

Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem

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Can it be presumed, that Persons
sworn to execute the Laws, shall
openly counteract and violate them?¹

I. INTRODUCTION

To what extent may the President, through the Department of Justice, challenge the validity of federal statutes signed into law by the President? This constitutional question, newly emergent, lies at the core of several recent cases that deal with the congressional veto. The Supreme Court has thus far avoided ruling on the merits of the veto.² When the Court does so, as likely it will fairly soon, the Justices will perforce have to confront the question of the propriety of executive officers admitting the unconstitutionality of the veto or directly challenging the veto power. The Justices will also be confronted with the important, unresolved theoretical question of what is "the United States" in separation of powers litigation. Although the legislative veto has been extensively discussed,³ no attention

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In the interests of full disclosure, see Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227 (1965) and Miller, *The Myth of Objectivity in Legal Research and Writing*, 18 CATH. U. L. REV. 290 (1969). Professor Miller helped write the briefs for the House of Representatives in the *Clark* and *Atkins* cases and also for the General Accounting Office (GAO) in the *Staats* case, discussed *infra*.

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The authors wish to thank Mr. Jack Gordon for his assistance in the preparation of this article.

1. M. KAMMEN, PEOPLE OF PARADOX 42 (1972). The statement originally appeared in the *Independent Reflector*, a New York weekly newspaper, in 1753.

2. For example, the Court in *Buckley v. Valeo*, 424 U.S. 1, 140 n.176 (1976), expressly declined to decide the constitutionality of the one-house veto. See also *Clark v. Valco*, 559 F.2d 642 (D.C. Cir.), *aff'd mem. sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977); *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978); *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (avoiding review of legality of a legislative veto provision based on a decision that even if it was unconstitutional, it was not severable from the rest of the statute).

Other than *Atkins*, there is little judicial comment on the constitutionality of the legislative veto. Justice White, for example, concurring in part and dissenting in part in *Buckley*, 424 U.S. at 256-86, was the only member of the Court to discuss the one-house veto provisions of the Federal Election Campaign Act. Justice White felt that regulatory power generally "is not rendered constitutionally infirm . . . by a statutory provision subjecting agency regulations to disapproval by either House of Congress." *Id.* at 284. See also *Sibbach v. Wilson*, 312 U.S. 1, 15 & n.17 (1941), in which the Court in dictum spoke positively, at least in policy terms, about legislative review mechanisms, lumping one-house veto together with simple layover measures.

3. See Bruff & Gellhorn, *Congressional Control of Administrative Regulations: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); Cooper & Cooper, *The Legislative Veto and the Constitution*, 30 GEO. WASH. L. REV. 467 (1962); Ginnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Javits & Klein,

has been accorded those two preliminary but critical questions which must be answered before there can be a definitive resolution of the growing use of the veto by Congress. This article outlines the issues associated with the congressional veto and suggests needed statutory reforms.

Two cases are illustrative. In *Clark v. Kimmitt*,⁴ Ramsey Clark, former Attorney General and candidate for Senator from New York, filed suit in federal district court as a "voter" under the Federal Election Campaign Act, for the sole purpose of testing the validity of the "one-house" veto provision of that statute. The statute requires the Federal Elections Commission (FEC) to submit proposed regulations to Congress, which has thirty legislative days to consider them. A formal vote of disapproval by either house is enough to kill the regulations, in whole or in part. If Congress does nothing, the FEC regulations become effective.⁵ Judge Charles Richey certified the case to the court of appeals, which, after an en banc hearing, dismissed the suit on procedural grounds.⁶ When Clark petitioned for certiorari, the Supreme Court requested the Solicitor General to file a brief on behalf of "the United States." At both appellate levels, the Department of Justice admitted or challenged the constitutionality of the one-house veto; in so doing, it equated "the United States" with the executive branch.

Similarly, when 140 federal judges sued in the Court of Claims for increased salary, the Department conceded the unconstitutionality of a legislative veto provision. That case, *Atkins v. United States*,⁷ presented the novel situation in which plaintiff and defendant agreed on the merits of the crucial statutory provision, yet the court forged ahead to rule on the merits. To the disappointment of the judges, the court upheld the legislative veto by a bare majority. *Atkins* remains the only instance thus far in which a court has definitively ruled on the legitimacy of the veto. The Supreme Court denied certiorari, after the Department of Justice continued to attack a segment of the statute that it had argued was otherwise valid. The Department again maintained that "the United States" was synonymous with the executive branch.

Congressional Oversight and the Legislative Veto: A Constitutional Analysis, 52 N.Y.U.L. REV. 455 (1977); McGowan, *Congress, Courts, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L.J. 367 (1977); Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

4. *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

5. An analogous method is employed for the adoption of federal rules of civil procedure. See the statement of Justices Black and Douglas dissenting to the Supreme Court order that amended certain rules of civil procedure, published at 374 U.S. 865, 865-66 (1966). See also *Sibbach v. Wilson*, 312 U.S. 1, 15 & n.17 (1941).

6. *Clark v. Valeo*, 559 F.2d 642, 647 (D.C. Cir.), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

7. 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

These cases, and others of recent vintage,⁸ suggest several matters of concern in separation of powers theory and doctrine. First, both cases should have been styled *President v. Congress*, for that, in fact and in effect, is what they were. Former President Ford, in signing the Federal Election Campaign Act, said that the Attorney General would contest what the President thought was an unconstitutional provision.⁹ Second, Congress cannot always rely on the Department of Justice in litigation. Each house of Congress has had to hire special counsel so that the interests of Congress could be represented. Last, the Department is not required to notify Congress about its litigating posture. The consequence of this omission is that some statutory provisions duly enacted by Congress and signed into law by the President receive only ad hoc, even fortuitous defenses when attacked by private litigants. For instance, in *Atkins* only when the Court of Claims, sua sponte, wrote to the Vice President and the Speaker was Congress officially notified; it then came in only as an amicus, not as a primary party, for the judges had named the United States, not Congress, as defendant. The Executive, in such instances, has acted vicariously through private litigants.¹⁰

Under the United States Code, conduct of litigation for the United States is reserved to the Department of Justice: "Except as otherwise authorized by law, the conduct of litigation in which the United States . . . is a party, or is interested, . . . is reserved to officers of the Department of Justice, under the discretion of the Attorney General."¹¹ Additionally, the intervention statute, 28 United States Code section 2403, provides: "In any action . . . to which the United States . . . is not a party, wherein the constitutionality of any Act of Congress affecting public interest is drawn into question, the court . . . shall certify such

8. *E.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976); *Chadha v. Immigration and Naturalization Serv.*, No. 77-1702 (9th Cir. appeal docketed July 18, 1977); *Nixon v. Solomon*, No. 77-1395 (D.C. Cir., filed Aug. 10, 1977); *McCorkle v. United States*, 559 F.2d 1258 (4th Cir. 1977), cert. denied, 434 U.S. 1011 (1978); and *Staats v. Lynn*, No. 75-055 (D.D.C., Nov. 26, 1975) (dismissed by stipulation).

9. Federal Elections Campaign Act Amendments of 1976, Statement by the President on Signing S. 3065 Into Law, 12 WEEKLY COMP. OF PRES. DOC. 857, 858 (May 11, 1976). President Carter has taken the same position on the legislative veto as his predecessors. *The Legislative Veto-Message From the President of the United States*, 124 CONG. REC. H5879-80 (daily ed. June 21, 1978).

10. Individual members of Congress are making increasing use of the courts to test the validity of specific executive actions. *See, e.g.*, *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir.), cert. denied, 436 U.S. 907 (1978) (challenging President's use of treaty power to convey United States properties to Panama); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974) (Family Practice of Medicine Act held to have become law despite President's refusal to sign).

The President has not attempted to obtain such a judicial test of a statute; it is thus uncertain whether the *Kennedy* strategy could be employed by the executive branch, although it is hornbook administrative law that officers of the federal bureaucracy cannot challenge the constitutionality of a statute addressing the powers of given agencies. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.04, at 74 (1958). *See also* *Oestereich v. Selective Serv. Sys. Local Board No. 11, Cheyenne, Wyoming*, 393 U.S. 233, 242 (1968); *Spiegel, Inc. v. FTC*, 540 F.2d 287, 294 (7th Cir. 1976); *Engineers Pub. Serv. Co. v. SEC*, 138 F.2d 936, 952 (D.C. Cir.), remanded per curiam with directions to dismiss as moot, 332 U.S. 788 (1947).

For a good but rather dated analysis of congressional attacks on executive power, see Note, *Congress Versus the Executive: The Role of the Courts*, 11 HARV. J. LEGIS. 352 (1974).

11. 28 U.S.C. § 516 (1976).

fact to the Attorney General, and *shall* permit the United States to intervene . . . on the question of constitutionality."¹² Again, the Attorney General directs and controls the litigation.

Were two matters clear—the meaning of the term “the United States” and that the Attorney General is indeed an officer independent of the President and Congress—the problems to be discussed herein would not arise. If they did arise, the problems could be quickly resolved by a small change in the quoted code provisions. But these matters are distinctly unclear. It is, for example, disingenuous to assert that the Attorney General does not follow the wishes of the Chief Executive. Another unanswered issue is the litigating responsibility of the Attorney General: who, indeed, is his client when he represents the United States?

