UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Representative Christopher Shays and
Representative Martin Meehan,
Plaintiffs,

v. Civil Action No. 04-1597 (EGS)

Federal Election Commission,
Defendant.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO ENFORCE ORDER

Plaintiffs Shays and Meehan respectfully submit this reply in support of their September 13, 2006 motion to enforce the Court's March 29, 2006 order. The Federal Election Commission ("FEC"), in its opposition brief, addresses many topics, but nowhere says when it intends to comply with this Court's order. Apart from its telling silence on this point, the FEC offers no sound reason for this Court to refrain from exercising the authority the FEC concedes the Court possesses to compel compliance with its order.

I. The FEC Still Has Not Given Any Indication of When It Will Comply with the Court's Order

Tellingly, the Commission in its opposition brief does not offer so much as a hint as to when it plans on complying with this Court's order, which was issued more than six months ago. Rather, the FEC says only that members of its legal staff "have been working on drafting a fuller Explanation and Justification for the Commission's consideration." Mem. at 3. In other words, the Commissioners apparently have yet to consider even a *draft* of a revised E & J.

How long does it take to draft an explanation of the FEC's decision to enforce the law against 527 organizations on a case-by-case basis? The FEC's elaborate protestations that it must "take the time necessary on remand to carefully analyze the complex issues involved in light of the extensive rulemaking record," Mem. at 5, are unpersuasive. The FEC has been working with that rulemaking record since 2004. The FEC presumably carefully analyzed the very same "complex issues" and "extensive rulemaking record" during the summary judgment briefing in this action.[1] The FEC does not adequately explain why in these circumstances it has apparently taken more than half a year to draft a document that comments on this same record yet again.

By comparison, after the completion of the FEC's rulemaking on the 527 problem in late August 2004 -- which, like 2006, was an election year -- it took the Commission just over two months to approve the E & J on the regulation of 527 groups *and numerous other issues*, *see* FEC Agenda Doc. No. 04-102 at 5 (Minutes of Oct. 28, 2004 Open Meeting) (**Exhibit A**), and only one month more to publish its E & J, *see* "Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees," 69 Fed. Reg. 68,056 (Nov. 23, 2004) (**Exhibit B**). The Commission offers no explanation why it has already taken three times as long to approve an E & J now as it did in 2004.

The FEC's Opposition refers to the press of other matters within the scope of its responsibilities. Mem. at 7-10. But the FEC has failed to elucidate why so many other matters seemingly take precedence over complying with this Court's order relating to a glaring and

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[1] *See* FEC SJ Mem. at 1, 6, 8-16, 30-31, 34-39, 43 (citing the rulemaking record); FEC SJ Reply Mem. at 10, 14 (same).

pernicious soft money loophole. It would not appear that case-by-case enforcement with respect to 527 group misconduct has contributed to the purported bottleneck at the FEC, since the FEC has not in the past six months pursued enforcement of any of the pending 527 cases of which plaintiffs are aware.

II. The 527 Group Issue Remains an Urgent Problem for the 2006 and 2008 Elections.

Contrary to the FEC's claim that there is "no basis in the record" to argue that this case was preceded by "years of inaction" on the FEC's part in addressing the 527 group crisis, Mem. at 4, the record and prior briefing have made exhaustively clear that the FEC has failed to effectively address the 527 issue -- either through a rulemaking or case-by-case adjudication -- for more than five years. After two inconclusive rulemakings, two national elections, several hundred million dollars improperly spent by 527 groups to influence federal elections, numerous individual -- and still unresolved -- complaints against 527 groups, and publicly available information that 527 groups are now reinvigorating their activities, the FEC has done nothing either proactively or in response to the Court's order.

