Executive Discretion and the Congressional Defense of Statutes
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Separation of powers means, among other things, that Congress legislates and that the President faithfully executes the laws. "Execution" means enforcement, but it also implies the responsibility to defend and to uphold the laws against attacks in court. In at least nine cases in recent years, however, the Executive has asserted a discretionary authority to decline to defend federal laws against constitutional challenges.1 If unchal-


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...lenged, the exercise of this discretion may substantially shift authority over the effective content of federal law from the legislative to the executive branch. This Note argues that the congressional defense of otherwise undefended statutes is the most appropriate way to correct this imbalance of constitutional authority between the two political branches.

Currently, the Senate Legal Counsel may defend the Senate in all cases in which congressional powers are directly at stake. Congress should recognize that congressional powers are directly threatened whenever any federal statute goes undefended. To enhance Congress' ability to defend statutes, this Note proposes a strengthened statutory mechanism that would require public notification to Congress of all executive decisions not to defend statutes and that would allow either house of Congress to undertake their defense. Finally, this Note addresses the threshold jurisdictional issues raised by the congressional defense of federal statutes and concludes that no barrier exists to such congressional representation.


2. The repeal of laws is a legislative function, but an Executive that possessed an unchecked discretion whether to provide or withhold a constitutional defense for a statute could exercise, in effect, the power of repeal. By relying vicariously on third-party challenges to the constitutionality of statutes, the Executive might accomplish indirectly what the Constitution does not allow him to do directly: the invalidation of specific statutory provisions after their enactment or the exercise of a line-item veto.


Originally, the bill creating the Office of Senate Legal Counsel was to have created a joint House-Senate Office of Congressional Legal Counsel. See S. REP. No. 170, 95th Cong., 2d Sess., reprinted in 1978 U.S. CODE CONG. & AD. NEWS 2416. Because the appropriate House committees did not consider the bill, and because the House was not prepared to agree to the creation of the joint office, the bill was later amended to create only the Office of Senate Legal Counsel. See H.R. REP. No. 1756, 95th Cong., 2d Sess. 80, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4381, 4396. In subsequent actions, the House has employed counsel on an ad-hoc basis to represent its interests before the courts. See, e.g., INS v. Chadha, 103 S. Ct. 2764 (1983) (special counsel employed); National Wildlife Fed'n v. Watt, 571 F. Supp. 1145 (D.D.C. 1983) (Counsel to Clerk of the House employed).
I. Executive Discretion Over the Defense of Statutes

The President is charged with the duty to "take Care that the Laws be faithfully executed" and the duty to preserve, protect, and defend the Constitution as the supreme law of the land. Generally, these duties are compatible. However, when the Executive faces a law that he believes is unconstitutional, he must decide whether the law should be executed as written and defended if attacked, or whether the duty of faithfulness to the Constitution requires its repudiation.

Early judicial and Attorney General opinions restricted the Executive's discretion by holding that the President's constitutional duty to execute the laws was paramount. They concluded that, after the opportunity to veto had passed, the Executive could not presume that any federal statute was unconstitutional.

Ordinarly, I would be content to say that it is not within the province of the Attorney General to declare an Act of Congress unconstitutional—at least, where it does not involve any conflict between the prerogatives of the legislative department and those of the executive department—and that when an act like this, of general application, is passed it is the duty of the executive department to administer it until it is declared unconstitutional by the courts.

This issue has been addressed several times in the context of challenges to the authority of state attorneys general to challenge the constitutionality of state statutes. In one such case, the attorney general was permitted to realign himself from the posture of a defendant to become a party plaintiff on the ground that the attorney general was not under an obligation to defend statutes he believed to be unconstitutional. Delchamps, Inc. v. Alabama State Milk Control Bd., 324 F. Supp. 117, 118 (M.D. Ala. 1971) ("Thus, if the Attorney General for the State of Alabama is of the opinion that certain enactments of the Alabama Legislature are clearly violative of the Constitution of the United States, this Court does not conceive that he is under any duty to attempt to defend such legislative enactments.

Other courts have held that state attorneys general may not challenge the constitutionality of state statutes, but have not determined whether the attorneys general are under an obligation to defend statutes they believe are unconstitutional. See, e.g., NAACP v. California, 511 F. Supp. 1244, 1262,
A. Exceptions to the Obligation: Separation of Powers Statutes and "Clearly Unconstitutional" Statutes

In more recent years, the Justice Department has asserted two exceptions to the Executive's constitutional obligation to defend statutes: The President is not required to defend statutes that, in his opinion, unconstitutionally encroach on the authority or powers of the presidency, and the President is not required to defend statutes that are "clearly unconstitutional." The first exception accommodates the occasional conflict between the roles of the President as the chief law enforcement officer of the United States and the role of the Attorney General as the advocate of the executive branch. Absent this discretion, the President would be unable to order the Attorney General to use the courts to challenge statutory encroachments of his power by Congress. The executive branch would thus

(E.D. Cal. 1981) (attorney general dismissed as having "no standing to challenge the constitutionality of a state statute merely because he believes it to be unconstitutional"); Baxley v. Rutland, 409 F. Supp. 1249 (M.D. Ala. 1976) (three-judge panel) (subjective opinion by state attorney general that statute is unconstitutional cannot support standing and jurisdictional requirements of justiciable case or controversy); People ex rel. Deukmejian v. Brown, 29 Cal. 3d 150, 524 P.2d 1206, 172 Cal. Rptr. 487 (1981) (en banc) (attorney general, claiming to be "the People's legal counsel," dismissed on motion of governor from suit seeking writ to require governor to perform duties without regard to new state statute); see also Finch v. Mississippi State Medical Ass'n, 585 F.2d 767, 775 (5th Cir. 1978) (governor, relying on oath of office to uphold United States Constitution, lacks standing to challenge state statutes).


8. These roles will conflict whenever a federal statute restricts executive authority. 28 U.S.C. § 2403 (1976) permits the Attorney General to intervene as a party on behalf of the United States in any federal action in which the constitutionality of a federal statute is in issue. It does not require that he intervene as counsel for the United States; he may, presumably, intervene to protect executive interests. The problem of which party represents "the United States" in separation of powers litigation is discussed in Miller & Bowman, Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem, 40 OHIO ST. L.J. 51, 60-70 (1979). The authors conclude that in interbranch litigation there is no such entity as "the United States"; there are only separate branches with separate interests. Id. at 67.

9. This discretion was first exercised in Myers v. United States, 272 U.S. 52 (1926), which began as a claim for back pay by the heirs of a postmaster who had been removed from his position without the statutory required advice and consent of the Senate. Defending the power of the President to remove subordinates without congressional interference, the Solicitor General argued for the first time that an act of Congress was unconstitutional. The Court, in an opinion by Chief Justice (and former President) Taft, agreed that the act in question improperly eroded the President's authority and rejected the defenses of the statute offered by Senator Pepper as amicus curiae. The approval/removal requirement of the act was identical to a provision in the Tenure in Office Act of 1867, 14 Stat. 430, the violation of which provided the legal justification for the impeachment of President Andrew Johnson. Even though the Tenure in Office Act was not before the Court in Myers, and even though the Act had been repealed in 1887, 24. Stat. 500, ch. 353, the Myers Court declared it unconstitutional. 272 U.S. at 176.

In a similar case nine years later, the government appeared in Humphrey's Executor v. United States, 295 U.S. 602 (1935), to argue that the statute authorizing a seven-year term of office for Federal Trade Commission members should not be interpreted as restricting the removal power of the
be totally dependent upon congressional definitions and restrictions of its powers. The second exception—that the President need not execute unconstitutional statutes—accommodates the conflict between the constitutional mandate that the President execute the laws and his oath to support and to defend the Constitution.

The line between constitutional and "clearly unconstitutional" statutes is difficult, if not impossible, to draw. But as a practical matter, the executive branch has construed the authority to decline to defend statutes in the latter category quite narrowly and, until recently, had exercised its discretion only once, in 1963, to challenge a separate-but-equal hospital financing provision of federal law. Plainly, this was no abuse of discretion; no one reasonably could have argued in 1963 that separate-but-equal state actions were constitutional.

In 1980, however, the Executive clearly expanded the scope of his authority not to defend federal laws on constitutional grounds by declining to defend the statute challenged in *League of Women Voters v. FCC*. In *League of Women Voters*, plaintiffs challenged the constitutionality of the

President. The Solicitor General went beyond this and, directly attacking the statute, argued that the Federal Trade Commission Act was unconstitutional if construed to limit the presidential removal power. The Court disagreed and held that the Act's restriction was permissible. *Id.* at 616, 621-32.

More recently, the Attorney General has declined to defend numerous statutes or provisions on separation of powers grounds. See, e.g., *INS v. Chadha*, 103 S. Ct. 2764 (1983) (legislative veto of executive suspension hearings unconstitutional); Senate Select Comm. on Presidential Campaign Activities v. *Nixon*, 498 F.2d 725 (D.C. Cir. 1974) (amenability of President to Senate subcommittee subpoena challenged on executive privilege grounds); *supra* note 1.

11. *Id.* art. II, § 1, cl. 8; see also *id.* art VI, cl. 2 (Constitution is supreme law of land).

In an earlier case involving the removal power, *United States v. Lovett*, 328 U.S. 303 (1946), the government declined to defend a challenged statute both on separation of powers and on additional constitutional grounds. In 1943, Congress passed legislation that cut off the salaries of four "irresponsible, unrepresentative, crackpot, radical bureaucrats." *Id.* at 308. The provision, which named the employees, was added by the House of Representatives to section 304 of the Urgent Deficiency Appropriation Act of 1943, 57 Stat. 431, 450. The Senate rejected the amendment four times before yielding to the uncompromising House. President Roosevelt protested, but later signed the legislation only to avoid delaying the conduct of World War II. *Id.* at 312-13. He then enforced the statute by cutting off the salaries of the employees.

A special counsel was authorized by Congress to defend the statute as amicus curiae on behalf of the United States before the Court of Claims, *United States v. Lovett*, 66 F. Supp. 142, 143 (Ct. Cl. 1943) ("The special counsel are designated variously in the record as representing the House, the Congress, [and] the United States.") and on behalf of the Congress before the Supreme Court. *United States v. Lovett*, 327 U.S. 773, 774 (1945) (mem.). Before the Supreme Court, President Roosevelt joined with the plaintiffs to attack the statute. Although the Court recognized that the statute worked an unconstitutional removal of executive employees by Congress, the majority rejected the provision solely on the constitutional ground that it constituted a prohibited bill of attainder. *Id.* at 315-16.

