

Will DOJ Defend FEC?

September 2019

A previous article of ELN explained the possibility that the Barr Justice Department might defend the Federal Election Commission's (FEC) enforcement dismissal actions in the event such an action were challenged in court and one of four commissioners voted against a defense.

The FEC requires a minimum of four commissioners to meet and make enforcement decisions. With the departure of a commissioner on August 31, the FEC, which was down to four commissioners for the last 18 months, lost a quorum. Without a quorum, the FEC cannot vote to authorize its General Counsel to defend new lawsuits challenging its enforcement actions taken shortly before losing a quorum. Likewise, the FEC cannot vote to authorize its General Counsel to defend "delay" lawsuits challenging the FEC's inaction on pending complaints. Some complainants might take advantage of the absence of a quorum to sue the agency over "delay" and seek as relief an order authorizing them to stand in the agency's shoes to bring enforcement actions, similar to private attorney general actions.

The Barr Justice Department might decide to defend the agency while it has no quorum and cannot defend itself against new lawsuits. Even if there is ambiguity in the statutes providing for the agency to defend itself and the DOJ's own plenary authority to represent agencies, a federal court is unlikely to resolve such an ambiguity in a way that leaves an agency unable to vote to defend itself without any counsel at all.

One lawsuit pending that might serve as a test case for the Barr Justice Department is *Campaign Legal Center v. FEC*, a legal challenge to the FEC's dismissal of the CLC's complaint against Correct the Record and Hillary for America. That case is pending in the U.S. District Court for the District of Columbia.

Authors

Lee E. Goodman
Partner
202.719.7378
lgoodman@wiley.law
Michael E. Toner
Partner
202.719.7545
mtoner@wiley.law

Practice Areas

Election Law & Government Ethics
Federal Election Commission
Representation