Quite apart from the problems that have plagued previous elections as a result of past FEC inaction, the FEC's continued inaction threatens imminent federal elections with soft money abuses and the actual and apparent corruption attendant thereto. Even in the months since this Court's March 29 order, new 527 groups have begun raising and spending millions of dollars in efforts to influence the 2006 congressional elections.[2] To take just one example, a former

[2] *See, e.g.*, sources cited in Pls' Mem. in Support of Mot. to Enforce at 6 n.4; *see also* L.S. Weidenbener, "State Files Lawsuit Over Automated Political Calls," Courier-Journal (Louisville, KY) (Sept. 19, 2006) (**Exhibit C**); J. Broder, "Democrats Form New Group for

backer of the Swift Boat Veterans for Truth, a 527 group that attacked John Kerry in the 2004 presidential election, has donated $5 million since August 18, 2006 to a new 527 group called the Economic Freedom Fund that has spent more than $500,000 on television ads criticizing two congressional candidates in Georgia and one in West Virginia.[3] EFF has spent more than $1.6 million on broadcast ads targeting federal candidates so far this year.[4] News reports make clear that the Commission's continued inaction, even after the Court's March 29 order, has encouraged 527 groups to gear up during the 2006 election cycle just as they did in 2004. J. Kurtz, "Democrats Form New 527 to Win Back House," Roll Call (June 5, 2006) (**Exhibit J**).

Moreover, if the Commission does not soon comply with the Court's order, the 2008 presidential election will almost certainly suffer a comparable fate. The most likely scenario is that once the FEC finally gets around to issuing a new E & J in compliance with this Court's order, plaintiffs and/or others will seek judicial review to test whether the FEC's proffered explanation passes muster under the Administrative Procedure Act, 5 U.S.C. § 706(2) ("APA"). If a court finds that it does not, it may order the FEC to issue new regulations, an alternative set forth in this Court's order of March 29, 2006. The FEC may at that point appeal or it may on remand consider rules regulating 527 groups. If the FEC opts for the latter course, any rules it

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Fund-Raising and Ads," N.Y. Times (Sept. 14, 2006) (**Exhibit D**); C. Cillizza, "New Group Is Racing To Slow Down GOP," Wash. Post (Sept. 7, 2006) (**Exhibit E**); J. Gerstein, "527 Groups Use Legal Loopholes To Influence Elections," N.Y. Sun (Sept. 18, 2006) (**Exhibit F**).

[3] *See* B. Evans, "Former Swift Boat Attack-ad Backer Takes on House Democrats," Associated Press (Sept. 14, 2006) (**Exhibit G**); B. Dart, "Swift Boat Ad Bankroller Targets 2 Ga. Democrats," Cox Washington Bureau (Sept. 23, 2006) (**Exhibit H**).

[4] *See* Economic Freedom Fund FEC Form 9 disclosures (Jan. 1, 2006-Oct. 2, 2006) (**Exhibit I**).

promulgates may be challenged in court under the APA. As can readily be seen, these steps could well consume much of the time between now and the campaign period for the 2008 election. Thus, the longer the FEC dallies before issuing its revised E & J, the greater the chance that 527 groups will continue to raise and spend millions of dollars of unregulated soft money to influence the 2008 federal elections -- just as they did in 2002 and 2004, and are now doing in 2006. The threat of potential case-by-case enforcement during this period is likely to have little, if any, effect, since it has had none in the past and is apparently having none today.

III. The FEC Has Not Argued that the Court Cannot, and Has Not Shown that the Court Should Not, Take Steps To Ensure the FEC Complies with its Order Promptly.

The APA authorizes the courts to review -- and, if necessary, impose obligations on -- agencies that fail to discharge their statutory responsibilities. *See* 5 U.S.C. § 706(1). Likewise, district courts clearly have the power to enforce the terms of their orders. *Fund for Animals v. Norton*, 390 F. Supp. 2d 12, 15 (D.D.C. 2005). This Circuit has explained that in determining whether an agency's delay has been unreasonable "depend[s] in large part . . . upon the complexity of the task at hand, the significance (and permanence) of the outcome, and the resources available to the agency." *Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). For the reasons previously given, these factors all weigh quite decidedly in favor of a finding of unreasonable delay here. Because of the continued urgency of the 527 problem and the FEC's repeated past delays in addressing it and because the task at hand

is neither complex nor subject to time-consuming procedural hurdles, it is entirely appropriate for the Court to order the Commission to comply with its March 29 order by a date certain.[5]

