SUPREME COURT OF THE UNITED STATES

No. 93–1151

FEDERAL ELECTION COMMISSION, PETITIONER *v.* NRA POLITICAL VICTORY FUND ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[December 6, 1994]

JUSTICE STEVENS, dissenting.

The Federal Election Commission (FEC) "is an independent administrative agency vested with exclusive jurisdiction over civil enforcement of the [Federal Election Campaign] Act." *FEC* v. *National Right to Work Committee*, 459 U. S. 197, 198, n. 2 (1982). Both the plain language of the governing statute, §311(a)(6), 88 Stat. 1282, as amended, 2 U. S. C. §437d(a)(6), and the unfortunate chapter in our history that gave rise to the creation of the FEC, demonstrate that the FEC's exclusive jurisdiction includes the authority to litigate in this Court without the prior approval of the Solicitor General.

Section 437d(a)(6) expressly provides that the Commission has the power "to initiate . . . , defend . . . or appeal any civil action in the name of the Commission to enforce the provisions of this Act and chapter 95 and chapter 96 of title 26, through its general counsel." It is undisputed that when the statute was enacted, the FEC had the authority to invoke our mandatory jurisdiction by filing an appeal under §437h of the Act.[1] Although the term "appeal"

[1]Under the original statutory scheme, certain constitutional challenges were to be certified to a court of appeals sitting en banc, with "appeal directly to the Supreme Court." 2 U. S. C. §437h (1976 ed. and Supp. III). See generally *California Medical Association* v. *FEC*, 453 U. S. 182, 188–189 (1981). Thus, even under the majority's interpretation of the word "appeal," the FEC

may be construed literally to encompass only mandatory review, a far more natural reading of the term as it is used in §437d(a)(6) would embrace all appellate litigation whether prosecuted by writ of certiorari, writ of mandamus, or notice of appeal. Indeed, 28 U. S. C. §518(a) (1988 ed., Supp. V), the statute that gives the Attorney General authority to conduct litigation in this Court refers simply to "suits and appeals." Because the term "suits" apparently refers to our original jurisdiction, it appears that the term "appeals" is intended to refer to a broad range of appellate litigation, including both mandatory appeals and petitions for certiorari.

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would have had independent litigating authority, at least when proceeding under §437h. It is incongruous, to say the least, to assume that Congress wanted the FEC to have independent authority to invoke our mandatory jurisdiction when proceeding under §437h, but not to have the authority to invoke our discretionary jurisdiction when proceeding under other sections of the same statute.

The ambiguity in the word “appeal” is apparent even in §§9101(d) and 9040(d), the sections on which the majority relies to cabin the authority granted in §437d(a)(6). In those sections, Congress uses the word “appeal” to describe two different categories of appellate litigation. In the text of those sections, “appeal” is used in contradistinction to “writ of certiorari” to indicate mandatory appeals. But Congress also uses “appeal” as the title to both §§9010(d) and 9040(d). See n. 4, *infra*. As thus used, “appeal” describes an entire category of appellate litigation that includes mandatory appeals and writs of certiorari. I see no reason for assuming that “appeal” in §437d(a)(6) was intended to incorporate the narrow, rather than the broad, understanding of “appeal.”

The historical context in which Congress adopted §437d(a)(6) demonstrates that the interpretation that the Court adopts today is unfaithful to the intent of Congress. Section 437d(a)(6) was passed as part of the Federal Election Campaign Act Amendments of 1974 (FECA). The 1974 amendments represented a response by Congress to perceived abuses arising out of the 1972 Presidential election campaign and culminating in the resignation of President Nixon. Indeed, the legislative history reveals Congress' belief that “[p]robably the most significant reform that could emerge from the Watergate scandal is the creation of an independent nonpartisan agency to supervise the enforcement of the laws relating to the conduct of elections.”[2]

One of the most dramatic events of the entire Watergate scandal was the firing of special prosecutor Archibald Cox in October 1973. When Cox threatened to secure a judicial determination that the

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[2]See Final Report of the Select Committee on Presidential Campaign Activities, S. Rep. No. 93–981, 93d Cong., 2d Sess., 564 (1974).

President was violating a court order to deliver certain Presidential tapes, President Nixon ordered the Attorney General to fire Cox. Both the Attorney General and the Deputy Attorney General refused, and instead resigned. The President's order to fire Cox was then carried out by the Solicitor General, in his capacity as Acting Attorney General. See generally *In re Olson*, 818 F. 2d 34, 41–42 (CADC 1987) *(per curiam)*. This incident, which came to be known as the "Saturday Night Massacre," sparked tremendous public outrage, of which Congress was surely aware. Against this background, Congress would not have been likely, less than one year later, to have made the FEC dependent for its Supreme Court litigation on the approval of the Solicitor General.

In short, the legislative history of the 1974 amendments shows that Congress intended the FEC to have ample authority to oversee presidential campaigns free of Executive influence. The FEC's authority to conduct civil litigation, including appellate litigation, must be construed in the light of Congress' intent.

