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March 17, 2008

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEOFFREY N. FIEGER; NANCY FISHER; FIEGER, FIEGER, KENNEY AND JOHNSON, P.C., Plaintiff-Appellant, v. UNITED STATES ATTORNEY GENERAL, ET AL. Defendants-Appellees.	No. 07-2291 CERTIFICATE OF COMPLIANCE

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing principal brief complies with the length requirements of Fed. R. App. P. 32(a)(7)(B). I have relied on the word count feature of Microsoft Word 2003, the Commission's word-processing system, and have determined that the foregoing brief contains 9,992 words.

I further certify that this brief complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman using Microsoft Word 2003.

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March 17, 2008

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEOFFREY N. FIEGER; NANCY FISHER; FIEGER, FIEGER, KENNEY AND JOHNSON, P.C., Plaintiff-Appellant, v. UNITED STATES ATTORNEY GENERAL, ET AL. Defendants-Appellees.	No. 07-2291 CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March 2008, I caused to be served by FedEx overnight delivery a copy of the foregoing Final Brief of the Federal Election Commission Chairman in His Official Capacity, upon the following counsel at the addresses listed below:

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March 17, 2008

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEOFFREY N. FIEGER; NANCY FISHER; FIEGER, FIEGER, KENNEY AND JOHNSON, P.C., Plaintiff-Appellant, v. UNITED STATES ATTORNEY GENERAL, ET AL. Defendants-Appellees.	No. 07-2291 DESIGNATION

DESIGNATION OF APPENDIX CONTENTS

Pursuant to the Sixth Circuit Rules 28(d) and 30(b), the Federal Election Commission hereby designates the following portion of the district court record for inclusion in the Joint Appendix, in addition to those contents that appear in the plaintiff-appellant's designation:

DESCRIPTION OF ENTRY	DATE	RECORD ENTRY NO.
Plaintiffs' Exh. B, in Support of Mot. for Decl. J.	Feb. 7, 2007	4
Attachment # 1 Defendant Federal Election Commission's Appendix with Index	April 16, 2007	19