AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 9: Liberalism Divided – Separation of Powers/Presidential Power to Execute the Law

*Benjamin R. Civiletti*, **The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation** (1980)[[1]](#footnote-1)

*Near the end of the Jimmy Carter presidency, Democratic Senator Max Baucus chaired a subcommittee of the Senate Judiciary Committee. In that capacity, he requested that Attorney General Benjamin Civiletti explain the authority for the Department of Justice to refuse to defend the constitutionality of a federal statutory provision in court. At issue was the administration’s decision not to defend the constitutionality of a provision of the Public Broadcasting Act of 1967, which prohibited noncommercial television licensees from editorializing or endorsing political candidates. The Reagan administration ultimately reversed that decision and offered a defense of the statute, but it was eventually struck down as violating the First Amendment. Civiletti’s letter to Baucus provided the most extensive discussion to that point of the executive branch’s duty to defend the constitutionality of congressional statutes.*

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The Attorney General has a duty to defend and enforce the Acts of Congress. He also has a duty to defend and enforce the Constitution. If he is to perform these duties faithfully, he must exercise conscientious judgment. He must examine the Acts of Congress and the Constitution and determine what they require of him; and if he finds in a given case that there is conflict between the requirements of the one and the requirements of the other, he must acknowledge his dilemma and decide how to deal with it. That task is inescapably his.

I concur fully in the view, expressed by nearly all of my predecessors that when the Attorney General is confronted with such a choice, it is almost always the case that he can best discharge the responsibilities of his office by defending and enforcing the Act of Congress. That view is supported by compelling constitutional considerations. Within their re­spective spheres of action the three branches of government can and do exercise judgment with respect to constitutional questions, and the Judicial Branch is ordinarily in a position to protect both the govern­ment and the citizenry from unconstitutional action, legislative and executive; but only the Executive Branch can execute the statutes of the United States. For that reason alone, if executive officers were to adopt a policy of ignoring or attacking Acts of Congress whenever they believed them to be in conflict with the provisions of the Constitu­tion, their conduct in office could jeopardize the equilibrium established within our constitutional system.

At the same time, I believe that if Congress were to enact a law requiring, for example, that the Attorney General arrest and imprison all members of the opposition party without trial, the Attorney General could lawfully decline to enforce such a law; and he could lawfully decline to defend it in court. Indeed, he would be untrue to his office if he were to do otherwise. This is not because he has authority to “deny the validity of Acts of Congress.” It is because everything in our constitutional jurisprudence inescapably establishes that neither he nor any other executive officer can be given authority to enforce such a law. The “assertion” of the Department of Justice is nothing more, nor less, than this.

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The available evidence concerning the intentions of the Framers lends no specific support to the proposition that the Executive has a constitutional privilege to disregard statutes that are deemed by it to be inconsistent with the Constitution. The Framers gave the President a veto for the purpose, among others, of enabling him to defend his Constitutional position. They also provided that his veto could be over­ridden by extraordinary majority in both Houses. That being so, an argument can be made that the Framers assumed that the President would not be free to ignore, on constitutional grounds or otherwise, an Act of Congress that he had been unwilling to veto or had been enacted over his veto.

At the same time, I believe that there is relatively little direct evi­dence of what the Framers thought, or might have thought, about the Executive’s obligations with regard to Acts of Congress that were transparently inconsistent with the Constitution; and, indeed, the ques­tion remained open for some time after the Constitution was adopted. President Jefferson, for example, writing of the Alien and Sedition Acts in 1804, concluded that each branch had power to exercise independent judgment on constitutional questions and that this was an important element in the system of checks and balances. . . .

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In *Myers v. United States* (1926), the Supreme Court was asked to decide whether the President had acted lawfully in removing a postmaster from office in contravention of an Act of Congress. The Act provided that postmasters were not to be removed by the President without the advice and consent of the Senate. The case involved a claim for back salary filed by the heirs of the postmaster who had been removed. The action was brought in the Court of Claims under statute that gives that court jurisdiction to hear cases not sounding in tort arising out of conduct by executive officers alleged to be unlawful under the Constitution or Acts of Congress.