This article focuses on overt, albeit indirect, challenges by the Department of Justice in interbranch governmental disputes. We do not deal with other aspects of what in fact is a far larger problem. A comprehensive analysis should include inquiry into at least the following relevant issues: the nature and extent of prosecutorial discretion; failure of the executive branch to enforce judicial decisions, which under the principle enunciated in *Cooper v. Aaron*¹³ are “the law of the land”; refusals by the President to spend appropriated funds;¹⁴ assertions by a President during extraordinary emergencies that he can ignore statutes;¹⁵ neglect, by design or otherwise, to implement statutes;¹⁶ and choices that must at times be made between apparently inconsistent statutes.¹⁷ Fuller explication must await another time and another forum.

As is the norm in separation of powers, the delphic language of the fundamental law provides merely a point of departure for analysis rather than answers. There are, furthermore, no prescribed criteria of judgment—for example, the intentions of the framers—by which solutions can be obtained. When answers eventually come, they will incorporate a combination of political theory and policy considerations. Only by an intellectually indefensible fiction could answers be logical derivations from the constitutional text. Existing doctrine will play no part, for there is none. Little exists in the Constitution to provide more than a directional signal for further analysis: the President is vested with “the executive power,”¹⁸ but that is undefined; he must “take care that the laws”¹⁹ are

12. 28 U.S.C. § 2403 (1976) (emphasis supplied).

13. 358 U.S. 1 (1958).

14. *But see* *Staats v. Lynn*, No. 75-055 (D.D.C., Nov. 26, 1975) (dismissed by stipulation), discussed at notes 120-23 and accompanying text *infra*.

15. *See generally* Becker, *The Supreme Court's Recent "National Security" Decisions*, 40 TENN. L. REV. 1 (1972); *Developments in the Law — The National Security Interest and Civil Liberties*, 85 HARV. L. REV. 1130 (1972).

16. *E.g.*, *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

17. *See, e.g.*, Miller & Pierson, *Observations on the Consistency of Federal Procurement Policies With Other Governmental Policies*, 29 LAW & CONTEMP. PROB. 277 (1964).

18. U.S. CONST. art. II, § 1, cl. 1.

19. *Id.* art. II, § 3.

faithfully executed; and he swears an oath to uphold and defend the Constitution.²⁰ As for Congress, it has all legislative power "herein granted,"²¹ which includes a rarely litigated provision of potentially immense significance—the second half of the "necessary and proper" clause: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."²² The self-asserted power of the Supreme Court to be "infallible" because it is "final"²³ gives that tribunal, if it wishes to take the case and not flee into the swamp of the political question doctrine, an opportunity not only to settle the validity of the congressional veto but also to resolve the two subsidiary issues discussed in this article.

II. SOME RELEVANT HISTORY

Those who drafted the Constitution did not, of course, contemplate a legislative veto. If one were to follow an antiquarian conception of constitutional adjudication, then such a veto would doubtless be invalid. Despite contrary language from some commentators and judges, the Supreme Court has never been bound by such filio pietistic notions. So, too, with the power of the Executive to challenge the constitutionality of statutes; it is evident from the sparse records of the convention that the framers simply did not think of such a possibility. Thus the relevant history associated with our two matters of concern, that is, the propriety of the executive branch challenging the legislative veto and the identity of "the United States," consists of a clutch of judicial decisions, not one of which answers either of our questions, and the legislative history of the applicable United States Code provisions.

From 1787 to 1974, the Department of Justice failed to defend the constitutionality of a statute in only four instances: *Myers v. United States*,²⁴ *United States v. Lovett*,²⁵ *Simkins v. Moses H. Cone Memorial Hospital*,²⁶ and *Senate Select Committee v. Nixon*.²⁷ These decisions may be summarily treated.

Myers dealt with the power of the President to discharge, contrary to statute, a postmaster who had been confirmed by the Senate. The statute, the Tenure of Office Act, called for Senate approval of such actions. The approval requirement was declared unconstitutional in a long opinion by Chief Justice Taft, who repudiated the position he had taken as professor

20. *Id.* art. II, § 1, cl. 8.

21. *Id.* art. I, § 1.

22. *Id.* art. I, § 8, cl. 18.

23. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

24. 272 U.S. 52 (1926).

25. 328 U.S. 303 (1946).

26. 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

27. 498 F.2d 725 (D.C. Cir. 1974).

and ex-President and upheld the Presidential prerogative. The postmaster had instituted the action against "the United States," but the Department of Justice argued the case on behalf of the postmaster. Congress was represented by Senator George Wharton Pepper as *amicus curiae*. The Solicitor General argued for the unconstitutionality of the statute.²⁸

Lovett, a better known case, concerned the constitutionality of a statutory provision that denied Lovett and his colleagues their salaries. The Department allied itself with Lovett and argued that when an Act of Congress is patently unconstitutional, the Constitution must predominate.²⁹ Lovett prevailed on the constitutional prohibition against any bill of attainder or *ex post facto* law. Congress, after being notified by the Attorney General that he could not in conscience argue for the validity of the statute, employed private counsel. As in *Myers*, no one questioned the propriety of the posture of the Attorney General.³⁰

Simkins came next, and differs in that it was a suit between two private litigants.³¹ Plaintiffs challenged their exclusion from federally funded hospitals constructed pursuant to the "separate but equal" provision of the Hill-Burton Act.³² Defendants objected to an attempted intervention by the United States through the Department of Justice, claiming that there was no constitutional issue and that intervention was improper when the United States sought to attack its own statute. These objections brought into issue the meaning of section 2403 and the legitimacy of the Department's action. The district judge felt constrained to read the intervention statute literally. Holding that the court lacked discretion in allowing intervention, the judge said: "I suppose [the Attorney General] can take any position he desires."³³ The Court of Appeals for the Fourth Circuit agreed and the Supreme Court denied *certiorari*.³⁴

28. 272 U.S. at 98.

29. 328 U.S. at 306.

30. *Id.*

31. Therefore 28 U.S.C. § 2403 (1976), quoted at text accompanying note 12, came into play.

32. 323 F.2d at 961. The challenged provisions were a portion of the Hospital Survey and Construction (Hill-Burton) Act of 1946, Pub. L. No. 79-725, 60 Stat. 1040, 1043 (1946), *as amended*, 42 U.S.C. § 291e(f) (1976). *See also* 42 C.F.R. § 53.112 (1977).

33. Transcript of Oral Argument at 84, *Simkins v. Moses H. Cone Memorial Hosp.*, No. C-57-G-62 (M.D.N.C. 1962), *aff'd*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *reprinted in Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 2d. Sess., 489 (1976) [hereinafter cited as *Hearings on Congress in Court*].

But compare the Court's decision on intervention in *Smolowe v. Delendo Corp.*, 36 F. Supp. 790, 792 (S.D.N.Y. 1940), *aff'd*, 136 F.2d 231 (2d Cir.), *cert. denied*, 320 U.S. 751 (1943):

In permitting this intervention, I am of the belief that the constitutionality of subdivision (b) of § 16 has been "drawn in question." By this I do not mean to hold that from now on the government has free rein in this litigation. The government itself recognizes the limited purpose of its intervention when it concedes that it is only interested on the state of the pleading in presenting evidence and arguments in support of the constitutionality of subdivision (b).

34. *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

Simkins is the one case that has to date squarely posed the meaning of section 2403. It is here that the section's legislative history becomes relevant. During the formative years of the New Deal, 1934-1936, the Supreme Court struck down thirteen acts of Congress: one-fourth of the total number that it had previously invalidated. Most of the statutes were anti-Depression measures. Particularly vexatious to the President and Congress was that many of these decisions resulted from private suits in which no one appeared on behalf of the government.³⁵ Public policy was being made in those lawsuits, which at times concerned only trivial matters for the litigants but had portentous consequences for the nation. An example is the *Gold Clause Cases*³⁶ in which national monetary policy turned on whether a plaintiff was entitled to recover fifteen dollars and sixty cents—a situation that bemused some Europeans, who could not understand how such important policy matters could be left to settlement by lawyer-judges in private litigation.³⁷

Under pressure from the White House, Congress enacted H.R. 2260, which ultimately became 28 United States Code section 2403, "to provide for appearance on behalf of and appeal by the United States in certain cases in which the constitutionality of acts of Congress is involved."³⁸ The House Judiciary Committee report on the bill recognized the need for such a statute: "In cases between private litigants in which the constitutionality of an act of Congress is attacked by one of the parties, no representative of the Government may now appear as a matter of right to defend the statute."³⁹ Can there be any doubt that Congress, by enacting H.R. 2260, intended to provide a means whereby the public's (the government's) interest could be *defended* in private litigation? The answer is clear beyond peradventure; as President Roosevelt commented, the statute "accords the Government the right to defend the constitutionality of the law of the land. No longer must the Government stand idly by, a helpless spectator, while the Acts of Congress are stricken down by the Courts."⁴⁰ The court was obviously on shaky ground when intervention was granted in *Simkins* to permit the Department of Justice to attack the "separate but equal"

35. The analogy today is that no one appears on behalf of Congress, save when Congress itself is the defendant.

36. *Perry v. United States*, 294 U.S. 330 (1935); *Nortz v. United States*, 294 U.S. 317 (1935); *Norman v. Baltimore & O.R.R.*, 294 U.S. 240 (1935); *United States v. Bankers Trust Co.*, 294 U.S. 240 (1935).

37. R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* 103-04 (1941).

38. Conference Report on H.R. 2260 (August 10, 1937) reprinted in *Hearings on Congress in Court*, *supra* note 33, at 485.