13. One year earlier in *Bailey v. Patterson*, 369 U.S. 31, 33 (1962) (per curiam), the Supreme Court held that the validity of state-supported racial discrimination is "foreclosed as a litigable issue."
provision of the Corporation for Public Broadcasting Act that prohibits editorializing and the endorsement of political candidates by noncommercial broadcast licensees that receive funds from the Corporation.\textsuperscript{15} The Department of Justice declined to defend the constitutionality of the provision because the government litigators had concluded that the statute chilled the First Amendment rights of publicly financed broadcasters and that no argument could overcome this constitutional defect.\textsuperscript{16} The Justice Department attorneys claimed that because a "reasonable defense" could not be made, the Code of Professional Responsibility prevented them from defending the statute in court.\textsuperscript{17}

There were, in fact, powerful arguments available in defense of the statute challenged in \textit{League of Women Voters}.\textsuperscript{18} There was also strong sentiment in the Senate\textsuperscript{19} and within the Justice Department's Office of Legal Counsel\textsuperscript{20} that the statute should be defended. This was thus not a

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\item \textsuperscript{15} 47 U.S.C. § 399(a) (amended 1981). "Noncommercial" is not defined by the statute. 47 C.F.R. § 73.503(d) provides, however, that noncommercial broadcast licensees be nonprofit and that they not broadcast commercials.
\item \textsuperscript{16} Department of Justice Authorization Hearings, supra note 7, at 853-54 (testimony of Alice Daniel, Ass't Att'y Gen., Civil Div., Dep't of Justice).
\item \textsuperscript{17} See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(2) ("In his representation of a client, a lawyer shall not: . . . Knowingly advance a claim or defense that is unwarranted under existing law . . . .").
\item \textsuperscript{18} Arguments in favor of the statute could run as follows. First Amendment jurisprudence has long recognized that the broadcasting medium can be subject to greater governmental control over political content than would be permissible over the print media. This disparate treatment follows from the assumption (among others) that broadcast spectra are limited while newspapers have access to an unlimited supply of newsprint upon which to communicate their views. Because the nature of broadcasting is inherently restricted, the government can protect the right of viewers and listeners to a politically balanced content as a right superior to that of broadcasters to determine their own programming. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 388-90 (1969); see also FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."). Thus, while newspapers cannot constitutionally be required to grant reply space to a politician, see Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the broadcast media may be required to do so, Red Lion Broadcasting Co., 395 U.S. at 386-92. If a noncommercial broadcaster were given the right to editorialize and to endorse political candidates, the "fairness doctrine" would require that opposing viewpoints be granted access and a right of reply. See id. at 385. By placing the restrictions on noncommercial broadcast licensees, Congress chose to restrict all partisan political content from publicly funded broadcasting.
\item In addition to the above arguments, the federal government has the inherent power to control the political activities of the institutions and individuals it finances. The Hatch Act, 5 U.S.C. § 7324(a)(2) (1982), for example, restricts certain forms of political expression by government employees. The statute under attack in \textit{League of Women Voters v. FCC} is simply an exercise of that power.
\item For additional arguments supporting the constitutionality of the provision, see Defendant's Memorandum of Points and Authorities at 21-26, League of Women Voters v. FCC, 547 F. Supp. 379 (C.D. Cal. 1972).
\item The Office of Senate Legal Counsel was notified of the decision of the Department of Justice not to defend § 399(a) and warned the Senate that if the statute were struck without a defense, the precedent would be established that the executive branch could nullify laws with which it disagrees by a default in court. See Notification to Joint Leadership Group from Senate Legal Counsel in Respect to \textit{League of Women Voters v. F.C.C.}, reprinted in 125 CONG. REC. 35,416 (1979). Pursuant to Senate authorization, the Counsel appeared in the case as amicus curiae.
\item Department of Justice Authorization Hearings, supra note 7, at 855.
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“clearly unconstitutional” statute for which a defense would conflict with the President’s oath of office. Instead, the executive branch made a political decision and invited the court to invalidate the statute by presenting no arguments in its defense.

League of Women Voters represents the first assertion by the Justice Department that it can evaluate, independently of Congress and the judiciary, the merits of arguments in defense of statutes that do not directly define or restrict executive powers, and give effect to those evaluations by declining to present the defense of arguably constitutional federal statutes in court. If the court then agrees with the unchallenged position, the statute will cease to be part of effective federal law.

The Constitution vests all legislative powers in the Congress including, of course, the power of repeal. While this delegation includes a role for the President, that role is strictly limited to “the recommending of

21. Subsequent to the intervention of the Senate the district court granted the Senate’s motion to dismiss the case on ripeness grounds and on the ground that there was no case or controversy because the defendant, the FCC, had agreed with the plaintiffs that the statute was unconstitutional. League of Women Voters, 489 F. Supp. at 520-21. While this ruling was being appealed, the Reagan administration took office. The chairman and ranking minority member of the Senate Judiciary Committee requested newly appointed Attorney General Smith to reverse the position of his predecessor and to defend the statute. See Letter from Senators Thurmond and Biden to Attorney General Smith (Feb. 3, 1981) (copy on file with Senate Legal Counsel). The Attorney General agreed to defend § 399(a) after determining that the application of the statute to government-owned broadcasters might well be held to be constitutional. See Letter from Attorney General Smith to Senators Thurmond and Biden (Apr. 6, 1981) (copy on file with Senate Legal Counsel); cf. Bob Jones Univ. v. United States, 103 S. Ct. 2017 (1983) (United States reversed earlier litigation position, agreeing with petitioner before Supreme Court that certain IRS rulings denying tax-exempt status to racially discriminatory private schools were unconstitutional). The Ninth Circuit remanded the case to the district court to allow the defense to be heard. League of Women Voters v. FCC, No. 80-5333 (9th Cir. Apr. 10, 1981). Subsequently, Congress amended the statute to limit the scope of § 399’s prohibition on editorializing to only those public radio and television stations that receive grants from the Corporation for Public Broadcasting. Pub. L. No. 97-35, 95 Stat. 357, 725-26 (1981) (codified at 47 U.S.C. § 399 (Supp. V 1981)). The district court then held the statute unconstitutional. 547 F. Supp. 379 (C.D. Cal. 1982), on appeal, determination of proper jurisdiction postponed to hearing on the merits, 103 S. Ct. 1249 (1983).

The ultimate disposition of this case is not as significant as the initial decision of the Department of Justice not to defend the statute. The fact that this decision was later reversed does not affect its precedential impact: Decisions not to defend arguably constitutional statutes may well be made by the Department again. Even while reversing the position of his predecessor, Attorney General Smith implied that an evaluation of constitutional arguments prior to undertaking a defense is appropriate. “In my view, the Department has the duty to defend an Act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General and the lawyers examining the case conclude that the argument may ultimately be unsuccessful in the courts.” Letter from Attorney General Smith to Senators Thurmond and Biden, supra (emphasis added).

22. This kind of discretion is fundamentally different from normal prosecutorial discretion with which neither the courts nor Congress may interfere. United States v. Cox, 342 F.2d 167, 171 (5th Cir.) (courts cannot interfere with discretionary powers of United States attorneys in their conduct of criminal prosecutions), cert. denied, 381 U.S. 935 (1965). One difference is that prosecutorial discretion does not always have a substantive impact on federal law. See, e.g., Fonzl v. Fessenden, 258 U.S. 254 (1922); United States v. Ream, 491 F.2d 1243 (5th Cir. 1974).

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laws he thinks wise and the vetoing of laws he thinks bad. 24 This delegation of legislative authority insures that the corpus of federal law will be the expression of policy choices made by the most politically representative branch of the federal government. 25 The Constitution assumes that, absent judicial intervention, the statutes representing those policy choices will be brought into effect by the Executive. But since a court may well hold a statute unconstitutional if no arguments are presented in its defense, 26 an executive decision not to defend a statute may have a substantial impact on federal law. 27

25. The judiciary has no legislative role, see U.S. CONST. art. I, § 1; id. art. III; Note, Advisory Opinions on the Constitutionality of Statutes, 69 HARV. L. REV. 1302 (1956), and no authority to make constitutional decisions on pure policy grounds. Even after a judicial declaration that a law is unconstitutional, the corpus of federal law is unchanged, although the effective corpus of law is reduced. See generally O. FIELD, THE EFFECT OF AN UNCONSTITUTIONAL STATUTE 274-304 (1935) (laws held unconstitutional remain codified and may be amended, repealed, and otherwise treated like any other codified statute). For example, in 1923 the Supreme Court held a women's minimum wage law unconstitutional in Adkins v. Children's Hosp., 261 U.S. 525 (1923). Fourteen years later, the Court formally overruled the Adkins decision in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). Attorney General Biddle explained that after the later decision the statute was valid and enforceable while the effect of the earlier decision had merely rendered it unenforceable: "The decisions are practically in accord holding that the courts have no power to repeal or abolish a statute, and that notwithstanding a decision holding it unconstitutional, a statute continues to remain on the statute books." 39 OF ATT'Y GEN. 22, 22-23 (1937); accord Lemon v. Kurtzman, 411 U.S. 192, 197-99 (1973); Chincoteague Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376-77 (1940).
26. See, e.g., Simkins v. Moses H. Cone Memorial Hosp., 323 F.2d 959 (4th Cir. 1963) (provision of Hill-Burton Act that could be used for financing of separate-but-equal hospital facilities held unconstitutional), cert. denied, 376 U.S. 938 (1964); Petition for Writ of Certiorari, id. at 13-14 ("Thus no one in the instant case has yet briefed or argued, or even uttered a word in the defense of, the constitutionality of the challenged provisions of the Hill-Burton Act; and in these circumstances, those provisions are quite literally going by default."); Gavett v. Alexander, 477 F. Supp. 1035 (D.D.C. 1979) (provisions of Civilian Marksmanship Program requiring Secretary of Army to sell surplus firearms at cost to members of National Rifle Association held unconstitutional after Justice Department refused to defend provision and argued that it served no legitimate governmental function). But see League of Women Voters v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980) (challenge to constitutionality of federal statute dismissed as lacking adverse parties and on ripeness grounds after Justice Department declined to defend it).
27. For this reason, executive discretion not to defend federal statutes has been severely criticized by commentators, usually in contexts that combine the problem of executive discretion over the defense of statutes with the related problem of discretionary enforcement of federal statutes. Many commentators have expressed the opinion that the Attorney General must assume the constitutionality of all statutes, at least where the separation of powers presents no difficulties. Corwin expressed the most extreme view of the obligation of the Executive to assume the constitutionality of all statutes. See E. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1887-1957, at 66 (4th ed. 1957) (President must promote enforcement of statute of questionable constitutionality by all powers constitutionally at his disposal unless and until enforcement is prevented by regular judicial process); see also Miller & Bowman, supra note 8, at 72 ("[T]he 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.") (citations omitted). This view was criticized as "mistaken" in R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 285 (1973). But see R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 306 (1974) ("It is a startling notion that the President, who by the terms of Article II, § 3, 'shall take care that the laws be faithfully executed,' may refuse to execute a law on the ground that it is unconstitutional. To wring from a duty faithfully to execute the laws a power to defy them would appear to be a feat of splendid illogic.") (citations omitted).
This potential impact disrupts the constitutional scheme in two ways.

There are several arguments that can be made in support of this discretionary authority. First, the supremacy clause of the Constitution, art. VI, cl. 2, requires the President to uphold the Constitution even at the expense of declining to defend any law he believes to be constitutionally deficient. Second, in the absence of legislation directing otherwise, the Attorney General possesses an unbridled discretion to decide whether to appeal decisions adverse to the constitutionality of federal statutes.Declining to defend them on the trial level may be characterized as the exercise of that same discretion. Finally, discretionary abdications of non-mandatory constitutional responsibilities by the three branches of government are not uncommon and are constitutionally acceptable.

