UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	CRIMINAL CASE NO. 1:11-CR-161-1
JOHNNY REID EDWARDS	)	
	)	
	)	

MR. EDWARDS' MOTION TO ADMIT LETTER FROM THE UNITED STATES DEPARTMENT OF JUSTICE

INTRODUCTION

Mr. Edwards was just made aware of and seeks to admit a January 16, 2009 letter from the U.S. Department of Justice ("DOJ") to the Citizens for Responsibility and Ethics in Washington ("CREW"), explaining that DOJ does not prosecute election law cases when the FEC has concluded that criminal liability does not exist. (*See* Exhibit A.) That letter provides:

> The FECA specifically gives the Commission the authority to interpret the features of the FECA. The role of the Department of Justice in matters arising under FECA is confined to prosecuting violations of the Act's provisions that are committed "knowingly and willfully." For such a criminal violation to occur, the application of the law to the facts of a matter must at the very least be clear, and there must be no doubt that the Commission considers that the underlying conduct presents a FECA offense.

(Ex. A at 1-2 (emphasis added) (internal citations omitted).) The letter explains that DOJ is not pursuing the criminal investigation suggested by CREW because the FEC declined to take a civil enforcement action by a 3-3 vote, when four Commissioners were required

to initiate an enforcement action. Because the FEC declined to take an enforcement action in that case, DOJ explained that it could not pursue a criminal case.

The FEC tape Mr. Edwards seeks to admit (*see* Docket No. 283) establishes that the FEC voted 6-0 to close the record of the audit of his campaign because it concluded the very payments at issue in this case are not campaign contributions. That is a more explicit rejection of the government's theory of this case than the 3-3 vote by the FEC not to initiate a civil enforcement action that is addressed in the letter to CREW.

Mr. Edwards is entitled to introduce the FEC statements to demonstrate the reasonableness of his view and the view of his staff that the payments by Mr. Baron and Ms. Mellon are not campaign contributions and that any omission was not material. For the same reason, the DOJ Letter adds to the evidentiary value of the FEC's statements by establishing that this is not the opinion of just anybody, but of the expert agency on FECA matters. In addition, due process requires the introduction of this evidence to alleviate any false impression DOJ has sought to create in this trial that its view of the evidence is the view of the United States government as a whole.

ARGUMENT

A. The Letter Is Relevant

Mr. Edwards maintains that he did not believe the payments by Mr. Baron and Ms. Mellon were campaign contributions, and his campaign staff have testified that they have not reported those payments as campaign contributions because they did not believe them to be. It is certainly relevant to tell the jury that the FEC agrees with them, as the

FEC tape establishes, and the significance of the FEC's conclusion is demonstrated by DOJ's letter to CREW. The DOJ Letter establishes that the FEC's opinion is the most important one within the Executive Branch when it comes to interpreting FECA.

Nor should the government be allowed to downplay the FEC's findings by questioning what the FEC considered or the wisdom of its decision. DOJ is no stranger to the FEC. They are both part of the very same unitary Executive Branch, and the federal government ought not to be able to claim that its left hand does not know what its right hand is doing. Nor can DOJ asks this Court to defer to its interpretation of the law over the FEC's opinion.

As the DOJ Letter acknowledges, the FEC has primary jurisdiction to decide legal questions arising under FECA. (Ex. A at 1-2.) The courts have said so as well. The Supreme Court explains that the FEC has the "the primary and substantial responsibility for administering and enforcing the Act." Buckley v. Valeo, 424 U.S. 1, 109 (1976). In fact, the D.C. Circuit has made clear that FEC's interpretation of election law is controlling even when the Department of Justice disagrees with it -- which is the situation in this case. In re Sealed Case, 223 F.3d 775, 780 (D.C. Cir. 2000). For example, in the administrative proceedings underlying In re Sealed Case, the FEC rejected a finding of probable cause that a violation of the Act had occurred, but the government later opened a grand jury investigation of the same matter. Id. at 777. The D.C. Circuit concluded the FEC's finding that no crime occurred was binding on the prosecutors. Id. at 781. "It is irrelevant that the prevailing interpretation was established in the context of agency

enforcement, whereas this is a criminal prosecution. Deference is due as much in a criminal context as in any other for interpretations made outside that context, such as those found in published regulations." Id. at 779. The D.C. Circuit warned: "If courts do not accord Chevron[v. NRDC, 467 U.S. 837 (1984)] deference to a prevailing decision that specific conduct is not a violation, parties may be subject to criminal penalties where Congress could not have intended that result." Id. at 780.

In addition to buttressing the "reasonableness" of the claim by Mr. Edwards and his campaign staff that they did not believe the payments were campaign contributions, the evidence of DOJ's break from the FEC's findings is relevant because it is fundamentally unfair for the government to give "the jury the false impression" that its views speaks for the United States, when that is not true. See, e.g., Alcorta v. Texas, 355 U.S. 28, 31 (1957). If the jury is to decide Mr. Edwards' guilt or innocence on the charges against him, due process should ensure that the jury makes an informed decision.