39. H.R. REP. NO. 212, 75th Cong., 1st Sess. 1 (1937). *Atkins v. United States* illustrates this concern: Congress was before the court only as amicus and then only by the court's unilateral invitation. 556 F.2d 1028, 1034 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

40. White House Press Release, August 25, 1937, at 2, reprinted in 122 CONG. REC. S 17,084 (daily ed. Sept. 29, 1976). A further indication of the intent of Congress is that § 2 of H.R. 2260, which became 28 U.S.C. § 1252 (1976), and which provided *inter alia* that if the United States intervenes and the court decision declares the Act of Congress unconstitutional, then an appeal could be taken directly to the Supreme Court.

provision of the statute. Because of intervening lawmaking, that provision has become clearly invalid. There was no real need for the Department to defend the statute.

*Bailey v. Patterson*⁴¹ had held that racial segregation under official auspices was no longer "a litigable issue." Thus, in *Bailey*, the district court had merely to take judicial notice of previous Supreme Court decisions which held that no state may require racial segregation of transportation facilities.⁴² Then in *Simkins* the Department explained to the district court that "it is indisputable that today Congress would not include a 'separate but equal' provision in a statute"; and "the United States" position in this case is not "calculated to disappoint Congressional expectation."⁴³ In other words, Congress had no defense to the constitutional challenge and would not expect the Department to defend such a statute. *Simkins* is thus a case in which the Executive attacked the constitutionality of a statute, but which provides little basis for similar present-day actions. It is one thing for the Department of Justice to attack a statute when all, including Congress, can see that the statute is invalid; and quite another to do so when the essence of the dispute lies between President and Congress. Judge Richey recognized that distinction, at least inferentially, when he denied the Department intervention of right in the *Clark* case and granted only permissive intervention.

Finally, in *Senate Select Committee v. Nixon*, the Solicitor General filed an amicus brief on behalf of the United States, asserting "that the United States has an overriding interest in the doctrine of executive privilege."⁴⁴ Such a statement meant that the Department equated "the United States" with the executive branch, an understandable posture for lawyers caught up in zealous pursuit of their client's interests; it also meant that the Department considered the President to be its client. One can readily understand the Executive taking such a position; what is beyond comprehension is for the Supreme Court to invite, as it did in *Clark*, a brief from the Department on behalf of "the United States." Since, as we have said, the case should have been styled *President v. Congress*, one can only conclude that the Justices were not thinking when they issued the request to the Department. The only alternative conclusion is that the Court has already prejudged the question of who is "the United States," and has decided in favor of the Chief Executive. If so, that would indeed be a parlous situation.

One additional historical item is relevant. In 1937, Attorney General

41. 369 U.S. 31, 33 (1962).

42. *E.g.*, *Boynton v. Virginia*, 364 U.S. 454 (1960); *Gayle v. Browder*, 352 U.S. 903 (1956) (*per curiam*); *Morgan v. Virginia*, 328 U.S. 373 (1946).

43. Unreported memorandum of United States in *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), *reprinted in Hearings on Congress in Court, supra* note 33, at 484.

44. 498 F.2d at 726.

Homer Cummings refused a request from the President to render an opinion on the constitutionality of the Federal Home Loan Banks.⁴⁵ The Attorney General stated that only the President would have the proper interest in questioning the validity of a measure passed by Congress, and even that interest ceases ten days after the bill is presented to him. If it were otherwise, Cummings continued, the Attorney General would be setting himself up as "judge of the Acts of the Congress and of the President."⁴⁶ Forty years later, the Attorney General is doing precisely what Cummings said should not be done, by asserting the prerogative to attack a statute in two situations: (1) when "upholding the statute would have the effect of limiting the President's constitutional powers or prerogatives";⁴⁷ and (2) when "the Attorney General believes, not only as a matter of personal conscience, but also as the chief legal officer of the United States, that a law is so patently unconstitutional that it cannot be defended."⁴⁸

*Clark and Atkins, McCorkle v. United States*⁴⁹ and *Chadha v. Immigration and Naturalization Service*,⁵⁰ and other cases exemplify the current situation concerning the congressional veto. Some of these cases are brought against Congress and the Department must intervene; some are against the United States and the Department is a party as a matter of right; and some are against a specific agency and the Department acts as the lawyer for that agency.

It might be thought that in *Chadha* and similar cases there is no true case or controversy since the advocates are wholly in agreement on the crucial issue, the validity of the congressional veto. Under normal circumstances, the suit would be dismissed on procedural grounds, there being no controversy to satisfy the requirement of article III of the Constitution. *Atkins* could have been decided that way, but was not. Speaking generally, other courts have sidestepped the case or controversy problem and gone on to the merits, as in *Atkins*, or become entangled with other procedural issues, as in *Clark*. How judges can find a true adversary proceeding when plaintiff and defendant agree on the crucial issue is completely mysterious.⁵¹

45. 39 OP. ATT'Y GEN. 11 (1937).

46. *Id.* at 15. For the proposition that the executive branch should defer to the courts on constitutional questions, see 40 OP. ATT'Y GEN. 158 (1942); 36 OP. ATT'Y GEN. 21 (1935); 31 OP. ATT'Y GEN. 475 (1919).

47. *Hearings on Congress in Court, supra* note 33, at 5. Under those circumstances, asserts the Department, the President is "entitled to a defense of his perceived rights." *Id.*

48. *Id.* at 6.

49. 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

50. No. 77-1702 (9th Cir. *appeal docketed* July 18, 1977). See notes 125-31 and accompanying text *infra*.

51. The question of the *standing* of the Attorney General to challenge the constitutionality of statutes is not given full-dress treatment here. Only if the courts perceive that the question in the cases being discussed is really *President v. Congress*, rather than a private litigant against a government department, can it be said that rights are indeed in conflict, and then only if the President has a "right" in fact. It is our position in the present paper that the President does not have a justiciable article III right. He piggybacks on private litigants, such as Mr. Chadha, and goes into court—as in the *Clark*

III. WHAT IS "THE UNITED STATES"?

We come, then, to our first question: what, in constitutional theory, is "the United States"? In most cases in which the Department of Justice participates, whether civil or criminal, the answer is obvious. It is a question that cannot be burked, however, when, as is increasingly the vogue, separation of powers issues are before federal courts. Neither court nor commentator has supplied an answer to the question. This section outlines a possible approach to an answer.

The United States of America originated as a legislative body in October 1774, when the First Continental Congress produced the "Declarations and Resolves of the First Continental Congress."⁵² Proclaiming for their respective Assemblies the right to legislate for the colonies, "the good people of the several Colonies" devised the Continental Association—a merchants' agreement to cut off trade with England.⁵³ According to one commentator, "the signature of the Association by members of Congress may be considered as the commencement of the American Union."⁵⁴ Before the 1787 Constitution was adopted, all acts of the United States of America were executed in the person of the Congress. The Congress was the manifestation of the United States in *all* its capacities, so that what was not performed by the Congress was not performed by the United States.⁵⁵ Even so, one might still conclude that under the Articles of Confederation the United States was something more than just the Congress. The central government, consisting solely of a unicameral legislature, had actual powers that were of marginal utility. Even though the Articles defined the United States as a "congress assembled,"⁵⁶ the individual states were able to retain their "sovereignty, freedom and independence"⁵⁷ by cloaking the Congress with a very limited subject matter jurisdiction, and by denying Congress the power to enforce its own legislation, particularly in the area of requisitions. Congress would call for money, but had to await the voluntary compliance of the States.⁵⁸

As Madison had observed, congressional inability to enforce its objectives was responsible for the impotency of the Congress, in particular,

case—without any real disagreement between plaintiff and the Justice Department on the merits. See also Comment, *An Attorney General's Standing Before the Supreme Court to Attack the Constitutionality of Legislation*, 26 U. CHI. L. REV. 624 (1959) (dealing mainly with state, not federal, cases).

52. H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 82 (5th ed. 1949).

53. *Id.* at 83. This clause is embodied within the fifth paragraph of the Declaration.

54. R. HILDRETH, 3 HISTORY OF THE UNITED STATES 46 (1882).

55. See H. HOCKETT, POLITICAL AND SOCIAL GROWTH OF THE UNITED STATES 246 (1933).

56. ARTICLES OF CONFEDERATION art. 2.

57. *Id.*

58. See J. MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787, at 5 (G. Hunt & J. Scott eds. 1920); THE FEDERALIST No. 15, at 157 (A. Hamilton) (B. Wright ed. 1961).

and the United States as a whole: "[T]he states relieved from the pressure of foreign danger, and flushed with the enjoyment of independent and sovereign power; instead of a diminished disposition to part with it, persevered in omissions and in measures incompatible with their relations to the federal government."⁵⁹ Hamilton agreed: having "total want of *SANCTION* to its laws,"⁶⁰ Congress passed resolutions which became "mere recommendations which the States observe or disregard at their option."⁶¹

It is not surprising that many delegates to the Constitutional Convention conceived of the national Executive as an extension of the Congress. Quite a few delegates had originally thought it the goal of the Convention merely to amend the existing Articles to provide the Congress—in other words, "the United States"—with the powers that it had been lacking. Once there was a consensus that a new constitution would be devised, many delegates nevertheless believed that the basic reform would provide Congress with the means for enforcing its acts. For example, Sherman thought that the purpose of the Executive would be to carry the will of the Legislature into effect, and that the Executive should thus be accountable to the Legislature.⁶² Sherman's view of the Executive, as being logically and functionally subordinate to the Legislature, was not unique. The original "Randolph plan" even contemplated election of the Executive by the Legislature. Although this method of executive selection was eventually rejected, it received majority approval throughout the Convention.⁶³ The final plan, of course, attempted to achieve a balance between efficiency and tyranny.⁶⁴

Thus, in attempting to define "the United States," one must look not only at the particular *branches* into which the government had been divided, but also at the *reasons* for having so divided it. To the extent that the creation of quasi-independent branches of government may be a means to impede the wheels of government and thus prevent the tyranny that would otherwise result from the concentration of powers in one hand, it is appropriate to apply a functional analysis to the scope of executive powers. An unchecked power to pick and choose those laws that are worthy of enforcement,⁶⁵ a power currently asserted by the executive branch, is as fatal to effective government as it was when the states existed

59. J. MADISON, *supra* note 58, at 5.

60. THE FEDERALIST No. 21, at 186 (A. Hamilton) (B. Wright ed. 1961) (emphasis added).

61. THE FEDERALIST No. 15, at 158 (A. Hamilton) (B. Wright ed. 1961).

62. J. MADISON, *supra* note 58, at 5.

63. See generally E. DUMBAULD, THE CONSTITUTION OF THE UNITED STATES 255-63 (1964).

64. Modern scholarship is beginning to refute the conventional wisdom that considers separated powers solely as a bulwark against tyranny. See, e.g., L. FISHER, PRESIDENT AND CONGRESS 1-27 (1972); W. GWYN, THE MEANING OF THE SEPARATION OF POWERS (1965).

