AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Presidential Power to Execute the Law

*Andrew Fois*, **Letter to Orrin G. Hatch on Duty to Defend** (1996)

*Section 567 of the 1996 Defense Authorization Act required the United States military to discharge any members of the armed forces who were HIV-positive. The controversial measure was promoted by a conservative member of the House of Representatives, but opposed by the Pentagon and the White House. Efforts to remove the measure from the bill eventually failed, and President Bill Clinton issued a signing statement indicating that Section 567 was unnecessary, discriminatory, and unconstitutional and announced that he was instructing the Department of Justice not to defend the measure against any constitutional challenges in court. The White House directed the Department of Defense to delay implementing the measure for as long as possible. Two months later, the Republican leadership in Congress agreed to repeal the HIV provision.*

*Shortly after the president’s signing statement, the Republican chair of the Senate Judiciary Committee, Orrin Hatch, asked the Department of Justice to provide any legal analysis it had performed on the constitutionality of the measure and the decision not to defend it in court. A month later, Assistant Attorney General Andrew Fois for the Office of Legislative Affairs provided the administration’s response. Fois explained that the Department of Justice had not produced any written documents relating to the HIV provision, but pointed to a variety of examples of the Department of Justice declining to defend the constitutionality of a federal statutory provision in prior administrations.*

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As the documents compiled by the Senate Legal Counsel indicate, the Department has declared that it will decline to defend the constitutionality of a statute in a wide variety of circumstances. For example, in several of the cases listed by the Senate Legal Counsel, the Department defended the constitutionality of a statute in district court, but declined to appeal an adverse decision because of dispositive precedent, the risk of producing damaging appellate precedent, or other litigation considerations. In a smaller group of cases . . . the President or the Department of Justice declined to enforce or implement a statute in the first instance, and the Department thereafter declined to defend the constitutionality of the statute in court.

We are aware of several instances (some of which are reflected in the Senate Legal Counsel’s list) analogous to the President’s decision to enforce, but not defend the constitutionality of, section 567 of the Defense Authorization Act. In these instances, the executive branch enforced a statute in the first instance but the Department of Justice challenged, or explicitly declined to defend, the constitutionality of that statute in court. Such cases include the following:

(a) *United States v. Lovett* (1946). As required by statute, the President withheld the salaries of certain federal officials. The Solicitor General, representing the United States as defendant, nonetheless joined those officials in arguing that the statute was an unconstitutional bill of attainder. The Attorney General suggested that Congress employ its own attorney to argue in support of the validity of the statute. Congress did so, and the Court of Claims and the Supreme Court gave Congress’s counsel leave to appear as amicus curiae on behalf of the enactment. The Supreme Court held that the statute was an unconstitutional bill of attainder.

(b) *INS v. Chadha* (1983). Pursuant to a provision of the Immigration and Nationality Act, the INS implemented a “one-house veto” of the House of Representatives that ordered the INS to overturn its suspension of Chadha’s deportation. Nonetheless, when Chadha petitioned for review of the INS’s deportation order, the INS -- represented by the Solicitor General in the Supreme Court -- joined Chadha in arguing that the one-house veto provision was unconstitutional. Senate Legal Counsel intervened on behalf of the Senate and the House to defend the validity of the statute. The Supreme Court invalidated the statutory one-house “veto” as a violation of the separation of powers.

(c) *Morrison v. Olson* (1988). Pursuant to the Ethics in Government Act of 1978, the Attorney General requested appointment of an independent counsel to investigate possible wrongdoing of a Department official. Despite the fact that the Department thus had “implemented the Act faithfully while it has been in effect,” the Solicitor General nevertheless appeared in the Supreme Court on behalf of the United States as amicus curiae to argue, unsuccessfully, that the independent counsel provisions of the Act violated the constitutional separation of powers.

(d) *Metro Broadcasting, Inc. v. FCC* (1990). The FCC had a longstanding policy of awarding preferences in licensing to broadcast stations with a certain level of minority ownership or participation. After the FCC initiated a review of this policy, a statute was enacted forbidding the FCC from spending any appropriated funds to examine or change its minority ownership policies. The FCC “[c]ompl[ied] with this directive”: it terminated its policy review and reaffirmed license grants in accord with the minority preference policy. Nonetheless, the Acting Solicitor General, appearing on behalf of the United States as amicus curiae, argued that, insofar as the statute required the FCC to continue its preference policy, it worked an unconstitutional denial of equal protection. The Acting Solicitor General authorized the FCC to appear before the Court through its own attorneys, ‘‘in order for the Court to have the benefit of the views of the administrative agency involved.” FCC’s counsel, representing the Commission as Respondent, urged the Court to uphold the constitutionality of the FCC policy and the statutory enactment. Senate Legal Counsel also appeared on behalf of the Senate as amicus curiae to defend the constitutionality of the statute. The Court held that the statutorily mandated FCC policy was constitutional.