Although the FEC argues that plaintiffs have failed to point to a case where a court ordered an agency to comply with a prior order to issue a revised explanation for its actions within a specific number of days, the Commission likewise does not point to any cases where a court has *denied* such a request -- perhaps because it is so unusual for an agency to delay so long in issuing an APA-compliant explanation of a previous decision in response to a court order.[6] In

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[5] In a similar recent order, this Court found that the Department of the Interior had failed to issue an adequate explanation for its procedural treatment of a tribal group's request for federal tribal recognition and remanded the case for the agency to "provide a detailed explanation of the reasons" for its failure to act. *Muwekma Ohlone Tribe v. Kempthorne*, C.A. No. 03-1231 (D.D.C. Sept. 21, 2006) (**Exhibit K**), slip op. at 31. Citing "the Department's past delays" to act on this matter, Judge Walton retained jurisdiction and imposed on the Department a strict deadline to issue its explanation. *Id.* at 32.

Likewise, in 2005, this Court gave the FEC a 60-day time limit to reconsider its dismissal of a complaint in light of the Supreme Court's decision in *McConnell v. FEC*, 540 U.S. 93 (2003). *See Kean for Congress Committee v. FEC*, 2005 WL 354484 (D.D.C., Feb. 15, 2005). In imposing that time limit, Judge Bates acknowledged the "significant time -- almost five years -- that has passed since the Kean Committee first filed its administrative complaint with the FEC. The Court will not permit this matter to languish unduly with the FEC in light of that history." *Id.* at *2.

[6] The FEC's citations to cases in which an agency was allowed more than a year to issue an explanation are inapposite, because none of those cases involved any allegations that an agency had unreasonably delayed issuing a new explanation in light of pressing public concerns. *See Heartland Reg'l Med. Ctr. v. Leavitt*, 415 F.3d 24 (D.C. Cir. 2005); *Time Warner Entertainment Co., L.P. v. FCC*, 144 F.3d 75 (D.C. Cir. 1998); *In re Application of Portland Cellular Partnership*, 6 FCC Rcd 2283 (FCC 1991). Surely, the FEC cannot seriously be hinting that it is prepared to justify delays of an additional six months?

In addition, the cases of multiple-year delay that the FEC cites all involved delayed *rulemakings* or *regulations*, which are far more arduous and time-consuming undertakings than issuing a revised *explanation*. *See Public Citizen Health Research Group v. FDA*, 724 F. Supp. 1013, 1021 (D.D.C. 1989); *Cutler v. Hayes*, 818 F.2d 879, 886 (D.C. Cir. 1987); *Potomac Elec. Power Co. v. Interstate Commerce Comm'n*, 702 F.2d 1026, 1033 (D.C. Cir. 1983); *Nader v.*

any event, the case-specific analysis that is required by applicable precedent provides a compelling basis for judicial action in the specific circumstances present here. At the very least, the Court should require the Commission to provide a schedule for issuing the E & J, or report periodically to the Court on its progress in complying with the March 29 order, as Judge Flannery ordered in *Common Cause v. FEC*, 692 F. Supp. 1397 (D.D.C. 1988), a case the FEC has not meaningfully distinguished. *See also Muwekma Tribe v. Babbitt*, 133 F. Supp. 2d 30, 41 (D.D.C. 2000) (ordering defendant agency to submit to the court a proposed schedule for resolving the plaintiff's petition in light of agency's prior unreasonable delay).

CONCLUSION

For these reasons, plaintiffs Shays and Meehan respectfully urge the Court to take appropriate actions to compel the Commission to comply with the Court's Order of March 29, 2006.

FCC, 520 F.2d 182, 206 (D.C. Cir. 1975). Likewise, the shorter delays that the courts found permissible in *St. Lawrence Seaway Pilots' Ass'n. v. Collins*, 362 F. Supp. 2d 59 (D.D.C. 2005), and *Sierra Club v. Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987), involved the issuance of rules, not mere explanations.

Dated this 5th day of October, 2006.

Respectfully submitted,

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