In 1980, Attorney General Civiletti concluded that the legislative veto device was unconstitutional. Relying explicitly upon the supremacy clause, he advised the Secretary of the Department of Education that as an executive officer, the Secretary was entitled to implement regulations even though they had been vetoed by Congress. 43 Op. Atty Gen. No. 25 (1980); see also Ely, United States v. Lovett: Litigating the Separation of Powers, 10 Harv. C.R.-C.L. L. Rev. 1, 4 (1975) (provision withholding salaries of four executive employees "is an unwarranted encroachment upon the authority of both the executive and judicial branches. It is not, in my judgment, binding upon them.") (quoting President Franklin Roosevelt). But see E. Corwin, Presidential Power and the Constitution 114 (1976) (asserting that President must enforce all validly enacted laws); cf. Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838) (mandamus will issue against executive officer to disburse funds approved by Congress).

As to the discretionary power to appeal, there has been an occasional congressional assertion that Congress has the power to restrict the positions the Attorney General may take in court with respect to the constitutionality of statutes, but apparently Congress has never asserted that it can force the Attorney General to defend or to appeal every statute or decision that is challenged. The most Congress can do is prevent him from attacking statutes by restricting his funds or by revoking his authority. See, e.g., Removing Politics from the Administration of Justice: Hearings on S. 2803 Before the Subcomm. on Separation of Powers & Senate Comm. on the Judiciary, 93d Cong., 2d Sess. 3 (1974) ("All powers of the Attorney General and of the Department of Justice flow from Acts of Congress. There can be little doubt—indeed I have no doubt at all—that what Congress gives, Congress can take away.") (statement of Sen. Ervin); see also Pub. L. No. 95-624, § 13, 92 Stat. 3459, 3464 (1978) (requiring notification from Attorney General to Congress whenever Justice Department will not support constitutionality of federal statute in court); Pub. L. No. 96-132, § 21, 93 Stat. 1041, 1049 (1979) (same); Van Alstyne, The Role of Congress in Determining the 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) (suggesting that all incidental powers of President flow from congressional delegations because Congress, as result of necessary and proper clause, is "first among equals"); infra note 36.

Finally, unless the Constitution is unambiguous and its language mandatory, there is no mandate that the granted powers must be exercised. For example, courts frequently decline jurisdiction over otherwise justiciable disputes for "prudential reasons." But see Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959) (criticizing prudential refusals of jurisdiction). Also, Congress often delegates unquestionably legislative (policymaking) authority to administrative agencies in the executive branch. See INS v. Chadha, 103 S. Ct. 2764, 2808 (1983) (White, J., dissenting) ("There is no question but that agency rulemaking is lawmaking in any functional or realistic sense of the term."). But see Batterton v. Francis, 432 U.S. 416 (1977) (such delegations constitutional). Since the other two branches may prudentially decline to exercise their vested powers with constitutional impunity, the argument follows that there is no constitutional reason why the Executive may not similarly decline to defend those federal statutes it finds constitutionally offensive.

But the language of the Constitution requires that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3 (emphasis added). This duty is non-discretionary and non-delegable. From one point of view, it is difficult to see how "faithful execution" is accomplished when the Executive permits statutes to fall in court without any defense. But "execution" and "defense" are different concepts, see infra pp. 993-94, so that whether § 3 requires the President to defend all federal statutes is yet unsettled. Constitutional structure and theory appear to require an affirmative answer to that question; pragmatic necessities, however, require only a "not as yet determined" answer because no case presenting the question in a constitutionally compelling context has yet arisen. Cf. Delchamps, Inc. v. Alabama State Milk Control Bd., 324 F. Supp. 117, 118 (M.D. Ala. 1971) (state attorney general not required to defend statute he believes unconstitutional).
First, it affects the legislative process by rendering congressional lawmaking less certain. Second, it increases presidential power by rendering the ultimate disposition of legislation more subject to executive control. As the Executive selectively declines to defend statutes, the corpus of federal law will reflect his policy preferences while concomitantly diminishing congressional control over federal law. At present there is no effective congressional or judicial review of this authority.

In contrast, nullification of legislation by the veto requires prompt notification to Congress. Congress, in turn, has an immediate right to override the decision of the Executive by a two-thirds majority vote of both houses. This symmetry of respective decisionmaking authority that characterizes the legislative process in general and the veto power in particular is lost when the Executive uses, or acquiesces in the use of, the courts to invalidate statutes on constitutional grounds. Faithfulness to the Framers' conception of the separation of powers requires congressional participation in any process by which statutes may be invalidated by Executive action or inaction.

Discretion to refuse to defend statutes is subject to abuse because it is difficult to define objectively what constitutes a "clearly unconstitutional" statute. The Executive may therefore determine with virtually unfettered discretion which statutes will be defended and which will not. The Executive could, for example, vicariously rely upon specific third-party lawsuits to invalidate statutory provisions or proposed constitutional amendments.

28. This uncertainty would increase the influence of the Executive in the drafting and the passage of legislation. Congress would be forced to draft and pass legislation that it could be sure would pass executive scrutiny on two levels: first to avoid a veto, and second to insure that the statute, if attacked, would be defended.


30. Even without authority to decline to defend federal statutes, the Executive still would possess considerable unreviewable discretion to nullify effective federal law. The Executive could, for example, decline to enforce specific laws (although if the laws imposed a non-discretionary duty upon the Executive—such as disbursing a given amount of funds—the Executive would violate his oath of office to order such noncompliance).


32. In a case filed by the Pacific Legal Foundation and the Mountain States Legal Foundation against Interior Secretary James Watt involving both constitutional and separation of powers issues, charges have been made that the principal parties may have acted in collusion. See Taylor, Collusion Request Laid to Law Firm, N.Y. Times, Oct. 13, 1981, at B8, col. 1. The suit, Pacific Legal Found. v. Watt, 529 F. Supp. 982 (D. Mont. 1981), successfully challenged an order from a House committee to Secretary Watt ordering him to withdraw the Bob Marshall Wilderness Area from eligibility for mineral exploration and leasing. The Justice Department declined to defend the committee order on the grounds that it was not authorized by statute and that it unconstitutionally infringed on valid executive prerogatives. Id. at 985.

Prior to becoming the Interior Secretary, Mr. Watt, as president of the Mountain States Legal Foundation, had sought through administrative channels to open the Bob Marshall Wilderness Area to oil and gas leasing. See Taylor, Senate Backs "Veto" of Watt's Move, N.Y. Times, Oct. 10, 1981, at A10, col. 1. The charge of "collusive overtures" was based on a letter from the current president of
ments with which the President or a member of his cabinet disagrees on political grounds, while professing to take no action on constitutional grounds. By declining to defend against such suits, this selective process could allow the Executive to invalidate specific provisions of statutes and thereby exercise indirectly that which the Constitution denies him directly: a post-enactment item veto.

At present, the Executive does not account for refusals to defend statutes, even though such refusals may affect the content of federal law as significantly as a successful veto. The Attorney General is not required to disclose a decision not to defend a statute or the reason for the decision. The Department of Justice is only required to notify the Senate Legal Counsel when it declines to appeal a decision adverse to the constitutionality of a federal statute. The Senate Legal Counsel, in turn, is not re-

the Mountain States Legal Foundation to the Justice Department claiming that “we were informed that the filing of this lawsuit was received with favor” by the officials in the Interior Department. Taylor, Collusion Request Laid to Law Firm, supra.

Collusive suits will, of course, be dismissed. See United States v. Johnson, 319 U.S. 302 (1943); infra note 41. The court in Pacific Legal Foundation, however, did not reach the charge of collusion but based its disposition on other grounds.

33. The possibilities with regard to constitutional amendments are suggested by the conduct of the Department of Justice in a recent case involving the proposed Equal Rights Amendment (ERA) to the Constitution. The ERA was submitted to the states by Congress in March 1972. H.R.J. Res. 208, 86 Stat. 1523 (1972). By its own terms, it was to take effect if ratified within seven years by the required three-fourths of the states. On October 6, 1978, Congress passed House Joint Resolution 638, which extended the deadline for ratification to June 30, 1982. 124 Cong. Rec. 34,315 (1978).

In December 1981, a district court held the ratification extension unconstitutional in a suit in which the defendant was the Administrator of the General Services Administration. Idaho v. Freeman, 529 F. Supp. 1107 (D. Idaho 1981), vacated mem., 103 S. Ct. 22 (1982). The Attorney General appealed to the Supreme Court but opposed efforts of the defendant-intervenor National Organization for Women to seek an expedited appeal. The Department argued that judicial intervention was premature but claimed to take no position on the merits. Department of Justice Press Release, Jan. 5, 1982. Even if the actions of the Department are not seen as opposing the extension for political reasons, criticism of the Executive for a lackluster defense of congressional intent is as justified in this case as it was for the conduct of the Department in Oregon v. Mitchell, 400 U.S. 112 (1970) (discussed infra note 40).

34. For example, the court in League of Women Voters v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980) was troubled because the passage of the statute by Congress and the acquiescence by the Executive in a declaration of its unconstitutionality presented this problem: “This suit is flavored by a sub silentio prayer by the Executive branch for action by the Judicial branch that it cannot take itself.” Id. at 521.

35. The Attorney General, for example, does not usually inform Congress of the intention of the Department before it actually declines to defend a statute. See The Representation of Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 94th Cong., 2d Sess. 86 (1975) (supplemental statement of Rex Lee, Ass't Att'y Gen., Civil Div., Dept. of Justice) (“It is not the practice of the Department of Justice to consult with Congress in determining whether to defend a statute, nor does it consult with Congress in determining whether to appeal an adverse constitutional holding.”).

36. 2 U.S.C. § 288k(b) (1982). This provision also requires the Attorney General to notify the Senate Legal Counsel of decisions not to appeal holdings adverse to the constitutionality of statutes “within such time as will enable the Senate to direct the Counsel to intervene as a party in such proceeding . . . .” Id. On other occasions, Congress has enacted similar reporting provisions on appropriations bills, typically requiring notification from the Attorney General to Congress whenever a decision not to appeal a decision is made. See, e.g., Pub. L. No. 96-132, § 21, 93 Stat. 1041, 1049
required to notify the Senate of the Attorney General's decision, unless he determines that intervention in the suit would be in the best interests of the Senate. The public may never be notified.

B. Limitations of Judicial Review of Executive Discretion

Given the constitutional imbalances caused by executive discretion not to defend statutes and the limitations on congressional attempts to deal with this problem on an ad hoc basis, one might argue that the courts should step in to correct the matter. For example, courts theoretically could issue a writ of mandamus to compel the Attorney General to defend the challenged statute. But the courts would be unlikely to do so because of the serious separation of powers problems such an action would present and because a judicially coerced defense would be unlikely to be as zealous or enthusiastic as a voluntary one. Moreover, judicial action could cause its own constitutional imbalances: It is simply not the role of the courts to order the other branches of government to take specific legal positions in live cases. Even inviting outside amici curiae to defend the statute would be an inadequate check: Amici cannot appeal from adverse decisions, they cannot move for summary judgment or otherwise participate in the actual conduct of the litigation, and they cannot provide a suit.

(1979); Pub. L. No. 95-624, § 13, 92 Stat. 3459, 3465 (1978). Unlike the reporting provision of 2 U.S.C. § 288k, these provisions were of limited duration and did not authorize a house of Congress to intervene in the case or to appeal.