65. See *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838).

under the Confederation. At its logical extreme, such power could mean an item veto of existing law.

The measure of a government's power can be related to the nature and extent of its sovereignty. Insofar as all power within the federal government theoretically must find its source within the Constitution, the United States, as a sovereignty, can be defined by the powers granted to it from the people through the Constitution.⁶⁶ One can readily see the basic disparities between the English and American systems of government: unlike the English model, in which all sovereign power is thought to emanate from the Crown,⁶⁷ the American system presupposes a popular sovereignty. Thus, English history represents a series of restrictions upon powers that had already been in existence; a series of increased limitations that the people managed to place upon the otherwise presumptively sovereign power of the Crown. Our Constitution, on the other hand, as well as the United States, a fortiori, represents successive grants of powers of sovereignty that were not otherwise promised. American sovereignty rests within the people who have merely expressed their will in the form of constitutional grants.⁶⁸

The Crown thus acts in its legislative capacity, subject to the *limitation* that it does so within the confines of ministerial responsibility. In contrast, "the United States" exercises power not from the vantage point of having had preexisting powers that have been subsequently restricted, but rather from the position that it had no previous powers except those that were specifically granted. Thus, in its legislative capacity, "the United States" possesses the affirmative powers granted to the Congress, as well as the negative power of the President to veto legislation: "The primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws."⁶⁹

It appears to be historically correct to define "the United States" by the powers conferred by the Constitution and to find any particular department of the government acting within its sovereign capacity when it acts within the scope of constitutionally delineated powers. Should one necessarily conclude that the President's sole power to disapprove legislation lies in the veto, and that the Justice Department, therefore, acts improperly when it attacks a law as unconstitutionally infringing upon the powers of the President? On the contrary, in *Myers v. United States*,⁷⁰ the

66. *E.g.*, *Perry v. United States*, 294 U.S. 330, 353 (1935); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1885).

67. "The law," said Sir William Blackstone, "ascribes to the King the attribute of sovereignty: he is forever sovereign and independent within his own dominion." W. BLACKSTONE, COMMENTARIES *241-42, cited in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 458 (1793).

68. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793).

69. THE FEDERALIST NO. 73, at 469 (A. Hamilton) (B. Wright ed. 1961).

70. 272 U.S. 52 (1926).

Court held that executive acquiescence to a congressional act that infringed upon the President's appointment powers could not be demonstrated by the President signing the bill into law, particularly when the repugnant provisions of the Act were attached to an urgently needed appropriations bill. At the urging of the Department of Justice, the Court in *Buckley v. Valeo*⁷¹ also held that a particular statute infringed upon executive power and therefore was unconstitutional, notwithstanding that it had been duly enacted and signed into law by the President.⁷² Justice Rehnquist, writing for the majority in *National League of Cities v. Usery*,⁷³ noted that *Myers* and *Buckley* seemingly reject the argument that the veto would be the President's sole weapon to protect his own interests.⁷⁴

Within the above framework, the identity of "the United States" remains unclear. The assumption underlying separation of powers theory and the intervention statute, 28 United States Code section 2403, is that the President and Congress will cooperate rather than fight. Indeed, as long ago as 1908, Woodrow Wilson stated that "warfare" between Congress and the Executive would be "fatal."⁷⁵ If separation of powers theory means anything, it means that powers are shared, not separated.⁷⁶ As Justice Story put it, the framers accepted a tripartite division of government but "endeavored to prove that a rigid adherence to it in all cases would be subversive of the efficiency of the government, and result in the destruction of public liberties."⁷⁷

"The United States," then, is a construct; it is a metaphysical entity. In constitutional theory, it exists even though it cannot be seen or touched. No one has yet spelled out what "the United States" means, save in specific instances, such as first amendment cases, in which the interests of an individual are balanced against those of "society." Under the present statute,⁷⁸ the identity of "the United States" remains unclear. It is clear, however, that "the United States" should not—indeed, cannot—be equated with the executive branch. That conclusion is buttressed by an examination of the interests of "the United States."

The recent case of *United States v. American Telephone & Telegraph Co.*⁷⁹ (*AT&T*) is relevant. In *AT&T* the Justice Department sought to

71. 424 U.S. 1 (1976).

72. *Id.* See also *National League of Cities v. Usery*, 426 U.S. 833, 841-42 n.12 (1976).

73. 426 U.S. 833 (1976).

74. *Id.* at 841-42 n.12.

75. W. WILSON, *CONSTITUTIONAL GOVERNMENT* 51-52 (7th ed. 1927).

76. "[W]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 334 U.S. 579, 635 (1952) (Jackson, J., concurring).

77. 1 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 533, at 396 (5th ed. 1891).

78. 28 U.S.C. §§ 516-519 (1976).

79. 551 F.2d 384 (D.C. Cir. 1976).

enjoin the defendant from complying with a subpoena issued by a House Subcommittee. Asserting that it was representing the United States, the Department brought the suit to protect the "public interest." The court of appeals recognized that although outwardly the case was between the government and a private corporation, it actually was between the President and the House of Representatives. The President did not want to produce taped telephone calls because of an alleged interest in national security; the House, on the other hand, had an interest in obtaining compliance with the subpoena power that it had invoked to obtain records of certain telephone calls. The only interest of AT&T was in obtaining a judicial declaration of its legal obligation. Although finding jurisdiction elsewhere, the court questioned the propriety of the Department's desire to secure jurisdiction under 28 United States Code section 1345, the grant of jurisdiction over suits brought by the United States. The difficulty, said the court, was "whether a suit is brought 'by the United States' within § 1345 when the executive branch is seeking to enjoin the legislative branch."⁸⁰

Of course there is a "difficulty"; no one branch of government can be said to be "the United States." The United States may be hydra-headed, but it is a single entity. Before demonstrating this, however, we will briefly mention several inter- and intrabranch cases that have posed problems about the nature of that entity.

In *United States v. Nixon*,⁸¹ the President argued that the court lacked jurisdiction because the controversy concerned an "in-house" dispute raging within the executive branch. That view was rejected and the Supreme Court proceeded to rule on the merits, allowing an employee of the executive branch—the Special Prosecutor—to sue his putative superior, the President. At least inferentially the court's decision means that "the United States" is not to be equated with "the President." The next conclusion is more difficult, but nonetheless clear: despite the *Nixon* decision, "the executive branch" is not "the United States."

One way to answer the question, what is "the United States," is to ask another question: what is an interest of "the United States"? A brief discussion of this additional question is relevant at this time, in the context of some judicial decisions.

The problem of identifying an interest of the United States in in-house disputes was first considered by the Supreme Court in *United States v. ICC*.⁸² The government, through the Department of Justice, sought to have set aside an Interstate Commerce Commission (ICC) order that denied the government restitution for allegedly unlawful rates charged by the railroads. Since all suits seeking review of ICC orders were required by

80. *Id.* at 389. For a discussion of the AT&T case, see Comment, *United States v. AT&T: Judicially Supervised Negotiations and Political Questions*, 77 COLUM. L. REV. 466 (1977).

81. 418 U.S. 683 (1974).

82. 337 U.S. 426 (1948).

statute to join the United States as a party defendant, the Commission sought dismissal on the ground that the United States was suing itself. The Court refused to be straitjacketed into such black-letter pronouncements, holding that while the case might technically be *United States v. United States*, it presented conflicts that were of a traditionally justiciable type. The government, therefore, had the right to redress its injuries as a shipper.

The situations presented in *AT&T* and *Clark* are radically different from that presented in *ICC*. In *ICC*, plaintiff United States did not appear in a governmental capacity, but rather as an ordinary commercial user of the railroads. The government's interest was pecuniary and thus more easily identifiable. On the other hand, *AT&T* concerned the political controversy of the proper allocation of power within the government. In such interbranch disputes the interest of "the United States" is more difficult to identify, although not entirely impossible. There is, however, a threshold problem: to identify who will determine that interest. As the Department of Justice argues, the United States has an interest in the proper application of the Constitution. It merely avoids the issue, however, to maintain that since the Attorney General is authorized by statute to represent the interests of the United States, then the Attorney General, and a fortiori, the President, has the authority to determine those interests when the office of the President has a self-serving interest to protect vis-a-vis the Congress.

