



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

June 24, 1987

Mail Stop 6-6

Richard K. Berg, Esq.
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Dear Dick:

As you requested, I am enclosing the briefs in the two Blinder, Robinson cases -- SEC v. Blinder, Robinson & Co., No. 80-M-1125 (D. Colo. 1986), appeal filed, No. 86-2319 (10th Cir.); and Blinder, Robinson & Co. v. SEC, Nos. 87-1080 and 87-1086 (D.C. Cir. 1987).

When we spoke, I stated that I would provide a brief summary of the status of SEC and FTC cases in which defendants have argued that, under Article II of the Constitution, Congress may not grant law enforcement power to agencies which are independent of the President's supervisory control. They have argued that, under the "take Care" clause of Article II and under the separation of powers doctrine, the President is vested with sole enforcement authority.

SEC Cases

The issue is being raised in the two appeals filed by Blinder, Robinson & Co. and Meyer Blinder, mentioned above. The Commission filed its brief in the Tenth Circuit on February 17, 1987; the clerk advises that it will be at least a year before oral argument is held. The D.C. Circuit has set oral argument for November 3, 1987.

The issue was also raised by motions to dismiss filed in two district court cases, SEC v. Thomas, No. 86-C-0313G (D. Utah), and SEC v. Warner, No. 86-6742-CIV (S.D. Fla.). In Thomas, the court, ruling from the bench, denied the constitutional challenge. In Warner, the constitutional attack, made by the American Savings and Loan Co., was rejected in a written opinion which relies heavily on Humphrey's Executor v. United States, 295 U.S. 602 (1935). In an additional case, American Board of Trade, Inc. v. SEC, No. 86 Civ. 3166 (WK) (S.D.N.Y. 1986), the court dismissed an action for declaratory and injunctive relief based upon the constitutional issue on the ground that plaintiffs could assert their claim as a defense in two pending Commission enforcement actions. None of these cases has been appealed.

FTC Cases

The issue was raised for the first time in recent years in Ticor Title Insurance Co. v. FTC, No. 85-3089 (D.D.C., January 3, 1986), aff'd, (D.C. Cir. March 24, 1987). There, the respondents in an FTC administrative proceeding brought suit against the FTC in October 1985 seeking to enjoin the proceeding on the assertion that the President is vested with exclusive law enforcement authority. The district court dismissed the complaint, without reaching the merits, on the ground that, since the FTC administrative proceeding was still pending, the matter was not yet ripe for adjudication. On appeal, the D.C. Circuit affirmed in three separate opinions, espousing three different concerns: failure to exhaust administrative remedies (Edwards, J.); lack of ripeness (Green, Joyce J.); and lack of subject matter jurisdiction stemming from the nonfinal nature of the agency action (Williams, J.).

In another FTC case, Hospital Corporation of America v. FTC, 807 F.2d 1381 (7th Cir. 1986), the same issue was raised. There, the Court of Appeals for the Seventh Circuit (Posner, J.) refused to consider a constitutional challenge to the FTC's enforcement authority under the Clayton Act and the FTC Act because, the court stated, it had been inadequately briefed. Hospital Corporation filed a petition for a writ of certiorari, stating that "[t]his case squarely presents the Court with an opportunity to reexamine the questionable premises underlying Humphrey's Executor." On April 24, 1987, the Solicitor General filed a memorandum in opposition to the petition, arguing that the Seventh Circuit properly rejected the constitutional challenge on procedural grounds. The memorandum also briefly addresses the merits, without taking a position. It states that the petition "implicitly raises questions about activities of other administrative agencies" and, because there was no decision below and there is no conflict among the circuits, the Court should not consider "a contention with such serious implications."

The only recent appellate case squarely addressing this issue is FTC v. American National Cellular, Inc., 810 F.2d 1511 (9th Cir. 1987). There, the Ninth Circuit held that, under Humphrey's Executor, the FTC may bring enforcement actions. The court found that nothing in the Supreme Court's recent separation of powers decisions, such as Bowsher v. Synar (the Gramm-Rudman decision), required a different result.

Richard K. Berg, Esq.
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I hope this letter is helpful. If you have any further questions or wish to discuss the matter further, please feel free to call. I would be very much interested in any public document on the subject you or your firm produces.

Best regards,

A handwritten signature in cursive script that reads "Paul".

Paul Gonson
Solicitor

Enclosures