38. Congress cannot compel the Attorney General to defend a statute by legislative means; the most it can do is to cut off funds to the Justice Department. See supra note 27. Although the House of Representatives could impeach the Attorney General or the President for his failure to exercise the powers of his offices, U.S. Const. art. I, § 3, cls. 6, 7, impeachment is simply too extreme a sanction for this situation. See R. Berger, Impeachment: The Constitutional Problems 299-301 (1973).

39. The writ may be issued against executive officers who fail to perform ministerial duties, the performance of which is not discretionary but mandatory. Mississippi v. Johnson, 71 U.S. (4 Wall.) 475 (1866); Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Before issuing the writ, the court would likely recognize that any party with standing to seek the writ would have standing to defend the statute. A court would undoubtedly refuse to recognize that an injury exists for the purpose of a writ if the party seeking the writ refused to undertake the defense of the statute himself.


The amendment's constitutionality was challenged in Oregon v. Mitchell, 400 U.S. 112 (1970). During oral argument in the case, the Solicitor General explained to the Court that the executive branch did not support the provision on any constitutional basis and that the Attorney General therefore felt that he should not defend the provisions. Transcript of Oral Argument at 27-28, Oregon v. Mitchell, reprinted in 123 Cong. Rec. 2974 (1977). The presentation of the government has been characterized as "lackluster and unenthusiastic," id. (remarks of Senator Abourezk), and has been implicitly blamed for the Court's decision to uphold the provision only as to national elections. Greene, Congressional Power over the Elective Franchise: The Unconstitutional Phase of Oregon v. Mitchell, 52 B.U. L. Rev. 505, 565 (1972).
with an adverseness of parties that it would otherwise lack.\textsuperscript{41} In these circumstances, Congress is the natural party and the courts should look no further to find the proper defendant.

To restore the proper relationship between the Executive and the legislature, and to protect Congress' legislative prerogatives, Congress should strengthen its powers to intervene in constitutional cases in three ways. First, the Ethics in Government Act should be amended to recognize explicitly that a representative of either house of Congress may intervene by right in any action in which the constitutional validity of an act of Congress is placed in issue and in which the Executive does not defend the statute. The Act currently allows the Office of Senate Legal Counsel to intervene in suits in which the constitutional powers and responsibilities of Congress are placed in issue or in which intervention is necessary to appeal court decisions affecting the constitutionality of federal statutes.\textsuperscript{42}

\textsuperscript{41} The existence of a truly adversary "case or controversy" under Article III of the Constitution must be determined from the positions of the original parties to the suit. But see infra note 72 (agreement of Attorney General with plaintiff that statute is unconstitutional will not bar adjudication after congressional intervention). The Supreme Court has held that a suit between two parties without any real dispute was to be dismissed as nonadverse even though the United States had intervened as a party on the trial level to defend the statute under constitutional attack. United States v. Johnson, 319 U.S. 302 (1943) (per curiam). In this case, the original plaintiff sued his landlord for violation of rent control legislation. Roach v. Johnson, 48 F. Supp. 833 (N.D. Ind. 1943). The district court dismissed the complaint, holding that the legislation and the regulations promulgated under it were unconstitutional. Id. at 835. The United States intervened and appealed the holding on the ground that because the landlord-defendant financed and controlled the plaintiff's case, the suit was collusive. The Supreme Court agreed, holding that in the absence of a genuine adversary issue between the parties, a "court may not safely proceed to judgment, especially when it assumes the grave responsibility of passing upon the constitutional validity of legislative action." Id. at 304. Moreover, the distinction between cases and controversies on the one hand, and advisory opinions on the other hand, is lost if a trial court can merely invite an \textit{amicus} to provide the "adverse" viewpoint on any question any party desires litigated.

\textsuperscript{42} 2 U.S.C. §§ 288k(b), 288e(a) (1982). Whether Congress intended this section to authorize the Senate to defend statutes on the trial level is uncertain. The Senate Report stated only that the purpose of the section was to "permit the Congress to make arrangements for intervention [and to] appeal such adverse finding with respect to constitutionality." S. REP. NO. 170, 95th Cong., 2d Sess. 107, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4216, 4323. The notification is required for any proceeding in which the Attorney General or the Solicitor General has made a decision not to appeal a decision holding a statute unconstitutional. Since a determination not to defend a statute on the trial level is a decision not to appeal a decision adverse to its constitutionality, the spirit of this provision, if not the letter, requires notification in time for intervention at the trial level.

This appears to be the understanding of the Justice Department. On one occasion the Attorney General explicitly relied on this provision to notify the Senate of his determination not to defend the constitutionality of a federal statute while the matter was pending before the trial court. Letter from Attorney General Griffin Bell to Michael Davidson, Senate Legal Counsel (Aug. 6, 1979) (on file with Senate Legal Counsel); \textit{see Department of Justice Authorization Hearings, supra} note 7, at 855 (testimony of Alice Daniel, Asst Att'y Gen., Civil Div., Dept' of Justice). In another case, the Attorney General notified the Senate of his determination not to defend a statute being challenged in cases in two jurisdictions without explicitly relying on any statutory mandate. Letter from Benjamin Civiletti to Vice President Mondale (Jan. 5, 1981) (on file with Senate Legal Counsel).

The Senate has appeared at the trial level in only one case following notification from the Justice Department of its determination to forego a constitutional defense of the statute in question. \textit{See} League of Women Voters v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980). The Justice Department notified Senate Majority Leader Robert Byrd of its decision not to defend the statute on October 11,
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The Act should be amended to recognize the right of either house of Congress to appear at the trial level to defend any undefended federal statute. Second, the Act should be amended to recognize the right of the House of Representatives to intervene in such cases and to appeal adverse decisions. The Senate Legal Counsel may represent the Senate to protect the interests of Congress as a whole when it intervenes in such a case. But because executive refusals to defend statutes affect both houses equally, both houses should possess an equal and independent authority to protect their interests. 43


43. Defense of a statute by one house of Congress (as opposed to a defense undertaken by Congress as a whole) is consistent with the constitutionally independent roles of each house with respect to the other. Examples of this congressional separation of powers are numerous. For example, each house has a different composition reflecting the dominance of different interests; the Constitution makes no provision for joint (or bicameral) officers of Congress; each house separately drafts and votes on legislation; appropriations bills must arise in the House, while the Senate has a special role in advising and consenting to treaties and various executive appointments; and there are separate roles for the two houses in impeachment proceedings.

The congressional defense of statutes has the character of preserving the status quo. It does not have the character of a new legislative action and therefore there is no constitutionally compelling reason why the defense could not be undertaken by one house rather than by Congress as a whole. Moreover, because the original statute may well have been passed as a result of a legislative compromise between the two houses, requiring that authorization to defend a challenged statute be passed by both houses would be unreasonably harsh: It simply may not be possible to recreate the original legislative compromise when the house desiring that the statute be defended has nothing with which to bargain to gain the other house's approval.

There have been independent actions by each house in analogous contexts in the past. For example, the statute challenged in United States v. Lovett, 328 U.S. 303 (1946), was rejected four times by the Senate as unconstitutional. After final passage by Congress, the House of Representatives, later joined by a reluctant Senate, undertook its defense in the Court of Claims. Id. at 306.

Most important, a one-house defense would serve as a check against the Executive and the other house acting in collusion to permit judicial invalidation of a statute that the intervening house wishes preserved. Bicameralism was one of the Framers' means of preventing legislative domination of the federal government. See, e.g., THE FEDERALIST No. 51, at 353 (J. Madison) (F. Dunne ed. 1901); Levi, Some Aspects of Separation of Powers, 76 COLUM. L. REV. 371, 374-75 (1976). It was also a means of checking the impulsive actions of one house acting alone. See Watson, Congress Steps Out: A Look at Congressional Control of the Executive, 63 CALIF. L. REV. 983, 1032-43 (1975), and authorities cited therein.

In one case, the perception of the President acting in concert with the Senate to deprive the House of Representatives of a role in the decision to transfer the Panama Canal and Canal Zone to the Republic of Panama led 60 House members to seek judicial relief. Edwards v. Carter, 580 F.2d 1055 (D.C. Cir.) (per curiam), cert. denied, 436 U.S. 907 (1978). The members unsuccessfully challenged the transfer on the ground that it was effectuated by means of a self-executing treaty proposed by the President and consented to by the Senate without the constitutionally required participation of the House of Representatives. The members urged that the property clause, U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .") (emphasis added), required House approval of a transfer of this magnitude. The court disagreed, holding that the property clause did not provide the only means by which property of the United States could be disposed of. Edwards,
Finally, the Attorney General should be required to notify both houses of Congress publicly of all decisions not to defend federal statutes. In addition to insuring that all members of Congress would be made aware of all of these decisions, this proposal would make the Executive and Congress politically accountable to the public for their discretionary decisions not to defend statutes. The requirement that the Attorney General publicly notify Congress of all decisions not to defend statutes by publication in the *Congressional Record* would insure that these decisions are subject to public awareness and scrutiny regardless of whether either house decides to undertake their defense.

At any stage of the litigation, either house could choose to support the decision of the Justice Department not to defend a challenged statute. For example, the Senate has taken no action in at least six cases following notification from the Attorney General of his determination not to defend the statutes in question. Because of the nature of the challenged statutes, in all of these cases a decision by the Senate to intervene and to support the statute would have been politically inconvenient at best and politically embarrassing at worst. While this lack of action implies Senate acquiescence in these repeals of convenience, the Senate has also been spared accountability to the voters for these decisions. Greater public scrutiny, however, would insure that both houses would become politically accountable for such decisions.

580 F.2d at 1064.

44. Although the Senate Legal Counsel is currently required to notify the Senate leadership of all suits in which he determines that intervention is necessary to protect the interests of the Senate, 2 U.S.C. § 288e(b) (1982), in the exercise of his judgment, the counsel could fail to inform the Senate of a case that the Senate or the House of Representatives would have chosen to defend. Judgment disagreements between the Senate and the Senate Legal Counsel are not unknown. For example, no action was taken by the Senate on a recommendation by the counsel that the Senate intervene in Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.), vacated mem., 444 U.S. 996 (1979), at the circuit court level. See Notice to the Senate With Respect to Goldwater Against Carter, 125 Cong. Rec. 31,300-01 (1979). In addition, in INS v. Chadha, 103 S. Ct. 2764 (1983), nine members of the House of Representatives submitted an *amicus* brief to the Court to oppose the efforts of the House's counsel to uphold the legislative veto. See id. at 2772-73 n.4. Public notification would insure that the congressional leadership and all other members of Congress would be able to exercise independent judgment on whether to intervene in those cases in which the constitutionality of federal statutes is at stake.