As an officer within the executive branch, the Attorney General often blurs the distinction between the broader interests of the government and the narrower ones of the President. For example, when the one-house veto provisions of the Federal Election Campaign Act were under constitutional attack in *Clark*, the Department of Justice sought intervention as plaintiff. Defendant Valeo challenged the propriety of this appearance by "the United States" to attack the constitutionality of its own statute, particularly when the Federal Elections Commission was defending the statute. Although the district court allowed the government to intervene "on behalf of the entities represented by the United States, namely, the President of the United States, and the Executive Branch of the federal government,"⁸³ its decision was obviously based upon incongruously identifying the United States with its agent, the Executive. In effect, the cart was put before the horse. Although the President undoubtedly represents the United States in certain constitutionally delineated areas, this does not establish that the interests of the two entities are interchangeable. The basic difficulty with the Department's position is that it fails to adopt a position in litigation on behalf of "the United States" that does not involve the intermediary step of identifying the United States exclusively with the executive branch.

83. *Clark v. Valeo*, 559 F.2d 642, 647 n.4 (D.C. Cir.), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

The court of appeals dismissed *Clark* for lack of ripeness, thus finding it unnecessary to address the propriety of the appearance by the United States "to argue for a judicial declaration of unconstitutionality of an act of Congress in the interest of the President and Executive Branch alone."⁸⁴ Judge Tamm, however, squarely addressed the issue in his concurring opinion:

Nothing in our decision today should be taken as an approval of the sweeping claim of the United States that in the absence of both a statutory authorization to sue and an articulated injury to an interest of the federal government as a whole, it nonetheless can come into court and challenge the actions of one branch of the federal government as an unconstitutional invasion of the powers of another branch.⁸⁵

The "articulated injury to the whole" test proposed by Judge Tamm would be consistent with the cases concerning pecuniary interests, such as *ICC*, as well as with our view that "the United States" encompasses more than any of its particular departments.

Cases affirming the broad discretionary power of the Attorney General to undertake litigation on behalf of the government have typically presented an articulated injury to the government as a whole. The discretionary power is the Department's control over whether suit should be brought. Thus, scandalous decisions not to prosecute generally have been left to the realm of politics and newspaper headlines.⁸⁶

When the Attorney General's power has been judicially expanded, interbranch disputes have not been at issue. The benefits of the expanded power did not inure to the political advantage of one branch over another branch. In the leading case of *United States v. San Jacinto Tin Co.*,⁸⁷ the government brought suit to set aside a land patent that allegedly was fraudulently issued. The Court rejected defendant's challenge to the authority of the Attorney General to bring suit, ruling that when the United States has a just cause requiring judicial relief, the Attorney General has the authority to institute the suit on behalf of the government. Crucial to the Court's position was the government's pecuniary interest in its valuable mineral ores. *San Jacinto* consequently has no bearing on the proper role of the Department of Justice in cases concerning the proper allocation of power within the government. *In re Debs*⁸⁸ expanded the Attorney General's authority to sue on behalf of "the United States" even though there was no pecuniary interest at stake. Nevertheless, the government's interest in unobstructed mail service is properly dis-

84. *Id.*

85. *Id.* at 654 (Tamm, J., concurring).

86. Political interference in the administration of justice is a related problem that is beyond the scope of this article. At least one court, however, has held that plea bargaining results are subject to judicial approval. *E.g.*, *United States v. Bean*, 564 F.2d 700, 704 (5th Cir. 1977).

87. 125 U.S. 273 (1888).

88. 158 U.S. 564 (1894).

tinguishable from the type of interest alleged in politically oriented interbranch disputes.

A more difficult case is *Booth v. Fletcher*,⁸⁹ in which the Attorney General's power to defend federal judges was upheld upon the theory that the government has an interest in the proper performance of its officers' duties, free from retaliatory actions. Judge Tamm, in *Clark*, describes such an interest as one "shared by the United States as a whole and distinct from an interest in defending the theory of one particular branch of the government as to its constitutional prerogatives."⁹⁰ While such an interest lacks the certainty otherwise available when defining a pecuniary interest, *Booth*, unlike *AT&T* and *Clark*, did not bear upon constitutional issues or concern an interbranch dispute. Nor was the Department of Justice seeking to defend the powers of the President against alleged legislative intrusion.

The proper advocacy role of the Attorney General involves legal ethics.⁹¹ Attorneys act to further the best interests of their clients to the extent the law permits. The Attorney General's client, by statute, is "the United States." Given the excessive tendency to confuse the narrow interests of the executive office with the broad interests of the nation, it is difficult to maintain that the President, as chief executive, determines the best interests of the nation in interbranch litigation. The United States has an indisputable interest in the enforcement of presumptively valid legislation, an interest that at least equals the President's interest in, for example, executive privilege. This was verified by the experience under the Articles of Confederation. At least in interbranch disputes, "the United States" has no role to play. While "the United States" may have an interest in the correct application of the Constitution, the conflicting interests of segments of the United States Government cancel each other out; a judicial determination of rights should be reached without the Justice Department pursuing the President's own interest in the manner of Presidential special counsel.

Thus, we suggest that in interbranch litigation there is no such thing as "the United States." There is the interest of the President, as in executive

89. 101 F.2d 676 (D.C. Cir. 1938).

90. *Clark v. Valeo*, 559 F.2d 642, 656 (D.C. Cir.), *aff'd sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977) (Tamm, J., concurring).

91. The Department of Justice disagrees, concluding that [t]he issue is not so much one of ethics in [the context of *Buckley v. Valeo*] as comity. Where a legislative codefendant has been made aware of a contrary Department of Justice view, retains its own counsel on that issue, and requests the Department to continue representation on issues where there is no difference of opinion, the precise manner of submitting the Attorney General's views becomes one of accommodation and not ethics.

Hearings on Congress in Court, *supra* note 33, at 138.

In *Buckley*, the Department of Justice's so-called amicus brief on behalf of the Federal Election Commission had five sections to it, and the first four did in fact contain an amicus brief. At the start of the fifth section, however, the Department assumed the role of an advocate and argued that the statute should be declared unconstitutional in certain respects. Therefore, in the fifth section, which was physically part of the amicus brief, the Department of Justice was actually attacking the statute.

privilege, and the interest of the Congress in the enforcement of its laws. The interest of "the United States," if anything, is the interest of the people of the United States in the fulfillment of constitutional provisions and in adequate, responsive government.

Because an interest of "the United States" should be an interest of the entire government, we can proceed to state affirmatively the meaning of the term. It is to be equated with another ambiguous term, "the State."⁹² What, then, is the State? The term is not easily defined.

Consider a recent assertion of Judge Roger Robb in *Halkin v. Helms*.⁹³ In denying relief to Americans who had been spied upon by the National Security Agency, Robb called the "state secrets privilege" absolute, adding that "a ranking of the various privileges recognized in our courts would be a delicate undertaking at best, but it is quite clear that the privilege to protect state secrets must head the list."⁹⁴ The meaning of Robb's statement is subtle, yet important: Judge Robb was articulating a theory of the State that could be called organismic. The State has interests that transcend those of the individuals in society, either singly or in groups.

This organismic conception of the State has a long intellectual history, although no judge has ever spelled it out in detail. One example is Justice Holmes' famous statement in *Missouri v. Holland*:

[W]hen we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they also created a nation.⁹⁵

Judge Learned Hand also maintained that judges "called upon to pass on a question of constitutional law . . . must be aware of the changing social tensions in every society which make it an organism."⁹⁶ Finally, Woodrow Wilson commented that

government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life.⁹⁷

Hand, to be sure, spoke of society being "an organism," and Wilson of government being "organic"; Holmes came closest to our notion of the

92. For analysis, see E. CASSIRER, *THE MYTH OF THE STATE* (1946); A. D'ENTREVES, *THE MODERN NOTION OF THE STATE* (1946); G. POGGI, *THE DEVELOPMENT OF THE MODERN STATE: A SOCIOLOGICAL INTRODUCTION* (1978).

93. No. 77-1922 (D.C. Cir. June 16, 1978).

94. *Id.* slip opinion at 11.

95. 252 U.S. 416, 433 (1920).

96. Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1, 12 (1930).

97. W. WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* 56 (1908).

State. The three terms—society, government, State— are here employed synonymously. Expressed another way, the State— and thus “the United States”—is an anthropomorphic “group-person”⁹⁸ with interests that transcend the arithmetical sum of the interests of the individuals within the body politic.

That theme, we suggest, runs through much of American constitutional law. It is to be seen particularly in the law stated by federal judges when they assert that they are “balancing interests” in civil rights cases between those of the individual and those of a never-defined entity called “society.”⁹⁹ It would seem that the Supreme Court also analogizes the group “the United States” to a biological being. The nation-state thus is considered by the Court and political figures, such as the President, to be a real person; the State is considered to have an existence separate and apart from the individuals who live within its geographical boundaries. President John F. Kennedy gave expression to this idea of a transcendent “public interest” in 1962, when he answered a reporter’s question concerning collective bargaining agreements:

These companies are free and the unions are free. All we [the Executive] can try to do is indicate to them the public interest which is there. After all, the public interest is the sum of the private interests, or perhaps it’s even some times a little more. *In fact, it is a little more.*¹⁰⁰

In other words, the nation takes on a life of its own, separate from and greater than any of its constituent parts or, of greater significance, the arithmetical sum of the private interests of the entity called “the United States.” Under this conception, “the United States” is greater than the sum of the people of the nation—not the government and surely not one branch.¹⁰¹

This metaphysical conception of the State will not be pursued further. Our point is that when one speaks of “the United States,” one evokes an entity that encompasses society *and* government in a single artificial being. The Constitution “in operation,” as well as the Constitution “of the books,”¹⁰² recognizes the State as the overarching social reality. The State

98. O. GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY: 1500 TO 1800* (E. Barker trans. 1934), *discussed in* A. MILLER, *PRESIDENTIAL POWER* 157 (1977).