Given the language and historical context of §437d(a)(6), it is unsurprising that the FEC has had a long and uninterrupted history of independent litigation before this Court.[3] Though, as the majority notes, *ante*, at 9, that history does not preclude us from reexamining the FEC's authority, the contemporaneous practice of independent litigation, uninterrupted in subsequent years, provides

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[3] The FEC has represented itself in cases resulting in decisions on the merits, see *ante*, at 8–9, and as *amicus curiae*, see, *e.g.*, *First National Bank of Boston,* v. *Bellotti*, 435 U. S. 765 (1978); *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990). Cf. R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 68, n. 56 (7th ed. 1993) (noting FEC's authority to litigate on its own behalf pursuant to §437d(a)(6)).

confirmation of Congress' original intent. See *BankAmerica Corp.* v. *United States*, 462 U. S. 122, 131 (1983). Moreover, during the administrations of Presidents Ford, Carter, Reagan, and Bush, the Attorneys General and Solicitors General of the United States did not object to the FEC's exercise of authority to litigate in this Court without the prior approval of the Solicitor General. As this Court has noted:

> "`[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.'" *Ibid.,* quoting *FTC* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 352 (1941).

See also *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 513 (1949) ("Failure to use such an important power for [over 10 years] indicates to us that the Commission did not believe the power existed").

In rejecting the result dictated by language, history, and longstanding practice, the majority relies primarily on the differences between §437d(a)(6) and 26 U. S. C. §§9010(d), 9040(d).[4] The relevant language in §9010, which originally conferred additional and unusual responsibilities on the Comptroller General of the United States, was enacted in 1971 as part of the Presidential Election Campaign Fund Act (Fund Act), which authorized

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[4]Sections 9010(d) and 9040(d) are identical. They read:

"(d) Appeal. The Commission is authorized on behalf of the United States to appeal from, and to petition the Supreme Court for certiorari to review, judgments or decrees entered with respect to actions in which it appears pursuant to the authority provided in this section."

public funding of Presidential campaigns.[5] As the majority notes, *ante*, at 6, §9040(d) was enacted at the same time as §437d(a)(6), in 1974. The majority suggests that the differences between §§9040(d) and 437d(a)(6) reveal Congress' intent to give the FEC a more limited litigation authority under the latter statute.

The differences between §§437d(a)(6) and 9040(d) cannot support the weight that the majority wishes them to bear. The striking similarity between §9010 and §9040 suggests that when Congress enacted §9040, it did little more than copy the provisions of §9010.[6] No evidence whatsoever suggests that Congress considered the significance of the wording of those sections when it created §437d(a)(6). The fact that the FEC's authority to file petitions for certiorari is expressed more explicitly in §§9010(d) and 9040(d) of Title 26 than in §437d(a)(6) of Title 2 is thus not a sufficient reason for failing to give the latter provision its ordinary and well-accepted

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[5]The 1974 amendment transferred those responsibilities to the FEC.

[6]As noted at n. 4, *supra,* §§9010(d) and 9040(d) are identical. The other provisions of those statutes, though not identical, are substantially similar. Compare, *e.g.,* §9010(b) ("The Commission is authorized through attorneys and counsel described in subsection (a) to appear in the district courts of the United States to seek recovery of any amounts determined to be payable to the Secretary of the Treasury as a result of examination and audit made pursuant to section 9007") with §9040(b) ("The Commission is authorized, through attorneys and counsel described in subsection (a), to institute actions in the district courts of the United States to seek recovery of any amounts determined to be payable to the Secretary as a result of an examination and audit made pursuant to section 9038").

interpretation.[7]

Furthermore, the majority's reading of the statutes rests on the anomalous premise that Congress decided to give the FEC authority to litigate Fund Act cases in this Court while denying it similar authority in connection with its broader regulatory responsibilities under the FECA. The majority explains this anomaly by hypothesizing that "presidential influence through the Solicitor General might be thought more likely in cases involving presidential election fund controversies than in other litigation in which the FEC is involved." *Ante*, at 6. This hypothesis is untenable. Indeed, the Court has previously noted:

> "[B]oth the Fund Act and FECA play a part in regulating Presidential campaigns. The Fund Act comes into play only if a candidate chooses to accept public funding of his general election campaign, and it covers only the period between the nominating convention and 30 days after the general election. In contrast, FECA applies to all Presidential campaigns, as well as other federal elections, regardless of whether publicly or privately funded." *FEC* v. *National Conservative Political Action Committee*, 470 U. S. 480, 491 (1985).

Finally, though admittedly important, the 1971 Act

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[7]As an aside, I note that the majority's strict reading of §§9010(d) and 9040(d) creates its own oddities. For example, it seems to me that an open question under the Court's narrow reading of the statutes is whether the FEC has the right to file briefs in opposition to the certiorari petitions filed by its adversaries. Compare §9010(d) (granting the FEC authority to "petition the Supreme Court for certiorari to review") with 28 CFR §0.20 (1994) (delegating to the Solicitor General authority to file "petitions for *and in opposition to* certiorari") (emphasis added).

was a relatively undramatic piece of legislation, enacted before Watergate seized the national (and congressional) attention. The notion that Congress was motivated by a concern about improper presidential influence in 1971 when it enacted the Fund Act, but ignored such concerns in 1974 when it enacted FECA, is simply belied by "a page of history". See *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921) (Holmes, J.).

During two decades of FEC litigation we have repeatedly recognized that the FEC's express statutory authority to initiate, defend, or "appeal any civil action" to enforce FECA "through its general counsel" encompasses discretionary appellate review as well as the now almost extinct mandatory appellate review in this Court. Because I remain persuaded that this settled practice was faithful to both the plain language and the underlying purpose of §437d(a)(6), I respectfully dissent.