45. *See* Letter from Barbara Babcock to Vice President Mondale (May 8, 1979) (Justice Department declined to defend statute at trial level requiring surplus arms to be sold at cost only to members of National Rifle Association); Letter from Attorney General Griffin Bell to Sen. Byrd (May 8, 1979) (gender discriminatory social security provisions not defended); Letter from Kenneth Geller, Deputy Solicitor General, to Michael Davidson (Oct. 1, 1979) (deciding not to appeal adverse decision in Gavett v. Alexander, 477 F. Supp. 1035 (D.D.C. 1979) (National Rifle Association case)); Letter from Attorney General Civiletti to Vice President Mondale (July 3, 1980) (subsidized bulk mail rates not defended in challenge by other political parties); Letters from Attorney General Civiletti to Vice President Mondale (Oct. 23, 1980 and Jan. 5, 1981) (gender discriminatory social security provisions not defended) (letters on file with Senate Legal Counsel).
II. Constitutional Objections to Congressional Defenses

Suits in which an attorney representing congressional interests defends the constitutionality of federal statutes present a number of constitutional problems concerning the jurisdiction of the federal courts to hear such cases. Most of these problems arise from the apparent novelty of Congress asserting an interest in the litigation of constitutional issues—an area traditionally the exclusive domain of the Executive. Private litigants can be expected to challenge congressional standing and the jurisdiction of the federal courts. Courts should recognize that these constitutional and jurisdictional limitations should not bar Congress from exercising its legitimate prerogative to defend statutes in appropriate cases.

A. Article III Barriers

To insure that judicial resources are not dissipated on advisory opinions but are effectively expended on disputes capable of remedy, federal courts exercise their jurisdiction only on adversary issues of real consequence that are properly brought within their jurisdiction as defined by statute or by Article III of the Constitution. Standing doctrine, the case or controversy requirement, and separation of powers barriers are three jurisdictional limits arising out of the Constitution. None of them bars a house of Congress from undertaking the defense of a federal statute.

1. Standing and the Injury Requirement

Standing is the right to bring a matter to the attention of a court. Whether a specific litigant has standing to bring or enter into a suit depends on that party’s relationship to the matter in dispute. The right of

47. See generally Brilmayer, The Jurisprudence of Art. III: Perspectives on the “Case or Controversy” Requirement, 93 Harv. L. Rev. 297 (1979) (good general discussion of principles underlying ripeness, mootness, standing to sue); Tushnet, Comment: The “Case or Controversy” Controversy, 93 Harv. L. Rev. 1698 (1980) (same); Brilmayer, A Reply, 93 Harv. L. Rev. 1727 (1980) (same).
48. Cf. Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972) (“Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as standing to sue.”).
49. In general, standing to sue exists if a plaintiff or potential intervenor alleges injury in fact, Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38-39 (1976), or the threat of real injury, O’Shea v. Littleton, 414 U.S. 488, 494 (1974), to an interest that is protected by statute or the Constitution, Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970). In addition to asserting a legally cognizable injury, the plaintiff must also allege that the injury was due to the actions of the defendant, or that the suit against the defendant will provide a remedy. Duke Power Co. v. Carolina Envl. Study Group, Inc., 438 U.S. 59, 72-78 (1978). Put another way, standing merely insures that “the individual complaining party [will] have such a strong connection to the controversy that its outcome will demonstrably cause him to win or lose in some measure.” Harrington v. Bush, 553 F.2d 190, 206 (D.C. Cir. 1977) (emphasis deleted).

The appeal in Harrington v. Bush followed the dismissal of a suit filed by a member of the House
Congress to defend statutes has been questioned—in part, because Congress cannot simply legislate itself standing to undertake such representation. But the injuries Congress suffers whenever a federal statute goes undefended by deliberate executive action provide the basis for its standing to defend in such a suit.

In general, congressional status does not automatically confer standing upon an individual who would otherwise lack standing. Nonetheless, ei-
ther house of Congress would unquestionably have standing to intervene in any suit to defend the constitutionality of a statute that confers a right, privilege, or benefit upon Congress because the loss of that benefit or privilege would satisfy the injury-in-fact requirement of standing. For example, the standing of the Senate to defend a provision for legislative review against attack was unquestioned in INS v. Chadha, where the challenged provisions granted to each house of Congress a specific right to overturn executive branch decisions to suspend deportation proceedings against individual aliens. The injury that gave rise to standing was the potential loss of legislative review power that the statute conferred.

When the Executive fails to defend a statute, Congress suffers two distinct injuries irrespective of any additional loss of statutory benefits: Congress suffers the threatened nullification of the specific exercise of its legislative authority in that case, and it suffers a material diminution of its Article I powers in general because the Executive has increased its power in the law-making process over that of Congress.

The nullification of a legislative vote by an invalid pocket veto or by


53. In addition to the standing requirement, in order for a party to intervene as of right, there must also be a showing of an interest that would be impaired without representation in that suit, and an absence of adequate representation for the intervenor's interests by the original parties. Fed. R. Civ. P. 24(a); see Atlantis Dev. Corp. v. United States, 379 F.2d 818, 825-28 (5th Cir. 1967).

54. 103 S. Ct. 2764 (1983). The legislative veto in this case was exercised by the House of Representatives.

55. Both of these injuries have been judicially recognized in suits by individual members of Congress in different contexts. See, e.g., Harrington v. Bush, 553 F.2d 190, 204-14 (D.C. Cir. 1977) (diminution of Article I powers provides individual legislator with standing); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974) (illegal nullification of vote by Executive provides all legislators who voted for bill with standing). Both injuries also have been held to satisfy the injury-in-fact requirement for the standing of legislators—even though their injuries were derivative of the injury to Congress as a whole. See Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977); Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974). The injury to Congress that gives rise to standing may, of course, be indirect. The invalidation of a statute that does not directly grant Congress a right, benefit, or privilege will injure others more directly than the Congress. But "[t]he fact that the harm . . . may have resulted indirectly does not in itself preclude standing." Warth v. Seldin, 422 U.S. 490, 504-05 (1975); accord Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 261-64 (1977); United States v. SCRAP, 412 U.S. 669, 686 (1973); Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972). Thus, in Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), Senator Kennedy was granted standing to challenge an allegedly illegal executive pocket veto based on the injury to him in his legislative capacity and not because he lost benefits to which he otherwise would have been entitled under the invalidated Family Practice of Medicine Act: "The prerequisite to standing is that a party be 'among the injured' . . . not that he be most grievously or the most directly injured." Id. at 435.

56. In Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974), the D.C. Circuit recognized Senator
procedural irregularity constitutes a judicially cognizable and remediable injury to every legislator who voted for the bill. Standing is assured in such suits because all legislators have a "plain, direct and adequate interest in maintaining the effectiveness of their votes." Normally the votes of Congress and all other specific exercises of legislative authority are implicitly protected when the Executive defends federal legislation against constitutional attack. Since individual members of Congress would have standing to defend an otherwise undefended statute to protect the effectiveness of their votes, Congress, or a single house of Congress, would also have standing to protect against the rendering of its corporate vote "a direct and immediate nullity."

Standing by a house of Congress to defend a statute also exists because

Kennedy's standing to challenge the claimed exercise of a pocket veto by President Nixon. On December 14, 1970, Congress presented to President Nixon the Family Practice of Medicine Act, which had been passed by both houses with a total of three dissenting votes. 116 Cong. Rec. 31,508 (1970) (one dissenting vote in Senate); id. at 39,379 (two dissenting votes in House). Congress adjourned on December 22 for the Christmas holidays and both houses returned before the end of December. During the period of the Christmas recess, President Nixon announced that he would not sign the bill. Because Congress was in temporary adjournment at the expiration of the ten days provided by the Constitution for the return to Congress of disapproved legislation, the Executive treated the bill as if it had been subject to a pocket veto. The bill was not published as law.

Article 1, § 7, cl. 2 of the Constitution provides that "[i]f any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law . . . unless the Congress by their adjournment prevent its Return, in which Case it shall not be a Law." Even though the Congress had temporarily adjourned, the Secretary of the Senate had been authorized to receive messages from the President during the recess. 116 Cong. Rec. 43,221 (1970); see Kennedy v. Sampson, 511 F.2d at 436-42.

Senator Kennedy challenged this disposition of the bill and sought a declaratory judgment that the bill validly had become law. (Arthur Sampson, the defendant, was the acting administrator of the General Services Administration and was responsible for the publication of the United States Statutes at Large pursuant to 1 U.S.C. §§ 106(a), 112, 113 (1982).) His standing to bring the suit was challenged by the Justice Department.

The court granted the relief requested by the individual senator and noted that even the Justice Department, which had originally challenged Senator Kennedy's standing to bring the suit, had argued that the Senate as a body would have standing to prosecute the suit. 511 F.2d at 434 & n.13; see also Brief for Appellants, at 29-41, Goldwater v. Carter, 617 F.2d 697 (D.C. Cir.) (executive branch recognized standing of Senate as a whole to raise constitutional issues relating to nullification of votes), vacated mem., 444 U.S. 996 (1979).

In Kennedy v. Jones, 412 F. Supp. 353 (D.D.C. 1976), the standing of the senator to challenge the validity of another intrasession pocket veto was recognized after Congress had passed and the President signed legislation identical to the bill that was "vetoed." The court granted the senator's request for relief and ordered the publication of the earlier bill, even though there was no change in the effective law as a result of the duplicative publication. In refusing to recognize the issue as moot and in granting relief, the court acted only to protect the effectiveness of a specific exercise of legislative authority from injury caused by "the refusal of the defendants to perform their . . . duties." Id. at 356.

57. In Coleman v. Miller, 307 U.S. 433 (1939), the Supreme Court recognized the standing of state legislators to challenge the effective nullification of their votes by an alleged procedural irregularity. The Kansas Senate had voted 20 to 20 on the ratification of the Child Labor Amendment and the tie was broken in favor of ratification by the Lieutenant Governor. The senators who voted against ratification of the amendment had standing to challenge the authority of the Lieutenant Governor to cast the tie-breaking vote.

58. Id. at 438.

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of the diminution of its legislative powers caused by the Executive's failure to defend the challenged statute.60 The protection of the "core functions" of the political branches under the Constitution is a function of the judiciary.61 In the absence of Justice Department representation, either house would have standing to defend its core legislative function against diminution by the Executive and thereby enable the judiciary to fulfill its assigned role.

2. The Case-or-Controversy Requirement

In the absence of any truly adversary interests affected by the suit, a court is without power to settle the abstract question of the constitutionality of a federal statute.62 Thus, when dismissing a case in which both the appellant and the state agreed that the lower court holding was incorrect, the Supreme Court tersely held: "We are thus confronted with the anomaly that both litigants desire precisely the same result, namely a holding that the anti-busing statute is constitutional. There is, therefore, no case or controversy within the meaning of Art. III of the Constitution."63

Congressional interests in preserving the validity of statutes would be protected if all suits were dismissed in which the Executive agrees with the plaintiff that the statute is unconstitutional. Indeed, Congress has actively sought to have such cases dismissed.64

60. See supra pp. 976-80.

61. Kaufman, The Essence of Judicial Independence, 80 COLUM. L. REV. 671, 690-93 (1980). To protect the constitutionally assigned powers of the President, in Myers v. United States, 272 U.S. 52 (1926), the Supreme Court struck down a statute that, by preventing the Executive from removing subordinates without legislative approval, interfered with the duty of the Executive to enforce the laws effectively. Similarly, the courts have protected the integrity of the plenary allocation of all legislative powers granted by Article I to the Congress. For example, relying on a holding by the Supreme Court that congressional investigations are an "essential and appropriate auxiliary to the legislative function," McGrain v. Daugherty, 273 U.S. 135, 174 (1927), one court has explicitly recognized that the House of Representatives "as a whole has standing to assert its investigatory power." United States v. AT&T, 551 F.2d 384, 391 (D.C. Cir. 1976).