99. Sometimes judges use “government” rather than “society,” but whatever the word employed, no one takes the trouble to define what is meant. Often, of course, the meaning of “government” is obvious. To equate society with government, however, is a particularly faulty type of thinking and writing. Government is the apparatus of the State; society is that which is governed, an association of discrete individuals who often associate in groups. As a general rule, the three terms—government, State, and society—should be carefully distinguished and not used as synonyms. *See, e.g.,* E. CASSIRER, *supra* note 92; A. D’ENTREVES, *supra* note 92; H. KELSEN, *GENERAL THEORY OF LAW AND STATE* (A. Wedberg trans. 1945); G. POGGI, *supra* note 92.

100. N.Y. Times, Mar. 8, 1962, at 1, col. 4 (emphasis added).

101. On the dangers of such a conception, *see, e.g.,* A. MILLER, *THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION* 154-61 (1976); A. DE RIENCOURT, *THE COMING CAESARS* 9-10 (1964) (originally published in 1957); Barker, *Introduction to O. GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY, 1500 TO 1800*, at xxxiv (1957) (Gierke’s work was originally published in 1913; Barker’s translation was made in 1933).

102. W. WILSON, *CONGRESSIONAL GOVERNMENT* (1885).

exists much like the business corporation—an artificial construct that is more a method than a thing; and it exists in constitutional theory, even though it has “no anatomical parts to be kicked or consigned to the calaboose; no soul for whose salvation the parson may struggle; no body to be roasted in hell or purged for celestial enjoyment.”¹⁰³ As a legal fiction, the State—“the United States”—itself does no act, speaks no word, and thinks no thoughts, but in its name those in government speak and for its benefit men may die and property may be seized.

Surely that is what Judge Tamm contemplated when he spoke of an “articulated injury to an interest of the federal government as a whole.” Surely, too, this construct makes it clear that no single branch can speak for “the United States” when it conflicts with spokesmen for other branches. And surely the Department of Justice is wrong in equating the executive branch with the United States.

IV. THE PROPRIETY OF EXECUTIVE ATTACKS ON STATUTES

Once it is perceived that “the United States” is a single entity with multiple heads, then the question who should decide interbranch disputes becomes important. *United States v. Nixon*¹⁰⁴ established that the writ of the Supreme Court can run against the President. Mr. Nixon capitulated, after some hints from counsel that he might not, as did President Truman following the decision in the *Steel Seizure Case*.¹⁰⁵ Nevertheless, Presidential acquiescence in judicial pronouncements is by no means certain. One need not cite President Jackson’s perhaps apocryphal sneer “John Marshall has made his decision; now let him enforce it,” to realize that Chief Executives have been known to ignore a judicial decision. *Ex parte Merryman*¹⁰⁶ is perhaps the leading example. *Ex parte Quirin*¹⁰⁷ could have been another but was not, principally because the Supreme Court reacted supinely to executive demand.¹⁰⁸ Presidents, moreover, do not have to overtly defy a judicial decree; when their own powers are not at

103. W. HAMILTON, ON THE COMPOSITION OF THE CORPORATE VEIL 4 (1946), quoted in R. ELLS & C. WALTON, CONCEPTUAL FOUNDATIONS OF BUSINESS 132-33 (1961). Although Professor Hamilton was speaking of the corporation, his remarks apply to the State as well.

104. 418 U.S. 683 (1974).

105. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

106. 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9,487) (President cannot suspend the privilege of the writ of habeas corpus).

107. 317 U.S. 1 (1942).

108. In *Quirin*, President Roosevelt convened a special tribunal of military officers to try Nazi saboteurs even though the civil courts were operating and the United States itself was not a theater of war; this action was upheld by the Supreme Court even though in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Court had invalidated the court martial of an alleged spy because the civilian courts were open. For a recounting of the difficulties the Court and Attorney General Biddle had in finding a legal basis for so trying the Germans, see F. BIDDLE, IN BRIEF AUTHORITY (1962); A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956).

issue, they can merely ignore it—as President Eisenhower did after the decision in *Brown v. Board of Education*.¹⁰⁹

In *Clark* the Justice Department contended that the veto represented “an infringement of the Constitution which it has an interest in protecting. . . .”¹¹⁰ The problem with this position is at least twofold. First, as Judge Tamm said in his concurring opinion,

Not only does this argument assume a role for the Executive as “the protector of the Constitution, but it also presupposes a decision on the merits of the suit. Whether the statutory provisions the Government seeks to challenge do or do not infringe on the constitutional powers of the President remains a question for the courts to decide, not the Executive.¹¹¹

In other words, Judge Tamm would not permit a bootstrap presentation. It should be recalled that the Justice Department was granted only permissive intervention in *Clark*, and not intervention of right. Arguments against the constitutionality of the legislative veto were ably presented by Mr. Clark’s lawyers; there was no need for any executive intervention.¹¹² Second, even taking the Justice Department’s contention about protecting the Constitution at face value, to attack the constitutionality of a validly enacted law flies in the face of the President’s constitutional duty to execute the laws faithfully. The Department’s response to this is that the Constitution, as the fundamental law, must also be executed. Predicated upon Supreme Court pronouncements begun in 1803 with *Marbury v. Madison*¹¹³ and culminating in 1974 with *United States v. Nixon*,¹¹⁴ conventional wisdom acknowledges that the Supreme Court makes law when interpreting the Constitution.¹¹⁵ That being so, the Executive has a constitutional duty to execute the law as made by the Supreme Court, and that law cannot be defied, as in *Merryman*, or ignored, as in *Brown*. We do not maintain that this conclusion would be accepted by the Department of Justice; but surely it is the logical extension of the Department’s argument that it has an interest in protecting the Constitution. Furthermore, the Executive should not be allowed to pick and choose from among constitutional provisions and judicial interpretations thereof: the article II

109. 347 U.S. 483 (1954).

110. *Clark v. Valeo*, 559 F.2d 642, 654 (D.C. Cir.), *aff’d sub nom. Clark v. Kimmitt*, 431 U.S. 950 (1977).

111. *Id.* at 654 (Tamm, J., concurring).

112. Litigation, like politics, makes strange bedfellows. It is interesting to note that Clark’s counsel came from the organization of Ralph Nader, who has directed much of his reformist energy against the Executive rather than Congress. See, e.g., Miller, *Whistle Blowing and the Law*, in *WHISTLE BLOWING 25* (R. Nader, P. Petkas & K. Blackwell eds. 1972). Mr. Nader opposes the congressional veto because it offers an industry lobbyist a “third bite of the apple”; the first bite is taken while the bill is pending, the second when the administrative regulations are proposed.

113. 5 U.S. (1 Cranch) 137 (1803).

114. 418 U.S. 683 (1974).

115. A candid acknowledgment of this lawmaking was expressed by Justice White, dissenting in *Miranda v. Arizona*, 384 U.S. 436, 531 (1966) (White, J., dissenting).

duty of faithful execution of the laws does not give the President any discernible discretion.

It is evident from the foregoing that perceiving "the United States" as a single entity makes the propriety of the Justice Department judicially challenging an act of Congress dubious at best. Additional reasons support this conclusion. First, on technical but sound historical grounds, no one is permitted to sue himself. This is true not only for natural persons but also for artificial persons, such as corporations. A fortiori, the principle also applies to the State—"the United States." This latter statement, however, should be a two-way street, which would make *Kennedy v. Sampson*¹¹⁶ and *Nader v. Bork*¹¹⁷ questionable. Congress should not be able to argue that the Department of Justice cannot challenge statutes, while simultaneously doing the same itself. Thus, the *Kennedy* and *Nader* cases should have been styled *Congress v. President*.

Second, the Presidential obligation faithfully to execute the laws does not give the Chief Executive a selective item veto over the laws he is to execute. Execution means enforcement and defense; it emphatically does not mean "killing" some laws the President does not like.¹¹⁸ This has been conclusively shown by the many cases on impoundment of funds.¹¹⁹ Under the express terms of the Constitution, the President can veto bills passed by Congress, but he does not have an item veto—and that is precisely what he is attempting to enforce in cases such as *Clark* and *Atkins*.

Third, the undefined term, "executive power," at the beginning of article II provides no basis for an independent reading of the Constitution. In this connection, the little-noted but important case of *Staats v. Lynn*¹²⁰ becomes significant. Under the Budget and Impoundment Control Act of 1974, the Comptroller General is authorized to challenge any refusal by the Executive to spend appropriated funds because he considers the appropriation to be invalid.¹²¹ In 1976, funds for housing were withheld by

116. 511 F.2d 430 (D.C. Cir. 1974). See note 10 *supra*.

117. 366 F. Supp. 104 (D.D.C. 1973) (members of Congress had standing to sue for declaration of the illegality of discharging Watergate Special Prosecutor Cox by the acting Attorney General).

118. Cf. *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible.").

119. E.g., *Train v. City of New York*, 420 U.S. 35, 42-48 (1975) (rejecting the argument that Congress intended to grant wide discretion to the Executive to control amounts spent under the Federal Water Pollution Control Act Amendments of 1972); *Local 2677, Am. Fed'n of Gov't Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973) (rejecting a claim of Presidential discretion under the Constitution); *State Highway Comm'n of Mo. v. Volpe*, 347 F. Supp. 950 (W.D. Mo. 1972), *aff'd*, 479 F.2d 1099 (8th Cir. 1973) (holding that anti-inflationary goals expressed in other statutes cannot justify executive defiance of specific spending legislation).