When the case came before the Supreme Court, the Solicitor Gen­eral, appearing for the United States, assailed the attempt to limit the removal power. He argued that the statute imposed an unconstitutional burden upon the President’s supervisory authority over subordinate officers in the Executive Branch. Senator Pepper made an amicus curiae appearance and argued that the statute was constitutional. The Court ruled that the statute was unconstitutional. More to the point, the Court ruled that the President’s action in defiance of the statute had been lawful. It gave rise to no actionable claim for damages under the Constitution or an Act of Congress in the Court of Claims.

In my view, *Myers* is very nearly decisive of the issue you have raised. *Myers* holds that the President’s constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts. He cannot be required by statute to retain postmasters against his will unless and until a court says that he may lawfully let them go. If the statute is unconstitutional, it is uncon­stitutional from the start.

I wish to add a cautionary note. The President has no “dispensing power.” If he or his subordinates, acting at his direction, defy an Act of Congress, their action will be condemned if the Act is ultimately upheld. Their own views regarding the legality or desirability of the statute do not suspend its operation and do not immunize their conduct from judicial control. They may not lawfully defy an Act of Congress if the Act is constitutional. . . .

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*Marbury v. Madison* (1803), was probably the first case in which the Executive made no effort to defend an Act of Congress on a constitutional point. President Jefferson was strongly of the view that Congress had no power to give the Supreme Court (or any other court) authority to control executive officers through the issuance of writs of mandamus. When Mr. Marbury and the other “mid­night judges” initiated an original action in the Supreme Court to compel delivery of their commissions, President Jefferson’s Attorney General, Levi Lincoln, made no appearance in the case except as a reluctant witness. No attorney appeared on behalf of Secretary Madison. The Court ultimately resolved the case by agree­ing and disagreeing with President Jefferson. The Court held that the relevant statute was unconstitutional to the extent that it attempted to give the Supreme Court power to issue writs of mandamus against executive officers, but that there was no general principle of law that would prevent Congress from giving that power to the lower courts.

A second significant historical incident involving a refusal by the Executive to execute or defend the Acts of Congress on constitutional grounds arose during the administration of Andrew Johnson. In defi­ance of the Tenure in Office Act, which he deemed to be unconstitu­tional, President Johnson removed his Secretary of War. This action provided the legal basis for one of the charges that was lodged against him by his opponents in the House; and during his subsequent trial in the Senate, the arguments offered by counsel on both sides provided an illuminating discussion of the responsibilities of the Executive in our constitutional system. President Johnson was acquitted by one vote.

I will mention a third incident that illustrates an interesting variation on the historical practice. In the midst of World War II, as a result of the work of the House Committee on Un-American Activities, Con­gress provided, in a deficiency appropriations act, that no salary or compensation could be paid to certain named government employees. These individuals had been branded in the House as “irresponsible, unrepresentative, crackpot, radical bureaucrats.” The Executive re­sponded to the statute by taking two courses at once. The Executive enforced the letter of the statute (by not paying the salary of the employees in question), but joined with the employees in a legal attack upon the constitutionality of the relevant provision. When the case came before the Supreme Court, an attorney was permitted to appear on behalf of Congress, as amicus curiae, to defend the statute against the combined assault. The Court struck the relevant provision, holding that it was a bill of attainder, and allowed the employees to recover. *United States v. Lovett* (1946).

Altogether, there have been very few occasions in our history when Presidents or Attorneys General have undertaken to defy, or to refuse to defend, an Act of Congress. . . .

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A helpful scholarly discussion of this problem, together with citations to other works, may be found in Edward Corwin’s book on the Presi­dency. Taking full advantage of his scholarly prerogative, Corwin ignores the teaching and, indeed, the holding of *Myers* and concludes that the President, even though he may doubt the constitutionality of a statute, “must promote its enforcement by all the powers constitution­ally at his disposal unless and until enforcement is prevented by regular judicial process.”

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1. Excerpt taken from 4A *Op. Off. Legal Counsel* 55 (1980). [↑](#footnote-ref-1)