64. In League of Women Voters v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980), the district court dismissed the suit on the suggestion of the Senate because the position of the defendant Federal Communications Commission was in agreement with the opposing party's position that the challenged statute was unconstitutional. The court also based its decision on ripeness grounds: Because there had been no enforcement or threat of enforcement of the statute against the plaintiffs, there was no concrete factual basis upon which the court could adjudicate the merits. Id. at 519-20. Whether on standing or ripeness grounds, "the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting;" Poe v. Ullman, 367 U.S. 497, 507 (1961); see also Delaware Women’s Health Org. v. Wier, 441 F. Supp. 497 (D. Del. 1977) (dismissal of non-adversary challenge to anti-abortion statutes after State's attorney general agreed that statutes were unconstitutional and issued opinion announcing that they would not be enforced); accord Granfield v. Catholic Univ., 530 F.2d 1035 (D.C. Cir. 1976).

To avoid defending the constitutionality of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 93 Stat. 324 (1982), the Senate has actively sought to be dismissed as
However, when the Justice Department refuses to defend a statute against constitutional attack, its agreement with the opposing side that the statute is unconstitutional will not necessarily resolve the "case or controversy" and render the suit unfit for judicial resolution. In INS v. Chadha, a nonresident alien challenged the constitutionality of the legislative veto provisions of the Immigration and Naturalization Act, under which he was subject to immediate deportation. The jurisdiction of the Court to hear the case was questioned because at all stages of the constitutional challenge, the executive branch had agreed with Chadha that the statute was unconstitutional. Nonetheless, the Court found a justiciable case or controversy in the legal relations between the parties outside of the courtroom: "Chadha has asserted a concrete controversy, and our decision will have real meaning: if we rule for Chadha, he will not be deported; if we uphold § 244(c)(2), the INS will execute its order and deport him." Thus, when a party is threatened with the enforcement of a federal statute and the enforcing agency or the Department of Justice agrees that the statute is unconstitutional, that agreement alone will not prevent a court from exercising jurisdiction in the case: "It would be a curious result if, in the administration of justice, a person could be denied access to the courts because the Attorney General of the United States agreed with the legal arguments asserted by the individual." A genuine adversary issue a defendant from a number of lawsuits. See Brief in Support of Motion of Senate Defendants to Dismiss, Paul v. The Executive Branch of the Union Known as the United States of America, 83-2 T.C. 9446 (W.D. Wis. 1983); see also Klingler v. The Executive Branch, 572 F. Supp. 589 (M.D. Ala. 1983). TEFRA has been challenged because the Constitution requires tax measures to originate in the House of Representatives, U.S. CONST. art. I, § 7, cl. 1, and TEFRA was almost solely the result of a Senate amendment. The Senate has argued that the United States—not the legislative branch—is the proper defendant and that the Senate is immune from such suits. See Brief in Support of Motion at 2-12, Paul.

66. 8 U.S.C. § 1254(c)(2) (1982) (permits either house of Congress to require Attorney General to terminate suspension of deportation proceedings when either house finds that suspension is unjustified).
67. See Brief for United States House of Representatives, Appellee-Petitioner, at 46-47, Chadha.
68. 103 S. Ct. at 2778.
69. Id. But see League of Women Voters v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980) (challenge to federal statute dismissed, in part, because Attorney General agreed with plaintiffs that statute was unconstitutional).

This result is hardly surprising. In other contexts courts often exercise jurisdiction or proceed to the merits in the absence of a traditionally adversary case or controversy. Courts will, for example, invite appearances by amici curiae to present arguments in the defense of a challenged holding or statute. See, e.g., Cheng Fan Kwok v. INS, 390 U.S. 918 (1968) (invitation to private counsel to argue in support of decision below); Granville-Smith v. Granville-Smith, 349 U.S. 1, 4 (1955) (invitation to "specially qualified counsel"); Atkins v. United States, 556 F.2d 1028, 1058 (Ct. Cl. 1977) (invitation submitted to President of Senate and Speaker of House). (This method of securing "adversary parties" is purely discretionary with the court and, in addition, suffers from the drawbacks discussed at supra pp. 981-82.) Courts will also exercise an independent review not barred by the concurrence of the parties before it on a question of law when there is a confession of error on appeal. See, e.g., Young v. United States, 315 U.S. 257 (1942) (confession of error by the Solicitor General); Sibron v. New York, 392 U.S. 40 (1968) (confession of error by local district attorney); Note, Confessions of
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between the parties arises from the respective legal obligations of the parties toward each other. This "adversary issue" continues to exist in the real world with real, demonstrable consequences to the complaining party—the statute will be enforced against him—indisputably and independently of whether the government justifies its actions in the abstract world of constitutional argument. To hold that a court must decline jurisdiction in such circumstances on case or controversy grounds "could insulate unconstitutional orders and procedures from appellate review simply by [defendants] agreeing that what they did was unconstitutional... [I]t would be a perversion of the judicial process to dismiss the appeal and thereby permit the order to be enforced on such grounds."  

Permitting congressional intervention, should a house choose to appear, will provide these suits with an adverseness of parties otherwise lacking.

Error by the Solicitor General, 74 Mich L Rev. 1067, 1070 (1976). The court, of course, need not accept the confession of error in spite of the agreement of the parties on its merits. See Weber v. United States, 315 U.S. 787 (1942), aff'd 119 F.2d 932 (9th Cir. 1941). Finally, courts will enter default judgments on the motion of one party—even against the United States—if the "claimant establishes his claim or right of relief by evidence satisfactory to the court." FED. R. Civ. P. 55(e).

70. See supra note 41 (discussing United States v. Johnson, 319 U.S. 302 (1943) (per curiam)).

71. Chadha v. INS, 634 F.2d 408, 420 (9th Cir. 1980), aff'd, 103 S. Ct. 2764 (1983). In a footnote, the court acknowledged the congressional amici's claim that there was no adverseness of parties to satisfy the requirements of Article III because, as amici, they could not appeal an adverse decision. Id. at 420 n.9. After holding against their position on that argument and against them on the merits, the court granted the amici's motion to intervene so that they could, successfully, appeal the decision. See Brief of the United States Senate, Appellee-Petitioner, at 6, Chadha. The House of Representatives had raised this argument in its brief, Brief of the U.S. House of Representatives at 46-47, Chadha, and argued the point before the Court in oral argument: 50 U.S.L.W. 3689 (U.S. Mar. 2, 1982).

72. The Supreme Court has for the most part determined that Congress is a proper party to defend statutes undefended by the Executive. See INS v. Chadha, 103 S. Ct. 2764, 2778 (1983). Yet the Court's conclusion is problematic for several reasons. First, the Court did not explicitly answer the question of whether a house of Congress, as opposed to Congress as a whole, is a proper party to defend an otherwise undefended statute: In Chadha the House and Senate were separate parties, petitioned separately for certiorari, 454 U.S. 812 (1981), and advanced separate arguments in support of the legislative provisions. Compare Brief of the United States House of Representatives, Appellee-Petitioner Chadha with Brief of the United States Senate, Appellee-Petitioner, Chadha.

Second, the Court's statement that the suit had sufficient adverseness when the congressional parties formally intervened, 103 S. Ct. at 2778, confuses the question of whether a case or controversy is to be found in the original position of the parties, or in the position of the parties before the appellate court. In Muskrat v. United States, 219 U.S. 346 (1911), the Supreme Court held that Congress could not confer jurisdiction on the federal courts to adjudicate the constitutionality of a statute against a nonadverse executive branch. In United States v. Johnson, 319 U.S. 302 (1943) (per curiam), the Court dismissed an action as nonadverse even after the United States had intervened as a party to defend the statute on the merits. See supra note 41. Taken together, these two cases imply that the existence of requisite adverseness must be found in the position of the original parties. Chadha now implies that in the special case in which Congress has intervened or appeared as amicus to defend a statute undefended by the Executive (which will enforce the statute against the plaintiff absent a judicial declaration of its unconstitutionality), an adverse and justiciable case or controversy will be recognized.

Third, the Court's conclusion that "w[e have long held that Congress is the proper party to defend the validity of a statute when [the government] agrees with the plaintiffs that the statute is inapplicable or is unconstitutional," 103 S. Ct. at 2778 (citing Cheng Fan Kwok v. INS, 392 U.S. 206, 210 n.9 (1968); United States v. Lovett, 328 U.S. 303 (1946)), is puzzling because neither of those cases directly supports that proposition. In Cheng Fan Kwok, the Court invited a private attorney to appear
Resolving the constitutional issue presented would remove the Executive from the awkward, Janus-like posture of threatening a party with the imposition of sanctions based upon a statute that the Executive argues cannot constitutionally be enforced. Lacking the certainty that all such suits will be dismissed, Congress must recognize its responsibility to assert a role in the defense of statutes to protect its constitutionally assigned legislative functions.

3. Separation of Powers Prohibitions

Although the representation of the United States before the courts is an executive function, the separation of powers doctrine does not prevent Congress from intervening in a suit to defend a statute. Where the executive branch has already declined to provide a defense, intervention, or an appeal by the Senate or the House, could hardly constitute an encroachment on the executive power to defend statutes because the power was deliberately unexercised in that case. Moreover, Congress would not be usurping the role of the Attorney General as the representative of “the United States.” Rather, it would represent its own interests and protect the integrity of the legislative process by defending the congressional policy choice embodied in the statute.

This conclusion is consistent with the holding of the Supreme Court in and argue in favor of the judgment below. Such invitations by themselves are not uncommon. See supra note 69. Cheng Fan Kwok, however, only presented the question of whether the statute was enforceable against the plaintiff in the circumstances of the case, not whether the statute itself was constitutional. Furthermore, in Lovett the Attorney General notified Congress that he could not support the constitutionality of a statute that restricted the President's removal power and that had the effect of a bill of attainder. Congress then authorized private counsel to defend the statute. See Ely, supra note 27. Like the legislative veto cases, the statute challenged in Lovett was a congressional attempt to circumscribe presidential authority. The case therefore only provides support by analogy for an appearance by a house of Congress to appear and defend a statute that does not affect or restrict either executive or legislative authority.

73. See Buckley v. Valeo, 424 U.S. 1, 138 (1976) (per curiam); United States v. San Jacinto Tin, 125 U.S. 273, 278-80 (1888); The Confiscation Cases, 74 U.S. (7 Wall.) 454, 458-59 (1868); see also 28 U.S.C. § 516 (1976) (conduct of litigation in which United States is party is left to discretion of Justice Department except where otherwise provided by law).

74. But see Hearings on S. 555, supra note 42 (congressional defense of statutes unconstitutional). For an excellent discussion of what “separation of powers” entails and a plea for a flexible approach to these sorts of problems, see 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2:6 (2d ed. 1978).

75. One could argue that part of possessing a power is the concomitant prerogative of deciding when to use it. Thus, the argument would run, the congressional defense of a statute would be unconstitutional because it would undermine the Executive's implied right not to defend statutes. However, not all executive powers imply a prerogative to decline to exercise them. For example, although the President is given all executive powers by article II, § 1, cl. 1, and the power faithfully to execute the laws by article II, § 3, the President may not impound funds approved by Congress for disbursement. Train v. City of New York, 420 U.S. 35 (1975); supra note 6. Similarly, Part I of this Note argues that the Executive's authority to defend statutes does not imply a right to refuse to defend them. Thus, the congressional defense of a statute would interfere with the Executive's right to defend statutes only after the Executive had already proffered a defense.
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*Buckley v. Valeo.* In that case, the Court held that the Federal Election Commission, composed of appointees of Congress, could exercise only those powers that Congress itself could exercise and could not exercise powers that are inherently executive in nature. The civil enforcement powers given the commission were held to be beyond the competence of legislative appointees because the legislative power "as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions."