120. No. 75-0551 (D.D.C. Nov. 26, 1975) (dismissed by stipulation).i

121. Impoundment Control Act of 1974, 31 U.S.C. §§ 1400-1407 (1976). See Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the "Sweeping Clause,"* 36 OHIO ST. L. J. 788 (1975). As Justice Jackson said in the *Steel Seizure Case*, "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

the Office of Management and Budget (OMB); Mr. Staats, the Comptroller General, brought suit against the President, the Director of OMB, and the Secretary of Housing and Urban Development (HUD). After the President was dropped as a party, the name of the case was changed from *Staats v. Ford* to *Staats v. Lynn*; Lynn was the Director of OMB. The General Accounting Office (GAO) was confronted with the defense that the executive function under the Constitution permitted only the President, through the Department of Justice, to represent the government in court.¹²² Therefore, the argument went, the GAO, a "legislative" agency, was improperly exercising an executive function. The case did not go to final decision because the funds were released and spent by HUD.

Staats is significant because it brings to center stage the propriety of one branch of the federal government suing another branch. Can the provision in the Budget Act be constitutionally justified? Under the analysis we have put forth, the answer is no; the case should have been styled *Congress v. President*. There is, however, an even stronger constitutional case to be made for Congress than for the President. Under the Constitution Congress may make all laws "necessary and proper" to carry out Congress' delegated powers and also those of any other department of the entire government.¹²³ Since the appropriations power is expressly vested in Congress, can there be any doubt that laws considered necessary should be valid, particularly under the expansive reading given the first part of the clause in *McCulloch v. Maryland*?¹²⁴ Otherwise, how is Congress to ensure that its will is fulfilled? Must it wait for the fortuity of a suit brought by some citizen? We suggest that, under the Constitution, Congress is not constrained to wait. In sum, the GAO's authority to sue under the Budget Act is valid.

We do not maintain that separation of power questions are mere logical deductions from unclear constitutional terms. No doubt it is true that most of these questions are settled through the political process, and that the courts do not have and should not have a substantial role in resolving these questions. Even so, when the text of the necessary and proper clause is, as L'il Abner would say, "clear enough that any fool kin plainly see," it is not a logical deduction from a nebulous term. It is an

On the technical question of sovereignty, it could be argued that since Congress, speaking generally, must waive sovereign immunity for immunity to be operative, Congress is "sovereign" in the national government. See, e.g., *Driver v. Helms*, 456 F. Supp. 496 (D.R.I. 1978). That type of technical argument, however, would hardly be persuasive in the situation under discussion.

122. See Williamson, *GAO Goes to Court: The Impoundment Case, A Review of Background and Issues in the First Lawsuit Ever Initiated by the Comptroller General in His Own Right*, [1977] GAO REV. 55.

123. U.S. CONST. art. I, § 8, cl. 18. Professor Van Alstyne has cogently shown that the latter half of the necessary and proper clause has a "horizontal" as well as a "vertical" effect. Van Alstyne, *supra* note 121.

124. 17 U.S. (4 Wheat.) 316 (1819).

application of the plain, the *only* meaning of that clause to say that Congress does indeed have ultimate power in such circumstances. One may not like that, and surely the Executive does not, but the words are there—and can be read in only one way. Within the multi-headed State that is “the United States,” Congress is supreme—when it wishes, which by any criterion is not very often.

One may feel compassion for Mr. Jagdish Rai Chadha, who quite possibly was treated shabbily by Congress when it vetoed the recommendation of the Immigration and Naturalization Service that he be granted a permanent visa.¹²⁵ *Chadha*, however, is not analogous to *Simkins*, in which the court merely had to take judicial notice of controlling precedent to invalidate the ‘separate but equal’ provision of the Hill-Burton Act.¹²⁶ Should compassion for a litigant guide a court? Should important constitutional theory turn on the status of an alien about to be deported? If the answer to that is yes, then there has been a definite move toward the creation of a truly independent Executive.

What policy considerations should judges employ in legislative veto cases? One has been mentioned, but surely there is enough in Professor Wechsler’s fervent plea for neutral principles¹²⁷ to conclude that a lawsuit that presents important constitutional issues should not be decided on the fact that Congress acted shabbily. The problem is one of power, not of wisdom.¹²⁸ As Justice Frankfurter said in *Dennis v. United States*, “Much that should be rejected as illiberal, because repressive and envenoming, may well not be unconstitutional.”¹²⁹ Mr. Chadha is incidental to the case; without him the judicial process could not have been triggered. The crucial issue is not whether Chadha can be deported by “the United States”; of course he can be deported. Rather, the issue reflects a tug of war between the Executive and Congress to determine whether the means of his deportation comports with the Constitution. Chadha is not arguing deprivation of procedural due process; rather, he seeks to invalidate one of the ways that Congress has invented to effect accountability of the public administration.

A ruling on the merits will mean that public policy can be made by parties who are in agreement on the basic issue being litigated. If permitted, this signals a breakdown of the adversary system. No doubt the system has faults,¹³⁰ but should they be dealt with in an ad hoc, helter

125. See *Chadha v. Immigration and Naturalization Serv.*, No. 77-1702 (9th Cir. appeal docketed July 18, 1977), in which, as of this writing, the Attorney General is challenging the constitutionality of § 244(c)(2) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503 (1976), pursuant to which the United States House of Representatives vetoed the decision of the Immigration and Naturalization Service to suspend the deportation of the petitioner Jagdish Rai Chadha.

126. See notes 31-34 and accompanying text *supra*.

127. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

128. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

129. 341 U.S. 494, 556 (1951) (Frankfurter, J., concurring).

130. See Miller & Barron, *The Supreme Court, The Adversary System, and the Flow of Information to the Justice: A Preliminary Inquiry*, 61 VA. L. REV. 1187 (1975).

skelter manner? The answer can only be negative. It is completely mysterious why, under any of the accepted interpretations of the article III case or controversy requirement, a federal court should entertain the suit. One need only cite *Muskrat v. United States*¹³¹ as conclusive authority that such a case should be dismissed.

Furthermore, Congress, which passed the statute being litigated, is not a primary party in the lawsuit. Thus, Congress, which surely has as much interest in the litigation as the Immigration and Naturalization Service or the Executive, has no control over the conduct of the suit. It appears as amicus only—hardly the posture any litigant would desire. So it was in *Atkins* and will be in other congressional veto cases not filed against Congress. Some means should be found to bring Congress directly into such judicial proceedings—on a regular, continuing basis. The State—“the United States”—may be a single entity, but it is hydra-headed, each head being “equal in origin and equal in title.”¹³² That equality fails if Congress is relegated to the inferior position of amicus curiae.

Finally, the Department of Justice has at times lacked the decency formally to notify Congress that it is attacking a statutory provision duly signed into law by the President. Contrast the manner in which Attorney General Francis Biddle proceeded in the *Lovett* case—notifying both Houses of Congress that he would support Lovett—with the failure to notify in *Atkins*.¹³³ It is bad enough for a statute to be challenged, but it is even worse for such a challenge to be mounted by surprise and without any attempt to inform Congress about the Department’s actions. At the very least, Congress is entitled to believe that, unless it is otherwise notified, its statutes will be defended by the Department. Moreover, it is entitled to believe that its statutes will be defended fully—not, as in *Buckley v. Valeo*,¹³⁴ with a partial effort.

On the basis of policy considerations as well as constitutional theory, Presidential attacks on the constitutionality of federal statutes founder. Such attacks fall far short of the degree of cooperation between the political branches which, as Woodrow Wilson noted, is the forgotten part of separation of powers.¹³⁵ The two branches must, and in most respects do, cooperate. When they differ, as in the legislative veto, the dispute should not be resolved by a group of lawyer-judges. Let the politicians resolve their separation of powers problems, as they can if they have the will to do so.

131. 219 U.S. 346 (1911) (holding that it is beyond the power of Congress to require the judicial branch to render advisory opinions).

132. *Gordon v. United States*, 117 U.S. 697, 701 (1864) (*per Taney, C.J.*).

133. 89 CONG. REC. A5350-52 (1943) (letter of Francis Biddle). *Cf. Atkins v. United States*, 556 F.2d 1028, 1058 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978) (“At oral argument, the Department of Justice conceded the unconstitutionality of section 359(1)(b).”).

134. See note 91 and accompanying text *supra*.

135. W. WILSON, *supra* note 75.

V. CONCLUSIONS AND RECOMMENDATIONS

Warfare between the two political branches of the federal government can be fatal to the constitutional order. Americans can no longer subscribe to the half-truth that powers were separated to prevent despotism.¹³⁶ Cooperation is a necessity, as is accountability. The problem is to make necessary exercises of power as tolerable and decent as possible. Despite some extravagant statements to the contrary, Congress emphatically is not in the driver's seat in government. We have witnessed "the rise of the bureaucratic state."¹³⁷ The bureaucracy is indeed ascendant, and may be out of control. Certainly it is not controllable by judicial review. As Professor Neustadt has pointed out, many a President has learned that he may be the Chief Executive, but he still has to negotiate with the fiefdoms in the public administration.¹³⁸

That, however, is the larger problem. Our immediate interest lies in the propensity of Presidents and their Attorneys General to attack statutes. What, if anything, should be done about it? A major step for reform in this area could be a measure passed in the waning days of the 95th Congress.