(e) *Simkins v. Moses H. Cone Memorial Hosp*. (4th Cir. 1963). A federal statute permitted the Surgeon General to condition federal funding for hospital construction on assurance by an applying State that the hospital facilities in question did not discriminate on account of race; but the statute explicitly instructed the Surgeon General to make an exception to this requirement where discrimination was accompanied by so-called “separate but equal” hospital facilities for all races. The Surgeon General issued a regulation that included such a “separate but equal” exception, and subsequently approved federal funding to defendant hospitals, which were openly discriminatory. The Department intervened on behalf of the United States in a private class action brought by black physicians, dentists and patients against the hospitals, and joined the plaintiffs in a constitutional “attack on the congressional Act and the regulation made pursuant thereto.” The en banc court of appeals held that the statute and regulation violated the equal protection component of the Fifth Amendment’s Due Process Clause.

(f) *Gavett v. Alexander* (D.D.C. 1979). In this case, a statute created a program pursuant to which the Army could sell surplus rifles at cost, but only to members of the National Rifle Association. The Army, in compliance with the statute, denied plaintiff an opportunity to purchase a rifle at cost because he was not an NRA member. Nonetheless, the Department of Justice concluded -- and informed the court -- that the NRA membership requirement violated the equal protection component of the Fifth Amendment’s Due Process Clause because the discrimination against non-NRA members “does not bear a rational relationship to any legitimate governmental interest and is therefore unconstitutional.” The Department reached this conclusion on the basis of advice from the Army that the membership requirement “serves no valid purpose” that was not otherwise met. The district court afforded Congress an opportunity to “file its own defense of the statute should it choose to do so,” but Congress declined to act on this invitation. The court permitted the NRA itself to intervene and argue on behalf of the statute’s constitutionality. The district court concluded that the statute was subject to strict scrutiny (because it discriminated on the basis of the fundamental right of association) and invalidated the enactment.

(g) *League of Women Voters of California v. FCC* (C.D. Cal. 1980). The Public Broadcasting Act of 1967, as amended, prohibited noncommercial television licensees from editorializing or endorsing or opposing candidates for public office. The Attorney General concluded that this prohibition violated the First Amendment and that reasonable arguments could not be advanced to defend the statute against constitutional challenge. The defendant FCC, through the Department of Justice, represented to the court that it would seek to impose sanctions on a licensee who violated the statute, if only for the purposes of “test litigation;” nevertheless, the FCC informed the court that it would not defend the statute’s constitutionality, Senate Legal Counsel appeared in the case on behalf of the Senate as amicus curiae, and successfully urged the trial court to dismiss the case as not ripe for adjudication in light of the unlikelihood that any enforcement action would transpire. While appeal of that decision was pending, a successor Attorney General reconsidered the Department’s previous position and decided that the Department could defend the statute’s constitutionality. The court of appeals accordingly remanded the case to the district court for consideration of the merits of the case. The Supreme Court ultimately held that the statute violated the First Amendment.

(h) *Turner Broadcasting Sys., Inc. v. FCC* (D.D.C.). Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992 (the “must carry” provisions) require cable operators to carry on their systems a pre-scribed number of signals of local commercial and qualified non-commercial television stations. The Act was enacted over President Bush’s veto. In his veto message, the President stated that one of the reasons for his veto was that the must-carry provisions were unconstitutional. Despite the President’s conclusion, the FCC took steps toward implementing the must-carry provisions “in order to comply with the 1992 Act.” However, in the litigation challenging the constitutionality of the must-carry provisions, the Department of Justice, appearing on behalf of defendant FCC, informed the district court that it declined to defend the constitutionality of the must-carry provisions, “consistent with President Bush’s veto message to Congress.” The Department urged the court to permit adequate time to provide Congress the opportunity to defend the validity of the statute. While preliminary proceedings were ongoing in the district court, the Clinton Administration reconsidered President Bush’s previous position and decided that the Department should defend the constitutionality of the must-carry provisions. . . .

In addition, it is worth noting several other cases in which the Department of Justice argued against the constitutionality of a statute in court, either where there was no occasion for the executive branch to enforce or implement the statute prior to litigation, or where the statute did not provide for any executive branch implementation. *Buckley v. Valeo* (1976); *In re Benny* (N.D. Cal. 1984); *Synar v. United States* (D.D.C. 1985); *Herchinger v. Metropolitan Washington Airports Auth.* (D.D.C. 1993).

You also have asked me to provide “the guidelines used by the Justice Department to decide when it will defend the constitutionality of a statute and when it will not.” There exist no formal guidelines that the Attorney General, the Solicitor General and other Department officials consult in making such decisions. As indicated by the cases on the Senate Legal Counsel’s list, including those discussed above, different cases can raise very different issues with respect to statutes of doubtful constitutional validity; accordingly, there are a variety of factors that bear on whether the Department will defend the constitutionality of a statute.

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