A prohibition of congressional enforcement of statutes, however, does not imply a prohibition of their defense by Congress. To see this, one must distinguish between the *enforcement* of a law and the *defense* of a law before a court. In *Buckley*, the Court held only that the power to enforce statutes could not be exercised by Congress. But the Court made clear that holders of congressionally created offices may properly perform duties that are in aid of those functions that Congress can carry out for itself or that are "in an area sufficiently removed from the administration and enforcement of public law as to permit their being performed by persons not 'Officers of the United States.'" Under the scheme proposed

76. 424 U.S. 1 (1976) (per curiam).
77. Id. at 138.
78. The civil enforcement powers held to be beyond the commission's authority consisted of the powers to institute civil actions for declaratory and injunctive relief against acts that violated, or would violate, the act; to implement or to construe the provisions of the act governing funds for presidential campaigns and national party conventions; to implement the provisions regarding the payment of matching funds; and to seek refunds of overpayments. Id. at 111.
79. Id. at 139 (quoting Springer v. Philippine Islands, 277 U.S. 189, 202 (1928)).
80. Enforcement is the discretionary invocation of administrative or judicially imposed sanctions prescribed by law against persons or organizations for specific offenses. By contrast, the defense of a law affects no person's rights directly: It is the invocation of a judicial determination, or the representation of certain arguments to lead the court to the determination, that the law is consistent with the Constitution and can, in future cases, be enforced. The Constitution places the authority to execute the laws on the Executive; it does not specify that only one of the political branches shall exclusively present arguments supporting the constitutionality of federal statutes to the courts.
81. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (enforcement powers may only be exercised by "Officers of the United States" appointed in accordance with U.S. Const. art. II, § 2). The standard articulated by the Court for determining whether a legislative appointee is acting as an Officer of the United States is of little help in determining whether the defense of a federal statute by a representative of a house of Congress is constitutionally prohibited: "We think [the] fair import of ["Officers of the United States"] is that any appointee exercising significant authority pursuant to the laws of the United States is an Officer of the United States, and must, therefore, be appointed in the manner prescribed by [the appointments clause]." Buckley v. Valeo, 424 U.S. at 126. Because the Court gave no indication of what constitutes "significant authority" except by way of examples, this definition of Officers of the United States has been criticized as characteristic of the I-know-it-when-I-see-it mode of constitutional analysis. See Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 Wayne L. Rev. 1335, 1337 (1976).
82. This must include, of course, the representation of congressional interests in court. See United States v. AT&T, 551 F.2d 384 (D.C. Cir. 1976); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725 (D.C. Cir. 1974).
83. Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); cf. Chadha v. INS, 634 F.2d 408, 425 (9th Cir. 1980) (separation of powers doctrine prohibits assumptions "by one branch of powers that are
in this Note, Congress would provide only a defense of a statute after the
decision by the executive branch not to defend it. Such an action would
not run afoul of the Buckley prohibition because it would be independent
of, and far removed from, the actual administration or enforcement of the
public law in question.

B. Prudential Barriers to the Congressional Defense of Statutes

To leave the resolution of certain kinds of disputes to the other
branches of government, courts have adopted "prudential" barriers to bar
such lawsuits. The congressional defense of statutes does not raise the
kind of issues which courts prudentially bar. Even if such issues were
implicated, they would present no permanent bar because prudential
standing barriers to congressional intervention can be removed by congress-
ional action.

1. Prudential Standing Concerns

In addition to the Article III requirements—assertion of a distinct and
remediable injury—courts will often impose a barrier of prudential stand-
ing rules to remove otherwise justiciable disputes from their jurisdiction.
These rules are closely related to Article III concerns, but arise indepen-
dently as matters of "judicial self-governance." They prevent the inappro-
priate use of the courts to decide abstract questions of wide public signifi-
cance when other governmental institutions may be more competent to
address them and when judicial intervention may be unnecessary to pro-
tect individual rights.

A relevant parallel can be found in cases in which the
courts have implied that the availability of a legislative remedy might bar
the standing of congressional plaintiffs on prudential

84. The best discussions of the problems raised
by prudential barriers to jurisdiction are Bickel,
The Supreme Court, 1960 Term—Foreword: The Passive Virtues, 75 HARV. L. REV. 40 (1961), and
86. See INS v. Chadha, 103 S. Ct. 2764, 2778 (1983) ("Of course, there may be prudential, as
opposed to Art. III, concerns about sanctioning the adjudication of this case in the absence of any
participant supporting the validity of [the challenged statute]."). For the reasons presented supra p.
981, it would be inappropriate for a court to invoke political question prudential barriers to jurisdic-
tion sua sponte when an otherwise justiciable suit is presented by the political branches for decision.
87. See, e.g., Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J.,
concurring) ("It never was the thought that, by means of a friendly suit, a party beaten in the legisla-
ture could transfer to the courts an inquiry as to the constitutionality of the legislative act.") (quoting
ally, unless an individual's rights are imperiled, courts will not act if the relief requested is within the primary competence and province of a political body or if such legislative relief is available and appropriate.

This kind of prudential concern should not prevent congressional intervention to defend the constitutionality of an otherwise undefended statute for two reasons. First, there is no alternative legislative relief. Congress cannot render a statute constitutional through legislative fiat, nor can it compel the Executive or a private party to secure a judicial declaration of its constitutionality. Second, and more important, Congress has restricted such an exercise of prudential discretion by the courts.

In *Warth v. Seldin* the Supreme Court enunciated the doctrine of prudential standing barriers and provided that "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." While this statement was made in the context of a suit by private plaintiffs against a governmental entity, it is of more general application: The Court explicitly acknowledged the authority of Congress to regulate access to the federal judiciary under Article III of the Constitution. What applies to private plaintiffs also applies to congressional plaintiffs. If there is an injury and the prospect of judicial relief, Congress may legislate itself standing to the extent that it can remove the prudential barriers that otherwise would have barred its access to the courts.

For example, the plaintiff in *Harrington v. Bush*, 553 F.2d 190 (D.C. Cir. 1977), was a member of the House of Representatives when he sought to enjoin the CIA from using funding and reporting provisions in connection with allegedly illegal activities. The D.C. Circuit affirmed the dismissal of the complaint on standing grounds, noting that the injury suffered by the congressman was caused by his colleagues in the House, who had enacted and utilized the "hidden" appropriations procedures for the CIA. It was also significant to the court that the plaintiff had introduced 23 bills in the three years prior to the filing of the suit to accomplish the same result as the lawsuit. The court, in essence, refused on standing grounds to grant the relief that would have been more appropriately granted, but had been denied, by Congress. *Compare id.* at 197 (judicial notice of failure of plaintiff's bills to pass) with *id.* at 215 (noting that to grant plaintiff relief, court would usurp legislative function of Congress and would overrule Congress' decisions to reject plaintiff's bills).

88. See supra note 38.
89. 442 U.S. 490 (1975).
90. Id. at 501.
91. The assertion by a representative from the Department of Justice that the Ethics in Government Act could not grant standing to permit Senate intervention is therefore only partially accurate: Congress can remove prudential—but not Article III—barriers to its standing. See *Hearings on S. 555*, supra note 42, at 32-33. In general, the view that Congress can grant itself standing to the extent that it can remove prudential barriers has support from commentators. For example, a D.C. Circuit judge has written that "[i]f the plaintiff passes the standing test and presents a justiciable dispute, it is assumed that the political branches have decided to commit such disputes to the judiciary and, barring extraordinary circumstances, that is a judgment which courts are bound to respect." McGowan, supra note 52, at 254-55.
Congress has already taken this action for the Senate and removed all prudential barriers to its intervention. The legislative history of the Ethics in Government Act demonstrates that Congress intended to grant intervention of right to the Senate Legal Counsel, subject to no prudential barriers, whenever the counsel is authorized to take action pursuant to a Senate resolution. A court may deny intervention only after an express finding that "such intervention . . . is untimely and would significantly delay the pending action or that standing to intervene has not been established under Section 2 of Article III of the Constitution of the United States." Congress can and should extend that prohibition to cover any action taken by a counsel for the House of Representatives as well.

Still, Congress cannot grant itself standing where it otherwise does not meet the Article III minimum requirements. However, the authority of Congress to restrict the courts from the consideration of prudential barriers and its authority to require them to consider only the fundamental Article III requirements for congressional standing also has the support of commentators. See, e.g., R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 326 (1973) ("Any doubts as to congressional 'standing' to complain of executive impairments of its functions can therefore be set to rest by statute."); McGowan, supra note 52, at 264-65 ("Conceivably Congress may be able to make its wishes known by limiting a federal court's discretion to withhold declaratory relief. As that discretion was bestowed by statute, Congress is arguably free to remove it either generally or with respect to particular cases."); Note, Congressional Access to the Federal Courts, 90 HARV. L. REV. 1632, 1647-48 (1977) (same).

Congress understood that this clause created a right of intervention for the counsel that could not be impeded by the discretion of a court. See supra note 92. In contrast to earlier proposals for a congressional counsel, which purported to grant standing without regard to the requirements of any provision of law, see, e.g., S. 3877, 93d Cong., 2d Sess., 120 CONG. REC. 26,575-76 (1974); S. 2569, 93d Cong., 1st Sess., 119 CONG. REC. 33,796-98 (1973), the Senate counsel proposal that ultimately passed recognized the limitations imposed by Article III on the counsel's standing and also recognized the authority of Congress to eliminate prudential barriers to intervention. Congress properly recognized that it need not establish standing to appear as amicus curiae; it need only establish that such appearance will not delay the proceedings. S. REP. NO. 170, supra note 92, at 108. The provision granting standing as of right does not establish that the Senate has standing in any particular lawsuit; it merely restricts the attention of the court making that determination from considering any prudential or discretionary concerns beyond the fundamental requirements of Article III.

Conversely, prudential barriers may still block suits by individual members of Congress not acting as the authorized representative of their house. This is especially true when there is a readily available legislative remedy for their complaint (which Congress may or may not be inclined to grant). When a senator is represented by the Office of Senate Legal Counsel, or when a member of the House of Representatives is represented by the counsel authorized by that house, prudential barriers should not be invoked to deny standing.

Given the reluctance in recent years of courts to entertain suits by individual members of Congress that were not authorized by their respective house, see, e.g., Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977); Harrington v. Schlesinger, 528 F.2d 455 (4th Cir. 1975), and given that a statutory mechanism now exists for the Senate to authorize representation in suits on its behalf, courts may become increasingly hesitant to grant standing to individuals attempting to assert legal rights on the basis of their status as members of Congress.
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2. Political Questions

Under the "political question" doctrine, courts will not resolve differences between the political branches when the resolution of the dispute turns on political, rather than legal, considerations. This doctrine is a judicially created barrier that serves primarily to define the proper judicial role relative to the other governmental institutions in our society. The grounds for invoking these prudential barriers include the respect due to the coordinate branches by the courts, the need for political and judicial reliance on political decisions already made, and the need to avoid embarrassing another branch by contradicting it.