On October 14, 1978, the Department of Justice Appropriation Authorization Act¹³⁹ received final congressional approval. Section 13 of the Act is the result of an amendment introduced by Congressman Elliott Levitas. Section 13 requires that the Department of Justice report to the appropriate committees of Congress any time that the Department does not defend a statute of the United States, but rather concedes that it is unconstitutional or attacks the validity of the statute.¹⁴⁰ The Department of Justice must transmit this report within thirty days after the Attorney General determines the position of the Department is that the provision in question is not constitutional.¹⁴¹ According to the Act, after making such a report, the Justice Department is required to declare in court that the Department is representing the position of the executive branch of government and therefore, by inference, is not representing the position of "the United States" on the constitutionality of the statute.¹⁴²

Congressman Levitas, in detailing the reasons for his amendments, explained that

[i]n recent years the executive branch through the Justice Department has more and more taken it upon itself to decide that a statute passed by the

136. *United States v. Brown*, 381 U.S. 437, 442-46 (1965).

137. Wilson, *The Rise of the Bureaucratic State*, 41 PUB. INTEREST 77 (1975). This, to be sure, is not a novel insight of Professor Wilson. See, e.g., D. WALDO, *THE ADMINISTRATIVE STATE* (1948).

138. R. NEUSTADT, *PRESIDENTIAL POWER* (1960).

139. Department of Justice Appropriation Authorization Act, Fiscal Year 1979, Pub. L. No. 95-624, 92 Stat. 3459.

140. *Id.* § 13(a).

141. *Id.* § 13(b).

142. *Id.* § 13(c).

Congress and signed by the President, or enacted over his veto, is unconstitutional [; that] the Congress found out about this action in a willy-nilly, informal fashion without any reporting, requires that this action be done.¹⁴³

Moreover, with regard to the Department of Justice representing the interests of "the United States," Congressman Levitas said,

[M]y amendment is designed solely to do two things: first, notify the House and the other body when they [Department of Justice] are going to blackjack us. We are saying we want them to let us know about it when they are going to sandbag us, and then at that point they cannot claim to represent the United States anymore; they are only representing the executive branch of the government and not the United States, because when an Act of Congress is passed and signed into law, it is the law of the United States, and I do not want the Justice Department to pretend to be defending the United States when it is not.¹⁴⁴

Prior to the Levitas amendment, three other proposals for reform were addressed to this separation of powers problem. One proposal was the Separation of Powers Defense Act¹⁴⁵ introduced in 1976 by Senator James Abourezk. Briefly, the bill would: (1) require the Attorney General to notify Congress of civil actions when the Department has decided not to appeal a decision holding congressional acts unconstitutional, thus enabling Congress to intervene and appeal the decision; (2) amend the law providing district court jurisdiction for suits on behalf of the United States,¹⁴⁶ so that jurisdiction would not exist in actions by the United States alleging the unconstitutionality of an act of Congress; (3) amend the law that authorizes intervention by the United States to argue questions concerning the constitutionality of acts of Congress,¹⁴⁷ so that the Justice Department could only argue in favor of the constitutionality of an act; and (4) permit Congress to intervene of right in suits in which the constitutionality of an act of Congress is not defended by the Justice Department or in which the Attorney General has decided not to appeal a decision holding an act unconstitutional. As Senator Abourezk explained, the purpose of the bill "is not to prevent the executive branch from bringing an action or intervening in actions which challenge the constitutionality of acts of Congress, but rather to prevent the

143. 124 CONG. REC. H11, 120 (daily ed. Sept. 28, 1978) (remarks of Rep. Levitas).

144. *Id.*

145. S. 3854, 94th Cong., 2d Sess. See 122 CONG. REC. S17,076-84 (daily ed. Sept. 29, 1976). Additionally, § 250(a)(1) of the proposed Watergate Reform Act, S. 495, 94th Cong., 2d Sess., would have authorized Congress to retain counsel who would be asked to intervene on behalf of Congress when the Department of Justice refused to represent Congress. See 122 CONG. REC. S12,114 (daily ed. July 21, 1976). Senator Abourezk had earlier introduced the provision as separate legislation. S. 2731, 94th Cong., 1st Sess., 121 CONG. REC. 38056 (December 2, 1975). The pertinent features of these bills have been introduced in the 95th Congress as part of S. 555, the Public Officials Integrity Act of 1977. See 122 CONG. REC. S1902-31 (daily ed. Feb. 1, 1977).

146. 28 U.S.C. § 1345 (1976).

147. *Id.* § 2403.

executive branch from asserting that it represents the United States when it does so."¹⁴⁸

In contrast, the plan of Congressman Frank Thompson presents a less sweeping approach toward reform.¹⁴⁹ Thompson's bill, similar in some respects to the Levitas amendment, would require any federal agency, including the Department of Justice, to notify Congress if the agency fails to enforce or defend any law enacted by Congress because it feels that the law is unconstitutional. Under the bill, situations such as *Atkins* would be avoided.¹⁵⁰ Under the Thompson bill, Congress would be notified of challenges by the Department of Justice to the constitutionality of a statute within thirty days after the Attorney General had made such a determination.

The third proposal, also submitted by Congressman Levitas,¹⁵¹ urged that: "None of the funds made available by the Title may be used by the Department of Justice directly or indirectly to urge the unconstitutionality of any statute of the United States unless such statute has previously been held unconstitutional by decision of the Supreme Court of the United States."¹⁵² Under this Levitas approach, the opinion and litigation responsibilities of the Attorney General would remain unaffected except in those instances in which the Attorney General concludes that a statute is unconstitutional. At that point, the Attorney General, although having concluded that a federal statute was unconstitutional, could not "urge" its unconstitutionality in an opinion or litigation.

These plans to prevent the Attorney General from attacking the constitutionality of a federal statute raise a common question of constitutionality: to what extent may Congress regulate the Department of Justice?¹⁵³ Few outside the executive branch would disagree with the analysis of former Senator Sam J. Ervin that "[a]ll powers of the Attorney General and the Department of Justice flow from Acts of Congress. There can be little doubt—in fact, no doubt at all—that what Congress gives, Congress can take away."¹⁵⁴ *McGrain v. Daugherty*¹⁵⁵ offers encourage-

148. 122 CONG. REC. S17,076 (daily ed. Sept. 29, 1976) (remarks of Sen. Abourezk).

149. Copy of Thompson draft obtained from Congressman Levitas' office. The bill was not introduced, for reasons unrelated to the reform discussed here.

150. See text accompanying notes 7-10 *supra*.

151. This amendment was apparently not introduced because a point of order raised by Congressman Rousselot to the relevant appropriation was sustained. See 124 CONG. REC. H5525-26 (daily ed. June 14, 1976).

152. Letter from Patricia Wald, assistant Attorney General, to Congressman Peter Rodino, Chairman, House Committee on the Judiciary (June 26, 1978) (copy on file at Ohio State University Law Library).

153. Complete analysis of the question is beyond the scope of this article. For an exhaustive discussion of the subject, see Note, *Removing Politics From the Justice Department: Constitutional Problems With Institutional Reform*, 50 N.Y.U.L. REV. 366 (1975).

154. *Removing Politics From the Administration of Justice: Hearings on S.2803 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 3 (1974).

155. 273 U.S. 135 (1927).

ment for that position. In *McGrain*, the Supreme Court said that "the function of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants are all subject to regulation by congressional legislation."¹⁵⁶ The proposals listed above thus appear to be a proper form of congressional "regulation."

The question really is not the constitutional validity of these proposals, but whether they go far enough. We suggest that they do not. Should each or even all be adopted, something further is required. Briefly, that "something" is a permanent lawyer or legal staff for Congress, similar to the Office of the Solicitor General. Manned by superior lawyers, such an office could perform a number of continuing functions: (1) litigating separation of powers problems; (2) providing legal advice to both Houses of Congress and their committees; and (3) monitoring the scrutiny of proposed administrative regulations under the many statutory provisions for legislative veto.¹⁵⁷ In some respects, this last function would be the most important.

On October 12, 1978, the Congress gave its final approval to the Ethics in Government Act,¹⁵⁸ which could be an important first step toward the establishment of an Office of Congressional Legal Counsel. The Act requires detailed public financial disclosure by top federal officials in all three branches of government. The Act also establishes restrictions on postservice activities by officials and employees of the executive branch. Additionally, the Act sets up a mechanism for the appointment of a temporary special prosecutor in cases of criminal wrongdoing by top executive branch officials. Finally, and most importantly to this article, Title 7 of the Act establishes an Office of Senate Legal Counsel to represent the interest of the Senate in court. Title 7 also confers jurisdiction on the courts to enforce Senate subpoenas.

Ideally, there should be established a joint House-Senate Office of Congressional Legal Counsel. Indeed, the original Senate bill provided for an Office of Congressional Legal Counsel to represent both houses. The House version, however, did not contain a comparable provision and the conferees were not willing to accede to the Senate version since the appropriate committees of the House had not considered the question.¹⁵⁹ It is understood, however, that the Senate Legal Counsel will consult with the House on litigation matters of interest to both houses.

There can be no doubt that Congress has the power to establish such an office despite the contrary arguments of the Executive in *Staats*.¹⁶⁰

156. *Id.* at 178.

157. For a compilation, see Norton, *Congressional Review, Deferral and Disapproval of Executive Actions: A Summary and Inventory of Statutory Authority (1976)* (published by the Library of Congress' Congressional Research Service).

158. Ethics in Government Act, Pub. L. No. 95-521, 92 Stat. 1824 (1978).

159. See CONF. REP. NO. 95-1756, 95th Cong., 2d Sess. 80 (1978).

160. See text accompanying notes 120-22 *supra*.

Surely the time has come for Congress to have its own lawyer, rather than having counsel on an ad hoc basis. Creation of a fulltime congressional legal counsel and the proposed legislation to control the Department of Justice are reforms needed to blunt Presidential attacks on the constitutionality of federal statutes.