B. The Evidence is Authenticated

There can be no question as to the authenticity of this letter. That the letter is on DOJ letterhead and signed by a senior DOJ official makes it a self-authenticated document under Federal Rule of Evidence 902(1), 902(4), 902(8) and 902(11). See, e.g., Alexander v. CareSource, 576 F.3d 551, 561 (6th Cir. 2009) (letter on EEOC letterhead, signed by EEOC official, is self-authenticating under Rule 902(10)). That also is

"evidence sufficient to support a finding that the matter in question is what its proponent claims," which authenticates it under Federal Rule of Evidence 901(a).

C. Hearsay Is No Objection

Because the letter is from DOJ, made in the course of its regularly conducted activity, it is not hearsay under Federal Rule of Evidence 803(6) and Rule 803(8). See, e.g., Sealed Appellee v. Sealed Appellant, 665 F.3d 620, 625 (5th Cir. 2011) (government letter admissible under Rule 803(8)). The Supreme Court favors a "broad approach to admissibility" under Rule 803(8), which includes statements of a "conclusion or opinion." Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169-70 (1988).

The letter also is admissible as an admission by a party-opponent under Rule 801(d)(2). "[T]he Federal Rules clearly contemplate that the federal government is a party-opponent for the defendant in criminal cases." United States v. Kattar, 840 F.2d 118, 131 (1st Cir. 1988). Where a defendant alleges that the government has taken inconsistent positions, "the inconsistence of the government's positions . . . should [be] made known to the jury." United States v. Lopez-Ortiz, 648 F. Supp. 2d 241, 248 (D.P.R. 2009) (quoting Kattar).

D. The Fifth And Sixth Amendments Require Admission

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (quoting Crane

v. Kentucky, 476 U.S. 683, 689-90 (1986)). "As a constitutional matter, a defendant's right to present a defense . . . 'includes, 'at a minimum, . . . the right to put before a jury evidence that might influence the determination of guilt.' [The Ninth Circuit has] identified violations of this right where, for example, a district court has 'declared a range of defense theories off-limits, without considering in detail the available evidence it was excluding,' excluded 'key corroborative evidence' for a 'central' defense claim contesting the government's theory of prosecution, and excluded evidence refuting the government's theory of motive." United States v. War Club, 403 Fed. App'x 287, 289 (9th Cir. Nov. 18, 2010) (internal citations omitted). Such an "[e]rror cannot be harmless where it prevents the defendant from providing an evidentiary basis for his defense." Id. at 290 (quoting United States v. Saenz, 179 F.3d 686, 689 (9th Cir. 1999)).

CONCLUSION

Mr. Edwards should be allowed to introduce the July 21, 2011 FEC proceeding and the January 16, 2009 letter from DOJ to CREW.

This the 15th day of May, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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This the 15th day of May, 2012.

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Exhibit A

U.S. Department of Justice

Criminal Division

Washington, D.C. 20530

JAN 16 2009

Ms. Melanie Sloan
Executive Director
Citizens for Responsibility and Ethics in Washington
1400 Eye Street, NW
Washington, DC 20005

Dear Ms. Sloan:

This responds to your letter addressed to Attorney General Michael Mukasey requesting this Department to initiate a criminal investigation of the United States Chamber of Commerce (the Chamber) and its president, Tom Donahue, to determine whether they violated the Federal Election Campaign Act's (FECA) prohibition against excessive and corporate contributions (2 U.S.C. 441a and 441b(a) respectively). According to your correspondence, these alleged offenses focus on large donations of corporate funds belonging to the Chamber to an organization named The November Fund.

The crux of the alleged FECA offenses described in your correspondence turns on whether The November Fund is a "political committee" that is subject to the FECA's limitations and restrictions. The November Fund was organized in 2004 under Section 527 of the Internal Revenue Code, and it allegedly engaged in activities that were to some degree related to the election process. However, as your letter notes, the Federal Election Commission (the Commission) recently declined to take action against the Chamber or the November Fund in connection with the financial interaction of the two organizations. This declination on the Commission's part was based on a 3 to 3 tie vote under circumstances where the affirmative vote of four Commissioners was required for the Commission to take enforcement action. 2 U.S.C. 437c(c).

The FECA specifically gives the Commission the authority to interpret the features of the FECA. 2 U.S.C. 437c(b)(1), 437f, *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981). The role of the Department of Justice in matters arising under the FECA is confined to prosecuting violations of the Act's provisions that are committed "knowingly and willfully." 2 U.S.C. 437g(d). For such a criminal violation to occur, the application of the law to the facts of a matter must at the very least be clear, and there must be

no doubt that the Commission considers that the underlying conduct presents a FECA offense. That is not the case here.

Accordingly there is no basis for this Department to conduct a criminal investigation in this matter.

Thank you for writing to the Department of Justice.

Sincerely,

Craig C. Donsanto
Director, Election Crimes Branch
Public Integrity Section