All of these considerations may be present when a house of Congress seeks to intervene at the trial level to defend a statute. Moreover, the fundamental difference between the branches—disagreement over whether a particular statute should be defended—is indeed political. Nonetheless, whether a house of Congress may intervene in a suit is fundamentally a different kind of question than that which the political question doctrine

Three co-sponsors of the Ethics in Government Act have argued that a court ought not take into account the failure of the Senate to direct its Office of Legal Counsel to appear in a case brought by an individual senator. 125 CONG. REC. 28,406-07 (Oct. 16, 1979) (statements of Senators Ribicoff, Percy, Javits); accord 125 CONG. REC. 31,301 (1979) (statement of Senator Hatfield) (courts should draw no inference from refusal of Senate to intervene in Goldwater v. Carter). For example, the Senate may wish to stay neutral in a politically charged case; the senatorial plaintiff may already be defending the interests of the Senate adequately; or the Senate may be in disagreement over the position the body as a whole ought to take.

The Senate's failure to authorize the Senate Legal Counsel to appear makes absolutely clear that such a suit is brought by a senator in an individual capacity and not as a representative of the Senate. Given the reluctance of all three branches to participate in a government by litigation, a court properly could recognize that the lack of representation of a senator by the Office of Senate Legal Counsel (or the absence of authorization for official representation by the House for one of its members) means that the member of Congress must establish his individual right to standing. In such a case, prudential barriers, if appropriate, may still block prosecution of the suit. See Note, Should Congress Defend Its Own Interests Before the Courts?, 33 STAN. L. REV. 715 (1981).


97. Baker v. Carr, 369 U.S. 186, 217 (1962). It is difficult to see how intervention by Congress to defend the constitutionality of a statute could be disrespectful or "embarrassing" to the branch that declined to defend the statute in the first instance.

98. In an unsuccessful attempt to implicate political question concerns, one could argue that congressional intervention would not respect the Executive's decision to decline to defend the statutes, but see supra note 75 (no inherent executive right to decline to defend federal statutes), that the decision by Congress to defend a statute is a political choice contradictory to the decision already made by the Executive, but see infra note 100 (decision to defend statute is not political question), or that because Congress made a flagrant decision to undertake the defense that the Executive declined to undertake, the Executive will be embarrassed, but see supra note 97 (congressional defense would not embarrass Executive).

99. In a similar context, Justice Powell stated that "differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations." Goldwater v. Carter, 444 U.S. 996, 997 (1979) (mem.) (Powell, J., concurring).
bars courts from answering.\textsuperscript{100} Although political differences over the wisdom or desirability of a particular statute may animate both the Executive's refusal to defend it and congressional intervention on its behalf, the court is not asked to resolve that underlying political dispute.\textsuperscript{101} The court is asked, first, to exercise

\textsuperscript{100} In INS v. Chadha, 103 S. Ct. 2764 (1983), the Court rejected the argument of the House of Representatives that Congress' exclusive power over naturalization, combined with the necessary and proper clause, U.S. CONST. art. I, § 8, cl. 18, grants Congress unreviewable authority under the political question doctrine to legislate in the field. The Court held that the doctrine does not bar it from determining whether Congress adopted a constitutionally permissible manner of implementing its power. The Court recognized that to hold otherwise would turn almost every challenge to the constitutionality of a statute into an unreviewable political question about the adequacy of the legislative authority of Congress to enact the statute.

Since issues that have a textually demonstrable commitment to a coordinate political branch may be barred from judicial resolution under the political question doctrine, the House's argument assumed that by its legislation Congress had already resolved the issue of whether it had constitutional authority under the necessary and proper clause to enact the challenged statute. By enacting the statute, Congress demonstrated that it indeed did have the authority to enact it. Although this argument is a stunning Article I application of the I-know-it-when-I-see-it mode of circular constitutional jurisprudence, its flaw lies in confusing the difference between the constitutionality of an act of legislating, and the underlying constitutionality of the Act itself.

\textsuperscript{101} Compare Henkin, supra note 95, at 600 n.8 ("[T]he courts, it has been assumed, would not entertain a suit by Congress against the President alleging Presidential usurpation of congressional authority.") with id. at 624 ("Claims that the President had usurped congressional authority, or Congress the President's, were heard and adjudicated in several major cases in our history without a suggestion that the courts are barred by some political question doctrine.") (citations omitted). In a later article Professor Henkin explained that while such suits would be dismissed under "traditional" jurisprudence, courts should, and often do, apply different tests to determine whether to exercise jurisdiction in cases involving political questions or the separation of powers. Henkin, Litigating the President's Power to Terminate Treaties, 73 AM. J. INT'L L. 647 (1979); see also R. BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 340 (1974) ("To avoid adjudication by resort to the leaky doctrine of 'political questions' is to throw Congress back on its own resources, among them the impeachment of the President for encroachment on its prerogatives, [or for subversion of the Constitution.").

However, League of Women Voters v. FCC, 489 F. Supp. 517 (C.D. Cal. 1980), resolved a fundamentally political dispute between the Executive and Congress. The former had felt that a non-separation of powers statute should not be defended, while the Senate, at least, felt that it should be defended. Although this dispute had as much to do with the constitutional merits of the case as with the Executive's authority to decline to defend arguably constitutional federal statutes, see supra pp. 974-81, congressional powers with respect to the Executive were not directly implicated. The executive branch felt that the challenged statute was unconstitutional and should not be enforced because, in addition to serving no useful purpose, the statute chilled the exercise of First Amendment rights. Department of Justice Authorization Hearings, supra note 1, at 853-56 (testimony of Alice Daniel). The position of the Senate was that the statute constitutionally served the public interest by preventing government domination of the political content of public broadcasting. Notification to Joint Leadership Group from Senate Legal Counsel in Respect to League of Women Voters v. FCC, reprinted in 125 CONG. REC. 35,416 (1979).

Compare this view with the concurring view of Justice Powell in Goldwater v. Carter, 444 U.S. 996, 997 (1979) (mem.):

Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority... . The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.

Permitting and encouraging congressional defenses of federal statutes at the trial level, however,
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jurisdiction and to listen to the congressional defense and, second, to adjudicate the constitutionality of the statute. Both of these issues can be resolved on the basis of legal and constitutional principles.\textsuperscript{102} The mere existence of a political dispute between the branches should not bar the resolution of these questions even though their resolution may affect the underlying policy dispute.\textsuperscript{103} Moreover, far from undermining a political decision already made, intervention would guarantee the defense of a political decision already made: the passage and signing into law of the disputed piece of legislation.\textsuperscript{104}

would prevent the possibility of the two political branches from reaching a "constitutional impasse" with the unknown dangers to the constitutional structure that that represents.

102. An example from a slightly different context may clarify the distinction. In Goldwater v. Carter, 444 U.S. 996 (1979) (mem.), the Supreme Court summarily disposed of a challenge by several senators to the unilateral termination of a mutual-defense treaty by the President. The plurality characterized the case as a dispute between co-equal branches and stressed that each had resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum. \textit{Id.} at 1004. Because the Constitution is silent as to any mechanism for terminating treaties and the respective roles of the political branches in the termination process, the plurality classified the dispute as non-justiciable. The Court's disposition did not answer the question of whether the treaty ought to be terminated (the fundamental disagreement between the plaintiffs and the Executive that animated the suit); it restricted its attention to the antecedent question of whether the Senate properly has a role in the termination of treaties. The plurality found that the Court could not properly answer that question.

The plurality opinion by Justice Rehnquist has been criticized as misapprehending the political question doctrine. See, e.g., \textit{id.} at 997 (Powell, J., concurring); Note, \textit{Jurisdiction: Political Questions}, 21 \textsc{Harv. Int'l L.J.} 567, 576 n.65 (1980) (criticizing plurality opinion for passing over questions of standing).

While differences between the political branches over whether a particular statute should be enforced will turn on political considerations not subject to judicial resolution, questions of the relative power of the two branches can be resolved by the courts on the basis of legal and constitutional considerations. It was assumed that in our trifurcated government this function would be lodged in the courts. See 4 J. Madison, \textit{Letters and Other Writings of James Madison} 349 (1867), reprinted in R. Berger, \textit{Impeachment: The Constitutional Problems} 291 n.226 (1973) ("[i]t may always be expected that the judicial branch . . . will . . . most engage the respect and reliance of the public as the surest expositor of the Constitution, as well in questions . . . concerning the boundaries between the several departments of the Government as in those between the Union and its members.").

103. If the Attorney General declines to defend a statute that involves the separation of powers between the Congress and the Executive, a court could decline jurisdiction to hear the constitutional challenge on political question grounds, as in Goldwater v. Carter, 444 U.S. 996 (1979) (mem.), or it could assume jurisdiction, as in Buckley v. Valeo, 424 U.S. 1 (1976). Because such cases involve assertions of authority by Congress, either house would be permitted to intervene in order to defend its statutorily granted prerogative. In this kind of case the political question doctrine could not bar an appearance by the House or the Senate to defend the statute, although it could bar ultimate judicial resolution of the specific question presented to the court in that case.

104. In nearly every case in which the Justice Department declined to defend a federal statute, the legislation was signed by an earlier administration. The refusal to defend therefore rejects the policy choice of both the passing Congress and the signing administration. Thus, it might be argued that, analogous to congressional injuries sufficient for standing under Article III, a representative from the previous administration ought to be allowed to intervene to defend that statute. Unlike the Executive, however, the Congress is a body with significant continuity, especially in the Senate. It would have a "continuing interest" in the disposition of its legislation in a way that the previous administration would not. Second, Congress suffers a material diminution of its legislative authority whenever the Executive refuses to defend a statute, see supra pp. 976-80, and there is no such analogous injury to the executive branch or to the passing administration.
Conclusion

Although the Senate may now authorize the Office of Senate Legal Counsel to intervene in a suit to appeal a decision adverse to the constitutionality of a federal statute, the House of Representatives should share a similar authority. In addition, both houses should have the authority to appear at the trial level to defend the constitutionality of an undefended federal statute.

Decisions by the Executive and Congress over whether a statute will be defended have as great an impact on the corpus of federal law as decisions to veto or to repeal a statute. Greater public scrutiny of these decisions will insure that they become as politically accountable as vetoes or repeals.

Although rarely exercised, the congressional defense of statutes appears at first glance to be a congressional usurpation of executive authority. In fact it is not, and it serves to protect legislative interests from encroachment by the Executive. What appears to be a constitutional anomaly is in fact a constitutional necessity: Congress must protect its interests in court to preserve its constitutional role.

105. Congress should be hesitant to invoke judicial power to protect its prerogatives and unique powers, just as courts should move with great caution if one half of one branch of the federal government appears at the bar. This is not just because "[judicial impartiality is most seriously compromised when another branch of government appears at the bar," Kaufman, supra note 61, at 693, nor because the issues in such disputes are necessarily "poorly suited for judicial resolution," McGowan, supra note 52, at 242. It is because such a suit signals the breakdown of the normal political functioning of the government. The appearance of a house of Congress to defend the constitutionality of a statute means that the Executive has abandoned—in that case—its constitutional duty to defend the laws of the United States. The judiciary and the Executive should take care to insure that the duties of the Executive do not become, by default, prerogatives of the legislature.